95272-8

COA NO. 33299-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

PETITIONER,

V.

JESUS DUARTE VELA,

RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

STATE'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Okanogan County Prosecuting Attorney Branden E. Platter, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. RELIEF REQUESTED

The State seeks review of Division Three's decision in *State of Washington v. Jesus Duarte Vela*, COA No. 33299-3-III. This opinion held that the defendant's Sixth Amendment right to present a defense was violated when the Superior Court excluded evidence offered by the defendant in support of his claim of self-defense. The published opinion was issued on September 5, 2017. A copy of the opinion appears in Appendix A. The State's timely filed motion for reconsideration was denied on October 31, 2017. A copy of the order denying reconsideration appears in Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Division Three's decision was based on an incorrect interpretation and application of *State v. Jones*, 168 Wn.2d 713, (2010); and whether *Jones* created a new standard for evidentiary rulings by a trial court.

2. Whether Division Three's decision is in conflict with

multiple other decisions of the Court of Appeals.

3. Whether Division Three's decision is inconsistent with the Supreme Court's ruling in *State v. Perez-Valdez*, 172 Wn.2d 808 (2011).

IV. STATEMENT OF THE CASE

On February 20, 2014, the defendant, Jesus Duarte Vela, shot and killed the victim, Antonio Menchaca-Naranjo. [CP 206-209] The morning of the incident, Menchaca was seen in the area of Duarte Vela's home, causing concern to Duarte Vela and his family. [RP 95, 164-165, 414, 98, 599-600] Later in the day, Menchaca showed back up in the area in an SUV driven by Mr. Martinez. [RP 101-103] Duarte Vela became more concerned because Duarte Vela did not know what Menchaca's intentions were. [RP 438] Duarte Vela began following the SUV. [RP 288] When Duarte Vela caught up with the SUV, Mr. Martinez pulled over and stopped his vehicle and Menchaca hid in the back seat. [RP 288] Duarte Vela pulled along the driver's side of Mr. Martinez's vehicle and stopped. [RP 289] After a brief conversation with Mr. Martinez, Duarte Vela drove off. [RP 246, 317] Shortly thereafter, Mr. Martinez drove back toward the Okanogan area and when they passed the same pullout, they saw Duarte Vela standing outside of his truck. [RP 291, 317]

Duarte Vela saw Menchaca in the SUV and became alarmed. [RP 421, 441, 463] He was afraid they had come looking for him and he felt

he had to do something. [RP 441, 443] Duarte Vela started following them again. [RP 292] Mr. Martinez began to stop his vehicle at another turnout to see what Duarte Vela wanted. [RP 292] Duarte Vela stopped his truck in front of Mr. Martinez's truck. [RP 292-293] Mr. Martinez, Menchaca, and Duarte Vela all exited their trucks at the same time. [RP 293, 391] Duarte Vela was angry and made comments to Menchaca, asking what they were doing at his home. [RP 294, 295, 308] Duarte Vela did not know whether they had any weapons. [RP 464, 472]

Neither Menchaca nor Mr. Martinez had made any threats to Duarte Vela. [RP 310] Duarte Vela testified that Menchaca reached into his pocket, made some movement, and said "*sabes que cunya.*" [RP 348, 628-629] Duarte Vela told Menchaca "What have I told you before? Don't go near my family," and then pulled out a gun and shot Menchaca. [RP 295, 296, 324, 337] Duarte Vela said that when he pulled out the gun, Menchaca was not really moving and that Mr. Martinez was just staring. [RP 482, 487, 510-511, 685-686, 712]

Duarte Vela presented significant evidence in support of his defense of self-defense including evidence going to his state of mind at the time of the shooting and his knowledge of Menchaca's history.[1]

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[1] Evidence was presented that Mr. Duarte Vela knew Mr. Menchaca had threatened Blanca (Mr. Duarte Vela's sister) in the past. [RP 674-75] Mr. Duarte Vela was afraid of Mr. Menchaca and fearful of him being around his family. [RP 592, 599, 697] Mr.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 discusses the considerations governing acceptance of review. Review is appropriate under RAP 13.4(b)(3) because this case raises a significant question of law with regard to whether *State v. Jones*, 168 Wn.2d 713 (2010) created a new standard for evidentiary rulings by trial courts. Review is also appropriate under RAP 13.4(b)(2) because the decision is in conflict with multiple published decisions of the Court of Appeals. Finally, review is appropriate under RAP 13.4(b)(1) because the Court of Appeals decision is in conflict with the decision of the Supreme Court in *State v. Perez-Valdez*, 172 Wn.2d 808 (2011).

A. The Division Three decision in *Duarte Vela* is based on an incorrect application of *State v. Jones* and the interpretation that *Jones* creates a new standard for evidentiary rulings by the trial court.

Division Three's decision in *Duarte Vela* is based on an interpretation and application of *State v. Jones*, 168 Wn.2d 713, 230 P.3d

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Duarte Vela recognized Mr. Menchaca in the vehicle and was alarmed as he felt Mr. Menchaca was staring at him. [RP 421, 441, 463] He was afraid Mr. Menchaca had come looking for him. [RP 441, 443] Mr. Duarte Vela testified that Mr. Menchaca got out of his vehicle and came toward him. [RP 445] He did not know whether Mr. Menchaca had any weapons so he was scared. [RP 464, 472] Mr. Menchaca said something in an angry tone. [RP 476] Mr. Duarte Vela testified that he felt threatened and that is why he took out his gun. [RP 476, 497, 618-19] Mr. Menchaca reached into his pocket and made some movement. [RP 348, 628-29] He testified that he was afraid of Mr. Menchaca and very fearful of Mr. Menchaca being around his family. [RP 592, 599, 697]. Duarte Vela was permitted to testify about his wife's statements, her state of mind, and her alleged fearfulness. [RP 607-608]

576 (2010) that *requires* a trial judge to admit evidence offered by a defendant if it is remotely probative of his defense, regardless of whether the trial court finds a legitimate, legal basis to exclude the evidence. The decision suggests that, following *Jones*, if the evidence *could* be admissible, it *must* be admitted. This suggests a new, heightened standard for trial courts to use in ruling on defense offered evidence that did not exist prior to *Jones* and the idea that a trial judge has little to no discretion in excluding defense offered evidence which is otherwise excludible under the rules of evidence.

Duarte Vela admitted evidence at trial that went to his state of mind at the time of the killing.[2] The trial court excluded some of the defense offered evidence based on different evidentiary rulings, stating they were either too remote or irrelevant. *Duarte Vela,* COA No. 33299-3-III at 6-8. Division Three, applying *Jones*, ruled that because the evidence *could* have been admitted, the trial court was *required* to admit it and Duarte Vela was therefore denied his constitutional right to present a defense. *Duarte Vela*, COA No. 33299-3-III at 24.

