95233-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERIC MICHAEL ELLISER,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 47929-0-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 13-1-04905-0
The Honorable Jack Nevin, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is ERIC MICHAEL ELLISER, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 47929-0-II, which was filed on October 25, 2017. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser acted as an accomplice to second degree murder and first degree assault, where there was no evidence that Elliser helped plan or knew ahead of time that Shane McKittrick planned to assault Derek Wagner, and where there was no evidence that Elliser actually aided, assisted or encouraged McKittrick?

2. Where evidence of skinhead values and of Eric Elliser's skinhead affiliation was not necessary to establish a motive for the crime, did the trial court err in admitting the evidence under ER 404(b)?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Eric Michael Elliser as an accomplice to

the crimes of murder in the second degree (RCW 9A.32.050(1)(b) and assault in the first degree (RCW 9A.36.011(1)(a)), in connection with the stabbing death of Derek Wagner. (CP 64-65) The State alleged that Elliser or an accomplice was armed with a deadly weapon (a knife) during the commission of the offenses. (CP 64-65) The jury found Elliser guilty of both charges. (04/28/15 RP 29; CP 292-93)[1]

At sentencing, the trial court vacated and dismissed Elliser's assault conviction on double jeopardy grounds. (08/21/15 RP 87; CP 414) The court found that Elliser was a persistent offender, and imposed a sentence of life without parole. (08/21/15 RP 80; CP 417) Elliser timely appealed. (CP 423) The Court of Appeals affirmed Elliser's conviction and sentence.

B. SUBSTANTIVE FACTS

Derek Wagner served time in prison and was released in the fall of 2013. (03/11/15 RP 19) He soon began a sexual relationship with a woman named Erin Cochran. (03/11/15 RP 22-23) But when Wagner learned that Cochran was married, he was upset and decided to stop sleeping with her until after her pending divorce was finalized. (03/11/15 RP 25-27, 03/18/15 RP 72)

[1] The transcripts in this case will be referred to by the date of the proceeding.

Cochran's husband at the time was Mark Stredicke. (03/16/15 RP 70; 03/18/15 RP 60-61) Stredicke and his friends, Jeffrey Cooke, Shane McKittrick, and Eric Elliser are associated with skinhead groups. (03/16/15 RP 44, 45-47; 03/18/15 RP 58-59) Wagner is also a skinhead, but was not close friends with the other men. (03/18/15 RP 57, 58; 03/17/15 RP 7, 16) Evidence was presented at trial that a skinhead might be punished and beaten up by other skinheads if he breaks a "rule" of skinhead culture or if he does something viewed as disrespectful to another skinhead. (03/18/15 RP 92; 03/19/15 RP 70-71)

Wagner planned to spend the weekend of November 15-17, 2013, visiting with another skinhead friend, Joshua Loper, who had also recently been released from prison. (03/16/15 RP 41, 44) Cooke, who benefited significantly from a plea agreement with the State, testified that he wanted to meet with Wagner and Loper to discuss skinhead business, and to see how they were transitioning back into the community. (03/18/15 RP 63, 64-65, 66, 68, 69) The three men spent the afternoon of November 16 drinking together at Loper's house. (03/16/15 RP 62, 67)

Because Loper had to work a graveyard shift, Cooke and Wagner eventually went to Cooke's house, where they continued

drinking. (03/16/15 RP 68, 72, 73; 03/18/15 RP 71, 76) Elliser, Matthew Wright, and Michelle McKittrick arrived later.[2] Cooke testified that Elliser and Wagner met and shook hands, and everything seemed fine between the two of them even though Wagner had slept with the wife of Elliser's friend. (03/18/15 RP 77, 78-79)

The group eventually went to the house that Elliser shared with Michelle, and continued drinking. (03/17/15 RP 19, 18; 03/18/15 RP 80, 81, 83-84) Shane McKittrick arrived soon after with his girlfriend Melissa Bourgault. (03/18/15 RP 84) At first everyone seemed to be getting along, but Wagner eventually became very drunk and obnoxious, calling McKittrick a punk and trying to goad him into fighting. (03/17/15 RP 94-95, 99)

At some point during the party, Cooke had a telephone conversation with Stredicke. Stredicke was upset because Cooke was hanging out with Wagner, the man who slept with his wife. (03/18/15 RP 86-87) Cooke testified that McKittrick was also upset about Wagner's presence. (03/18/15 RP 87-88) McKittrick and Wagner began arguing about the fact that Wagner had "slept with a

[2] Michelle is Shane McKittrick's sister. (04/16/15 RP 115) Michelle will be referred to by her first name, and Shane will be referred to as McKittrick.

comrade's wife."[3] (03/18/15 RP 89)

Cellular phone records show calls between the men that night, and text messages sent between McKittrick and Stredicke. (03/25/15 RP 119; 04/13/15 RP 75-76; Exhs. P218, P232, P259A-261A) First McKittrick asks Stredicke "what's what?" (04/13/15 RP 75; Exhs. P218, P232) But Stredicke responds, "don't fuck with the dude, I'll catch him." (04/13/15 RP 75; Exhs. P218, P232)

But McKittrick was still upset, and was yelling about wanting to fight with Cooke because he was supporting Wagner. (03/18/15 RP 114, 117) McKittrick handed a phone to Cooke so he could talk to Stredicke again. Cooke told Stredicke he did not think there was any reason to fight Wagner because Wagner had not known that Cochran was married, and when he found out he stopped seeing her. (03/18/15 RP 119, 120) According to Cooke, however, McKittrick insisted they fight Wagner over the issue. (03/18/15 RP 120-21)

McKittrick took issue with Cooke's defense of Wagner and decided he wanted to fight Cooke. (03/18/15 RP 114, 117, 120) Cooke usually carries a knife in a sheath on his belt. (03/18/15 RP

[3] "Comrade" is a term that skinheads use to refer to fellow skinheads. (03/17/15 RP 78; 04/14/15 RP 30)

