74015-6

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Court of Appeals
Division I
State of Washington

NO. 74015-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ALEXANDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the trial court properly refused to instruct the jury on defense of property where there was no evidence of malice.

2. Whether the trial court properly admitted a witness's 911 call when Alexander agreed to its admission, and then later objected.

3. Whether the trial court properly exercised its discretion to admit another witness's 911 call over Alexander's objection that it was cumulative of live testimony.

4. Whether Alexander waived challenging the admission of officers' testimony as an improper opinion on guilt by failing to raise that specific objection at trial.

5. Alternatively, whether any error in admitting the 911 calls and officers' testimony was harmless.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Brian Frank Alexander with assault in the second degree with the domestic violence allegation. CP 64-65.

A jury convicted Alexander as charged. CP 68-69; 10RP 2.[1] The court imposed a standard-range sentence. CP 400-08; 11RP 50-51.

2. SUBSTANTIVE FACTS

On August 11, 2014, around 10 p.m., Kelly Colangelo was stumbling alone through Magnuson Park while bleeding from her head. 5RP 121-22. Annette Weis saw Colangelo, a stranger, fall to the ground and pick herself up multiple times. 5RP 122. Weis asked Colangelo what had happened and she replied that a man had beaten her and dropped her off. 5RP 122-23. Colangelo had a huge, bloody gash above her left eye, and was "streaked in blood." 5RP 124. Colangelo refused medical aid because she did not want the police to come. 5RP 121. Weis followed Colangelo back to her apartment, and called 911. 5RP 123, 128; Ex. 51, track one.

Shortly thereafter, Colangelo appeared outside her neighbor, Rebecca Kent's, door inebriated and bleeding. 6RP 94. Kent and Colangelo had been close friends until Colangelo had recently

[1] The Verbatim Report of Proceedings is designated as follows: 1RP (3/4/15), 2RP (5/19/15), 3RP (5/20/15), 4RP (5/21/15), 5RP (5/26/15), 6RP (5/27/15 transcribed by Michelle Vitrano), 7RP (5/27/15 transcribed by Cheryl J. Hammer), 8RP (5/28/15), 9RP (6/1/15 transcribed by Janet R. Hoffman), 10RP (6/1/15 transcribed by Michael P. Townsend), and 11RP (8/28/15).

relapsed and resumed drinking. 8RP 10, 19. Kent noticed that Colangelo's eye was "bleeding badly," and that she had finger and hand marks on her neck, bruises on her arms and legs, and a bloody ear where it appeared that her earring had been torn out.[2] 6RP 94-95; 8RP 7. Colangelo told Kent that her boyfriend, Alexander, had grabbed her by the neck and banged her face against his dashboard and then threw her out of his moving vehicle. 6RP 91; 8RP 7. Kent called 911 to report what had happened. 6RP 96; Ex. 51, track two.

Seattle police responded to Kent's apartment and found Colangelo crying with a needle and thread dangling from the gash above her eye that she had been trying to stitch shut. 5RP 9, 44. Although Colangelo did not want to talk with the police about what had happened, she eventually told them that her boyfriend had "accidentally punched" her in the face. 5RP 12, 45. Colangelo refused to tell the officers her boyfriend's name. 5RP 30.

Medics bandaged Colangelo's eye and transported her to Harborview hospital for further treatment and evaluation. 6RP 33. At the hospital, Colangelo told medical providers that she had been

[2] On prior occasions, Colangelo had returned from spending time with Alexander with marks on her neck, bruises on her body, and body aches. 6RP 93-94; 8RP 7-8.

assaulted and thrown from a moving vehicle. 6RP 13, 54. The emergency room treating physician noted that Colangelo had a two-centimeter laceration above her left eye, bruising around her right eye, and bruising on the front of her neck. 6RP 55-56.

A couple of days after the incident, Seattle Police Detective Daljit Gill met with Colangelo and took photographs of her injuries. 5RP 68-69; Ex. 52-67. Colangelo had two black eyes, stitches under her left eye brow, bruising on her neck and jaw line, and bruises on her left arm and leg. Ex. 52-67.

