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SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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SUPREME COURT NO. 96190-5

NO. 34946-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY BURNAM,

Petitioner.

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

The Honorable Raymond F. Clary, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Corey Michael Burnam, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Burnam seeks review of the Court of Appeals published decision in State v. Cory Michael Burnam, __ Wn. App. __, __ P.3d __, 2018 WL 3432780 (Slip Op. No. 34946-2-III, as amended on July 19, 2018).¹

C. REASON TO ACCEPT REVIEW

This Court should accept review because the decision raises significant questions of constitutional law. RAP 13.4(b)(3).

D. ISSUE PRESENTED FOR REVIEW

Under the Sixth Amendment and Wash. Const. art. I, section 22, does a criminal defendant asserting self defense a murder charge have the right to introduce evidence he was aware of the deceased previous involvement in a prior murder because it is “minimally relevant” to whether he had the requisite state of mind to claim self defense?

E. STATEMENT OF THE CASE

The Spokane County Prosecutor charged Burnam with first degree murder and with interfering with the reporting of domestic violence. CP 12-13. The State claimed Burnam killed his girlfriend, Alicia Sweet, with

premeditated intent while armed with a deadly weapon. CP 12.

Burnam gave notice he would assert self defense. RP 202. As part of that defense, Burnam planned to testify to his awareness of Sweet's involvement in a prior homicide. CP 20-23; RP 208-13. Burnam offered this testimony to support the reasonableness of his belief his life was in danger when Sweet assaulted him and as evidence of Sweet's aggressive character to corroborate his claim Sweet was the first aggressor. CP 21; RP 208-13. The State moved to exclude Burnam from presenting this evidence, claiming it was inadmissible character evidence. CP 148-180.

The parties agreed Burnam's cousin, Bud Brown, had been charged with a previous murder. RP 209. Brown and Sweet had been dating at that time. RP 219. Sweet pled guilty to rendering criminal assistance for disposal of the murder weapon. RP 209. At the time of Burnam's trial, Brown's charges were still pending. RP 223.

Pretrial, Burnam explained his testimony would establish Sweet had a knife and struck him with a rifle barrel, both he and Sweet had used methamphetamine before she assaulted him, and he had defensive wounds. RP 209-10, 213. He sought to testify that Bud Brown was his cousin, Sweet and Brown were involved in a prior homicide, and Burnam

¹ A copy of the decision and order of amendment are attached as an appendix.

“had some direct knowledge of her involvement in that situation.” RP 209.

Burnam argued the purpose of introducing evidence of Sweet’s involvement in a prior murder would help establish the reasonableness of his belief Sweet had the ability and intent to kill him, and thereby establish the reasonableness of his response. RP 213, 219. He argued this testimony was critical to his self-defense claim. RP 220-22. His testimony would show Sweet was the first aggressor. RP 219.

Burnam argued the relevance of the testimony was not whether Sweet was involved in the prior murder, but instead Burnam’s belief she was and its impact on his mental state. RP 221-22. He argued that excluding this evidence would weaken his defense. RP 223.

Burnam also argued the evidence was relevant and necessary to explain why he feared for his life. RP 209. Burnam’s understanding of her involvement indicated Sweet had a “willingness to be complicit in” a homicide involving a .22 caliber handgun, a weapon the defense argued is “designed to inflict ... pain.” RP 230-31. Thus, Burnam’s fear was not solely based on Sweet’s methamphetamines use, striking him with a rifle barrel, and that she had armed herself with a knife. RP 209.

State witnesses agreed there was no domestic violence between Sweet and Burnam. RP 210, 223, 287, 845-46. As a result, without more

explaining Burnam's fear of Sweet his actions in response appeared unreasonable. RP 209-10. This was particularly true where the defense anticipated the State would try to undermine his self-defense claim with evidence of Sweet's extensive wounds and argue Burnam went too far. RP 224. It was essential to his self defense claim that he be allowed to explain why he felt the need to defend himself so forcefully. RP 224.

The trial court found there was no evidence that it is more likely than not that Sweet committed a violent act. RP 250. The court's ruling suggested Burnam's offer of proof was insufficient regarding what he knew or the basis for his knowledge. See RP 246-47, 250. The court characterized Burnam's proposed testimony as Sweet's "character trait for alleged violence" and reasoned it created unfair prejudice to the State and created a danger of misleading or confusing the jury with an alleged but uncharged murder. RP 251. The court concluded a "victim's character trait for alleged violence is not an essential element of a self-defense claim." RP 251 (citing State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998)). The court ruled, "I'm not going to allow the trait, the proffered trait testimony in respect to Ms. Sweet." RP 252.