93) But he did not want to be armed if he was going to fight McKittrick, so he took off the sheath and knife and threw them on the ground. (03/18/15 RP 94, 120-21) Elliser intervened before Cooke and McKittrick could start fighting. (03/17/15 RP 115; 03/18/15 RP 120-21, 122)

When Wagner picked up Cooke's knife, Bourgault yelled at him to leave it on the ground. (03/18/15 RP 121; 03/17/15 RP 29-30) Wagner told her to "shut up" and called her a vulgar name. (03/18/15 RP 121; 03/17/15 RP 28-29, 31) Wagner kept the knife and sheath, and walked to Cooke's car. (03/18/15 RP 94, 122-23) McKittrick was angry that Wagner was disrespectful to his girlfriend. (03/18/15 RP 121-22; 03/17/15 RP 31) But Elliser, who did not want any problems or fighting to occur, tried to keep the peace. (03/18/15 RP 124-25)

Cooke, Wagner and a third man, Matthew Wright, got into Cooke's car and left. (03/18/15 RP 125; 03/19/15 RP 6) A few blocks away, Cooke noticed McKittrick's car coming up behind them with its high-beams on. (03/18/15 RP 6) Wagner told Cooke to pull over because he was ready to fight and was "not afraid" of McKittrick. (03/18/15 RP 7-8) According to Cooke, Wagner even grabbed the steering wheel in an effort to get Cooke to stop the car.

(03/23/15 RP 7) Immediately after Cooke stopped the car, Wagner grabbed the knife, put it into his pants, and got out. (03/19/15 RP 9; 03/23/15 RP 8)

According to Cooke, Wagner and McKittrick began yelling and circling each other in fighting stances. (03/19/15 RP 11) Elliser then pulled up in his car. (03/19/15 RP 12) Wagner tells Elliser to "get your boy," referring to McKittrick, but Elliser responded "you lied to me bitch." (03/19/15 RP 12) Cooke testified that Elliser moved from his car towards Wagner and McKittrick and "went to go grab him or something." (03/19/15 RP 14) Cooke did not clarify who Elliser tried to grab or for what purpose.

Cooke heard McKittrick say "what's in your hand?" and "put it down," and then heard Wagner yell that he had been stabbed. (03/19/15 RP 18, 20; 03/23/15 RP 8-9, 10) Cooke saw Wagner run away and heard McKitrick say "I stuck him." (03/19/15 RP 18) Cooke testified that Wagner did not seem seriously injured when he ran away, and nobody immediately tried to stop him or chase him. (03/19/15 RP 20-21; 03/23/15 RP 11)

Wright's version of events was different. He also heard Wagner tell Cooke to stop the car so he could fight McKittrick. (03/17/15 RP 34-35) But he testified that Wagner and McKittrick

began to fight once they were out of the cars, and that Wagner fell to the ground once and McKittrick stood back and allowed him to get back up. (03/17/15 RP 40-41) Wright heard McKittrick yell that Wagner was "trying to grab a knife." (03/17/15 RP 44) Then he saw Wagner run across the street, and heard McKittrick say "I just stabbed him." (03/17/15 RP 42, 44) According to Wright, Elliser arrived in his car after Wagner ran away. (03/17/15 RP 42, 44, 117) But Wright also testified that nobody tried to run after or catch Wagner. (03/18/15 RP 52-53)

Private surveillance video from a neighbor's residence shows Cooke's car stop by the intersection of South 45th Street and South Asotin Street, and shows McKittrick's car arrive a few seconds later. People can be seen moving around the cars. (03/12/15 RP 94-95; 04/14/15 RP 165, 04/15/15 91-92, 96; Exh. P239) About a minute and a half later, Elliser's car can be seen pulling up to the scene. (04/15/15 RP 91-92; Exh. P239) The video does not show whether Elliser got out of the car. (04/15/15 RP 97; Exh. P239) The brake lights from Elliser's car can be seen flickering, then 38 seconds later can be seen flickering again, indicating that at the most Elliser was out of his car for just those 38 seconds. (04/15/15 RP 96-97; Exh. P239)

Telephone records also show that Stredicke and Elliser spoke shortly after the incident. (03/25/15 RP 103, 110; Exh. P129A) The surveillance video shows Elliser's and Cooke's cars circling the neighborhood after the initial stabbing. (04/14/15 RP 167-68; 04/15/15 RP 24; Exh. P239) Cooke and Wright can also be seen on foot walking on South Asotin Street, then disappearing from frame before reappearing again. (04/14/15 RP 172-73; Exh. P239) At one point, Elliser, Cooke and Wright stop to discuss what happened. According to Cooke, Elliser said that "it wasn't supposed to go like that." (03/19/15 RP 23, 67)

Winter Mimura lives on South Asotin Street, a short distance from the intersection where Wagner was stabbed. (03/11/15 RP 89) That afternoon he saw Wagner's body lying on the ground in his back yard. (03/11/15 RP 91) Wagner was lying face up on the ground, and had been dead for several hours. (03/11/15 RP 76, 82; 04/13/15 RP 13-14) Officers found Cooke's knife sheath under Wagner's body. (03/12/15 RP 41) They also canvassed the neighborhood and found Cooke's knife on the ground near the intersection of South 45th Street and South Asotin Street. (03/11/15 RP 80; 03/12/15 RP 55; 03/16/15 RP 18)

Cooke testified that Stredicke called him the next morning

demanding to know if Wagner was at his house. (03/19/15 RP 45, 48) Cooke, Elliser, McKittrick and Stredicke saw each other later that day and discussed what happened. (03/19/15 RP 45-46; 03/25/15 RP 138) They all seemed to be under the impression that Wagner was alive but in hiding. (03/19/15 RP 46-47, 48)

V. ARGUMENT & AUTHORITIES

The issues raised by Eric Elliser's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING ALL OF THE ELEMENTS OF SECOND DEGREE MURDER AND FIRST DEGREE ASSAULT.