Division Three's decision was based entirely on *Jones*. In *Jones*,

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[2] Duarte Vela sought to admit evidence of threats made by the victim two or three years prior to the incident, the victim's history of domestic violence, an alleged abduction of the defendant's sister approximately seven years earlier, and multiple statements regarding what the defendant was thinking around the time of the killing. *Duarte Vela*, COA No. 33299-3-III at 6-9.

the defendant was charged with second degree rape based on forcible compulsion. 168 Wn.2d at 717. The victim claimed the defendant put his hands around her neck and forcibly raped her. *Id.* at 717. The defendant wished to testify that on the night of the incident, the victim engaged in consensual sex with the defendant and two other men. *Id.* The defendant was attempting to offer, by his version of events, the defense of consent. The trial court excluded the evidence. *Id.*

The Supreme Court recognized the rights of a defendant in a criminal trial and the importance of a trial court in weighing those rights in making evidentiary rulings on defense evidence.[3] *Jones*, 168 Wn.2d at 720. The Court then noted that the defendant was prepared to testify that the victim consented to sex during a sex party and recognized this was "Jones's entire defense." *Id* at 721. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. *Id.* The Court therefore held that the complete bar of the defendant

[3] The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. ... These rights are not absolute, of course. Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.' Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. '[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.' The State's interest in excluding prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.' ... We have therefore noted that for evidence of *high* probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.' *Jones*, 168 Wn.2d at 720 (internal citations omitted).

from testifying to his version of events violated his Sixth Amendment right to present a defense. *Id.*

Based on *Jones*, Division Three analyzed the proffered pieces of evidence to simply determine whether the evidence *could* have been admitted, notwithstanding the trial judge's rulings,[4] rather than reviewing the reasonableness of the trial court's rulings or the defendant's need for the precluded evidence. Having found that much of the evidence *could* have been admitted, the court then concluded "These evidentiary rulings precluded Duarte Vela from presenting a legal defense to the killing that he admitted...For this reason, the trial court's evidentiary rulings violated Duarte Vela's Sixth Amendment right to present a defense." *Duarte Vela*, COA No. 33299-3-III at 24.

The court's analysis of Menchaca's 2012 threat against Duarte Vela's family reflects the heightened evidentiary standard Division Three applied following *Jones*. The trial court ruled that the victim's 2012 prison threat was too remote in time given that the threat was made two to three years earlier and Menchaca had not been in prison since that time. *Duarte Vela,* COA No. 33299-3-III at 6-7. Division Three then

[4] The court analyzed the proffered evidence and found that it was not hearsay, it was not character evidence, some of the evidence was not speculative, and that some of the evidence was not too remote. *Duarte Vela,* COA No. 33299-3-III at 13, 17-20, 21, 23.

distinguished the case from *State v. Adamo*, 120 Wn. 268, 207 P. 7 (1922)[5] in an attempt to show that the evidence *could* have been admissible.

The Division Three court held, without any substantial reasoning, that while five years was sufficiently too remote in *Adamo*, two or three years in this case was not too remote. *Duarte Vela*, COA No. 33299-3-III at 18-19. This decision was an arbitrary time distinction based entirely on the court's speculation as to circumstances of this case.[6] The court then ruled that because the evidence could have been considered as not too remote, that *Jones* requires the evidence to be admitted and tested on cross examination.

The decision states "The evidence of Menchaca's threat to kill Duarte Vela's family was highly probative of his defense, and the Sixth Amendment right to present a defense thus requires admitting such highly probative evidence." *Duarte Vela*, COA No. 33299-3-III at 15 citing

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[5] In *Adamo*, the defendant was on trial for murder. 120 Wn. 268. The defendant sought to admit evidence that approximately five years before the killing, the victim had made a motion toward his hip as though he had a gun during a quarrel between the victim and a witness and that the victim had made threats of violence against the witness at that time. *Id.* at 269. The trial court refused to allow the testimony as too remote in time. *Id.* The Supreme Court recognized that a defendant charged with homicide may show that third parties had quarrels with the victim so long as the defendant knew of the quarrel at the time of the killing. *Id.* Such evidence can support the defendant's state of mind at the time of the killing as to whether he had reason to fear bodily harm. *Id.* However, the Court then held that it was not improper to exclude the evidence as too remote. *Id.* at 270.

[6] The decision made comment that "[the victim] may have been delayed in accomplishing his threat by being in prison and then being deported back to Mexico." *Duarte Vela*, COA No. 33299-3-III at 18.

Jones, 168 Wn.2d at 720-721. The court further stated that

> if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence will not only be removed, but will invite prejudice to the defendant who introduced such evidence. For these reasons, the trial court should admit probative evidence, even if suspect, and allow it to be tested on cross-examination.

Duarte Vela, COA No. 33299-3-III at 15-16.

Division Three's interpretation and application of *Jones* extends the decision too far and the court's application signifies a heightened standard for defense evidentiary rulings. The ultimate question is whether Duarte Vela was "able to argue his theory of the case," *Perez-Valdez*, 172 Wn.2d at 816, not whether Duarte Vela's evidence *could* have been admitted.

A trial court has "broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-663, 935 P.2d 555 (1997). Appellate courts review decisions on the admission of evidence for abuse of discretion. *Perez-Valdez*, 172 Wn.2d at 814. Notwithstanding a court's de novo review of constitutional challenges, courts continue to review evidentiary rulings with an eye toward the abuse of discretion standard.[7]

[7] Division Three cited to *Jones* for the standard of review that a Sixth Amendment challenge is reviewed de novo. *Duarte Vela*, COA No. 33299-3-III at 11. *Jones* based this standard of review on *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Jones did not create a new heightened standard for defense evidence requiring that evidence that *could* be admitted *must* be admitted. *Jones* simply discussed the importance of the trial court weighing the probative value of proffered evidence against its prejudice or relevance. This is not a new rule and is simply a restatement of the well-established evidence rule 403.[8] See also Evidence Rule 401 and 402.

Division Three quoted, with emphasis, the line from *Jones* stating:

> Evidence of high probative value could not be restricted regardless of how compelling the State's interest may be if doing so would deprive the defendant [] of the ability to testify to [the defendant's] version of the incident.

Duarte Vela, COA No. 33299-3-III at 12 citing *Jones*, 168 Wn.2d at 721. However, this statement must be read in the context of the case in which is it stated. In *Jones*, the defendant was *completely* barred from presenting his version of events and the ruling was based on this premise. In *Duarte Vela*, the defendant presented his version of events, he just was not permitted to present every piece of evidence he wanted. As pointed out by

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Jones, 168 Wn.2d at 719. In *Iniguez*, the Court stated the reason it was going to apply a de novo review to a decision to grant or deny a continuance, an issue normally reviewed for abuse of discretion, was because the defendant challenged it under his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280. However, the Court in *Iniguez*, reviewed the reasonableness of the discretionary decisions of the trial court as part of its de novo review. *Id.* at 294.

[8] ER 403- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Justice Korsmo in his dissent, Duarte Vela was permitted to testify regarding why he was afraid of the victim. *Duarte Vela,* COA No. 33299-3-III at 1 (dissent). He simply was not permitted to present every piece of evidence he wanted. *Id.*

Evidentiary rulings are reviewed for abuse of discretion, even under a de novo review. This analysis requires the reviewing court to consider the reasonableness of the trial court's decision in the context of the circumstances of the case. Division Three made no reference to the substantial amount of evidence that Duarte Vela actually did present to support his claim of self-defense.[9] The court only asked whether those isolated pieces of evidence *could* have been admissible. *Jones* also does not require a trial judge to admit weak or mildly probative evidence under the idea that it can just be subject to cross examination. Such a ruling would eliminate the entire gatekeeping function of the trial judge.

Division Three's decision appears to read *Jones* as requiring admission of all probative defense evidence, regardless of any tenable grounds for a trial judge to exclude the evidence. The decision suggests that, following *Jones*, if evidence is *admissible*, it must be *admitted.* The State asks this Court to reverse the Division Three decision on the grounds

[9] See n.1.

that the decision is based on an incorrect interpretation and application of *Jones*.

B. Division Three's decision in *Duarte Vela* is in conflict with a substantial line of cases out of the Court of Appeals.

Division Three's decision in *Duarte Vela* is in conflict with a substantial line of cases out of the Court of Appeals. Most recent is a post-*Jones* case out of Division One, *State v. Lizarraga*, 191 Wn.App. 530, 553, 364 P.3d 810 (Div.1 2015), review denied, 185 Wn.2d 1022 (2016). In *Lizarraga*, the defendant attempted to introduce out-of-court hearsay statements.[10] Division One held that the trial court did not violate the defendant's Sixth Amendment right to present a defense when it excluded the hearsay statements. *Id.* at 553.