Colangelo told Gill that she had spent the day of the incident with Alexander, and that she had been depressed about the death of her 15-year-old son. 6RP 132-33, 175. Alexander was driving Colangelo home when things escalated and Alexander started verbally abusing Colangelo and calling her a "boo-hoo f—king cry baby." 5RP 175-76. Alexander started punching Colangelo in the face and jaw, and pulling her hair. 5RP 162, 176. Colangelo tried to open the car door and jump out on the freeway because she would have rather been hit by a car, than continue to be hurt and betrayed by someone that she loved as much as Alexander. 5RP 176. Alexander hit Colangelo with closed fists, ripped off her necklace, and squeezed and grabbed her neck. 5RP 176-77.

Colangelo felt blood pouring down her face and tried unsuccessfully to grab the steering wheel from Alexander. 5RP 173, 177. Alexander dropped Colangelo off a few blocks away from her apartment covered in blood. 5RP 143, 145, 162.

At trial, Colangelo offered a different version of events. Colangelo testified that Alexander did not directly hit her, and that she told Gill a "big elaborate story" to avoid getting in trouble. 5RP 163, 178. Colangelo explained that on the night of the incident, Alexander called her a "cry baby," and lacked compassion for her loss. 5RP 138. During the drive home, she became upset and emotional, and wanted to jump out of the car. 5RP 141-42. She unfastened her seatbelt, and started "wrestling" with Alexander. 5RP 142.

Colangelo opened the car door and Alexander tried to pull her back inside. 5RP 142. Colangelo grabbed the steering wheel, sending the car into the curb, and causing her to hit her eyes and head on the windshield. 5RP 142. At some point, Colangelo's necklace was ripped off leaving a "necklace mark." 5RP 142, 150. Colangelo admitted that she loved Alexander and that she did not want him to be in trouble. 5RP 183. Alexander did not testify at trial.

Alexander pursued a lawful use of force defense at trial. He proposed that the court instruct the jury on self-defense, defense of others, and defense of property. CP 55. The court agreed to instruct the jury on lawful use of force to defend one's self and others, but refused to instruct the jury on malicious interference with personal property. 6RP 121; CP 88. The court stated, "I do not believe that somebody has the right to beat somebody else to prevent them from grabbing the steering wheel," and suggested that it might be different if Alexander had found Colangelo "bashing the car with a hammer." 6RP 122.

Nonetheless, Alexander repeatedly argued in closing that he acted justifiably in defense of his car. 8RP 88, 93, 99. The jury convicted Alexander as charged, rejecting his self-defense and defense of others claims. CP 68-69; 10RP 2. Post-verdict, Alexander sought a new trial, arguing that the trial court had erred by refusing to instruct the jury on defense of property. CP 100-363; 11RP 4. The court denied Alexander's motion, reasoning that it was illogical that Alexander's use of force was lawful to protect his car, but unlawful to protect himself or others. 11RP 7-10. The court also noted that there was no evidence that Colangelo acted maliciously. 11RP 9.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LAWFUL USE OF FORCE IN THE DEFENSE OF PROPERTY.

Alexander argues that the jury should have been instructed that a person may use reasonable force to prevent malicious interference with personal property. Alexander's claim fails because there was no evidence presented at trial that Colangelo acted maliciously. Nonetheless, even if the trial court erred by refusing to instruct the jury on defense of property, the error was harmless.

A trial court must instruct the jury on each party's theory of the case provided that the law and the evidence support it. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). A defendant is entitled to a jury instruction on an affirmative defense if it is supported by substantial evidence in the record. State v. O'Dell, 183 Wn.2d 680, 687, 358 P.3d 359 (2015). When evaluating whether evidence is sufficient to support giving a jury instruction, the trial court must view the evidence in the light most favorable to the defendant. Id. at 687-88.