The State charged Elliser with one count of second degree felony murder and one count of first degree assault. (CP 64-65) A person is guilty of second degree felony murder if, as charged in this case, "[h]e or she commits or attempts to commit any felony, including assault ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]" RCW 9A.32.050(1)(b). "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm

... [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a).

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The State contended that McKittrick assaulted Wagner with a knife at the intersection of South 45th Street and South Asotin Street, and that one of the stab wounds inflicted by McKittrick caused Wagner's death. (04/21/15 RP 25-26, 42, 76) The State asserted that Elliser was an accomplice to McKittrick during this assault. (CP 64-65; 04/21/15 RP 49) This assault formed the factual basis for both the second degree murder and the first degree assault charges. (CP 64-65; 04/21/15 RP 49)

To convict a defendant as an accomplice, the State must prove that the defendant, "with knowledge that it will promote or facilitate the commission of the crime," solicited, commanded, encouraged, or requested another person to commit the crime, or aided or agreed to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a); State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Physical presence and awareness of the criminal activity alone are insufficient to establish accomplice liability. State v. Parker, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

Rather, the State must prove that the defendant was ready to assist the principal in the crime and that she shared in the

criminal intent of the principal, thus "demonstrating a community of unlawful purpose at the time the act was committed." State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982); see also Rotunno, 95 Wn.2d at 933; Wilson, 91 Wn.2d at 491. Contrary to the Court of Appeals reasoning, the State did not establish that Elliser was an accomplice to the assault committed by McKittrick. (Opinion at 13-14)

There was no evidence that Elliser was involved in any conversations with Stredicke or McKittrick or any other skinhead about whether or not to fight Wagner because of his affair with Cochran. There was no evidence that Elliser felt that Wagner should be punished. There was no evidence that Elliser knew, when McKittrick drove after Cooke, that he intended to fight or assault Wagner or Cooke. And in fact, the evidence showed that Elliser acted as peacemaker several times that night, including when Cooke and McKittrick began fighting at his house just before the final incident. (03/17/15 RP 115; 03/18/15 RP 122, 124-25)

The evidence also showed that Elliser arrived at the intersection after McKittrick and Wagner had already exited their respective cars and began their confrontation. (03/17/15 RP 117; 03/19/15 RP 12; 03/23/15 RP 84) At this point, Wagner was a

willing participant in the fight.[4] According to Cooke, Elliser declined Wagner's request to control McKittrick and accused Wagner of lying. (03/19/15 RP 12) Elliser's decision not to stop their fight does not make him an accomplice. His mere presence and acquiescence does not rise to the level of being an accomplice. Parker, 60 Wn. App. at 724-25; Wilson, 91 Wn.2d at 491; Rotunno, 95 Wn.2d at 933.

If Cooke is to be believed, the most Elliser did is try to "grab him or something." (03/19/15 RP 14) Cooke does not say who Elliser tried to grab or for what purpose. It is not clear from Cooke's testimony whether Elliser was trying to grab one of the men to end the fight, thus continuing his earlier efforts to be a peacemaker, or whether he was in fact trying to assist McKittrick in assaulting Wagner. This vague evidence cannot establish, beyond a reasonable doubt, that Elliser intended to or actually assisted and aided McKittrick.

The State failed to prove that Elliser acted as an accomplice to McKittrick, and his murder and assault convictions must be reversed and dismissed with prejudice.

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[4] Wagner told Cooke to pull over because he wanted to fight McKittrick. (03/19/15 7-8; 03/23/15 RP 7)

B. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF SKINHEAD VALUES AND ELLISER'S AFFILIATION WITH A SKINHEAD GROUP.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Bad acts under ER 404(b) include "acts that are merely unpopular or disgraceful." State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, WASH. PRACT., EVIDENCE § 114 at 383-84 (3rd ed. 1989)); *see eg.* State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. Powell, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an essential fact of the crime charged. State v. Saltarelli, 98 Wn.2d

358, 362, 655 P.2d 697 (1982); State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. Saltarelli, 98 Wn.2d at 362-63; State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983); ER 403.

Over defense objection, the State was allowed to elicit evidence that the participants in this incident, including Elliser, are members of skinhead groups. (01/20/15 RP 86-89; 03/02/15 RP 14-19; 03/26/15 RP 30-45; 04/13/15 RP 124-32) To become a skinhead, one must pledge loyalty to other skinheads and must follow codes and principles of behavior. A skinhead who breaks a rule or who acts in a way that harms or disrespects another skinhead faces punishment from other skinheads, sometimes in the form of physical violence. (03/19/15 RP 70-71; 04/14/15 RP 24-25, 25-26, 27-28, 30) The trial court allowed this evidence because it supposedly established the motive for the assault: that Wagner

disrespected Stredicke by sleeping with his wife.[5] (04/13/15 RP 132, 143; 04/14/15 RP 5-8) The Court of Appeals agreed. (Opinion at 16)

Cases involving gang affiliation evidence are instructive. Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. *See* State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995). Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn. App. at 822.

In this case, the trial court abused its discretion when it admitted evidence of skinhead affiliations and practices because the evidence was not necessary to prove a material issue in the

[5] A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. McBride, 74 Wn. App. 460, 463, 873 P.2d 589 (1994). The court abuses its discretion if there are no tenable grounds for its decision. State v. Tharp, 27 Wn. App. 198, 206, 616 P.2d 693 (1980).

case and the probative value was slight in comparison to its potential for prejudice.

First, the evidence was totally unnecessary to prove a motive for the assault on Wagner. The jury certainly could have grasped the idea that Stredicke was angry at Wagner for sleeping with his wife, and that McKittrick was angry that Wagner had been disrespectful to his girlfriend and friends. This is certainly not the first time that infidelity has led to violence, or that a group of drunk men have settled their differences with a physical fight. The State could have easily established a motive without the skinhead evidence.