Division One recognized that "[t]he defendant's right to present a defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 553 citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). "Evidentiary 'rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or

[10] In *Lizarraga*, the nature of the defendant's defense to a charge of murder was that he was not the shooter. *Lizarraga*, 191 Wn.App. at 544. During the investigation, a witness, Cervantes, told law enforcement that a different individual, Vaca-Valencia, had shot the victim. *Id.* at 539. Cervantes did not testify at trial. *Id.* at 544. The defendant sought to admit evidence of Cervantes' statement that Vaca-Valencia had shot the victim. *Id.* at 521. The trial court denied the evidence on the grounds that it was hearsay. *Id.*

'disproportionate to the purposes they are designed to serve.'" *Lizarraga*, 191 Wn.App. at 553 citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Accordingly, a defendant's interest in presenting relevant evidence may "bow to accommodate other legitimate interest in the criminal trial process." *Lizarraga*, 191 Wn.App. at 553 citing *Scheffer*, 523 U.S. at 308.

Therefore, in a case where the defense proffered evidence was significantly more central to the defendant's defense than that in *Duarte Vela*, Division One recognized, subsequent to *Jones*, that the rules of evidence still apply and the trial judge maintains discretion to exclude evidence relevant to the defendant's defense. *Lizarraga*, 191 Wn.App. at 553.

Lizarraga is merely one case in a substantial line of cases which have consistently held that a trial court's exclusion of defense evidence pursuant to the rules of evidence does not violate the defendant's right to present a defense:

> *State v. Donald*, 178 Wash. App. 250, 316 P.3d 1081 (Div. 1 2013) (court rejected defendant's claim of constitutional violation from trial court's exclusion of defendant's offered testimony that other suspect had a propensity for criminal behavior and therefore committed the robbery the defendant was charged with; evidence excluded under ER 404(b)).
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> *State v. Rafay*, 168 Wash. App. 734, 285 P.3d 83 (Div. 1

2012) (no constitutional violation when trial court refused to allow defendant to call an expert who would testify that his confession was coerced).

State v. Strizheus, 163 Wash. App. 820, 262 P.3d 100 (Div. 1 2011) (no constitutional violation when trial court refused to allow defendant to present a 911 phone call where the defendant's son confessed to the crime the defendant was charged with).

State v. Sublett, 156 Wash. App. 160, 231 P.3d 231 (Div. 2 2010), as amended on reconsideration, (June 29, 2010) and aff'd, 176 Wash. 2d 58, 292 P.3d 715 (2012) (defendant's constitutional rights were not violated when defendant was prohibited from presenting evidence that was hearsay and irrelevant).

State v. Soper, 135 Wash. App. 89, 143 P.3d 335 (Div. 2 2006) (no constitutional violation when the court struck the testimony of the defendant's physician after learning the physician was not licensed to practice medicine in Washington as required by the medical marijuana defense; defendant's physician had testified that the defendant used marijuana for legitimate medical reasons).

State v. Mee Hui Kim, 134 Wash. App. 27, 139 P.3d 354 (Div. 1 2006), as amended, (July 11, 2006) (in vehicular homicide and vehicular assault case, the driver defendant sought to admit evidence that the passenger may have given her the date-rape drug; the court ruled that defendant's constitutional rights were not violated by exclusion of this evidence as it lacked foundation and was therefore irrelevant).

State v. Tracy, 128 Wash. App. 388, 115 P.3d 381 (Div. 2 2005), aff'd, 158 Wash. 2d 683, 147 P.3d 559 (2006) (in prosecution for possession of marijuana, the fact that the defendant may have had permission from a California physician to use medical marijuana in California was irrelevant; under Washington law, permission from a California physician who was not licensed to practice in

Washington was not a defense and thus was immaterial; no violation of defendant's right to fair trial).

State v. Thomas, 123 Wash. App. 771, 98 P.3d 1258 (Div. 1 2004) (trial court properly excluded testimony of a defense expert on diminished capacity where the expert's testimony was inadmissible under the normal rules of evidence; the appellate court found no constitutional violation occurred).

State v. Willis, 113 Wash. App. 389, 54 P.3d 184 (Div. 1 2002), as corrected on reconsideration, (Nov. 5, 2002) and judgment aff'd in part, rev'd on other grounds in part, 151 Wash. 2d 255, 87 P.3d 1164 (2004) (in prosecution for rape of child, trial court properly refused to allow defense expert to testify where expert was not fully qualified and lacked a reasonable basis for his opinion; appellate court rejected argument that trial court violated defendant's constitutional right to present a defense).

State v. Picard, 90 Wash. App. 890, 954 P.2d 336 (Div. 2 1998) (trial court properly refused to allow defendant to introduce exculpatory hearsay that did not fall within any exception to the hearsay rule).

State v. Baird, 83 Wash. App. 477, 922 P.2d 157 (Div. 1 1996), (defendant was charged with assaulting his wife and claimed diminished capacity based on intoxication and an enraged state of mind. Defendant offered a secret recording, made in violation of the Privacy Act, of a conversation between his wife and her lover. Defendant argued that while the recording was obtained illegally, his right to present a defense trumps the privacy statutes. Trial court properly excluded the recording as in violation of the Privacy Act).

See also *State v. Madison*, 53 Wash. App. 754, 770 P.2d 662 (Div. 1 1989) ("There is nothing ... to suggest that defendants in general are exempted from the normal rules of evidence in presenting their case.").

These cases signify an established trend of recognizing that the

rules of evidence are not trumped by a defendant's constitutional right to present a defense. In each case, as in *Duarte Vela*, the defendant offered evidence that was excludible under the rules of evidence and the courts routinely held that such exclusion did not infringe upon a defendant's right to present a defense. In every case, as in *Duarte Vela*, the defendant was permitted to present their case; they merely were not permitted to present every piece of evidence they wished.

Duarte Vela is indistinguishable from these cases making Division Three's decision arbitrary as no distinction can be made as to why the evidence was required to be admitted in Duarte Vela's case, but the evidence could be properly excluded in the preceding line of cases. *Lizarraga* and the entire line of cases, *supra*, remain consistent with *Adamo, Jones*, and *Perez-Valdez, infra*. *Duarte Vela* has become an outlier case.

This Court should reverse the Division Three ruling as inconsistent with the line of cases, *supra*, that have held a defendant's constitutional right to present a defense was not violated when the trial court excluded defense evidence properly excludible under the rules of evidence.

C. Division Three's decision in *Duarte Vela* is inconsistent with the Supreme Court case, *State v. Perez-Valdez.*

Division Three's decision is inconsistent with *State v. Perez-*

Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011). In *Perez-Valdez*, the defendant, who was charged with rape of a child, sought to admit evidence of the victims' prior act of arson as evidence of their motive to lie in the case against Perez-Valdez.[11] *Id.* at 813. The Supreme Court held that the trial court did not abuse its discretion when it excluded the defense's proffered testimony, which was central to the defendant's defense. *Id.* at 817. Notably, the trial court excluded the evidence in large part because the incident was too remote in time. *Id.* at 817. As the Court said,

> Although another trial judge might well have admitted the same evidence, the decision to not allow admission of the arson evidence is neither manifestly unreasonable nor based on untenable grounds or reasons. It is of legitimate concern that the arson was too removed from a false accusation of rape to necessarily be considered evidence of motive to lie.

Id. at 816.