The standard of review applied to a trial court's refusal to give a proposed defense instruction depends on whether the

refusal was based on law or fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give a jury instruction based on a factual dispute is reviewed for an abuse of discretion, while a trial court's refusal based on a legal ruling is reviewed de novo. Id. at 771-72. A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In other words, the reviewing court considers whether "any reasonable judge would rule as the trial judge did." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

A defendant is entitled to use reasonably necessary force to defend lawfully possessed property from malicious interference. RCW 9A.16.020(3). By statute, malice is defined as "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). It may be inferred from acting in willful disregard of the rights of another, acting wrongfully without just cause or excuse, or by acting or failing to act in a way that betrays a willful disregard of social duty. Id. To claim defense of property, a defendant need not fear injury to himself. State v. Bland, 128 Wn. App. 511, 513, 116 P.3d 428 (2005). The question of whether the

defendant's force was greater than necessary is ordinarily a question of fact for the jury. Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942).

Given Alexander's choice not to testify, the only evidence that supported Alexander's proposed defense of property was Colangelo's testimony that in the process of trying to break free from Alexander's grasp and jump out of his car, she grabbed his steering wheel. 5RP 142. Colangelo testified that immediately prior to grabbing the steering wheel, she was "crying [her] eyes out" because Alexander had called her a "cry baby" and had no compassion for her. 5RP 138, 141. She became "panicked and claustrophobic" and "had to get the f—k out" of Alexander's car. 5RP 142.

Consequently, she unfastened her seatbelt and was going to jump out of the car when she and Alexander started "wrestling." 5RP 142. Colangelo opened the car door and Alexander tried to pull her back inside. 5RP 142. In the process, Colangelo grabbed the steering wheel, sending the car into the curb, and causing her to hit the windshield. 5RP 142. When asked if she wanted to kill Alexander, Colangelo responded, "No. No. I just wanted him to let me go." 5RP 143.

Based on this testimony, the trial court reasonably chose not to instruct the jury on defense of property. At trial and on appeal, Alexander has failed to identify any evidence that Colangelo acted maliciously. Alexander does not acknowledge the definition of malice, let alone argue that Colangelo possessed an "evil intent, wish, or design to vex, annoy, or injure" him. RCW 9A.04.110(12). Rather, Alexander suggests that Colangelo "may have been disposed to behave recklessly," which is a far cry from acting maliciously. Br. of Appellant at 8; RCW 9A.08.010(1)(c) (defining recklessness as knowing of and disregarding a substantial risk that a wrongful act may occur where that disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation).

Viewing the evidence in the light most favorable to Alexander, it is clear that Colangelo was grieving the loss of her son, that Alexander was unsympathetic, and that she wanted away from him so badly that she was willing to jump out of a moving car. There is no evidence that Colangelo harbored an evil intent, wish, or design to injure Alexander. Rather, Colangelo grabbed the steering wheel because she was heartbroken and desperate to get away from Alexander. Given this record, Alexander cannot show

that the trial court abused its discretion by refusing to instruct the jury on the lawful defense of property.

Alternatively, if the trial court erred in refusing to instruct the jury on the affirmative defense, then any error was harmless. An instructional error is harmless "if the record supports a finding that the jury verdict would be the same absent the error." State v. Berube, 150 Wn.2d 498, 506, 79 P.3d 1144 (2003). From the outset, it bears noting that Alexander repeatedly argued in closing that he was defending his property, despite the court's ruling precluding such an argument. See 8RP 88 (Alexander "was defending his vehicle"), 93 (Alexander was "faced with a problem of defending that vehicle"), and 99 (suggesting Colangelo was trying to "kill" Alexander and "wreck [his] car").

Nonetheless, there is no question that the jury would have convicted Alexander even if it had been instructed on the affirmative defense of property. It is undisputed that the jury was essentially presented with two versions of events. Alexander either intentionally and unjustifiably assaulted Colangelo, as she told witnesses and law enforcement immediately after the incident, or Colangelo caused her own injuries by grabbing the steering wheel and hitting the windshield, as she later suggested in her recant

letter and testimony. The jury roundly rejected the latter theory and convicted Alexander of intentional assault. Alexander was not prejudiced by the trial court's alleged failure to instruct the jury on defense of property because the jury did not believe his theory of events. Any error was harmless.