The primary issue at trial was whether Burnam acted in self-defense. In January 2016, Sweet and Burnam were dating. RP 268, 843. They lived in a room in the home of Sweet's friends, Pamela Schumer and

Norman Anderton. RP 269, 271, 286. Burnam and Sweet had no history of domestic violence. RP 287, 845-46. Burnam was larger and stronger than Sweet. RP 836-37. He was approximately 40 years old and she was approximately 30 years old. RP 844.

Schumer recalled Burnam mentioning possible infidelity on the part of Sweet. RP 291. Her testimony on this, however, was imprecise, noting initially that Burnam thought Sweet was “messaging around,” but later acknowledging Burnam hoped that she was not. RP 291-92, 294.

Burnam testified that the day before the incident, Schumer and her friend told him to “maybe start looking for another girlfriend.” RP 840-41. He conceded this made him upset, but stated he had no suspicion of infidelity by Sweet. RP 840-41.

It was undisputed that on January 29, 2016, while in their shared bedroom, Burnam stabbed Sweet multiple times in the neck and struck her in the head with a rifle barrel. RP 823-25. Items strewn about the room were consistent with a struggle. RP 289, 518, 824.

Burnam admitted using methamphetamine and marijuana the previous day, and that Sweet had accused him of taken drugs from her purse. RP 812-13. Burnam admitted he taunted her, and she was “really upset” and “getting agitated.” RP 812. Sweet then took two hits of methamphetamine. RP 813. Burnam continued to laugh at her because he

had not taken her drugs and so there was no reason for her to be upset. RP 814-15. Sweet then grabbed Burnam's folding knife, swung around and stood facing him. RP 816. Burnam described that "[s]he just stood there ... she had a look in her eye like, like I don't know what, she just took a hit off the bong and she just woke up ... I can't really say. You would have to get high to understand the high that you're getting when you smoke the stuff" RP 816.

Burnam did not stand up and tried not to provoke her further. RP 816. She "tried to take a quick stab," as if she was "warming up" but missed. RP 817. Burnam still did not stand, feeling he had nowhere else to go and the situation was not too serious. RP 817. Sweet tried to stab him again, but he put his hand up and she missed again. RP 818. He responded saying, "He[y] you almost stabbed me in the face again" and, "What the f[---] are you doing?" RP 818. Burnam could see Sweet was going to attempt to stab him again. RP 818. Sweet grabbed Burnam by his clothes and stabbed him in the finger of his left hand. RP 818-19.

Burnam then grabbed Sweet. RP 820. She was on top facing away from him, and he was holding her wrists while she held the knife. RP 820. They struggled for more than 10 minutes. RP 820. Burnam told Sweet he would let go if she would drop the knife, but she did not. RP 820. They rolled off the bed and still Sweet would not let go of the knife.

RP 821. Burnam believed that if he let her go she would stab him. RP 821. Burnam also testified he believed Sweet was injured by the knife during this tussle because he was keeping her hands close to her chest and she was still holding the knife as they rolled. RP 861-62.

Sweet eventually dropped the knife and Burnam shoved her off to a corner of the room. RP 821. Burnam, still laying on the bed on his back, searched for and grabbed the knife, but did not stand up or attempt to attack Sweet. RP 822, 862-63. Sweet then hit Burnam in the face with a rifle barrel. RP 822-23. Burnam stated she hit him so hard he was “seeing dots” and “was scared there is something wrong.” RP 823.

In response he “lunged up,” “swinging,” and stabbed Sweet several times in the neck with the knife in an attempt to save his life and avoid being hit with the rifle barrel again. RP 823, 860. They “both crashed to the floor” and Sweet dropped the rifle barrel. RP 822, 897. Burnam tried to flee out the bedroom door, but it was blocked with debris from their struggle. RP 824, 890. He turned around, intending to go out the window and saw Sweet was sitting up on the floor, again holding the rifle barrel. RP 890. Burnam tried to grab the rifle barrel away and they struggled. RP 898. Holding the rifle barrel at the middle and muzzle end, Burnam struck Sweet twice in the head with the breech end. RP 825, 909-11, 915.

Burnam intended to knock Sweet out so he could exit the room through the window without being stabbed or hit from behind. RP 912, 923.

Sweet let go of the rifle barrel, sat back, and put her hands on her face. RP 917. She was still breathing and her eyes were open, and she gave Burnam a look to indicate that she did not want to continue fighting. RP 923. Burnam left through the window. RP 917.

Burnam said he was not thinking during the incident, other than that Sweet was trying to kill him, at various points she had possession two deadly weapons, and that he needed to protect himself. RP 888.

