SUPREME COURT NO. 99548-6

NO. 80191-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HARRELL,

Petitioner.

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

The Honorable Roger Rogoff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

William Harrell, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Harrell, no. 80191-1-I, entered on February 1, 2021. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Under State v. McCreven,[1] when the predicate felony for felony murder is second-degree assault based on reckless infliction of substantial bodily harm, the appropriate self-defense instruction is WPIC 17.02 on the lawful use of (nonlethal) force when the person reasonably believes she is about to be injured. Harrell's felony murder charge was predicated on this prong of the second-degree assault statute. Did the court err in denying his request for a lawful use of force instruction, WPIC 17.02? Alternatively, was counsel ineffective in failing to cite McCreven?

2. Harrell's constitutional right to effective assistance of counsel was violated when his attorney failed to cite case law supporting the request for jury instructions on the lawful use of non-lethal force.

3. Should this Court also review the issues Harrell raised in his Statement of Additional Grounds for Review?

[1] State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012).

C. STATEMENT OF THE CASE

On April 28, 2017, Harrell lost his best friend. 2RP[2] 1340. When police arrived at the recreational vehicle (RV) where Harrell and Outen lived, paramedics were working on Outen's lifeless body, and Harrell was standing nearby in tears. 2RP 449, 464, 848.

Harrell admitted that both he and Outen had consumed large quantities of illegal drugs. 2RP 1302. He testified Outen had attacked him physically several times that evening and also tried to steal his wallet. 2RP 1314-20. To avoid Outen's assaults, Harrell left the RV and walked to a nearby bus stop. 2RP 1314-20.

However, upon learning the bus would not arrive for 30 minutes, he returned to the RV to cut a piece of heroin. 2RP 1321-22. He picked up a knife and asked Outen to pass him the scale. 2RP 1327. She responded by demanding some of the heroin. 2RP 1327. Still angry, he told her she could not have any. 2RP 1327.

Then, she threw something at his head. 2RP 1327. He fended it off, fearing it would knock him unconscious. 2RP 1328, 1331. He was not sure what it was, but thought it was probably their propane heater. 2RP 1328. Immediately after he fended off the heater, which left him with scraped

[2] There are 18 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 18, 2018, Apr. 11, 15, 16, 18, May 20, July 12, 2019; 2RP – Apr. 22, 23, 24, 25, May 2, 6, 7, 8, 13, 14, 15, 2019.

knuckles, Outen lunged at him. 2RP 1328, 1331. With no time to think, Harrell put up his hands to push her away. 2RP 1334. Unfortunately, the knife was still in his hand. 2RP 1334.

Outen stepped out of the RV, looked around, and "folded." 2RP 1335. It was then that Harrell realized something was seriously wrong. 2RP 1335. He put the knife back inside, pulled Outen out of the bushes, yelled for someone to call 911, and began trying to revive her. 2RP 1335-37. Firefighters arrived and began attending to Outen. The firefighters kept mentioning a drug used for drug overdose, so Harrell pulled down Outen's shirt to show them the stab wound to her upper chest.[3] 2RP 1338.

Police arrived to find Harrell standing nearby, crying and obviously distraught. 2RP 449, 848. He told police it was "not an OD," the couple had fought, and she fell into the bushes. 2RP 620, 1346. He did not say more to the police because the firefighters were already aware of the knife wound. 2RP 1339. Once police learned of the knife wound, they arrested Harrell, who was still standing nearby with blood on his hands and clothes. 2RP 620, 627.

Outen was later pronounced dead at the hospital, and the King County prosecutor charged Harrell with second-degree felony murder, based on a predicate offense of second-degree assault. 2RP 705, 766; CP 1, 8. The

[3] Neither firefighter could recall for certain whether any bystanders gave them information. 2RP 597, 604.

medical examiner testified Outen died from a stab wound to the chest. 2RP 726-27, 743. The level of methamphetamine in her system was "on the high side" of what he usually sees. 2RP 742.

Samantha Freed was a witness to some of the events of that evening. She was in the RV, consuming drugs with Harrell and Outen just before the fight. 2RP 490-91. She testified the couple argued, as they often had in the past, with Harrell accusing Outen of stealing his drugs. 2RP 483-84, 498. Harrell told Freed to leave, and she did. 2RP 501. However, on the way out, she claimed she heard Harrell tell Outen, "If you don't get the f--- out, I'm going to stab you." 2RP 502. Harrell specifically denied saying this. 2RP 1339. Freed also claimed to have seen him reach towards the kitchen area which contained a wooden knife block. 2RP 502.

After leaving and walking across a parking lot, Freed testified, she paused to put on her backpack and heard a scream and a thump. 2RP 503. Harrell testified Outen never screamed. 2RP 1339. Then Freed heard Harrell yelling to call 911 and saw him trying to revive Outen. 2RP 503, 533. She described Harrell's demeanor as "desperate." 2RP 512. She heard him repeating, "Baby, I'm sorry, please wake up." 2RP 512. Freed called 911, then fled the scene. 2RP 510, 512.

A nearby restaurant provided surveillance video of the area. 2RP 857; Ex. 41. There were significant gaps in coverage, and the grainy footage

made it impossible to identify individuals. 2RP 863, 1088. Harrell agreed it appeared to show Freed leaving the RV and, a short time later, Outen falling out the door. 2RP 1348. Harrell believed he could see Freed leaving the RV one minute before Outen's exit. 2RP 1368-72. The State, however, made clear its position that Freed did not leave the RV until 27 seconds before Outen. Id.