Any probative value was slight at best, but the potential for prejudice was quite high. Evidence of unpopular beliefs and associations is prejudicial to a defendant. *See* Scott, 151 Wn. App. at 526 (evidence of gang affiliation is considered prejudicial); United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to "prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged"). Admission of such evidence also implicates a defendant's constitutional rights of freedom of association and freedom of expression. *See* State v. Monschke,

133 Wn. App. 313, 331, 135 P.3d 966 (2006) (citing Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)) (the First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint). Thus, there was a danger that the jury would view Elliser as a bad person with anti-social or violent tendencies, and that the jury would feel compelled to punish him for holding such unpopular or offensive views. And testimony that skinheads resolve their differences with violence would tend to make the jury believe that Elliser and McKittrick were merely acting in conformity with their propensity for violence. This is exactly what ER 404(b) is designed to prevent.

Without a strong showing that the evidence regarding skinhead beliefs and associations was necessary to establish Elliser's or McKittrick's motive, the evidence should not have been admitted. The admission of the evidence was improper, unnecessary, and highly prejudicial. Elliser's convictions should therefore be reversed.

VI. CONCLUSION

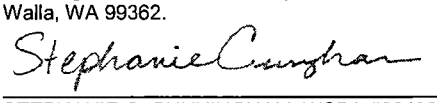
For the reasons stated above, this Court should accept review, and reverse Elliser's conviction.

DATED: November 17, 2017

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Eric Michael Elliser

CERTIFICATE OF MAILING

I certify that on 11/17/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Eric M. Elliser, DOC# 804911, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in State v. Eric Michael Elliser, No. 47929-0-II

Filed
Washington State
Court of Appeals
Division Two

October 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHANNE THOMAS McKITTRICK, Appellant.	No. 47929-0-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. ERIC MICHAEL ELLISER, Appellant.	No. 47953-2-II UNPUBLISHED OPINION

LEE, J. — Shanne Thomas McKittrick and Eric Michael Elliser appeal their convictions for second degree felony murder of Derek Wagner with a deadly weapon sentence enhancement. They argue that the State failed to present sufficient evidence to show that McKittrick committed an assault that resulted in Wagner's death and that Elliser participated in McKittrick's assault of Wagner, and the trial court erred in admitting evidence of skinhead culture in violation of ER 404(b). McKittrick also argues that the trial court erred in giving a primary aggressor jury instruction and sustaining the State's objection to defense counsel's self-defense closing argument.

Elliser also argues that the trial court erred in failing to give a unanimity jury instruction. In a statement of additional grounds (SAG), Elliser contends that the trial court erred in allowing the State's expert to testify about skinhead culture. We affirm.

FACTS

A. THE CRIME

Derek Wagner, Jeffrey Cooke, Mark Stredicke, Eric Elliser, Shanne McKittrick, and Matthew Wright are or were affiliated with skinhead organizations. Wagner and Cooke were friends.

On November 16, 2013, Wagner went with Cooke to talk to Elliser about the affair that Wagner had with Stredicke's wife, Erin Cochran. After speaking, Wagner and Elliser shook hands, and there did not appear to be any issue between them. Elliser left shortly thereafter.

Later, Wagner, Cooke, and Wright went over to Elliser's house in Cooke's car where they hung out and drank. Elliser; Elliser's girlfriend, Michele McKittrick[1]; McKittrick; McKittrick's girlfriend, Melissa Bourgault; and Danny Harvester were also there. While at Elliser's house, McKittrick had an upsetting phone call with Stredicke. McKittrick was mad that Wagner had slept with Stredicke's wife, that Cooke brought Wagner over, and that Cooke was "hanging out" with Wagner. Verbatim Report of Proceedings VRP) (Mar. 23, 2015) at 26. Cooke tried to explain to McKittrick that Wagner did not know that Cochran was married, but McKittrick was still angry.

[1] We use Michele McKittrick's first name because she shares the same last name as one of the defendants. We intend no disrespect.

McKittrick then argued with Wagner about the fact that Wagner had an affair with a "comrade's wife."[2] VRP (March 18, 2015) at 89. Michele eventually told everyone to leave.

As everyone was leaving, McKittrick was on the phone with Stredicke again. McKittrick was still angry, and McKittrick and Cooke were about to fight over Cooke's defense of Wagner. Cooke threw his knife on the ground because he did not want to be armed in the event they did fight. Elliser intervened before anything happened. Wagner then picked up Cooke's knife and Bourgault yelled at him to put it down. Wagner told Bourgault to "shut up" and called her a vulgar name. VRP (Mar. 18, 2015) at 121. McKittrick got upset and was about to fight Wagner when Cooke intervened.

Everyone then went to their cars and left. Wagner, Cooke, and Wright left in Cooke's car; McKittrick and Bourgault left in Bourgault's car; and Elliser followed separately in his car. As they were driving, Cooke noticed that McKittrick was following closely behind them with his high beams on and honking. Wagner told Cooke to pull over because he was ready to fight and not afraid of McKittrick. They pulled the car over. Wagner grabbed Cooke's knife from the center console, tucked it into the back of his pants, and got out of the car. Cooke got out of the car as well.

Outside of the car, Wagner and McKittrick began yelling, rushed towards each other, and started circling one another. Elliser pulled up, got out, and yelled at Wagner for lying to him. McKittrick and Elliser were on either side of Wagner, and Elliser tried to grab Wagner. Cooke went back to the car to grab a bat to stop the confrontation when he heard Wagner call for help

[2] "Comrade" is a term skinheads use to refer to fellow skinheads. VRP (Apr. 14, 2015) at 31.

and McKittrick tell Wagner to put down what was in his hand. Cooke then heard Wagner say that McKittrick stabbed him. Wagner ran off, and McKittrick said that everyone had to go because he "stuck" Wagner. VRP (Mar. 19, 2015) at 19.

The next day, Wagner's body was found in the backyard of a nearby home. Wagner's body had three stab wounds.

B. THE CHARGES

The State charged McKittrick, by amended information, with first degree premeditated murder and second degree felony murder predicated on assault, alleging he committed the crimes as an accomplice. The State charged Elliser, by amended information, with second degree felony murder predicated on assault and first degree assault, also alleging he committed the crimes as an accomplice.