No one except Burnam and Sweet observed the events in the room. RP 279. Anderton, the only other person in the residence at the time, said he heard thumps from the bedroom, and later heard Burnam exit the bedroom and enter the kitchen. RP 271-72, 827. After seeing Burnam at the sink with a knife in his hand, Anderton went to the bedroom where he observed blood and a partial view of Sweet laying on the ground. RP 272-74, 827. Anderton tried to use his cell phone, but after a brief interaction, Burnam grabbed the phone out of his hand. RP 274, 828. Anderton left the residence and called 911 from another location. RP 276-77, 828.

Burnam left the residence. RP 276, 829. After making his way through the neighborhood and briefly interacting with a neighbor, Burnam hid under a nearby trailer. RP 296-98, 425, 829-32. Officers used a K-9

to track and drag Burnam out from under the trailer. RP 425, 429, 833. Burnam resisted. RP 435, 833. Burnam testified that as he was arrested, he told officers that Sweet had tried to kill him. RP 833.

During trial an issue arose regarding the Detective Keyser's interrogation of Burnam conducted shortly after Burnam's arrest. RP 990. The State moved to exclude any reference to a video recording of the interrogation, and to allow only the detective's live testimony. RP 990. The State argued the court had previously ruled that no evidence was admissible on the subject of the prior homicide involving Bud Brown, but Burnam and Detective Keyser discussed this topic multiple times during the interrogation. RP 989-90.

Asserting Burnam believed Sweet was more involved in the prior murder than her rendering criminal assistance conviction suggests, defense counsel clarified that the detective's question during the interrogation showed law enforcement initially suspected Burnam killed Sweet to keep her from testifying at Brown's trial. RP 992. Counsel argued Burnam and the detective's discussion of Bud Brown was relevant because it showed Burnam consistently and repeatedly asserted he feared for his life and acted in self-defense. RP 993. However, "based on the Court's prior ruling," defense counsel agreed to redaction of the

discussion from the version was played for the jury. RP 994, 996, 1011-12.

Officers who observed Burnam's injuries noted a dog bite on his wrist, lacerations on his fingers, a black eye, and scratches on his chest, right arm, and side and back of his head. RP 432, 444, 453, 446. A detective testified these injuries, including the finger lacerations, black eye and scratches, could be consistent with being dragged out from the trailer by the dog, or could be consistent with a struggle. RP 446, 452-53.

Burnam agreed the scratches on his chest were a result of being dragged out by the dog. RP 833. He said the black eye was from when Sweet struck him with the rifle barrel and the cuts to his finger were from when he tried to grab the knife from Sweet. RP 822-23, 855-556, 868.

The primary cause of Sweet's death was bleeding from stab wounds to her neck. RP 551, 559, 562. She had several other injuries, including hand lacerations, a stab to her chest that did not extend past her ribs, and a circular impression on her forehead consistent being struck with the breech end of a rifle barrel found in the room. RP 535-36, 538, 544.

The rifle barrel injuries were consistent with Sweet being struck from above while she lay on the ground or with two people facing one

another shoving the rifle barrel back and forth. RP 558-59. Sweet's hand lacerations could be either offensive or defensive wounds. RP 554.

Sweet's blood and urine contained methamphetamine and marijuana. RP 700-01. Sweet's methamphetamine was at an "abuse" level. RP 708, 710. Burnam's blood also showed methamphetamine and marijuana use. RP 719. Burnam's methamphetamine was lower than Sweet's, but still considered beyond therapeutic. RP 719.

Methamphetamine is a stimulant that can alleviate fatigue, cause an adrenaline rush, and create a strong euphoric effect. RP 703. The euphoric effect can cause an individual to believe she is stronger than she is, resulting in a "superman complex." RP 720. Use of methamphetamine "can lead to irritability, aggressiveness, paranoia, risk-taking behavior," as well as agitation, pseudo hallucination, delusions, psychosis, and violence. RP 703, 708. Marijuana can distort a person's spatial and temporal awareness, and even cause hallucinations and paranoia at higher levels. RP 706-07. Although marijuana may be used to alleviate symptoms of methamphetamine use, it does not "counteract" them. RP 706, 710-11. A person using both would "potentially have the effects of both compounds acting at the same time." RP 711.

A crime lab tested three areas of the rifle barrel: the breech end interior and exterior, and the center exterior. RP 660-61. These all tested

positive for Sweet's blood. RP 640. Testing also showed a second DNA contributor to the sample obtained from the center of the barrel, but there was too little DNA to draw conclusions. RP 641. The muzzle end of the barrel was not swabbed or tested. RP 675, 684.