The Supreme Court recognized that the proffered evidence may have actually been admissible under ER 404(b); however, such rules are rules of exclusion, not inclusion. *Id.* at 815. The ability for evidence to be admissible, does not require its admission. *Id.* The trial court maintains discretion on evidentiary matters and those rulings will not be disturbed absent a manifest abuse of discretion. *Id.* at 816. As the Supreme Court

[11] The defendant's theory was that just as the victims had committed arson to get removed from their foster home, they also falsely accused him of rape to get out of their adoptive home. *Perez-Valdez*, 172 Wn.2d at 813.

stated in *Perez-Valdez*, "the defense was still able to argue its theory of the case..., yet the jury, which saw the [victims] and all other witnesses testify, was convinced of Perez-Valdez's guilt." *Id.* at 816. *Perez-Valdez* is consistent with multiple prior Supreme Court cases holding that a trial court's exclusion of defense offered evidence does not violate the defendant's right to present a defense.[12]

Division Three's ruling in *Duarte Vela* held that "[u]nless the evidence was inadmissible under the State's other arguments, the trial court's exclusion of this evidence 'deprive[d] [Duarte Vela] of the ability to testify to [his] versions of the incident.'" *Duarte Vela*, COA No. 33299-3-III at 15. However, this ruling is in direct conflict with the ruling of *Perez-Valdez* as it suggests that admissibility requires admission and that any failure to admit such evidence necessarily violates a defendant's Sixth Amendment right to present a defense. No case law presented on appeal, or cited by Division Three, has ever held that admissibility

[12] *State v. French*, 157 Wash. 2d 593, 141 P.3d 54 (2006) (no constitutional error in refusing to allow defendant to reopen case to present additional evidence to impeach State's witness; the record already contained sufficient evidence to allow the parties to argue their theories to the jury); *State v. Finch*, 137 Wash. 2d 792, 975 P.2d 967 (1999) (in prosecution for murder, trial court properly refused to allow defense witness to recount self-serving out-of-court statement by defendant; court rejected argument that defendant had an overriding due process right to introduce the evidence). See also *Nevada v. Jackson*, 133 S.Ct. 1990, 186 L.Ed. 2d 62 (2013) (in rape prosecution, defendant was precluded from presenting evidence of the victim's prior accusations of rape; the testimony was barred under Rule 608 and the defendant's constitutional right to present a defense did not trump the rule).

requires admission.

A defendant's right to present evidence is not absolute. *Jones*, 168 Wn.2d at 720. A court may properly exclude evidence under evidence rule 403 without violating a defendant's constitutional rights. *Perez-Valdez*, 172 Wn.2d at 815. *Perez-Valdez*, a case decided after *Jones*, and authored by the same justice,[13] affirms that it still falls to the trial court to determine in each case whether the proffered evidence is of sufficient relevance to allow admission. *Perez-Valdez* is consistent with *Jones*, *Adamo*, and the substantial line of cases cited in Section B of this petition, as it recognizes that, while a defendant has a constitutional right to present their defense, the trial court has the authority to exclude otherwise admissible evidence so long as it is done on a reasonable basis within the rules of evidence. *Perez-Valdez*, 172 Wn.2d at 817.

Perez-Valdez is indistinguishable from Duarte Vela's case. The evidence presented by Duarte Vela clearly laid out his defense of self-defense including the fact that he was afraid, the reason for his fear, and his fear that Menchaca may have had a weapon.[14] See *Perez-Valdez*, 172 Wn.2d at 817. Therefore, Duarte Vela was permitted to present his defense of self-defense and he was "able to argue [his] theory of the case." *Id.* at 816. Duarte Vela offered additional evidence that was helpful to his

[13] The majority opinion in both *Jones* and *Perez-Valdez* were authored by Justice Owens.
[14] See n.3.

defense, just as Perez-Valdez had. Just as in *Perez-Valdez*, the trial court in *Duarte Vela* excluded the additional evidence as too remote. The fact that Duarte Vela's additional evidence could have been admissible does not mean it is necessary for the defendant to present his defense. *Perez-Valdez*, 172 Wn.2d at 815.

There is no meaningful distinction between *Perez-Valdez* and *Duarte Vela* that can justify the difference in outcomes. *Duarte Vela* is inconsistent with *Perez-Valdez* and this Court should reverse Division Three's decision and affirm the defendant's conviction.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court reverse Division Three's decision in *Duarte Vela*, COA No. 33299-3-III as it improperly interprets and applies *Jones,* 168 Wn.2d 713, is inconsistent with numerous Court of Appeals decisions and is inconsistent with *Perez-Valdez*, 172 Wn.2d 808. The State requests this Court affirm Mr. Duarte Vela's convictions.

Dated this 29 day of November, 2017

Respectfully Submitted:

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Okanogan County, Washington

APPENDIX A

State v. Duarte Vela, No. 33299-3-III, Published Opinion
(September 5, 2017)

FILED
SEPTEMBER 5, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 33299-3-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
JESUS DUARTE VELA,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Jesus Duarte Vela[1] appeals his conviction for second degree murder. Duarte Vela asserted self-defense at trial. The trial court permitted Duarte Vela to testify he was fearful of the victim, but would not allow Duarte Vela to explain why he feared the victim or the severity of the injury he feared. The jury rejected Duarte Vela's self-defense claim and convicted him of second degree murder.

On appeal, Duarte Vela argues the trial court's evidentiary rulings were erroneous and violated his right under the Sixth Amendment to the United States Constitution to present a defense. We agree and, therefore, reverse his conviction for second degree

[1] Because of the number of similar first and last names, we refer to the appellant as "Duarte Vela," and his family members by their first names.

murder and remand for retrial.

FACTS AND PROCEDURE

A. FACTS

On February 20, 2014, Duarte Vela shot and killed Antonio Menchaca in Okanogan County. The question at trial was *why* Duarte Vela shot and killed Menchaca.

Menchaca was once married to Blanca Duarte, Duarte Vela's sister. The former couple had two children, Jesus and a younger sister. Menchaca left Okanogan in 2007. His whereabouts during the seven years between then and the shooting were not clearly established: At some point after 2007 he had been incarcerated, in May 2012 border patrol agents returned him to Mexico and, in February 2014, he travelled from Mexico to his sister's home in Fresno, California.

On February 18, 2014, Menchaca traveled from his sister's home to Okanogan, in part to see his children. Menchaca arrived at Blanca's apartment in the morning hours of February 20. Jesus, then 17 years old, saw his dad hugging his younger sister around 7:00 a.m. that morning. Jesus was afraid and called Duarte Vela, his uncle. He explained to Duarte Vela that his dad was at the apartment and asked Duarte Vela to pick him up after school that day. Duarte Vela's wife, Billie Jo Wilson, was home when Duarte Vela received the call and learned from Duarte Vela that Menchaca was back in town.

Duarte Vela decided to go to his sister's apartment to make sure she and her family were safe. He knew that Menchaca had threatened Blanca in the past. Duarte Vela was fearful of Menchaca and concerned that Menchaca posed a threat to Duarte Vela's family. For these reasons, he took his gun with him.

When Duarte Vela arrived at his sister's apartment, Menchaca was the only person there. Duarte Vela asked why he was at the apartment and told him that Blanca did not want to see him. Duarte Vela told him to stay away from Duarte Vela's family. Menchaca assured him that he would return to Fresno. Duarte Vela felt relieved and went to work.

That afternoon, Billie Jo, together with her two younger children, drove to the turnout at the head of her shared driveway to pick up her oldest daughter who was arriving by school bus. A sport utility vehicle (SUV) pulled into the turnout just after Billie Jo parked. The SUV driver and passenger both looked directly at Billie Jo. She thought the passenger was Menchaca. As Duarte Vela arrived at the turnout, the SUV left. Billie Jo told her husband there were two people in the SUV, she thought the passenger was Menchaca, and she was frightened. She knew that Menchaca had caused problems with the family years earlier. Duarte Vela was frightened for his children and drove after the SUV.