The prosecution also presented testimony by Gina Wood, a former friend of the couple. CP 126-29. She claimed that, several years earlier, she witnessed an incident in which Harrell accused Outen of stealing his drugs. 2RP 801. According to Wood, Harrell proceeded to remove Outen's clothing and perform a thorough search of her person, including inserting his fingers into her vagina to check for drugs. 2RP 802-03. This incident was admitted for the limited purpose of showing possible motive or intent under ER 404(b). CP 126-29. Other prior incidents were excluded. CP 126-29.

The prosecutor asked Wood what, if anything, she was thinking anything during this incident. 2RP 815. Wood responded, "I was very scared at the time, and I had never seen anything like this." 2RP 815. The court overruled Harrell's objection to this line of questioning as irrelevant. 2RP 815. Wood then went even further, stating it appeared Outen was "very used to this." 2RP 816. Counsel did not object again. 2RP 816.

When Harrell testified, the prosecutor cross-examined him pressing for legal conclusions in language that skewed the legal standard for justifiable homicide. 2RP 1341-42, 1381-82. The prosecutor asked Harrell whether the amount of force he used was necessary to prevent Outen from causing a scraped knuckle. 2RP 1341-42. He asked whether "stabbing her in response to the injuries you got would be excessive?" 2RP 1381-82. He asked whether "the force you used was too much?" 2RP 1382. The court overruled defense counsel's repeated objections to the questions as calling for a legal conclusion. 2RP 1341-42, 1381-82.

The defense requested the jury be instructed on excusable homicide or lawful use of force (WPIC 17.02), rather than justifiable homicide (WPIC 16.02), because Harrell's testimony indicated Outen's death occurred accidentally while he was lawfully defending himself (by shoving) against Outen's assault on him with the heater. 2RP 1404, 1420, 1422-23. The defense also requested jury instructions on first-degree manslaughter as a lesser-included offense. 2RP 1443. The court denied these requests. 2RP 1432, 1434. Given a choice between justifiable homicide instructions and no instructions on the lawful use of force, defense counsel opted for justifiable homicide instructions. 2RP 1435.

During closing argument, the prosecutor urged the jury to reject certain possible reasons to doubt the prosecution's case. For example, the

prosecutor argued the idea that Harrell was attacked was an "unreasonable doubt" because there was "no evidence to support" it. 2RP 1448. He also claimed Harrell's version of his final interaction with Outen could not have occurred in a mere 27 seconds. 2RP 1467. When he turned to the special verdict question about whether the couple were family or household members, the prosecutor argued, "obviously stabbing and killing somebody is a horrible, horrible crime. Doing that to somebody that loves you is worse." 2RP 1471. That theme continued for the special verdict regarding whether he was armed with a deadly weapon, as the prosecutor argued, "Again, the crime of murder in the second degree is a horrible crime. Using a weapon is worse." 2RP 1471.

The jury found Harrell guilty and found the offense was committed against a family or household member with a deadly weapon. CP 197. Harrell then pled guilty to the aggravating factor that this offense was "part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time" under RCW 9.94A.535(3)(h). CP 235-36.

At sentencing, the defense presented psychological reports indicating Harrell's debilitating history of traumatic experiences and argued the mitigating factors warranted a standard range sentence, rather than the exceptional sentence recommended by the prosecution. CP 238, 248-305.

The court also heard from Outen's parents and three of Harrell's former partners. 1RP 336-39. The court imposed an exceptional sentence of 260 months, 40 months above the top of the standard range, but also less than the 336 months recommended by the prosecution. CP 311, 313; 1RP 333-34. In addition, Harrell was also ordered to serve a 24-month deadly weapon sentencing enhancement and 36 months of community custody. CP 313-14.

On appeal, Harrell argued the court erred in rejecting his requests for jury instructions on lawful use of non-lethal force and on the lesser-included offense of first-degree manslaughter. He also argued the court erred in admitting Wood's testimony regarding the prior incident, and the prosecutor committed misconduct during cross-examination of Harrell and during closing argument as well as by presenting Wood's testimony about the prior incident. He also argued trial counsel was ineffective in failing to object and to cite relevant case law and cumulative error deprived him of a fair trial.

Harrell also filed a pro se statement of additional grounds for review. He argued: 1) the court erred in admitting Wood's testimony on the prior incident under ER 404(b), 2) the court erred in ruling that presentation of certain evidence by Harrell would open the door to other prior incidents of domestic violence that would otherwise be inadmissible, 3) the court violated Harrell's right to present a defense when it denied his request for instructions on non-lethal self-defense, 4) the prosecutor committed

misconduct by stating facts not in evidence during cross-examination of Harrell and during closing argument, 5) Harrell's trial attorney was ineffective in failing to call an expert witness to testify about the effects of the levels of narcotics found in Harrell's system, in failing to investigate or present expert testimony by an accident reconstructionist, by contradicting Harrell's testimony, and by failing to object during closing argument.