2. THE TRIAL COURT PROPERLY ADMITTED THE 911 CALLS AND OFFICERS' TESTIMONY ABOUT COLANGELO'S INJURIES.

Alexander argues that his conviction should be reversed based on the trial court's alleged erroneous admission of Weis's and Kent's 911 calls, and two officers' testimony suggesting that Colangelo's injuries were inconsistent with a car accident. Alexander is mistaken. He waived his right to challenge the admission of Weis's 911 call and the officers' testimony by either failing to object, or failing to object on the grounds that he now raises on appeal. Even if Alexander's claim is not waived, he cannot show that the trial court abused its discretion by admitting the challenged evidence. Further, any error was harmless because the outcome of the trial would not have been materially affected had the alleged errors not occurred.

a. Relevant Facts.

During motions in limine, the State moved to admit Weis's and Kent's 911 calls under the excited utterance and present sense impression exceptions to the hearsay rule. CP 427-28. The court admitted the calls "without objection" from Alexander.[3] 2RP 17-18.

At trial, Weis identified her voice on the 911 call and the following exchange ensued:

> STATE: Your honor, at this time the State is moving to admit State's exhibit number 51 (Weis's 911 call) and not publish it in the interest of time management.
> COURT: Any objection?
> DEFENSE: *None. No objection.*
> COURT: 51 is admitted.

5RP 128 (emphasis added).

The next day, Alexander sought to "renew" his objection to the "911 calls." 6RP 4. The court corrected Alexander, noting that he had not previously objected to the calls' admission. 6RP 4. Alexander objected nonetheless, arguing that the calls were cumulative of live testimony, although Kent had not yet testified.

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[3] Alexander erroneously claims that he "moved to exclude all out-of-court statements from Ms. Weis, Ms. Kent, and Ms. Colangelo, among others" in his trial brief. Br. of Appellant at 11. A close look at the trial brief citations provided by Alexander reveals that he solely moved to exclude Colangelo's hearsay statements, and not the other witnesses' statements. See CP 13 (suggesting "various hearsay statements exist *purportedly attributable to Ms. Colangelo*," and objecting to them as hearsay) (emphasis added), 20-23 (framing the issue as "whether or not *Ms. Colangelo the Declarant* remained under the stress or the excitement of the event") (emphasis added).

6RP 4. The court overruled Alexander's objection to Weis's 911 call because it had already been admitted, and reserved ruling on Kent's 911 call until she testified. 6RP 4-5. The court suggested, however, that Kent's call would likely be admitted. 6RP 5.

Subsequently, Kent appeared and testified briefly about the incident, explaining that Colangelo arrived bleeding and injured on her doorstep, that Colangelo tried to stitch her eye wound with Kent's sewing kit, and that Colangelo said that she had "gotten in a fight and that he had slammed her face into the car panel, instrument panel, and thrown her out of the moving vehicle." 6RP 94-96. Kent also testified that Alexander had previously assaulted Colangelo.[4] 6RP 93-94.

Immediately thereafter, the prosecutor moved to admit Kent's 911 call and Alexander objected to its admission as cumulative. 6RP 97. Alexander did not object on hearsay grounds. The court overruled Alexander's objection, and the prosecutor played Kent's 911 call to the jury, pausing at various points for Kent to explain her statements. 6RP 97-98. During the 911 call, Kent revealed additional details about the incident that were not included

[4] During motions in limine, the court admitted Alexander's prior abuse of Colangelo for the limited purposes of proving absence of mistake or accident, and to help the jury assess Colangelo's credibility. 2RP 41-44.

in her prior testimony. For example, Kent told the 911 operator identifying details about Alexander, including his first name, race, age, build, height, hair color, and provided the type and color of Alexander's car. Ex. 16 at 5-6.[5] Kent also described Colangelo's injuries and suggested that Colangelo "may have gotten thrown out of a car." Ex. 16 at 3, 5. The prosecutor played both 911 calls during closing, and later during deliberations at the jury's request. 8RP 68; 9RP 3.

At trial, three witnesses testified about the likelihood that Colangelo's injuries resulted from a car accident versus an intentional assault. The first witness, Seattle Police Officer Jeffrey Swenson, testified that he had responded to car accident and assault calls in his seven years as a patrol officer, and that Colangelo's injuries "could have been" consistent with getting punched. 5RP 7, 12-13. Alexander did not object to this testimony.