Duarte Vela signaled for the SUV driver to pull over, and he did. Duarte Vela pulled alongside the SUV. Duarte Vela recognized the driver as Luis Martinez, a distant relative. He did not see anyone else in the SUV. Duarte Vela said his wife reported she saw an SUV with two people in it and thought that one of the people was Antonio Menchaca. Duarte Vela explained he was concerned because he did not know what Menchaca's plans were and said he did not want Menchaca to cause any problems for his family. Martinez assured Duarte Vela, "'It's only by [sic] myself.'" 2 Report of Proceedings (RP) (Jan. 28, 2015) at 438. He did not mention that Menchaca had hidden himself in the back seat as they had left the turnout.

Duarte Vela returned to his wife. She was still frightened. Soon after, they both saw Martinez drive by with Menchaca in the front passenger seat. Duarte Vela realized he had been lied to, Menchaca was in the SUV a few minutes earlier, and Menchaca was not returning to Fresno as he had earlier promised.

Duarte Vela, even more concerned that Menchaca posed a threat to his family, followed the SUV. Martinez saw Duarte Vela and pulled his SUV to the side of the road and parked it. Duarte Vela stopped his truck in front of it. Duarte Vela and the two men exited their vehicles. Duarte Vela still had his gun hidden in his pocket. The way the two men walked toward Duarte Vela caused him to become nervous. Duarte Vela asked why

they were earlier parked by his family. Menchaca said something about being owed money by a person who lived near the turnout, but Duarte Vela did not believe him. Menchaca's tone of voice sounded threatening to Duarte Vela. At about this time, Duarte Vela began to draw his gun and Menchaca's hand went inside his pocket to reach for something. Duarte Vela fired two or three shots. One shot struck Menchaca in one arm, went through his torso, and lodged in his other arm. Either during or just before the shots, Menchaca displayed a paper in his hand, not a weapon. An injured Menchaca ran into a nearby orchard where he soon died.

Martinez, and also Duarte Vela or his wife, called 911. Both callers said Duarte Vela shot Menchaca. Two sheriff's deputies went to Duarte Vela's house and found him outside standing on the porch with a telephone in his hand. Duarte Vela was advised of his rights and agreed to answer questions. Duarte Vela related the events of that day, explained he was both angry and fearful when he confronted Menchaca that afternoon, and admitted, "'I didn't do the right thing probably.'" 3 RP (Jan. 29, 2015) at 513. The State charged Duarte Vela with various firearm offenses and second degree murder.

The trial occurred in January 2015. Prior to jury selection, the State moved in limine to exclude evidence of Menchaca's prior bad acts. Duarte Vela responded that he

sought to admit certain prior bad acts of Menchaca known to him to establish the reasonableness of his fear of Menchaca.

B. CONTESTED EVIDENTIARY RULINGS

1. Menchaca's prison threat made around spring of 2012

Duarte Vela proffered the testimony of his brother, Alphonso, who would testify that he had a telephone conversation while Menchaca was in prison two or three years earlier during which Menchaca threatened to return to Okanogan and kill Duarte Vela's entire family. Alphonso also would testify that he told Duarte Vela of this threat.

Duarte Vela argued that the prison threat was admissible to show his state of mind—reasonable fear of Menchaca—which was an element of his self-defense case. The State argued that the threat was too remote, not relevant to self-defense, and not admissible under any hearsay exception. The trial court eventually refused to allow Duarte Vela and his brother to testify about Menchaca's prison threat, mostly because the threat was too remote in time.

The trial court explained:

> Well, I'm concerned about the remoteness and the uncertainty of the timeline. The range two to three years seems to me to be pretty broad. I would like it if we could pin that down.
>
> The other concern I have is that these—if it was two to three years ago and assuming—Well, the problem is we don't know, number one, if the victim was in prison at the time. I assume he was. I don't really have any

> reason to doubt that. But what I don't know is when he got out. Did he get out within a week or two of that phone call or did he get out a week or two prior to coming to the State of Washington? And the reason I think that's important is because if he got out within a short time of making the phone call but he never came to Washington, then it seems to me it's—there's a relevancy issue. There's a remoteness issue. On the other hand, if he got out within just a week or two or a month, some short period of time, then indeed it may be highly relevant and it is not remote. So I think what I have to do is to hear more.
>
> And, [defense counsel], I'm going to advise you to call Alfonso Duarte as a witness. But understand, I'll be listening very closely for . . . foundational questions . . . to establish the time frame for . . . when this phone call happened and if it can be established as to when the victim got out of prison so that the Court is able to rule on the issue of remoteness.

RP (Jan. 27, 2015) at 12-13. After further argument from the State, the court reiterated, "If he was released two or three years ago, then indeed this is too remote." RP (Jan. 27, 2015) at 14.

Later at trial, the State brought forth a report from the border patrol that it had returned Menchaca to Mexico in May 2012. This showed that Menchaca had been released from prison before that time, which would have been at least two and one-half years before the January 2015 trial. Presumably because of the trial court's comments that "two or three years ago [was] too remote," Duarte Vela did not call Alphonso to testify.

2. Menchaca's abduction of Maricruz Duarte in 2007

Duarte Vela also proffered the testimony of his younger sister, Maricruz Duarte, who would testify that Menchaca had abducted her in 2007 when she was just 15 years old, and that Duarte Vela knew about this. The State argued it had evidence Maricruz and Duarte Vela had retracted portions of the abduction accusation and that the testimony was not relevant to Duarte Vela's state of mind. The trial court excluded the evidence on the basis that the testimony was irrelevant and inadmissible.

3. Menchaca's domestic violence against Blanca for years until they separated five or six years before trial

Duarte Vela also proffered the testimony of Blanca who would testify that Menchaca had repeatedly battered her throughout their marriage, including after they left Okanogan in 2007 to go to Fresno, and that she had told Duarte Vela about this. She would have testified that the domestic violence occurred throughout their marriage and ended five or six years before trial, presumably because they separated at that time.

Duarte Vela also sought to offer the testimony of his wife, who witnessed some of the domestic violence when the couple lived in Okanagan.

The trial court excluded both testimonies as too remote in time.

4. Miscellaneous evidence excluded throughout trial

In addition to excluding the above offered testimonies, the trial court excluded Duarte Vela from testifying: (1) what he had been told by his family members about

Menchaca's threat to kill his family and Menchaca's domestic violence against Blanca, (2) why he feared Menchaca being around his family, (3) why he believed he needed to arm himself when he went to his sister's apartment to confront Menchaca, (4) that his wife told him the SUV driver and Menchaca gave her a threatening look when the SUV first parked in or near the pullout, (5) why he followed the SUV the first time, (6) why he believed there were two people in the car when he followed the SUV the first time, (7) Martinez's statement to him that he was alone in the SUV, (8) what he felt when he saw Martinez later drive by with Menchaca in the passenger seat, (9) why he had an elevated fear as he went after the SUV for the second time, (10) his wife being upset when he returned and explained that Menchaca was not in the SUV, (11) his belief that something was wrong when Martinez and Menchaca both got out of the car and walked toward him, (12) what he feared Menchaca and Martinez might do as they walked toward him, and (13) the degree of bodily harm he feared just before he shot Menchaca, as Menchaca became upset and reached into his pocket.

C. "NO DUTY TO RETREAT" INSTRUCTION AND JURY VERDICT

Toward the end of trial, Duarte Vela requested a "no duty to retreat" instruction. In denying the instruction, the trial court explained:

> I am not going to allow your proposed . . . "[no] duty to retreat" instruction. And the reason that I'm not allowing that is because Mr. Duarte testified

> that at some point he did retreat, that he did back up. And so as I read that instruction and I read the case law and the comments on that instruction, it seems to me that it is not applicable, and I'm not going to allow it.

4 RP (Jan. 30, 2015) at 747. Defense counsel did not take formal exception to the trial court's refusal.

The trial court instructed the jury, the parties gave their closing arguments, and the jury deliberated. The jury returned a verdict of guilty on all counts.

Duarte Vela appealed.