The Court of Appeals rejected Harrell's arguments and affirmed his conviction. Harrell now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

1. THE COURT ERRED IN DENYING HARRELL'S REQUEST TO INSTRUCT THE JURY ON LAWFUL USE OF FORCE.

A self-defense instruction pertaining to non-lethal force is appropriate when the predicate felony for second-degree murder is second degree assault by means of reckless infliction of substantial bodily harm. State v. McCreven, 170 Wn. App. 444, 467, 284 P.3d 793 (2012). Because the court failed to recognize this distinction and refused to instruct the jury on the non-lethal variant of self-defense, Harrell's conviction should be reversed. Id. Harrell asks this Court to grant review under RAP 13.4(b)(2) because the Court of Appeals decision is inconsistent with McCreven and under RAP 13.4(b)(3) because his counsel was constitutionally ineffective in

failing to cite McCreven in support of his request for the correct jury instructions on his theory of the case.

An accused person is entitled to jury instructions regarding the law that supports the defense theory of the case. State v. Tullar, 9 Wn. App. 2d 151, 155-56, 442 P.3d 620 (2019). A sufficient factual basis for a self-defense instruction exists whenever there is any evidence, from any source, that the accused acted in self-defense. Id. at 156. A factual determination by the trial court is reviewed for abuse of discretion, but the evidence must be viewed in the light most favorable to the defense. Id. When a requested instruction is rejected on a legal basis, appellate review is de novo. Id. at 155 (citing State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015)).

"A person is entitled to use force to defend himself and prevent an injury less than great or serious physical injury or death." McCreven, 170 Wn. App. at 465 (citing State v. Slaughter, 143 Wn. App. 936, 942, 186 P.3d 1084 (2008). When the accused is charged with felony murder based on the predicate felony of assault, the jury may be instructed on the use of non-lethal force in self-defense because the defendant "could argue that he used reasonable force to prevent injury when the accidental killing occurred." McCreven, 170 Wn. App. at 465 (discussing Slaughter, 143 Wn. App. at 942).

Harrell's theory of the case was that he may have committed assault by shoving Outen away from him, but he did so in self-defense when she lunged at him after throwing the heater. 2RP 1404, 1420, 1422-23. This is a different theory from the pure accident theory argued in State v. Henderson, 192 Wn.2d 508, 510, 430 P.3d 637 (2008). Additionally, Henderson involved a charge of felony murder predicated on second-degree assault with a deadly weapon, not the reckless infliction of substantial bodily harm. Id. The Court of Appeals erred in relying on Henderson because the question here was not before the court in Henderson. The issue in that case was whether Henderson, on a felony murder/assault by deadly weapon charge, was entitled to instructions on excusable homicide. Id. at 510, 515. The Henderson court did not decide or even consider whether a person like Harrell, charged with felony murder/assault by reckless infliction of substantial bodily harm, was entitled to instructions on the lawful use of non-lethal force.

The case that is directly on point is McCreven. In that case, the court instructed the jury only on justifiable homicide. McCreven, 170 Wn. App. at 463. Like Harrell, the defendants in McCreven were charged with felony murder predicated on second-degree assault both by recklessly inflicting substantial bodily harm and by use of a deadly weapon. Id. at 464-65. The court held that the instructions improperly required the jury to find the

defendants were in fear of "great or serious personal injury" in order to find they acted in self-defense. Id. at 465-67. The reason for this conclusion was the lower mens rea required for felony murder predicated on second degree assault: "to convict under RCW 9A.36.021(1)(a), the State need not prove the codefendants intended to cause Beaudine's death; "great personal injury," i.e., severe pain and suffering; or "serious physical injury." McCreven, 170 Wn. App. at 465.

In short, the requisite level of self-defense instruction hinges on the state's burden of proof. If the state were attempting to prove intent to kill, or even intentional use of a deadly weapon (for example under the alternate deadly weapon variant of second-degree assault), the justifiable homicide instruction would be appropriate. Id. at 467. The court determined that the trial court erred because "it did not give a jury instruction patterned after WPIC 17.02 for the second degree felony murder charge the State alleged occurred during an assault in violation of RCW 9A.36.021(1)(a) (without a deadly weapon)." Id. at 467. The court concluded this error "compels that we reverse." Id. McCreven stands for the principle that when a second-degree felony murder charge is predicated on reckless second-degree assault, the accused is entitled to instructions on non-lethal self-defense. That is the case here.

The Court of Appeals reasoned that McCreven did not apply for several flawed reasons. First, the court declared that Harrell was fully able to argue his theory of the case because "Nothing in the instructions suggested that Harrell was not entitled to do what he claimed he intended to do: push Outen away as she lunged at him." App. at 7. This is incorrect because the jury was instructed on the definition of assault. CP 212. The jury could easily have concluded that he committed an assault by shoving her, and that the presence of the knife in his hand rendered that assault a reckless infliction of substantial bodily harm under RCW 9A.36.021(1)(a). In light of this possibility, Harrell was entitled to instructions clarifying that shoving, although an assault, could be justifiable in response to a non-lethal attack.

Additionally, this argument does not provide a meaningful way to distinguish the facts of McCreven, where a fistfight in the parking lot of a bar culminated in a stabbing. 170 Wn. App. at 453. The court instructed the jury on justifiable homicide, rather than non-lethal self-defense. Id. at 463. The McCreven court did not concern itself with the precise argument made at trial. Instead, it focused on the fact that, without the instruction on non-lethal self-defense, the self-defense instructions lessened the state's burden of proof and failed to correctly state the standard for self-defense: "As a result, the jury instructions lessened the State's burden to disprove Nolan's, McCreven's, and Smith's claims that they were acting in self-defense. The

instructions as a whole did not reflect the correct level of feared injury and thus did not reflect the legal standard of self-defense in this case." Id. at 467 (citing State v. Knutz, 161 Wn. App. 395, 403, 253 P.3d 437(2011)). The same is true here. The jury was left with no option to acquit if it found Harrell did not commit second-degree reckless assault but instead acted with non-lethal force (shoving) to defend himself against a non-lethal attack by Outen.