In closing, the State noted it was undisputed that Burnam killed Sweet, and argued the primary issue was Burnam's mental state and intent. RP 1042-43. Burnam's suspicion that Sweet was cheating on him provided a motive, and his flight from police showed consciousness of guilt. RP 1048, 1059. The State emphasized the extent of Sweet's injuries, and that Burnam was larger and stronger and sustained relatively fewer injuries, to challenge Burnam's assertion that his fear and his actions were reasonable in self-defense. RP 1061-63, 1090-91.

Burnam's closing argument emphasized that Sweet had stabbed him with the knife and struck him with the rifle barrel before he acted to defend himself. RP 1065. Defense counsel emphasized that the jury must evaluate Burnam's self defense claim based on all the facts and circumstances known to Burnam at the time, but in keeping with the court's ruling, made no mention of Burnam's knowledge of Sweet's involvement in the prior homicide. RP 1065-66.

Burnam was convicted as charged. CP 68, 69, 72; RP 1096. On appeal, Burnam argued the trial court erred by excluding evidence of his

knowledge of Sweet's prior involvement in a murder, noting it unfairly prevented him from presenting his self defense claim. The Court of Appeals disagreed in a published decision. Burnam seek further review.

F. ARGUMENT

REVIEW IS WARRANTED BECAUSE THE DECISION
ERODES THE RIGHT TO PRESENT A DEFENSE.

The Court of Appeals' published decision goes too far. It unfairly limits a defendant's right to present relevant evidence in support of a self defense claim. The decision condones excluding evidence relevant to a self defense claim if the defendant is able to articulate the basis for his fear of the deceased but fails to satisfy the trial court that the basis identified would have made the trial judge fearful as well. This invades the province of the jury to find facts and apply the law. This Court should grant review, reverse and remand for a new trial, and conclude that evidence at least minimally relevant to a claim of self defense cannot be excluded absent a strong showing it will be unfairly prejudicial to the State's case.

The Sixth Amendment and Wash. Const. art. I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v.

Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Taken together, these rights constitute the right to present a defense. State v. Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), as amended on denial of reconsideration (Oct. 31, 2017), review denied sub nom, 190 Wn.2d 1005, 413 P.3d 11 (2018) (citing State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010)).

These rights are not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Evidence “must be of at least minimal relevance.” Id. at 622. “[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.” Id. 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. Where evidence has “*high* probative value ‘it appears no state interest can be compelling enough to preclude its introduction.’” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285

P.3d 873 (2012). A violation of the constitutional right to present a defense, however, is reviewed *de novo*. Jones, 168 Wn.2d at 719.

Here, the Court of Appeals affirmed the trial court's decision to exclude evidence of Sweet's participation in a prior murder on the basis that Burnam's "offer of proof was inadequate to establish the relevance of the evidence." Appendix at 8. This was error.

The Court of Appeals correctly noted that

An offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review. State v. Negrin, 37 Wn. App. 516, 525, 681 P.2d 1287 (1984) (quoting Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978)).

Appendix at 11.

But the Court of Appeals then concludes Burnam's offer of proof was too vague as to the specific acts of violence he alleged Sweet committed. Appendix at 12. This misconstrues the relevant issue, which is what was Burnam's state of mind at the time of his violent encounter with Sweet, and not, as the Court of Appeals and trial court focused on, which was what was Sweet actual conduct in relation to the other murder.

Whether Sweet actually did more than dispose of the gun for Brown is not what was relevant about Burnam's proposed testimony. It

does not matter what Sweet actually did for purposes of Burnam’s trial. What matters is what Burnam thought she had done and how it affected his response to her attack of him with the knife and shotgun barrel, as repeatedly noted by Burnam’s trial counsel. RP 209, 211.

When asserting a claim of self defense, the defendant bears the initial burden to produce “some evidence demonstrating self-defense,” at which point the burden shifts to the State to disprove self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984)).

A homicide is “justifiable” when

(1) [i]n the lawful defense of the slayer ... there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer ... , and there is imminent danger of such design being accomplished; or (2) [i]n the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or ... in a dwelling ... in which he or she is.

RCW 9A.16.050.

Case law further defines the elements of a self-defense claim as follows:

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” This

standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Walden, 131 Wn.2d at 474 (quoting Janes, 121 Wn.2d at 238 (citing State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984))).

In evaluating a claim of self-defense, the jury must consider “the defendant’s point of view as conditions appeared to [him] at the time,” and “must place themselves in the shoes of the defendant and judge the legitimacy of [his] act in light of all that [he] knew at the time.” Allery, 101 Wn.2d at 594 (emphasis added) (citing State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977) (Utter, J. plurality). The jury’s consideration must include “*all* the facts and circumstances known to the defendant,” even those “prior to” or “substantially predating” the incident. Janes, 121 Wn.2d at 238 (emphasis in original) (citing Wanrow, 88 Wn.2d at 235); Allery, 101 Wn.2d at 595 (citing Wanrow, 88 Wn.2d at 235-36).