C. EXPERT WITNESS AND SKINHEAD EVIDENCE

McKittrick filed a motion to exclude the testimony of the State's gang expert, William Riley, regarding skinhead culture and any evidence that the defendants were skinheads. Riley had worked with the Washington State Department of Corrections for 28 years and was the Department's Security Threat Group Coordinator; he had worked with various groups of investigators related to different gangs, prison and street gangs included. McKittrick argued that Riley was unqualified to give expert testimony and that the testimony was highly prejudicial.

The trial court found that Riley qualified as an expert due to his experience and that the evidence was admissible. However, the trial court specifically excluded "the ideology of the organization . . . as it relates to the purity of the white race and the sanctity of what are referred to as Aryan women." VRP (Feb. 23, 2015) at 151.

The trial court revisited this issue during trial. The trial court concluded that the testimony and evidence were admissible. The trial court found that evidence of the high regard for women, the importance of loyalty between skinheads, the need to hold each other accountable for transgressions, the perception of those who did not, and the implications of a fellow skinhead's infidelity with another's wife were relevant and admissible. However, the trial court also found that the socio-political beliefs, beliefs on the sanctity of women, and any mention of Aryan organizations or white supremacists were not relevant and not admissible.

D. TESTIMONY ON SKINHEAD CULTURE

Cooke testified that as skinheads "you pledge your loyalty and respect and your honor to each other." VRP (Mar. 19, 2015) at 70. A person who commits infidelity is viewed as untrustworthy. If the person that is wronged in such a situation does not do anything about it, they are viewed as weak.

Riley testified that respect is highly regarded within skinhead culture and plays a role in a member's perceived strength and weakness. A member who lacks respect is a negative reflection on the group. As a skinhead, if a member "allow[s] disrespect" to himself, the group mentality is that such person must take care of business and get his respect back; however, if the person is unable to do so for some reason, the group may opt to have another member take care of it. VRP (Apr. 14, 2015) at 25. If a skinhead steps out of line, he may be subject to discipline. Infidelity with another skinhead's wife is considered a major violation and could subject the violating member to "more than just a bare knuckle fight." VRP (Apr. 14, 2015) at 30.

E. TESTIMONY OF MATTHEW WRIGHT

Wright testified that he, Cooke, and Wagner went to Elliser's house where McKittrick and Bourgault later showed up. Wagner tried to pick a fight with McKittrick after thinking McKittrick was talking about him. As everyone was leaving, Bourgault said something to Wagner and he called her a vulgar name. McKittrick and Wagner then confronted each other, but Cooke broke it up.

Wright then testified that he, Cooke, and Wagner left Elliser's house in Cooke's car. McKittrick followed them and was honking at them, so Wagner told Cooke to pull over so he could "get out and beat his ass, fight him." VRP (Mar. 17, 2015) at 34. After Cooke pulled over, Wagner and McKittrick started fighting outside. Wright later heard McKittrick say that Wagner was trying to grab a knife, but Wright did not see a knife during the fight. Wagner then ran off across the street, was limping, then fell. Wright admitted that he could not see much of the fight because the windows in Cooke's car were tinted and that he never got out of the car.

Wright also testified that Elliser arrived right after this, was angry, and then left to find Wagner. McKittrick then told everyone to go because he had just stabbed Wagner. Wright and Cooke looked for Wagner, could not find him, and went back to Cooke's house. While Wright was there, McKittrick came over to buy a truck from Cooke because he "stabbed [Wagner] bad . . . [he] need[ed] the truck, [and] need[ed] to go." VRP (Mar. 17, 2015) at 74.

F. TESTIMONY OF JEFFREY COOKE

Cooke testified that Wagner wanted to speak with Elliser about sleeping with Cochran. Wagner wanted to explain his side of the story and was ready to fight if it came down to it. Cooke stated that everyone involved in the situation were skinheads and that everything becomes skinhead business.

At Elliser's house, McKittrick was on the phone with Stredicke and began "ranting about [Wagner] being the guy that slept with [Stredicke's] wife." VRP (Mar. 18, 2015) at 86. McKittrick and Wagner then began arguing about Wagner sleeping with a "comrade's wife." VRP (Mar. 18, 2015) at 89. When everyone was leaving, McKittrick and Cooke almost got into a fight over Cooke's defense of Wagner. Cooke threw his knife on the ground in anticipation of a fight, and Wagner picked it up. Bourgault yelled at Wagner to not pick up the knife, and Wagner called her a vulgar name.

Cooke, Wagner, and Wright then left in Cooke's car. After driving for a few minutes, McKittrick and Bourgault appeared behind them with high beams on. They pulled over at Wagner's insistence. Wagner got out of the car. McKittrick and Wagner approached each other, began arguing, and then circled one another. Elliser then pulled up, got out of his car, and yelled at Wagner that he lied to him about the affair.

Elliser and McKittrick were on either side of Wagner and Elliser tried to grab Wagner. When Cooke went back to his car to retrieve a bat, he heard Wagner call for help and McKittrick

tell Wagner to put down what was in his hand. Wagner then ran off yelling that McKittrick had stabbed him. McKittrick said that he stabbed Wagner. Cooke and Wright went to look for Wagner, but they did not find him. While looking for Wagner, Cooke ran into Elliser, who said that "things got out of hand, it wasn't supposed to go like that." VRP (Mar. 19, 2015) at 23.

McKittrick showed up at Cooke's house later that night and said that he had to get out of here. When Cooke asked McKittrick whether he stabbed Wagner with his knife, McKittrick told him that he did not use Cooke's knife. McKittrick said that he got rid of the knife on the bridge before coming over. McKittrick then bought a truck from Cooke.

The next morning, Cooke, McKittrick, Elliser, and Bourgault met at McKittrick's house, and McKittrick tried to make up an alibi. When everyone told him that his alibi did not make sense, he said that he had no choice but to stab Wagner because Wagner pulled a knife on him.