Later, Swenson testified that he had responded to car accident calls involving people who had been injured by hitting a windshield. 5RP 16. The prosecutor asked if Swenson could describe the injuries that he had witnessed, and Alexander objected

[5] Exhibit 16 is a transcript of Kent's 911 call that was provided to the court during motions in limine, but was not admitted at trial. 2RP 16; CP 444. Counsel's citations are to the transcript for ease of reference.

on relevancy grounds. 5RP 16. The court overruled Alexander's objection, and Swenson testified that people will generally have a "large singular bruise" with "smaller[,] kind of feathery cuts from the glass" on their foreheads. 5RP 16. The prosecutor followed up by asking about whether people would have "bruising around the eyes," and Alexander objected to a lack of foundation. 5RP 17. The court overruled the objection, and Swenson explained, "when someone strikes another person around the face area, they get further into the eye socket, whereas like a hard flat piece doesn't generally get into the eye area as much." 5RP 17.

Seattle Police Detective Daljit Gill offered similar testimony. She testified that she had previously responded to car accidents and assaults, and that she had seen people who had hit their head on the car. 5RP 61. Based on this experience, the prosecutor asked Gill if Colangelo's injuries appeared consistent with a car accident. 5RP 82-83. Gill answered, "No," without objection by Alexander. 5RP 83. The prosecutor next asked if Colangelo's injuries were consistent with "[s]omebody slamming on the brakes really hard," and Gill answered, "No." 5RP 83. Alexander objected, arguing that Gill's answer called for speculation. 5RP 83. At no point during either Swenson's or Gill's testimony did Alexander

object on the grounds that the prosecutor's questions called for an opinion on guilt.

The final witness who testified about the likely cause of Colangelo's injuries was the emergency room attending physician, Dr. Francisco de la Fuente. He testified – without objection – that Colangelo's black eyes were consistent with being punched, and inconsistent with hitting a windshield or dashboard. 6RP 81. De la Fuente explained that car crash victims who have hit a windshield typically sustain bruising and lacerations on their forehead and nose because "they stick out more," and not on their eyes because they are "recessed and protected." 6RP 81-82. On cross-examination, de la Fuente testified that it was "unlikely" that Colangelo's double black eyes resulted from hitting a windshield. 6RP 74.

b. Alexander Waived Challenging The Admission Of Weis's 911 Call By Failing To Object.

Washington courts have "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (quoting

Bellevue Sch. Dist. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)); RAP 2.5(a).[6]

Here, Alexander indicated that he had "[n]o objection" to the court admitting Weis's 911 call during both motions in limine, and Weis's direct testimony. 2RP 17-18; 5RP 128. The court properly admitted the call based on the State's motion to admit the call as an exception to the hearsay rule, and Alexander's lack of objection. Alexander cannot now claim that his conviction should be reversed because the court did his bidding.

The fact that Alexander later objected to the call's admission is irrelevant. Alexander has not provided any authority, let alone argued, that a party can agree to the admission of evidence at trial, return a day later and object to its admission, and consequently preserve the right to challenge the evidence's admission on appeal. Such a rule would result in an end run around the long-established rule requiring parties to object, and potentially lead to endless relitigation of evidentiary matters at trial. Having failed to object to the admission of Weis's 911 call at trial, Alexander is precluded from challenging it on appeal.

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[6] Alexander does not claim that the call's admission amounts to "manifest constitutional error," or that his attorney was ineffective for failing to object. See RAP 2.5(a)(3) (permitting review of an issue raised for the first time on appeal that is a "manifest error affecting a constitutional right").

c. Alexander Waived Challenging The Admission Of Kent's 911 Call As Hearsay.