Here, the jury was properly instructed that to establish self defense, Burnam must have (a) “reasonably believed” Sweet “intended to inflict death or great personal injury,” and (b) “reasonably believed that there was imminent danger of such harm being accomplished.” CP 74

(Instruction No. 25); see also WPIC 16.02. Alternatively, Burnam acted lawfully if he killed Sweet while resisting her attempt to commit a felony either (a) upon him, or (b) in a dwelling or place of abode in which Burnam was present. CP 75 (Instruction No. 26); see also WPIC 16.03.

In both instances, Burnam must have “employed such force and means as a reasonably prudent person would use under the same of similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.” CP 74, 75 (Instruction Nos. 25, 26) (emphasis added); see also WPIC 16.02, 16.03.

The testimony offered by Burnam, and excluded by the court, was necessary to establish why he feared Sweet, why he believed she intended to and was capable of killing him, and why his use of deadly force was necessary. Burnam sought to testify to his belief Sweet had been more involved in the prior homicide than the misdemeanor she was punished for. RP 227-31. He believed she could participate in a violent murder and escape with only minor punishment. RP 240. The fact that she had done so once may embolden her to do it again. This explained the depth of his fear when she assaulted him with a knife and later the metal rifle barrel. It explained why he felt his actions were necessary to defend his life.

Because his testimony bore directly on the reasonableness of his beliefs and actions, both of which were necessary elements of his self defense claim, it was “*highly probative*” evidence. Jones, 168 Wn.2d at 720 (emphasis in original).

The Court of Appeals published decision fails to recognize the breadth of a criminal defendant’s right to present a defense. That right should not be limited absent a powerful showing it will render the trial unfair. No such showing was made here. Had Burnam’s jurors heard about why Burnam feared for his life when Sweet attacked him, they were just as capable and certainly in a better position of authority as the triers of fact to decide whether it was believable, and if it was, whether it justified Burnam’s response to Sweet’s attack. That the trial court engaged in the fact finding instead of the jurors rendered Burnam’s trial unfair to Burnam.

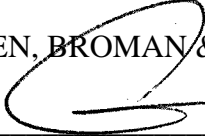
G. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 16th day of August, 2018

Respectfully submitted,

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CASE # 349462
State of Washington v. Corey Michael Burnam
SPOKANE COUNTY SUPERIOR COURT No. 161006648

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
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JULY 17, 2018
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. 34946-2-III
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
COREY MICHAEL BURNAM,)	
)	
Appellant.)	

LAWRENCE-BERREY, C.J. — We review de novo whether a trial court’s exclusion of defense evidence violated the accused’s constitutional right to present a defense. The more the exclusion of defense evidence prejudiced the accused, the more likely we will find a constitutional violation. Where the excluded defense evidence has minimal or no relevance, we affirm the trial court’s ruling.

Here, Corey Burnam sought to admit evidence that the woman he killed had four years earlier dated a man accused of murder and that she had hid the murder weapon. We agree with the trial court that this evidence had minimal or no relevance to Mr. Burnam’s claim at trial that he feared serious injury or death. We therefore affirm.

FACTS

In January 2016, Mr. Burnam and Alicia Sweet were staying at the home of Norman Anderton and Pamela Schuman. One night, Mr. Anderton was at home and heard a few faint thumps from a bedroom, followed by a louder thump; he did not hear any voices. Mr. Anderton got up to investigate but the sound stopped, so he sat back down.

Shortly after, Mr. Burnam appeared with a knife in his hand and blood on his shoe. Mr. Burnam went to the kitchen sink and washed his hands and face in the sink but did not put the knife down. Mr. Anderton went to check the bedroom but could not enter because the door was partially blocked. He could see Ms. Sweet on the floor, covered in blood. Mr. Anderton returned to the living room and attempted to use his telephone to call law enforcement, but Mr. Burnam took the telephone from him after remarking, “‘You’re calling 911, aren’t you?’” Report of Proceedings (RP) at 274.

Mr. Anderton left the home and got into his car to drive to a nearby relative’s home. As he was leaving, he saw Mr. Burnam outside attempting to get into a blue truck owned by Ms. Schuman’s father. Mr. Anderton arrived at the relative’s home and called law enforcement.

Law enforcement arrived and unsuccessfully tried to revive Ms. Sweet. In the bedroom, law enforcement found a shotgun barrel that was covered with blood toward the breech end. Law enforcement found blood in several places in the bedroom and outside the home, including near the bedroom window. Meanwhile, Mr. Burnam attempted to gain entry to the home of a neighbor, who refused him.