The Court of Appeals in this case also reasoned that there was no evidence Harrell reasonably feared imminent death, serious injury, or substantial bodily injury. App. at 7. This reasoning only highlights the need for the instructions Harrell requested, rather than those the trial court foisted on him. Harrell does not concede there was no evidence of justifiable homicide, as the Court of Appeals claims. The trial judge must have perceived at least some evidence to support the instructions it gave the jury. See State v. George, 161 Wn. App. 86, 100, 249 P.3d 202 (2011) (trial judge should deny request for self-defense instructions "where the defense theory is completely unsupported by evidence"). But regardless, the trial court's ruling forced Harrell to assume the greater burden of establishing reasonable fear of imminent death.

Additionally, it was Harrell's right to choose his theory of the case so long as there was evidence to support it. "Coinciding with a defendant's right

to present a full defense, and to have the jury be fully instructed on the defense theory of the case, is a defendant's right to control that defense." State v. Phillips, 9 Wn. App. 2d 368, 381, 444 P.3d 51, rev. denied, 194 Wn.2d 1007 (2019) (citing State v. Jones, 99 Wn.2d 735, 740-41, 664 P.2d 1216 (1983)). Harrell agrees the evidence of a non-lethal attack by Outen was greater than the evidence that he reasonably feared imminent death. He was, therefore, entitled to argue that his conduct was a defense against that non-lethal attack. By forcing him to choose between no instruction and instruction only on justifiable homicide, the court also violated Harrell's right to control his defense.

Harrell's testimony that he shoved Outen when she lunged at him after throwing what he thought was a propane heater is evidence that he used non-lethal force in self-defense. Because this was the defense theory of the case, and McCreven directly supports it, the Court of Appeals also erred in rejecting Harrell's claim that his attorney was ineffective in failing to cite McCreven. Counsel is deficient for failing to recognize and cite appropriate case law. State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009). This is a constitutional issue that this Court should review under RAP 13.4(b)(3). Harrell asks this Court to grant review of both the court's failure to give the requested jury instruction on non-lethal self-defense and the

correlated issue, counsel's ineffectiveness in failing to cite McCreven in support of that request.

2. THIS COURT SHOULD ALSO GRANT REVIEW OF THE CHALLENGES RAISED IN HARRELL'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

In his Statement of Additional Grounds for Review, Harrell made five arguments: He argued: 1) the court erred in admitting Wood's testimony on the prior incident under ER 404(b), 2) the court erred in ruling that presentation of certain evidence by Harrell would open the door to other prior incidents of domestic violence that would otherwise be inadmissible, 3) the court violated Harrell's right to present a defense when it denied his request for instructions on non-lethal self-defense, 4) the prosecutor committed misconduct by stating facts not in evidence during cross-examination of Harrell and during closing argument, 5) Harrell's trial attorney was ineffective in failing to call an expert witness to testify about the effects of the levels of narcotics found in Harrell's system, in failing to investigate or present expert testimony by an accident reconstructionist, by contradicting Harrell's testimony, and by failing to object during closing argument. See Statement of Additional Grounds for Review (filed July 31, 2020). The Court of Appeals rejected Harrell's arguments. App. at 18-21. Harrell respectfully also requests review of these issues.

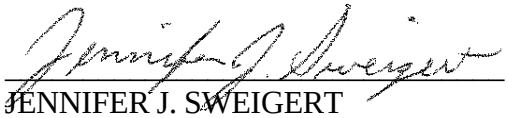
E. CONCLUSION

For the foregoing reasons, Harrell respectfully requests this Court grant review and reverse.

DATED this _3rd_ day of March, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent v. WILLIAM HARRELL, Appellant.	No. 80191-1-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — William Harrell stabbed his romantic partner, Kirstyn Outen, in the chest and killed her. Harrell claimed that, in the midst of an argument, he tried to push Outen away as she lunged toward him but accidentally stabbed her. Harrell challenges his conviction of second degree felony murder following a jury trial. He contends that the trial court erred in denying his request for an instruction on the lawful use of nonlethal force; the prosecutor engaged in misconduct during cross examination and in closing remarks; the court erred in admitting prejudicial witness testimony; trial counsel's performance was constitutionally inadequate; and the court erred in denying his request for a lesser included instruction. Finding no error, we affirm.

FACTS

In the early morning hours of April 28, 2017, paramedics arrived at a recreational vehicle (RV) parked in the Ballard neighborhood of Seattle in

response to a 911 call. They found Kirstyn Outen outside the RV unconscious and unresponsive. William Harrell, who later described Outen as his fiancé, was standing nearby, visibly distraught.

Paramedics began to administer aid, and police officers arrived a few minutes later. The paramedics believed they were responding to a possible overdose. When a police officer asked Harrell what happened, he said that he and Outen had been smoking heroin, they had a fight, he chased her out of the RV, and she fell into the bushes.

Paramedics were unable to revive Outen and she was pronounced dead shortly after. After police officers learned that Outen had been stabbed, and observed blood on Harrell's hands and clothing, they arrested him. They later found a bloody kitchen knife with a six-inch blade on a table inside the RV. The medical examiner determined that Outen died from a single stab wound to the chest. The wound penetrated Outen's left lung and aorta and extended to the back of her chest cavity where it met her spine.