"A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." E.g., Guloy, 104 Wn.2d at 422; State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976); State v. Poole, 42 Wash. 192, 200, 84 P. 727 (1906). The rule requiring an objection is as well established as the rule requiring a specific objection. Guloy, 104 Wn.2d at 421-22. Both rules seek to prevent or cure errors when they occur, and avoid costly retrials. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); Boast, 87 Wn.2d at 451. Because Alexander challenged the admission of Kent's 911 call solely as cumulative of live testimony, he is precluded from now claiming that it was inadmissible hearsay.

During motions in limine, the State argued that Kent's 911 call should be admitted under the present sense impression and excited utterance exceptions to the hearsay rule. CP 427-28; 2RP 15-17. Alexander did not object. 2RP 17. The day after Weis's testimony and admission of her 911 call, Alexander objected to admitting the 911 calls, and the following exchange ensued:

COURT: . . . What is the new objection?
DEFENSE: Hearsay. You hear the witness testify to the content. You go, it's cumulative. Why would the witness need to testify beyond? If they're going to testify to the content of the 911 call, then why hear the call? What does the call offer beyond the testimony?
COURT: Okay. At this point *I'm going to overrule that objection*. So far as I know, at least part of this is admissible because the witness has testified. The State just chose not to publish that portion of the 911 call at the time, and that part of the 911 call is in at least. Ms. Kent's portion I'm going to reserve on until we see her body sitting in the chair and testifying, but then that's going to come in too.
DEFENSE: Understood.

6RP 4-5 (emphasis added). Although Alexander initially stated "Hearsay," it is clear from his comments as a whole that he objected to admitting the calls because they were cumulative of live testimony, and not because they were hearsay. Indeed, when the State sought to admit Kent's 911 call during her direct examination, Alexander objected to the call's admission solely as "cumulative evidence." 6RP 97.

Having objected to the admission of Kent's 911 call as cumulative at trial, Alexander is limited to pursuing that specific

claim on appeal.[7] See Guloy, 104 Wn.2d at 422 (refusing to consider the defendants' evidentiary claim on appeal because they objected on a different ground at trial).

d. The Trial Court Properly Denied Alexander's Objection To The Admission Of Kent's 911 Call As Cumulative.

A trial court may exclude relevant evidence that is needlessly cumulative. ER 403. The admission of relevant evidence is within the trial court's sound discretion, and will not be reversed on appeal absent an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Here, Kent's 911 call provided additional identifying information about Alexander that was not contained in her prior testimony. Ex. 16 at 5-6 (providing Alexander's first name, race, age, build, height, hair color, car color, and car type). To the extent that there was overlap between Kent's testimony and the 911 call, it was minimal. Compare 6RP 93-96 (Kent's testimony about the incident and prior incidents), with Ex. 16 at 1, 3, 5 (same).

[7] Even if Alexander preserved his hearsay objection, his claim fails because Kent's statements satisfy the present sense impression and excited utterance exceptions to the hearsay rule. ER 803(a)(1), (2). Alexander concedes that "some" of Kent's statements are excited utterances. Br. of Appellant at 17. To the extent that any of the statements were erroneously admitted, the error was harmless for the reasons stated below, *infra section 2.f.*

Kent's brief statement to the 911 operator about how the incident occurred, that Colangelo "may have gotten thrown out of a car," was significantly less incriminatory than her testimony on the stand. Ex. 16 at 5; see 6RP 96 (testifying Colangelo said that "they had gotten in a fight and that he had slammed her face into the car panel, instrument panel, and thrown her out of the moving vehicle").

Based on this record, the trial court reasonably exercised its discretion to admit Kent's 911 call. Alexander cannot show, nor does he argue, that no reasonable judge would have overruled his objection. Thang, 145 Wn.2d at 642.

e. Alexander Waived Challenging The Admission Of The Officers' Testimony As An Improper Opinion On Guilt.

As discussed more fully above, a party alleging an evidentiary error on appeal is limited to the specific ground raised at trial. Guloy, 104 Wn.2d at 422. Alexander argues that Swenson and Gill improperly opined on his guilt by testifying that Colangelo's injuries were inconsistent with those suffered by car accident victims, despite having failed to raise this objection at trial. See 5RP 16 (objecting to Swenson's testimony as irrelevant), 17 (objecting to Swenson's testimony based on lack of foundation), 83 (objecting to Gill's testimony as speculative). Having failed to

object to the officers' testimony as an improper opinion on guilt at trial, Alexander is precluded from raising this claim on appeal.

f. Alternatively, Any Error Was Harmless.