Canine Deputy Jason Hunt arrived at the scene and began to track Mr. Burnam with his partner Gunnar. Deputy Hunt saw a person running down a nearby street and called out, but the man continued running and ducked behind a shed. Gunnar located Mr. Burnam underneath a nearby trailer and began to pull him out. As law enforcement pulled him out and arrested him, he exclaimed that Ms. Sweet had tried to kill him. Detective Kirk Keyser later performed a videotaped interview of Mr. Burnam. In this interview, Mr. Burnam claimed Ms. Sweet attacked him because she thought he had taken her heroin.

An autopsy revealed Ms. Sweet had dozens of cuts and blunt impact injuries all over her body, head, and hands. Of particular note was a blunt impact head injury that went through several layers of Ms. Sweet's scalp, described as two symmetrical circles that appeared to be from the breech end of a shotgun barrel. Ms. Sweet had five stab wounds to the right side of her neck. The majority of those stabs wounds were in the

same area of the neck and formed a wound that reached all the way to her cervical spine. In addition to hitting her spine, these stab wounds severed Ms. Sweet's jugular vein, typically a mortal injury on its own. In contrast, Mr. Burnam had a black eye, a cut on one of his left fingers, a cut on one of his right fingers, and a bite wound caused by Gunnar.

Toxicology tests revealed that Ms. Sweet had methamphetamine and marijuana in her system, but no heroin. Mr. Burnam had methamphetamine and marijuana in his system, but no heroin. Blood testing revealed that the shotgun barrel had bloodstains on the breech end and that nearly all of the blood was from Ms. Sweet. Only a trace and an unidentifiable component was from another person, and that trace blood was on the center of the barrel. Law enforcement never recovered the knife used in the homicide.

Procedural history

The State charged Mr. Burnam with first degree murder or, in the alternative, second degree murder and interfering with the reporting of domestic violence.

As trial approached, Mr. Burnam notified the court of his intent to testify on his own behalf in support of his self-defense claim and his intent to testify that Ms. Sweet had been involved in a prior homicide. Mr. Burnam claimed that this was character evidence and asked the court to analyze its admissibility under ER 404(b).

According to the record, the prior homicide occurred in December 2012. Bud Brown allegedly murdered David Deonte. According to the affidavit of facts, law enforcement learned that Ms. Sweet was dating Mr. Brown at the time. Sometime after the homicide, Ms. Sweet briefly gave the firearm away and then attempted to get it back. When law enforcement questioned her, she was evasive and misleading. The State charged her with first degree rendering criminal assistance by means of concealing, altering, or destroying the gun. The affidavit does not state or imply that any person other than Mr. Brown was involved in Mr. Deonte's killing.

Mr. Brown and Mr. Burnam are cousins. Mr. Brown's homicide trial was set to begin a few days after Mr. Burnam killed Ms. Sweet, a material witness in that case.

Mr. Burnam made a lengthy offer of proof in support of his motion. Mr. Burnam argued that the evidence would help establish the reasonableness of his fear of serious harm or death during his struggle with Ms. Sweet. Mr. Burnam repeatedly asserted the jury should know that Ms. Sweet was involved with a homicide or capable of being involved with a person who had committed a homicide.

The court analyzed the issue under ER 404(b) and excluded all evidence of the Brown homicide case.

Trial

The State called witnesses who testified to the facts contained above. Once the State closed, Mr. Burnam had his opportunity to tell his side.

According to Mr. Burnam, the incident began when Ms. Sweet angrily accused Mr. Burnam of taking her drugs and then using her methamphetamine. He laughed at her, taunted her, and told her that he had not taken her drugs. Ms. Sweet then grabbed his nearby folding knife, stood up, and confronted him.

Mr. Burnam explained that he did not make eye contact with her because he did not want to provoke her. Nonetheless, Ms. Sweet took a quick swing at him with the knife, as if warming up. She swung again and nearly hit him in the face. She then grabbed him and stabbed him on the finger of his left hand.

Mr. Burnam explained that he then grabbed Ms. Sweet, and they both struggled for the knife. The struggle continued for 10 minutes. He told her he would let her go if she dropped the knife.

Mr. Burnam believed Ms. Sweet was stabbed at least once at this point. She eventually let go of the knife, and he shoved her away. He picked up the knife but did not stand up. Mr. Burnam claimed he was heavily bleeding from the cuts on his fingers at this point.

According to Mr. Burnam, Ms. Sweet grabbed a shotgun barrel, stood up, and struck him in the eye. He then became scared something was wrong and thought that she might kill him. He stood up and stabbed Ms. Sweet repeatedly in the neck. The two then struggled over the shotgun barrel. During the struggle, Mr. Burnam pushed the breech end and hit her twice on her forehead. They then collapsed on the floor. Mr. Burnam attempted to leave through the bedroom door but found it obstructed. He then climbed out the window.