The State charged Harrell with second degree felony murder. At Harrell's trial, Samantha Freed testified that she arrived in Seattle on April 28, 2017, after being released from a drug treatment program in Florida. She returned to Washington State with a plan to return to the streets and resume using drugs. Freed contacted Outen and Harrell. She knew them because a few years earlier, they camped in the same area for several months. Freed asked them to obtain heroin and methamphetamine for her.

Freed arrived at the RV where Harrell and Outen were living at around 8:00 P.M. and smoked heroin and methamphetamine with them throughout the night. An acquaintance named Wally arrived at some point to borrow gas cans. While Harrell watched Wally out of the back window, making sure he took only gas cans, Outen moved a methamphetamine pipe that was on the table in plain sight. Harrell turned towards Outen and accused her of stealing drugs. Outen and Harrell argued, and Harrell stormed out of the RV. Outen followed him, but returned a few minutes later. It appeared to Freed that she had been crying.

A few minutes later, Harrell returned and told Freed to "get the fuck out." Harrell demanded that Outen leave also. As she left, Freed heard Harrell tell Outen that if she did not leave he would stab her. Freed saw Harrell reach toward a knife block that was on the table.

As Freed crossed the street in front of the vehicle, she heard Outen scream followed by a couple of loud thumps. She turned and saw Outen sprawled on the sidewalk in front of the RV with Harrell on top of her. Harrell called out for Freed or someone to call 911 and Freed did so. Harrell kept repeating that he was sorry and pleading for Outen to wake up. Freed left the scene before law enforcement arrived because she had an outstanding warrant and did not realize that Outen was critically injured.

Harrell testified at trial and admitted that he argued with Outen on the night she died. According to Harrell, the argument began when he saw Outen try to grab his wallet when his back was turned. Harrell then left the RV taking some of his belongings and heroin that he kept in a safe. Harrell claimed that Outen

tried to physically block him from leaving, and once he managed to get outside, she followed him and tried to stop him by "swatting" at him and grabbing his clothing. Eventually, Harrell said Outen gave up and returned to the vehicle while he continued toward the bus stop.

Because the next bus was not scheduled to arrive for a significant amount of time, Harrell also returned to the RV. Harrell explained that after Freed left, he took out a kitchen knife in order to cut the heroin he had in his pocket and asked Outen to hand him a scale. When Outen asked him to cut off a piece for her, Harrell responded that he "wasn't giving her shit." According to Harrell, Outen then threw something at him, possibly a 5-pound space heater. As he raised his hands to protect himself, he scraped his knuckles. Harrell testified that Outen then lunged at him, and he tried to push her away while still holding the knife in his hand. Harrell testified that Outen then "folded up" just outside the RV and fell into the adjacent bushes. Harrell realized that he had accidentally stabbed Outen only after she fell, and when he noticed the bloody knife in his hand, Harrell then placed the knife back inside the RV. Harrell said that once he became aware the paramedics were treating Outen for an overdose, he lifted Outen's shirt to show them her injury.

After considering the testimony of Freed, Harrell, and approximately 25 other witnesses, the jury found Harrell guilty as charged. Harrell then pleaded guilty to an aggravating factor, stipulating that the crime was a part of an "ongoing pattern of psychological, physical, or sexual abuse."

RCW 9.94A.535(3)(i). The court imposed an exceptional sentence of 284 months.

Harrell appeals.

ANALYSIS

Lawful Use of Force Jury Instruction

Harrell proposed a jury instruction on the lawful use of force applicable to charges other than homicide based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02 (4th ed. 2016) (WPIC). That instruction provided, in relevant part, that a person may lawfully use force against another when the person "reasonably believes that he is about to be injured" and "the force is not more than is necessary." The court declined to give the instruction. The court provided several other instructions pertaining to self-defense including a justifiable homicide instruction based on WPIC 16.02, which contains a heightened requirement that in order to use lethal force, the defendant must reasonably believe the victim intended to inflict death or great bodily injury.

Jury instructions are generally sufficient if they are supported by substantial evidence, properly state the law, and allow the parties an opportunity to satisfactorily argue their theories of the case. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We review the adequacy of jury instructions de novo. Id. But where the superior court refuses to give an instruction based on the facts of the case, we review its decision for abuse of discretion. State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009). A superior court abuses its discretion when its decision is manifestly unreasonable or based upon untenable

grounds or untenable reasons. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A defendant is entitled to a self-defense jury instruction when there is "some evidence admitted in the case from whatever source which tends to prove a killing was done in self-defense." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

Because he testified that the stabbing occurred as he raised his hands to fend off Outen's attack without realizing he had a knife in his hands, Harrell contends there was a sufficient evidentiary basis for the instruction. And relying on State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012), he argues that because the felony murder charge was predicated on second degree assault and one of the means of committing assault alleged by the State was that he assaulted Outen and recklessly inflicted substantial bodily harm, the lawful use of force instruction was legally "appropriate."