G. TESTIMONY OF MEDICAL EXAMINER

Dr. Thomas Clark, the Pierce County Medical Examiner, performed Wagner's autopsy. Dr. Clark observed three stab wounds on Wagner's body that were fairly close together. One of the stab wounds was to Wagner's left chest cavity, which incised a rib, caused his left lung to collapse, and caused his heart to bleed into his pericardial space. Another stab wound punctured Wagner's liver and stomach. A third stab wound punctured Wagner's abdomen and caused hemorrhaging under the skin. The wound to the liver and stomach occurred after the wounds to

the chest and abdomen, but it was inconclusive whether the chest wound or the abdomen wound occurred first. The wound to the abdomen would have caused a much slower process of death than the wound to the chest. All three wounds could have caused Wagner's death under the right circumstances, but it was the stab wound to the chest that caused his death, which would have been measured in a small number of minutes. The drop in blood pressure due to the chest wound and the accumulation of blood in the area around the heart would have also been measured in a small number of minutes, but Wagner could have still run for a block after receiving the chest wound.

H. JURY INSTRUCTIONS

The trial court instructed the jury and gave both a self-defense and primary aggressor instruction. As to self-defense, the court instructed that:

> Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company when: 1) the defendant reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury; 2) the defendant reasonably believed that there was imminent danger of such harm being accomplished; and 3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, at the time of the incident taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

Supp. CP (McKittrick) at 360. The trial court also instructed the jury that the State had the burden of proof to disprove self-defense beyond a reasonable doubt. The trial court further instructed the jury:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self[-]defense or defense of another and thereupon kill or use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Supp. CP (McKittrick) at 366.

I. CLOSING ARGUMENTS

During McKittrick's closing arguments, defense counsel stated that justifiable homicide required reasonable and imminent belief that the other person intended to commit a felony or inflict death or great personal injury and that the force applied was as much as a reasonably prudent person would in the same conditions as McKittrick. He told the jury that they must "put [themselves] in the shoes of the defendant" considering all the facts and circumstances as they appeared to McKittrick. VRP (Apr. 22, 2015) at 23. The State objected to this argument and the trial court sustained the objection. In response to the State's request to strike, the trial court sustained the objection and stated that the jury's decision was to be based on "their recollection of the evidence and the court's instructions on the law." VRP (Apr. 22, 2015) at 24.

J. JURY VERDICT

The jury found McKittrick guilty of the lesser included crime of first degree manslaughter and second degree felony murder. The jury found Elliser guilty of first degree assault and second degree felony murder. The jury also found that both defendants were armed with a deadly weapon during the commission of the crimes.

At sentencing, the trial court vacated and dismissed McKittrick's first degree manslaughter conviction and Elliser's first degree assault conviction on double jeopardy grounds. McKittrick and Elliser appeal.[3]

[3] We decline to address the issues raised by McKittrick and Elliser regarding their vacated manslaughter and assault convictions, respectively, because those issues are moot. "An issue is moot if it is not possible for this court to provide effective relief." *State v. Deskins*, 180 Wn.2d 68, 80, 322 P.3d 780 (2014). Here, the trial court vacated and dismissed McKittrick's

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

McKittrick argues that the State failed to present sufficient evidence to prove that he committed second degree felony murder predicated on assault. Elliser argues that the State failed to present sufficient evidence to prove that he was an accomplice to second degree felony murder.

To sustain a conviction, the State must prove all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Circumstantial evidence and direct evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

We review a challenge to the sufficiency of the evidence de novo. *Rich*, 184 Wn.2d at 903. A sufficiency challenge admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and interpreted strongly against the defendant. *State v. Wilson*, 141 Wn. App. 597, 608, 171 P.3d 501 (2007). We defer to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

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manslaughter conviction and Elliser's assault conviction. As a result, the issues are moot because we cannot provide effective relief for convictions that do not exist.

1. McKittrick

McKittrick argues that the State failed to present sufficient evidence to prove that he committed second degree felony murder because it failed to show that he made the stab wound that caused Wagner's death. We disagree.

Under RCW 9A.32.050(1)(b), a person is guilty of second degree felony murder when he "commits or attempts to commit any felony, including assault, . . . and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants." A person commits first degree assault when he "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death" or "[a]ssaults another and inflicts great bodily harm" with the intent to inflict "great bodily harm." RCW 9A.36.011(1)(a), (c). A person commits second degree assault when he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm," "[a]ssaults another with a deadly weapon," or "[w]ith intent to commit a felony, assaults another" under circumstances that do not rise to the level of first degree assault. RCW 9A.36.021(1)(a), (c), (e).

Here, the State presented sufficient evidence to show that McKittrick assaulted Wagner with a deadly weapon and caused Wagner's death. The evidence showed that Wagner yelled out that McKittrick stabbed him and McKittrick admitted as much. Wright heard McKittrick say that he had stabbed Wagner. Cooke testified that McKittrick admitted that he stabbed Wagner and that he got rid of the knife. Also, the medical evidence showed that Wagner was stabbed three times and any one of the stab wounds could have caused Wagner's death.

From this evidence, viewed in the light most favorable to and admitting all reasonable inferences in favor of the State, a rational jury could have found that McKittrick stabbed Wagner, and as a result of McKittrick's assault, Wagner died. Therefore, sufficient evidence was presented to support McKittrick's conviction for second degree felony murder predicated on assault.

2. Elliser

Elliser argues that the State failed to present sufficient evidence to prove that he was an accomplice to second degree felony murder because it failed to show that he knew McKittrick planned to assault Wagner or that he aided, assisted, or encouraged McKittrick. We disagree.