Mr. Burnam admitted that he did not call out to Mr. Anderton for help during the 10 minute struggle. He claimed the reason he did not call law enforcement was that he was scared. He also admitted he had a conviction for making false statements to police.

Despite his testimony, the jury found Mr. Burnam guilty of first degree murder and interfering with the reporting of domestic violence.

Mr. Burnam appealed.

ANALYSIS

Mr. Burnam contends the trial court excluded highly probative evidence relevant to his self-defense claim, which violated his right to present a defense. He also claims that the court used the incorrect legal analysis and that precedent demanded the court to

admit the evidence. The State’s main theory in response is that Mr. Burnam’s offer of proof was inadequate to establish the relevance of the evidence.¹ We agree.

A. STANDARD OF REVIEW

This court generally reviews a trial court’s evidentiary rulings for abuse of discretion. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *review denied*, 190 Wn.2d 1005, 413 P.3d 11 (2018). But “[i]f the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense.” *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). The more the exclusion of defense evidence prejudiced the defendant, the more likely we will find a constitutional violation. *State v. Jones*, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010).

¹ The State also argues that Mr. Burnam did not preserve for review the constitutional argument he now raises. The State correctly notes that Mr. Burnam did not argue to the trial court that he had a constitutional right to present the evidence he sought to present. In response, Mr. Burnam argues that the exclusion of evidence is a manifest error affecting a constitutional right and thus reviewable under RAP 2.5(a)(3).

Rather than base our decision on RAP 2.5(a)(3), we exercise our discretion to review the constitutional argument raised on appeal. *See State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) (RAP 2.5(a) authorizes an appellate court to review an unpreserved error.).

B. A DEFENDANT’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Both the United States Constitution and the Washington Constitution guarantee the right to present testimony in one’s defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). “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.” *Jones*, 168 Wn.2d at 720. “Evidence that a defendant seeks to introduce ‘must be of at least minimal relevance.’” *Id.* (quoting *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). If 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.

In considering a claim of self-defense, the jury must take into account all of the facts and circumstances known to the defendant. *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). 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.’” *State v. Wanrow*, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (quoting *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902)). 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).

Evidence of a victim’s violent actions may be admissible to show the defendant’s state of mind at the time of the crime and to indicate whether he 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, a defendant “may, in addition to the character evidence, show specific acts of the [victim] which are not too remote and of which [the defendant] had knowledge at the time of the [crime] with which he is charged.” *Adamo*, 120 Wash. at 271. “Evidence of specific acts may be admissible for the limited purpose of showing whether the defendant had a reasonable apprehension of danger.” *State v. Fondren*, 41 Wn. App. 17, 25, 701 P.2d 810 (1985).

C. NO ERROR FOR EXCLUDING IRRELEVANT EVIDENCE

Mr. Burnam argues that the proffered evidence was highly relevant. We first review his offer of proof.

An offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review. *State v. Negrin*, 37 Wn. App. 516, 525, 681 P.2d 1287 (1984) (quoting *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978)).

Mr. Burnam's offer of proof failed to inform the trial judge of the specific nature of the offered evidence. Mr. Burnam's offer of proof was lengthy but repeatedly vague on the specific nature of the offered evidence:

So the facts are that Mr. Burnam knows Ms. Sweet to be associated with Bud Brown, who was alleged to have committed a homicide. Ms. Sweet's involvement that she pled guilty to was the providing of a firearm. I think that—and I don't want to overstate the law enforcement's position in the Bud Brown homicide, but I believe that law enforcement was under the impression or thought that she had been more involved, in fact, that she may have even been there and been a participant.

What Mr. Burnam knows is that Bud Brown is his cousin, is that Ms. Sweet and Mr. Brown were involved in this situation and that he has some direct knowledge of her involvement in that situation. Where that all comes to fruition is what was Mr. Burnam thinking on that night.

RP at 209. Mr. Burnam continued to assert that the jury should know that Ms. Sweet was involved with or capable of being involved with a homicide. He continued,

Rendering criminal assistance is important because of what it was rendering criminal assistance to. Mr. Bud Brown is not a very nice guy and he has several investigations in relation to other homicides. The fact that Ms. Sweet associated with him and was involved in one of these homicides is something that I believe the jury gets to know for the sole purpose of what's going through Mr. Burnam's mind on that night.

RP at 211.