ISSUES

1. Did the trial court violate the Sixth Amendment to the United States Constitution when it refused to let Duarte Vela testify why he feared Menchaca, when it refused to allow Duarte Vela's witnesses to testify what they had told Duarte Vela about Menchaca's threat and past violence, and when it refused to allow Duarte Vela to testify about the degree of bodily harm he feared just before he shot Menchaca?

2. Did the trial court err in refusing Duarte Vela's "no duty to retreat" instruction?

ANALYSIS

A. SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

1. *Standard of review*

We review a claim of a denial of Sixth Amendment rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Since Duarte Vela argues that his Sixth Amendment right to present a defense has been violated, we review his claim de novo.

2. *Contours of the right*

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). In *Jones*, our Supreme Court wrote:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.*
>
> These rights are not absolute, of course. Evidence that a defendant seeks to introduce "must be of at least minimal relevance." [*State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)]. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006).

Jones, 168 Wn.2d at 720. The *Jones* court continued:

> "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the

> State's interest outweighs the defendant's need." *Id.* We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16. . . .

Id. (alterations in original).

In concluding its discussion of the Sixth Amendment, the *Jones* court wrote:

> *[T]he clear implication [is] that evidence of high probative value could not be restricted regardless of how compelling the State's interest may be if doing so would deprive the defendant[ ] of the ability to testify to [the defendant's] versions of the incident. . . .*

Id. at 721 (emphasis added).

3. *The parties' arguments about whether Duarte Vela's Sixth Amendment right was violated*

As previously noted, Duarte Vela argues the trial court's evidentiary rulings violated his right to present a defense. He principally argues the trial court committed reversible error when it excluded evidence relating to: (1) Menchaca's prison threat, (2) Menchaca's years of domestic abuse against Blanca, (3) Menchaca's abduction of Maricruz, (4) why he feared Menchaca, and (5) the type of bodily harm he feared just before he shot Menchaca.

The State responds that the above evidence was inadmissible and irrelevant, and the Sixth Amendment does not permit the introduction of inadmissible and irrelevant evidence. The State argues that the trial court's exclusion of the above evidence, in addition to the other previously listed miscellaneous evidence, was proper because the evidence was either (a) hearsay, (b) untrustworthy, (c) too remote in time, (d) improper character evidence, or (e) speculative. We disagree.

(a) The excluded evidence was not hearsay because the evidence was not offered for its truth, but to establish Duarte Vela's state of mind

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Whether an out-of-court statement is hearsay depends on the purpose for which the statement is offered. *State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.2d 176 (1990).

In considering a claim of self-defense, the jury must take into account all the facts and circumstances known to the defendant. *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984); *State v. Wanrow*, 88 Wn.2d 221, 234, 559 P.2d 548 (1977). Because the "'vital question is the reasonableness of the defendant's apprehension of danger,'" the jury must stand "'as nearly as practicable in the shoes of [the] defendant, and from this

point of view determine the character of the act.'" *Wanrow*, 88 Wn.2d at 235 (quoting *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902)). Evidence of a victim's propensity toward violence that is known by the defendant is relevant to a claim of self-defense "'because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at that time, had reason to fear bodily harm.'" *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting *State v. Adamo*, 120 Wash. 268, 269, 207 P. 7 (1922)). Thus, such evidence is admissible to show the defendant's reason for fear and the basis for acting in self-defense. *State v. Walker*, 13 Wn. App. 545, 549, 536 P.2d 657 (1975).

Here, Duarte Vela sought to introduce Menchaca's threat to kill Duarte Vela's family and Menchaca's past domestic violence not to prove they were true, but for the very relevant purpose of showing the reasonableness of his fear of Menchaca. The evidence, therefore, was not hearsay. To the extent the trial court excluded this and several miscellaneous statements offered by Duarte Vela to show his state of mind, the trial court erred.

The reasonableness of Duarte Vela's fear of Menchaca is one of two components of his self-defense claim, the other component being the degree of bodily harm he feared just before he shot Menchaca. Menchaca's past threat to kill Duarte Vela's family was

central to Duarte Vela's ability to explain the reasonableness of his fear. Unless the evidence was inadmissible under the State's other arguments, the trial court's exclusion of this evidence "deprive[d] [Duarte Vela] of the ability to testify to [his] versions of the incident." *Jones*, 168 Wn.2d at 721.

(b) Probative evidence, even if suspect, should be admitted and tested by cross-examination

The State cites ER 403 for the general rule that a trial court has discretion to prevent a jury from considering a victim's propensity toward violence if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. But the ER 403 balancing of probative value versus unfair prejudice is weighed differently when the defense seeks to admit evidence that is central to its defense. The evidence of Menchaca's threat to kill Duarte Vela's family was highly probative of his defense, and the Sixth Amendment right to present a defense thus requires admitting such highly probative evidence. *Jones*, 168 Wn.2d at 720-21. We have previously held that ER 403 cannot be used to exclude "crucial evidence relevant to the central contention of a valid defense." *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

The State makes the point that weak or false evidence is not probative. But if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence will not only be removed, but will invite prejudice to the

defendant who introduced such evidence. For these reasons, the trial court should admit probative evidence, even if suspect, and allow it to be tested by cross-examination. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

In a related argument, the State argues that state of mind evidence is admissible only if there is (1) some degree of necessity to use the out-of-court statement, and (2) there is circumstantial probability that the statement is trustworthy. For this proposition, the State cites *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980). *Parr* is not on point.

In *Parr*, the State sought to admit out-of-court statements of the deceased victim to show the victim was afraid of the defendant. *Id.* at 98. The *Parr* court sought to balance the need for this evidence with the prejudice of the defense being unable to rebut the statement. *Id.* at 99. The *Parr* court ruled, in a homicide case where the victim's state of mind is relevant, the State may offer evidence of the victim's fear of the defendant if there is circumstantial probability that the statement is trustworthy. *Id.* at 98-99.

Here, we are not concerned with the State admitting evidence. Rather, we are concerned with the defendant's right to present a defense under the Sixth Amendment.

The proper test for admitting or excluding evidence in that context is set forth in *Jones*, as quoted above.

The State, citing ER 803(a)(3), argues that Duarte Vela could not testify about his own *past* state of mind because that rule permits statements describing the declarant's *then-existing* state of mind. The State's argument misses the point. ER 803 concerns out-of-court statements. ER 803(a)(3) excepts from hearsay an out-of-court statement made by a declarant concerning the declarant's then-existing mental, emotional, or physical condition. In general, Duarte Vela sought to testify only about *his* own past emotion, not a declarant's. ER 803(a)(3) therefore does not apply. Perhaps once or twice, Duarte Vela sought to testify that his wife told him she was nervous or frightened. Those statements are declarations that qualify as admissible hearsay under the noted exception.

(c) Remoteness

i. Menchaca's prison threat

In arguing that Menchaca's prison threat was too remote in time, the State relies on *Adamo*, 120 Wash. 268.

In that case, Adamo killed Joseph Gracio in August 1921. *Id.* at 269. Implied is Adamo's assertion that he shot Gracio in self-defense because he reasonably feared Gracio. *Id.* Adamo sought to establish the reasonableness of his fear by introducing

statements of two witnesses. Gracio had separately threatened violence against each witness and made a threatening gesture as if he had a gun. *Id.* at 269-70. The trial court prohibited both witnesses from testifying. *Id.* at 270. The *Adamo* court held the trial court did not err with respect to the first witness because the event occurred five years before the shooting and was, thus, too remote. *Id.* at 269-70. The *Adamo* court also held the trial court did not err with respect to the second witness because the event, which occurred three years before the shooting, was unknown to Adamo when he shot Gracio. *Id.* at 270.

We find *Adamo* not controlling for three reasons. First, in *Adamo*, the trial court excluded the victim's past violent behavior known to the defendant because that behavior occurred *five* years before the killing. Here, the trial court excluded Menchaca's prison threat known by Duarte Vela that occurred only *two* years before the shooting.