The charges against McCreven and his three codefendants stemmed from the stabbing death of one individual and the serious injury of another that occurred during a fight in a parking lot outside of a bar. McCreven, 170 Wn. App. at 453. Division Two of this court held that because the use of deadly force in self-defense requires a reasonable belief that the defendant is threatened with death or great personal injury as to the felony murder charge premised on second degree assault with a deadly weapon, see RCW 9A.36.021(1)(c), the justifiable homicide instruction, as provided here, was appropriate. Id. at 467. However, as to the felony murder charge premised on second degree assault committed by intentionally assaulting the victim and recklessly inflicting

substantial bodily harm, the justifiable homicide instruction did not allow the defendants to argue that they committed the assault that resulted in fatal injury due to a reasonable belief the victim was about to inflict a lesser harm: imminent substantial bodily injury. Id. at 466-67. Therefore, the failure to provide the general instruction on self-defense was error. Id. at 467.

Unlike the case in McCreven, the failure to give a self-defense instruction based on WPIC 17.02 did not prevent Harrell from presenting his theory of the case. Nothing in the instructions suggested that Harrell was not entitled to do what he claimed he intended to do: push Outen away as she lunged at him. It was undisputed that instead of pushing her, he stabbed her in the chest. And there was no evidence that Harrell did so because he reasonably feared that she was about to inflict death, serious injury, or substantial bodily injury.

The Washington State Supreme Court's analysis in State Henderson, 192 Wn.2d 508, 430 P.3d 637 (2018) is instructive. During a tense argument between two groups of people, Henderson shot and killed another man. Henderson, 192 Wn.2d at 510-11. The State charged Henderson with felony murder based on second-degree assault with a deadly weapon. Henderson, 192 Wn.2d at 511. Henderson challenged the trial court's failure to instruct the jury on excusable homicide, WPIC 15.01, which was relevant to Henderson's defense that he brandished a firearm to diffuse the conflict but then accidentally shot and killed the victim. The court examined the instructions in their entirety and held that it was not error for the trial court to refuse to give the proposed instruction because the instructions "adequately told the jury the intent, conduct, and

necessary lack of accident it must find beyond a reasonable doubt to convict." Henderson, 192 Wn.2d at 514. Henderson was able to argue his theory of the case and the jury was properly instructed that the assault had to be intentional. Henderson, 192 Wn.2d at 514-515. According to the trial court's instructions, the jury could not have convicted Henderson if the jurors believed the shooting was accidental. Henderson, 192 Wn.2d at 515.

As in Henderson, the primary disputed issue at trial was whether or not Harrell intentionally committed the assault that resulted in Outen's fatal injury. And here too, the court properly instructed the jury that in order to convict Harrell of murder in the second-degree, the State had to prove beyond a reasonable doubt that he committed assault in the second-degree and caused Outen's death in the course of that crime. The court's instructions also provided that in order to convict Harrell, the jury had to find that he "intentionally" assaulted Outen and recklessly inflicted substantial bodily harm or assaulted her with a deadly weapon. The instructions defined assault as an "intentional touching or striking or cutting." And the court instructed the jury that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime."

These instructions provided a complete and accurate statement of the law that did not deprive Harrell of his right to present a defense. They allowed Harrell to argue that the stabbing was unintentional. If the jury believed that Harrell intended to push Outen out of the way, but accidentally stabbed her, it could not convict him under the instructions. The difference in the degree of the threat of

injury a person must perceive in order to lawfully use force under the justifiable homicide instruction, as opposed to the general self-defense instruction, was not material given the evidence and the parties' theories of the case. The court's decision declining to provide Harrell's proposed instruction was not an abuse of discretion. And because McCreven did not require the court to provide Harrell's requested instructions under these circumstances, his trial counsel did not perform deficiently by failing to bring that authority to the trial court's attention.

Prosecutorial Misconduct

Prosecuting attorneys are quasi-judicial officers who have a duty to ensure that defendants receive a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A defendant alleging misconduct by the State bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We review the propriety of a prosecutor's conduct "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Once a defendant establishes improper conduct, we determine whether the defendant is entitled to relief by applying one of two standards of review. Emery, 174 Wn.2d at 760. If the defendant timely objected at trial and the objection was overruled, the defendant must show that the misconduct led to prejudice that had a substantial likelihood of affecting the verdict. Id. If there was no objection at trial, the defendant is deemed to have waived the claim of

error unless the defendant can show that the misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" that could not have been cured by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

I. Cross Examination

It was undisputed that Outen died as a result of a stab wound Harrell inflicted. During cross examination, the prosecutor pressed Harrell about his testimony that he unintentionally stabbed Outen during a fight. Specifically, the prosecutor asked several questions to clarify that Harrell did not claim to have stabbed Outen to protect himself from being injured. For example, the prosecutor asked whether it was "necessary" to stab Outen because she had thrown something at him causing minor injury to the back of his hands. The prosecutor also asked whether stabbing Outen in the chest would have been, in fact, an "excessive" measure to prevent Outen from assaulting him in the manner he described. Defense counsel objected to this line of questioning, arguing that it was designed to elicit improper legal conclusions. The court overruled the objections and informed the jury that the prosecutor's questions went to Harrell's perception of the facts and not to the law as applied to those facts.

Harrell contends that the prosecutor engaged in misconduct by pressuring him to provide a legal opinion as to whether the force he used was "justifiable" and whether his "conduct was lawful."

It is generally true that a witness may not testify to legal conclusions. State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002). "Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law." Olmedo, 112 Wn. App. at 532. The prosecutor's questions probed Harrell's intent and perceptions and were not improper. Although the questions echoed some of the concepts encompassed in the justifiable homicide instruction about reasonable means and force, the inquiry was directed toward uncovering legally relevant facts and not legal conclusions.