Under RCW 9A.08.020(2)(c), a person is legally accountable for the conduct of another person when he is an accomplice of the other person in the commission of a crime. A person is an accomplice when he "[s]olicits, commands, encourages, or requests such other person to commit" the crime or "[a]ids or agrees to aid such other person in planning or committing it," "with knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i), (ii). However, mere presence and knowledge of the criminal activity is insufficient to establish accomplice liability. *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74, *review denied*, 175 Wn.2d 1020 (2012). The person must have acted with "knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." *State v. Moran*, 119 Wn. App. 197, 210, 81 P.3d 122 (2003), *review denied,* 151 Wn.2d 1032 (2004). A person is not guilty as an accomplice unless he "associates himself with the venture and takes some action to help make it successful." *Truong*, 168 Wn. App. at 539.

Here, the State presented evidence that Elliser arrived after Wagner and McKittrick were already circling each other. Elliser was angry at Wagner and yelled that Wagner had lied to him about the affair. Elliser then approached Wagner and McKittrick—standing on the opposite side of McKittrick—and tried to grab Wagner. Shortly thereafter, McKittrick stabbed Wagner, who then ran off. Such evidence showed that Elliser knew he was aiding in McKittrick's assault of Wagner and took action to make it successful. Viewing the evidence in the light most favorable to the State, a rational jury could have found that Elliser knew he was aiding in Wagner's assault, which led to Wagner's death. Therefore, sufficient evidence supports Elliser's conviction as an accomplice to second degree felony murder.

B. ADMISSION OF EVIDENCE ON SKINHEAD CULTURE

McKittrick and Elliser argue that the trial court erred when it admitted evidence on skinhead culture because it was unnecessary to establish motive and unduly prejudicial. We hold that the trial court did not err.

Under ER 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Gang evidence falls within the scope of ER 404(b). *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). However, such evidence may be admissible for other purposes, such as proof of motive, intent, or identity. *Id.*

To admit gang evidence under ER 404(b), the trial court must (1) find by a preponderance of evidence that the misconduct occurred, (2) identify the purpose for which the evidence is being introduced, (3) determine that the evidence is relevant to prove an element of the crime charged, and (4) find that its probative value outweighs its prejudicial effect. *State v. Embry*, 171 Wn. App.

714, 732, 287 P.3d 648 (2012), *review denied,* 177 Wn.2d 1005 (2013). There must be a nexus between the crime and the gang evidence before the trial court may find the evidence relevant. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010). And the trial court's balancing of probative value versus prejudicial effect is entitled to great deference. *Degroot v. Berkley Constr.*, Inc., 83 Wn. App. 125, 128, 920 P.2d 619 (1996).

We review a trial court's ER 404(b) rulings for an abuse of discretion. *Embry*, 171 Wn. App. at 731. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Such is the case when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Id.* at 284.

Here, the trial court admitted evidence of skinhead culture. Cooke testified that as skinheads "you pledge your loyalty and respect and your honor to each other." VRP (Mar. 19, 2015) at 70. Riley also testified that respect is highly regarded within skinhead culture. Infidelity is a significant betrayal of loyalty and is a sign of disrespect. If a member allows himself to be "disrespected," the group mentality is that such person must take care of business and get his respect back; however, if the person is unable to do so for some reason, the group may opt to have another member take care of it. If a skinhead steps out of line, they may be subject to discipline ranging from writing an essay to a fight; infidelity with another skinhead's wife could subject the violating member to more than a fight.

In admitting such evidence, the trial court applied the four-part test and found that (1) the gang affiliation had been stipulated to; (2) the evidence of skinhead culture "contextualizes the events of the evening for the trier of fact, and it shows that that [sic] there is a possible motive for this"; (3) the evidence was relevant to prove motive; and (4) the probative value of showing motive and a violation of group standards outweighed the prejudice resulting from showing gang affiliation. 2 VRP at 147. The trial court stated:

> I do find that probative value to show the reason for the acrimony, perhaps the reason for the upset, the question of loyalty, the question of disrespect may have lent itself, at least to the initial confrontation between the individuals, to be distinguished from what ultimately happened.

VRP (Apr. 14, 2015) at 7. These findings are entitled to great deference. *Degroot*, 83 Wn. App. at 128.

Here, while McKittrick may have been angry at Wagner for calling Bourgault a vulgar name, the evidence shows that McKittrick was angry at Wagner before then because Wagner had slept with a "comrade's wife." VRP (Mar. 18, 2015) at 89. When Wagner left Elliser's house, McKittrick followed Wagner, trailing closely with his high beams on and honking. Thus, the evidence on skinhead culture—adherence to loyalty, high regard for respect, and the need for discipline—was probative to show the reason behind McKittrick's level of acrimony and actions.

And the trial court established parameters for its admission of evidence on skinhead culture. To minimize any prejudice, the trial court precluded any mention of their socio-political beliefs, beliefs on the sanctity of women, and identification as Aryan organizations or white supremacists. The trial court cannot be said to have abused its discretion. Therefore, we hold that the trial court did not err when it admitted evidence of skinhead culture.

C. PRIMARY AGGRESSOR JURY INSTRUCTION AND ARGUMENT ON SELF-DEFENSE

McKittrick argues that the trial court erred when it gave a primary aggressor jury instruction and sustained the State's objection to defense counsel's argument on self-defense because it negated his claim of self-defense. We disagree.

1. Primary Aggressor Jury Instruction

"[A]n aggressor or one who provokes an altercation" cannot successfully invoke the right to self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). While not favored, an aggressor instruction is appropriate "'where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.'" *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016) (quoting *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010), *review denied*, 171 Wn.2d 1017 (2011)), *review denied*, 187 Wn.2d 1023 (2017). If a reasonable juror could find from the evidence that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *Id.*

We review de novo whether the state provided sufficient evidence to support a primary aggressor instruction. *Id.* We view the evidence in the light most favorable to the party requesting the instruction. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

Here, the State requested that a primary aggressor instruction be given. At trial, it presented evidence that McKittrick was angry and arguing with Wagner at Elliser's house about Wagner's affair with Cochran and that the argument continued throughout the night. McKittrick and Wagner also confronted each other at Elliser's house after Wagner called Bourgault a vulgar name, but

nothing came from it at the time. At that point, Wagner left with Cooke and McKittrick left in a separate car. But after Wagner left, McKittrick's car appeared behind Cooke's car—which Wagner was riding in—with its headlights on and honking. McKittrick was driving. Wagner then kept insisting that Cooke stop the car, so that Wagner could fight McKittrick, and grabbed Cooke's knife before getting out of the car. After both cars pulled over, McKittrick and Wagner both rushed towards each other.