Second, Menchaca may have been delayed in accomplishing his threat by being in prison and then being deported back to Mexico. The evidence indicates Menchaca did not reenter the United States and travel back to Washington State until the day before Duarte Vela killed him. The fact that Duarte Vela had not seen Menchaca since he threatened to kill Duarte Vela's family could account for why Duarte Vela felt threatened

when Menchaca, unexpectedly, and for the first time, appeared around his family two years after the threat.

Third, *Adamo* did not analyze the evidentiary issue in light of the defendant's Sixth Amendment right to present a defense. As noted earlier, *Jones* and authorities cited therein, have altered a court's calculus for admitting evidence probative of the defendant's version of events, even evidence of "minimal relevance." *Jones*, 168 Wn.2d at 720-21. Menchaca's prison threat to kill Duarte Vela and his family, made two years before the shooting, was more than minimally relevant, and in fact was the most important evidence to establish Duarte Vela's self-defense claim.

It is the role of the jury, not the trial judge, to weigh the reasonableness of Duarte Vela's fear, and to do so by considering "*all* the facts and circumstances known to the defendant '[so as] to stand as nearly as practicable in the shoes of [the] defendant.'" *Wanrow*, 88 Wn.2d at 234-35 (quoting *Ellis*, 30 Wash. at 373). For example, was Duarte Vela's fear reasonable two years after the prison threat, what did Duarte Vela believe motivated Menchaca's threat so it might be a lasting rather than a transitory threat, and what did Duarte Vela know about Menchaca that increased or decreased the significance of the threat. These questions are all factual and, except in extreme cases, cannot be answered as a matter of law. When it comes to ensuring a defendant's Sixth Amendment

right to present a defense, it is best to admit relevant evidence and trust the State's cross-examination to ferret out falsities.

ii. Menchaca's history of domestic violence

Standing alone, Menchaca's history of domestic violence against Blanca was irrelevant. Simply because a person commits domestic violence against his spouse does not make it more likely that he would, several years later, use a gun to kill a sibling of that spouse. However, one may not consider Menchaca's history of domestic violence against Blanca in isolation. *Wanrow*, 88 Wn.2d at 234-35. Menchaca's extensive history of domestic violence against Blanca could have caused Duarte Vela to attach more credibility to Menchaca's prison threat and for a longer time. If so, the trial court should exercise its discretion and admit that history. We are unable to determine whether Menchaca's history of domestic violence has any relationship to Menchaca's prison threat. For this reason, we do not provide a dispositive answer.

iii. Menchaca's abduction of Maricruz

Similar to our above analysis, Menchaca's abduction of Maricruz, standing alone, is irrelevant. But because we are unable to determine whether this evidence has any relationship to Duarte Vela's perception of Menchaca's prison threat, we do not provide a dispositive answer.

(d) The evidence sought to be admitted was not character evidence

In arguing that the trial court properly excluded Duarte Vela's evidence about Menchaca as improper character evidence, the State cites *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998). *Hutchinson* is not on point.

In 1987, two deputies arrested Hutchinson for driving under the influence. *Id.* at 867. In their pat down for weapons, they failed to find a gun hidden on Hutchinson's person. *Id.* Soon after they arrived at the garage attached to the sheriff's office, the deputies deposited their guns in a lockbox. *Id.* Hutchinson then shot and killed both deputies. *Id.* at 868. Hutchinson stole the police car, escaped, but was soon arrested. *Id.* After *Miranda*[2] warnings, Hutchinson claimed he acted in self-defense because the deputies had assaulted him. *Id.* At trial, Hutchinson sought to admit evidence of a 1980 performance evaluation accusing one of the deputies of being aggressive and physical with intoxicated arrestees. *Id.* at 870. In addition, Hutchinson sought to admit evidence of the reputation of the local sheriff's office and specific acts of violence or intimidation by one of the deputies. *Id.* The trial court allowed evidence only of the general reputation of the deputies "'for a pertinent trait of character relevant hereto.'" *Id.* The *Hutchinson* court affirmed, and held:

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> The remaining witnesses would have testified about specific acts allegedly committed by [one deputy], which the Defendant characterized as violent. The trial court correctly excluded these witnesses' testimony because evidence of a character trait—here, [the deputy's] allegedly violent disposition—must be in the form of reputation evidence, not evidence of specific acts. ER 404(a)(2); ER 405(a). Specific acts may be used to prove character only where the pertinent character trait is an essential element of a claim or defense. ER 405(b). Specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense.

Id. at 886-87.

Hutchinson involves ER 404(a)(2) and ER 405, which concerns what evidence is admissible to prove the character of the victim. There, Hutchinson did not claim he knew of the deputies' past violent acts. For this reason, he needed to rely on character evidence to prove that the deputies acted in conformance with their alleged character.

Here, Duarte Vela was not attempting to prove Menchaca's character. Rather, Duarte Vela was attempting to establish that he reasonably feared Menchaca because of what he believed about Menchaca at the time he shot him. It is well established that a victim's specific acts of violence, *if known by the defendant*, are admissible when the defendant asserts self-defense. *See, e.g.*, *Walker*, 13 Wn. App. at 549-50; *Cloud*, 7 Wn. App. at 218.

(e) The evidence was not speculative

The State defends several of the trial court's evidentiary exclusions on the basis that the evidence offered was speculative. The one complained of by Duarte Vela was his attempt to testify about the degree of bodily harm he feared just before he shot Menchaca.

Deadly force may be used if one reasonably fears great bodily harm or death. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); RCW 9A.16.050. If a person remembers being fearful that the victim was going to cause him great bodily harm or death, it is not speculative to testify to that fact. Moreover, the degree of harm one actually feared is relevant to the degree of harm one *reasonably* feared, which is a component of Duarte Vela's self-defense claim. For this reason, Duarte Vela's excluded testimony about the degree of harm he feared was highly probative, not speculative, and therefore admissible. The trial court erred when it excluded this highly probative evidence. *Jones*, 168 Wn.2d at 720.

4. *The trial court's exclusion of admissible evidence violated Duarte Vela's Sixth Amendment right to present a defense*

Whether the exclusion of testimony violated the defendant's Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist. *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006).

Here, the trial court precluded Duarte Vela from testifying why he feared Menchaca. It also precluded Duarte Vela's witnesses from testifying that they told Duarte Vela about Menchaca's violent acts and threat. The trial court further precluded Duarte Vela from testifying that as Menchaca began drawing something from his pocket, he feared Menchaca would cause him great bodily harm or death. These evidentiary rulings precluded Duarte Vela from presenting a legal defense to the killing that he admitted to. The omitted evidence creates a reasonable doubt that did not otherwise exist. For this reason, the trial court's evidentiary rulings violated Duarte Vela's Sixth Amendment right to present a defense.

B. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO GIVE DUARTE VELA'S "NO DUTY TO RETREAT" INSTRUCTION

Duarte Vela contends the trial court erred when it refused to give his requested jury instruction on no duty to retreat. He contends the trial court erred because it failed to analyze whether he was in full retreat.

Where "a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given." *State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996). Even when a defendant testifies that he or she is backing up, the trial court should determine whether the retreat is a full-fledged retreat or instead the ebb-and-flow or circling of a street fight. *Id.* at 743.

Duarte Vela's testimony was that he stepped out of his truck. While he was behind his truck, Menchaca and Martinez approached him from two angles, as if to flank him. Duarte Vela simply testified that when pulling out his gun, "I stepped back a little bit." 3 RP (Jan. 29, 2015) at 629. The trial court reasoned in denying the motion, "the reason that I'm not allowing that is because Mr. Duarte testified that at some point he did retreat, that he did back up." 4 RP (Jan. 30, 2015) at 747.