An erroneous evidentiary ruling is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Even if the trial court erred by admitting the 911 calls and the officers' testimony, there is not a reasonable probability that the outcome of the trial would have been different.

The critical disputed issue at trial was whether Alexander intentionally and unjustifiably assaulted Colangelo, as she told witnesses, medical providers, and law enforcement shortly after the incident, or whether Colangelo caused her own injuries by grabbing the steering wheel and inadvertently hitting the windshield, as she suggested in her recant letter and trial testimony.

The admission of Weis's and Kent's 911 calls had no more of an impact on resolving that dispute than Weis's and Kent's testimony at trial about Colangelo's statements. Weis testified that Colangelo said "a man had beaten her and dropped her off," consistent with her statement to the emergency dispatcher that "a

woman . . . was beaten by a man." 5RP 123; Ex. 14 at 1.[8] As previously noted, Kent actually provided more detail in her trial testimony about how Colangelo said she was injured, than Kent provided to the 911 operator. 6RP 96; Ex. 16 at 5.

Further, after Kent's 911 call was admitted, the prosecutor elicited additional testimony from Kent about Colangelo's statements, none of which Alexander objected to, and all of which Alexander solicited again on cross-examination. See 8RP 7 (Kent testifying without objection that Colangelo told her Alexander "had thrown her out of a car" and "grabbed her by the neck and banged her face on the instrument panel of the vehicle before throwing her out of the vehicle"), 26-27 (Kent testifying on cross-examination that Alexander "reached over, grabbed [Colangelo's] neck and pushed her face down, slammed her face down" into the dash, and "kicked her out of the car, out of a moving vehicle").

Additionally, the jury heard testimony from law enforcement and medical providers further incriminating Alexander. Colangelo told a responding police officer that her boyfriend had "accidentally punched" her in the face. 5RP 12. Colangelo told medical

[8] Exhibit 14 is a transcript of Weis's 911 call that was provided to the court during motions in limine, but was not admitted at trial. 2RP 16; CP 444. Counsel has cited the transcript for ease of reference.

providers that night that she had been assaulted and thrown from a moving vehicle. 6RP 13, 54. Two days after the incident, Colangelo told Gill that Alexander repeatedly punched her in the face and jaw with closed fists, and squeezed and grabbed her neck. 5RP 162, 176-77. Moreover, the emergency room attending physician, de la Fuente, confirmed that Colangelo's injuries most likely stemmed from being punched, rather than from her hitting a windshield or dashboard. 6RP 81. Thus, the incriminatory impact of the 911 calls' admission was undeniably eclipsed by the other overwhelming evidence that Alexander intentionally assaulted Colangelo. A reasonable jury would have convicted Alexander even if the 911 calls had been excluded.

Similarly, the trial court's admission of the officers' testimony suggesting that Colangelo's injuries were not the result of a car accident was harmless in light of Alexander's failure to object to other testimony on the issue. For example, Alexander did not object when Swenson testified that Colangelo's injuries "could have been" consistent with getting punched, nor did he object when Gill testified that Colangelo's injuries were inconsistent with a car accident. 5RP 12-13, 82-83.

Most importantly, Alexander did not object to de la Fuente's *expert* testimony that Colangelo's double black eyes were consistent with being punched, and inconsistent with hitting a windshield or dashboard. 6RP 81. Indeed, Alexander elicited testimony from de la Fuente on cross-examination that it was "unlikely" that Colangelo's black eyes resulted from hitting a windshield. 6RP 74. Thus, there is not a reasonable probability that the outcome of Alexander's trial would have been materially affected if the officers' testimony had been excluded.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Alexander's conviction.

DATED this 17th day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Lila Silverstein, the attorney for the appellant, at Lila@washapp.org, containing a copy of the Brief of Respondent, in State v. Brian Frank Alexander, Cause No. 74015-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of August, 2016.

Name:
Done in Seattle, Washington