II. Closing Argument

Harrell claims that the prosecutor improperly asserted during closing remarks that there was no evidence of Outen's physical aggression, thereby suggesting that his testimony was not evidence.

In the context of closing arguments, the prosecuting attorney has wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). We review allegedly improper comments in the context of the entire argument. Fisher, 165 Wn.2d at 747.

The prosecutor here simply asked the jury to draw inferences from the evidence that were consistent with the State's theory of the case. The prosecutor maintained that the trial testimony, as a whole, did not indicate that Harrell stabbed Outen in self-defense. And without objection, the prosecutor stated that the evidence did not support Harrell's "contention" that Outen attacked him. The

prosecutor's argument was not misleading and did not imply that Harrell's testimony was not evidence.

Harrell also challenges the prosecutor's remarks related to special verdict questions. If the jury found Harrell guilty of murder, the instructions required the jury to answer: (1) whether Outen and Harrell were "family or household members," and (2) whether Harrell was "armed with a deadly weapon. Discussing the special verdicts, the prosecutor characterized Harrell's crime, involving both domestic violence and a weapon, as "worse" than second-degree murder in general. Harrell did not object.

Harrell now claims that the comments improperly appealed to the jury's passion and prejudice and encouraged jurors to rely on the relative severity of Harrell's crime in comparison with other homicides. The relevant question is whether the challenged argument "encouraged the jury to base the verdict on the improper argument rather than on properly admitted evidence." State v. Salas, 1 Wn. App. 2d 931, 946, 408 P.3d 383 (2018).

The isolated comments about the special verdicts were neither the focus of the State's argument nor an emotional appeal to the jury. The State primarily argued that the evidence was not consistent with Harrell's claim of accident. The prosecutor maintained that the fact that Outen was stabbed less than a minute after Freed heard Harrell threaten to stab her was convincing evidence that he intended to do so. The prosecutor's suggestion, that Harrell's relationship with the victim made the crime "worse," was consistent with Harrell's testimony that the crime had a tragic impact because he lost his "best friend."

In the context of the entire closing argument, the comments did not appeal to the jury's passion and prejudice. The prosecutor encouraged the jury to base its verdict on the properly admitted evidence. Because there was no prejudicial misconduct, defense counsels' failure to object was not deficient performance.

Gina Wood's Testimony

Before trial, the court ruled that a limited number of Harrell's alleged prior acts of violence toward Outen were admissible under ER 404(b). The court admitted only alleged incidents connected to accusations that Outen was stealing Harrell's drugs or money, concluding that those incidents were relevant to intent and motive. See ER 404(b) (prior bad acts may be admissible as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

In accordance with this ruling, Gina Wood testified that Harrell and Outen briefly stayed with her in New York several years earlier. During that time, Wood said that Harrell accused Outen of stealing drugs from him, he did not believe Outen's denials, and proceeded to remove her clothing and search her body inserting his fingers in her vagina while doing so. The prosecutor asked Wood about her use of drugs on the night in question. The prosecutor also asked questions that would allow Wood to explain why she did not intervene or otherwise assist Outen when this happened in her presence. In response, Wood said she was "very scared at the time" and "had never seen anything like this."

Harrell contends that (1) the trial court erred in overruling his objection to questions about Wood's state of mind, and (2) the prosecutor engaged in

misconduct by eliciting irrelevant and unfairly prejudicial testimony. We disagree on both counts.

Harrell argues that the testimony about Wood's state of mind was irrelevant and shed no light on his motive. But the State was entitled to present evidence to establish that the incident occurred. To that end, questions going to Wood's memory, her perception, and the reasons why she did not react as one might expect by reporting the incident or trying to stop Harrell or assisting Outen, provided relevant context and assisted the jury to evaluate Wood's testimony. We conclude the trial court did not abuse its considerable discretion in determining that the State's questions were relevant and admissible. See State v. Mee Hui Kim, 134 Wn. App. 27, 139 P.3d 354 (2006) (the trial court has broad discretion regarding the admission of evidence, and the court's decision will not be reversed absent a manifest abuse of discretion). For the same reason, the questions did not amount to misconduct.

Wood also testified that Harrell searched Outen's body for five minutes. When asked whether Harrell "kept going over the same areas," Wood said Harrell was "feeling all over her, and [Outen] was very used to this I can tell." Harrell claims that this testimony was unfairly prejudicial because it strongly implied a history of domestic violence. And because defense counsel failed to object, he contends that he was deprived of constitutionally effective assistance of counsel.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of

counsel. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) counsel's representation was deficient and (2) prejudice. Estes, 188 Wn.2d at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Estes, 188 Wn.2d at 458. "A claim that counsel was ineffective is a mixed question of law and fact that we review de novo." State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776 (2015).

We apply a strong presumption that defense counsel's performance was reasonable. Estes, 188 Wn.2d at 458. Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. Id. The decision regarding whether and when to object to trial testimony is a "classic example[ ] of trial tactics." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541, review denied, 193 Wn.2d 1038 (2019). A reviewing court presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). To rebut this presumption, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Counsel could not have reasonably anticipated Wood's testimony that Outen appeared to be "very used to this," because it was not responsive to the prosecutor's inquiry. In this situation, defense lawyers commonly refrain from

objecting to a damaging, but fleeting remark, even if they believe an objection would be sustained. They recognize that by objecting, they draw attention to the testimony. See State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (defense counsel may make a reasonable tactical decision not to object to inadmissible evidence when such an objection may draw undesired attention). Even assuming the court would have sustained an objection, there was a reasonable strategic basis to refrain from objecting in order to avoid highlighting Wood's unsolicited comment. Harrell cannot overcome the presumption that the failure to object was tactical.