We may affirm the trial court on any basis supported by the record. *Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009). The State did not argue that Duarte Vela had a duty to retreat. This is because the facts would not support such a theory. Duarte Vela's theory was that Menchaca, at close range, was angry and in the process of drawing a gun, so he shot Menchaca in self-defense. Because the facts would not support retreat as an option to someone pulling a gun at close range and because the State did not argue that Duarte Vela could have retreated, the trial court did not err in refusing the instruction.

CONCLUSION

Although we deny Duarte Vela's argument of instructional error, we conclude the trial court's evidentiary rulings denied Duarte Vela his Sixth Amendment right to present a defense.[3] We therefore reverse and remand for a new trial consistent with this opinion.

Lawrence-Berrey, A.C.J.

I CONCUR:

Siddoway, J.

[3] Duarte Vela also filed a statement of additional grounds for review (SAG). His SAG generally asks us to consider all the facts, including the excluded evidence. We consider his argument subsumed by his attorney's Sixth Amendment argument, which we have addressed. We therefore do not separately address the issues raised in Duarte Vela's SAG.

No. 33299-3-III

KORSMO, J. (dissenting) — A trial judge does not lose his gatekeeper function on evidentiary issues merely because a criminal defendant asserts a constitutional right to present the evidence. We still review the judge's evidentiary rulings for abuse of discretion within the defense theory of the reason why the evidence ought to be admitted. Here, the defendant testified to his fear of the victim and why he was afraid of him; the trial judge did not abuse his authority in deciding that "enough was enough" and limiting some of the corroborating evidence. Nonetheless, the majority reverses the trial judge because of his failure to distinguish Washington Supreme Court precedent as the majority does. The conviction should be affirmed.

The main problem for the defense is that this was a pretty weak case of self-defense. Jesus Duarte Vela shot his former brother-in-law, a man whom he had not spoken to in the seven years since the victim departed from town, without warning after tracking him down for the third time that day and forcing the car he was in to stop. There was no reason to believe the victim was armed, so Mr. Duarte Vela's fear that his victim was reaching for a nonexistent weapon understandably was rejected by the jury. The excluded evidence went to the issue of why the defendant allegedly was afraid of his victim, a topic that was addressed through the defendant's own testimony and one that

the prosecutor did not challenge throughout a lengthy cross-examination. No evidence was offered that Mr. Duarte Vela had reason to believe the victim was reaching for a gun at the time of the shooting. If the defense had evidence that the victim typically was armed or had threatened to use a firearm in the past, they did not offer it. That corroboration was lacking. Whether or not the victim had abused the defendant's sister eight years earlier in California did not enlighten the jury on the critical issue in the case. Accordingly, the trial court did not abuse its discretion in excluding that evidence.

The majority undertakes a very nice analysis of two Washington Supreme Court decisions, but then attempts to apply them to the facts of this case as if it were acting as the trial judge rather than as the reviewing court. Noticeably lacking in the analysis is an indication that the trial court *had* to apply either case in the same manner.[1]

Oldest is *State v. Adamo*, 120 Wash. 268, 207 P. 7 (1922). There our court affirmed a trial court ruling that excluded, on remoteness grounds, a threat made by the victim to the defendant five years earlier. Here, the trial judge excluded evidence of an alleged threat made by the victim from prison at least two to three years earlier for the

[1] This analytic error began early in our review process. Prior to oral argument, this court sent a letter to the parties directing them to be prepared to discuss various noted reasons why *State v. Adamo*, 120 Wash. 268, 207 P. 7 (1922), could be distinguished from this case and asking if it was an abuse of discretion for the trial court to not distinguish *Adamo*. We did not ask the parties to address the more pertinent question of whether the trial court was *required* to distinguish a case that it had merely used as supporting, rather than controlling, authority.

same reason, citing to *Adamo*. Nothing in this record indicates that the trial judge believed he *had* to follow *Adamo* or thought the case compelled exclusion of the evidence. Instead, the veteran trial judge determined that the evidence was too remote and excluded it. That was a tenable ground for excluding the evidence. In the absence of compelling authority requiring the trial judge to admit the evidence, we should be affirming since there was no abuse of discretion.

The majority suggests that *Adamo* and other cases involving discretionary evidence rulings have been eclipsed by *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). The short answer is "no" since *Jones* did not change the controlling law in the least. There our court reversed a conviction because the defendant had not been able to present his version of the events. *Id.* at 724. The entire subject matter, a consent defense to the rape allegation, had been excluded. That was not the case here, nor did defense counsel ever make such a claim to the trial judge. Mr. Duarte Vela was not able to present all of the supporting evidence he desired to offer, but he was able to present his defense. *Jones* simply does not stand for the proposition that the defense is entitled to put in all relevant evidence it possesses in support of the defense.

Illustrative is a subsequent case authored by Justice Owens, the author of the *Jones* opinion. *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011). There the defense to allegations of rape by two of the defendant's adoptive daughters "was centered on a theory that the girls were lying." *Id.* at 811. The defense sought to show that the girls

were willing to take "extreme actions" to be removed from homes, "potentially including lying about rape." *Id.* The defense was allowed to offer evidence about house rules that the girls did not like, but the trial judge excluded evidence that the girls had committed arson to get moved out of a foster home. *Id.* The Supreme Court affirmed, noting that while the trial judge could have admitted the evidence under the rules, the court did not abuse its discretion in excluding the evidence. *Id.* at 816-17. The trial court was in the same position here. The trial judge could have, but was not required to, allow the corroborating evidence.

There is a fine line between admissible evidence and evidence that *must* be admitted. The constitutional right to present a defense means that the defense theory must be allowed when there is admissible evidence to support it. *Jones*, 168 Wn.2d 713. That constitutional right does not mean that *any and every bit of evidence* offered by the defense in support of its theory is required to be admitted. *Perez-Valdez*, 172 Wn.2d 808. Trial judges still retain discretion under ER 401, ER 403, and all of the other evidentiary rules to consider the necessity of the evidence in light of the case record and the proffered theory of admissibility. *Id.* The Rules of Evidence exist for a reason, and both sides are entitled to a fair trial. We count on trial judges to apply the rules and afford them great discretion in doing so. The evidence excluded here, to the extent it even existed, was deemed too remote to the actual issues in the trial. That call was for the trial judge, not this court.

Here, the defense provided sufficient evidence to raise its self-defense theory and supported that theory with the defendant's testimony. It was not allowed to offer everything it desired, but it had enough to make its case. That is all that the constitution requires. There are cases where the admission of too little corroborating evidence might effectively foreclose the defense, but this was not one of those instances.

The trial court found the evidence too remote to be admitted. Since that was a tenable basis for ruling, we should be affirming the trial court. I therefore dissent.

Korsmo, J.

APPENDIX B

State v. Duarte Vela, No. 33299-3-III, Order Denying Motion for Reconsideration and Amending Opinion (October 31, 2017)

FILED
OCTOBER 31, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 33299-3-III**
	)	
Respondent,	)	**ORDER DENYING**
	)	**MOTION FOR**
v.	)	**RECONSIDERATION**
	)	**AND AMENDING**
JESUS DUARTE VELA,	)	**OPINION**
	)	
Appellant.	)	

The court has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of September 5, 2017, is denied.

IT IS FURTHER ORDERED that the paragraph on page 11 that begins "We review a claim of a denial" shall be deleted and the following shall be substituted in its place:

> We review a claim of a denial of Sixth Amendment rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). We continue to review most trial court evidentiary rulings for an abuse of discretion. But when a trial court's discretionary ruling excludes relevant evidence, the more the exclusion of that evidence prejudices an articulated defense

theory, the more likely we will find that the trial court abused its discretion. *Id.* at 720.

PANEL: Judges Lawrence-Berrey, Siddoway, and Korsmo

BY A MAJORITY:

George Fearing

GEORGE FEARING
CHIEF JUDGE