McKittrick argues that a reasonable jury could conclude that Wagner provoked a fight with McKittrick based on Wagner's actions at Elliser's house—confronting McKittrick after thinking that McKittrick was talking about him—and after leaving Elliser's house—insisting that Cooke pull over, grabbing Cooke's knife before he left the car, and rushing at him. However, the evidence is viewed in the light most favorable to the party requesting the instruction—here, the State. Doing so, a reasonable jury could find that McKittrick provoked the fight based on his own actions at Elliser's house by arguing with Wagner about his sleeping with Cochran; by following Wagner after leaving Elliser's house; by closely following Cooke's car, honking, and having his high beams on; and when they were out of the car, by circling around Wagner.

McKittrick argues that his conduct after leaving Elliser's house did not create the need for Wagner to grab a knife and charge at him, and that his conduct could have been directed at Cooke. Even though primary aggressor instructions are not favored, such an instruction is appropriate when "the jury can reasonably determine from the evidence that the defendant provoked the fight" and when "the evidence conflicts as to whether the defendant's conduct provoked the fight." *Sullivan*, 196 Wn. App. at 289. Both situations exist here to support the trial court's decision to give a primary aggressor instruction. Therefore, the trial court did not err.

2. Defense Counsel's Argument on Self-Defense

McKittrick challenges the trial court's ruling sustaining the State's objection during closing arguments when his defense counsel argued self-defense, stating that the jury must subjectively put itself in McKittrick's shoes. We review a trial court's decision to limit closing argument for an abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). A trial court abuses its discretion only if no reasonable person would adopt the view taken by the trial court. *State v. Wooten*, 178 Wn.2d 890, 897, 312 P.3d 41 (2013).

The trial court has broad discretion over the scope of closing argument. *Perez–Cervantes*, 141 Wn.2d at 474-75. Our Washington Supreme Court has emphasized that the trial court should restrict the argument of counsel to the facts in evidence and the law as set forth in the instructions to the jury. *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007), *cert. denied*, 552 U.S. 1145 (2008).

Under the law of self-defense, a homicide is justifiable when the defendant, who was not the aggressor, acted in defense of himself. RCW 9A.16.050; *Riley*, 137 Wn.2d at 909. But the jury must find that the defendant reasonably believed that he or she was in danger of imminent harm. *Riley*, 137 Wn.2d at 909. And the evidence of self-defense must be assessed from the view of a "reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees." *Id.*

During closing arguments, while discussing self-defense, defense counsel told the jury that they must "put [themselves] in the shoes of the defendant" considering all the facts and circumstances as they appeared to McKittrick and that it "is not an objective standard this is not,

[w]ell, this is what I would have done." VRP (Apr. 22, 2015) at 23-24. The State objected to this argument and the trial court sustained the objection.

Our Supreme Court has clarified that the evidence of self-defense must be assessed from the view of a "reasonably prudent person standing in the shoes of the defendant." *Id.* Thus, while defense counsel may have been correct that the jury must put themselves in McKittrick's shoes, defense counsel was incorrect in arguing that it was a subjective standard. The jury must assess self-defense through the lens of a reasonably prudent person. Thus, the trial court did not abuse its discretion by sustaining an objection to defense counsel's legally erroneous argument.

D. RIGHT TO A UNANIMOUS JURY VERDICT

Elliser argues that his right to a unanimous jury verdict was violated because the State failed to elect which act it was relying on to prove first degree assault, and the trial court failed to give a unanimity jury instruction. However, we decline to address this issue because it is moot.

"An issue is moot if it is not possible for this court to provide effective relief." *State v. Deskins*, 180 Wn.2d 68, 80, 322 P.3d 780 (2014). In presenting this issue, Elliser requests that his first degree assault conviction be reversed. However, the trial court dismissed Elliser's first degree assault conviction on double jeopardy grounds. Therefore, we cannot provide effective relief for a conviction that does not exist. Because the issue is moot, we decline to address this issue on appeal.

E. SAG

Elliser argues in a SAG that the trial court erred by allowing Riley to testify.[4] We disagree.

Under ER 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education," may testify to any specialized knowledge that "will assist the trier of fact to understand the evidence or to determine a fact in issue." "'Practical experience is sufficient to qualify a witness as an expert.'" *State v. Weaville,* 162 Wn. App. 801, 824, 256 P.3d 426 (quoting *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)), *review denied*, 173 Wn.2d 1004 (2011).

We review the determination of whether a witness is qualified to testify as an expert for an abuse of discretion. *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995). Such a determination is within the sound discretion of the trial court and its ruling will not be reversed absent a manifest abuse of discretion. *Id.*

Here, Riley testified to working with the Department of Corrections for 28 years, serving as the Security Threat Group Coordinator, and working with groups of investigators related to different prison and street gangs, skinheads included. Riley had dealt with skinheads since 1989 and had created a number of presentations and publications on gangs. The trial court found that Riley's area of expertise fell outside the scope of most lay people, and that his testimony could be of assistance to the trier of fact; thus, he qualified as an expert. Elliser fails to show that the trial court abused its discretion. Therefore, we hold that Elliser's SAG claim fails.

[4] Elliser also argued in his SAG that Riley's testimony on skinhead culture was inadmissible because it was unduly prejudicial. This argument is addressed above in Section B.

APPELLATE COSTS

McKittrick and Elliser request that we decline to impose appellate costs against them if the State substantially prevails on this appeal and makes a proper request. If the State files a request for appellate costs, McKittrick and Elliser may challenge the request before a commissioner of this court under RAP 14.2.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.

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