Mr. Burnam kept claiming that Ms. Sweet was involved in a homicide and was even more involved than law enforcement knew. However, he never said what acts she allegedly committed beyond disposing of the firearm, just simply that he thought she was capable of being involved in a homicide. He did not claim how he knew this information. The thrust of his lengthy argument focused on the fact that Ms. Sweet simply had been associated with a homicide four years earlier.

The record is clear that Ms. Sweet pleaded guilty to rendering criminal assistance by disposing of a firearm used previously in a homicide. Rendering criminal assistance is a nonviolent felony. RCW 9.94A.030(34), (55); RCW 9A.76.070. The mere fact that Ms. Sweet dated a man accused of murder and hid the murder weapon does not strongly imply that Ms. Sweet was violent. The prejudicial effect of excluding this questionable evidence is minimal. We conclude the trial court did not violate Mr. Burnam's constitutional right to present a defense when it excluded this evidence.

D. *DUARTE VELA* IS DISTINGUISHABLE

Mr. Burnam relies heavily on *Duarte Vela*. In that case, the State charged Duarte Vela with murdering Menchaca, and Duarte Vela claimed self-defense. 200 Wn. App. at 313. The State moved to exclude evidence of Menchaca's prior bad acts, while Duarte Vela claimed the acts were probative of his self-defense claim because they would establish the reasonableness of his belief of serious harm or death. *Id.* The prior bad acts alleged were Menchaca's threats to kill the entire family, Menchaca's kidnapping of one of Duarte Vela's sisters, and Menchaca's repeated battering of another of Duarte Vela's sisters. *Id.* at 313-16. The trial court excluded the proffered evidence based on remoteness in time and its belief that the evidence was not believable. *Id.* The jury found Duarte Vela guilty. *Id.* at 316.

On appeal, Duarte Vela claimed a violation of his right to present a defense, and this court reversed. *Id.* at 327-28. This court noted that the specific bad acts were highly probative of Duarte Vela's claim of self-defense and that the trial court could not exclude such highly probative evidence simply because it believed the evidence was weak or false. *Id.* at 320-21.

Duarte Vela's case is distinguishable. In that case, Duarte Vela sought to introduce evidence of violent acts, known to him through his family members or

observations: Menchaca beat one of Duarte Vela's sisters, kidnapped another sister, and made threats to kill the family. These purported acts are obviously violent, *and* Duarte Vela's offer of proof specified what he knew and how he knew it. In contrast, Ms. Sweet's association with an accused murderer and her guilty plea to a nonviolent felony committed independent from the homicide are not specific acts of violence.

As further distinguished from *Duarte Vela*, the trial court here allowed the accused to testify in detail about the struggle, his belief that he was fighting for his life, and to fully argue his self-defense theory to the jury. The jury considered Mr. Burnam's testimony, the disparity of injuries, his failure to call out to Mr. Anderton for help, his implied threat to Mr. Anderton during the latter's attempt to call police, and his flight from the crime scene. In light of all of the evidence, the jury did not believe Mr. Burnam.

We conclude that the trial court did not violate Mr. Burnam's right to present a defense by excluding evidence of Ms. Sweet's peripheral role in the homicide.

Appellate costs

Mr. Burnam asks this court to not award appellate costs in the event the State substantially prevails. The State has substantially prevailed. In accordance with RAP 14.2, we defer the question of appellate costs to our commissioner or clerk/administrator.

No. 34946-2-III
State v. Burnam

Affirmed.

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Fearing, J.
Fearing, J.

Renee S. Townsley
Clerk/Administrator

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July 19, 2018

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CASE # 349462
State of Washington v. Corey Michael Burnam
SPOKANE COUNTY SUPERIOR COURT No. 161006648

Counsel:

Enclosed please find a copy of the order amending the opinion that was filed by the court on July 17, 2018.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Ray Clary
c: Corey Michael Burnam
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WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

STATE OF WASHINGTON,)	No. 34946-2-III
)	
Respondent,)	
)	ORDER AMENDING
v.)	OPINION FILED
)	JULY 17, 2018
COREY MICHAEL BURNAM,)	
)	
Appellant.)	

IT IS ORDERED that the opinion filed on July 17, 2018, shall be amended as follows:

The first sentence in the second full paragraph on page 3 that begins: "Canine Deputy Jason Hunt" shall be deleted and the following shall be inserted in its place: "Deputy Jason Hunt arrived at the scene and began to track Mr. Burnam with his canine partner Gunnar."

PANEL: Judges Lawrence-Berrey, Siddoway, Fearing

FOR THE COURT:


ROBERT LAWRENCE-BERREY
CHIEF JUDGE

NIELSEN, BROMAN & KOCH P.L.L.C.

August 16, 2018 - 2:33 PM

Filing Petition for Review

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