Manslaughter Lesser Included Offense Instruction

Harrell argues that the trial court erred by refusing to provide a jury instruction on first-degree manslaughter as a lesser included offense of felony murder.

A party is entitled to have the jury instructed on a lesser included offense if that offense satisfies the two pronged test established in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, under the legal prong, the lesser offense must consist solely of elements necessary for the conviction of the greater offense charged. Id. at 448. Second, under the factual prong, the evidence must support an inference that only the lesser offense was committed to the exclusion of the greater offense charged. Id. We review the trial court's conclusion on the legal prong de novo and review a determination as to the factual prong for an abuse of discretion. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

On several occasions, the Washington State Supreme Court has rejected Harrell's position and held that first-degree manslaughter is not a lesser included offense of felony murder premised on second-degree assault because it fails to meet the legal prong of the Workman standard. See State v. Gamble, 154 Wn.2d 457, 469, 114 P.3d 646 (2005). ("We hold that first degree manslaughter is not a lesser included offense of second degree felony murder where second degree assault ... is the predicate felony"); State v. Tamalini, 134 Wn. 2d 725, 730, 953 P.2d 450 (1998) (accord); State v. Berlin, 133 Wn.2d 541, 550, 947 P.2d 700 (1997). As the court explained in Gamble, "manslaughter requires the proof of a mens rea element vis-à-vis the resulting death, while felony murder, based on second degree assault does not." 154 Wn.2d at 469. Second-degree felony murder predicated on assault, as charged in Gamble's case, required the State to prove that the defendant "acted intentionally and 'disregard[ed] a substantial risk that [substantial bodily harm] may occur,'" while first-degree manslaughter required the State to prove that the defendant "'[knew] of and disregard[ed] a substantial risk that a [homicide] may occur.'" Id. at 467-68 (alterations in original) (emphasis omitted) (quoting RCW 9A.08.010(1)(c)).

According to Harrell, Gamble is not dispositive because the State alleged that Gamble committed assault by a single means—intentionally assaulting the victim and thereby recklessly inflicting substantial bodily harm—but the jury in this case was also instructed that Harrell could commit the crime by assaulting the victim with a deadly weapon. See RCW 9A.36.021(1)(a), (c). But in State v. Davis, 121 Wn.2d 1, 4, 846 P.2d 527 (1993), our supreme court held that first-

degree manslaughter is not a lesser included offense where felony murder is predicated on the deadly weapon prong of second-degree assault. And while the court subsequently overruled the lesser included offense test employed in Davis, the court has expressly approved of the result in Davis. See Berlin, 133 Wn.2d at 550; Gamble, 154 Wn.2d at 463-64, n. 6.

The trial court did not err by declining to give Harrell's proposed lesser included instruction on first-degree manslaughter.

Statement of Additional Grounds

As explained, before trial, the court ruled that although all alleged prior acts of violence against Outen were relevant, for the most part, the potential prejudice outweighed the probative value of the evidence. However, the court determined that some evidence of violence tied to accusations that Outen was stealing drugs or money, was relevant to Harrell's intent and motive at the time of the stabbing and admissible. The court also ruled that if Harrell offered evidence of Outen's alleged violent acts toward him to show his reasonable fear of injury, the State would be permitted to offer additional evidence of violent acts toward Outen to provide context and rebut the implication that Outen was the source of violence in the relationship. Ultimately, the State only introduced evidence of the conduct Wood witnessed and Harrell did not testify about prior acts of violence by Outen.

Challenging these pretrial rulings, Harrell argues that Wood and a second witness who did not testify at trial were not credible and the allegations were not corroborated by police reports or criminal charges. These arguments largely go

to the weight of the evidence rather than its admissibility. To the extent Harrell maintains that Wood's testimony describing the search of Outen's body for drugs was not relevant to his alleged motive in this case, we disagree. Intent and motive were the central issues in the case. The trial court did not abuse its discretion in concluding evidence showing that Harrell's suspicions about Outen's stealing directly led to assaultive behavior in the past was relevant. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (this court reviews admission of ER 404(b) evidence for an abuse of discretion). And the court's ruling on the probative value and prejudice of other prior alleged acts of violence did not preclude its determination that some of that evidence would become more relevant, and therefore admissible, if Harrell testified about Outen's violence toward him. See State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (trial court has alleged discretion to admit otherwise inadmissible evidence when witness "opens the door" in testimony and evidence is relevant to some issue at trial).

Harrell claims that it was misconduct for the prosecutor to speculate about why he "questioned the timeline" in closing argument. He also asserts that the prosecutor mischaracterized the evidence by stating that the knife was pointing "down" and "across" Outen's chest when the medical examiner described the angle of the knife as "slightly" downward.

The prosecutor argued that Harrell's testimony was inconsistent with the video surveillance footage obtained from an adjacent business that showed people coming and going from the RV during the night of the crime. The

prosecutor's suggestion that Harrell interpreted the video evidence in a manner that aligned with his version of the incident was not misconduct. The prosecutor's description of the knife entry wound was also consistent with the evidence.

Harrell alleges ineffective assistance of counsel based on counsels' decision not to present the testimony of an expert witness who could have testified about the general effects of drugs he consumed on the night of the stabbing. The decision of whether to call an expert witness generally falls within the province of tactical decisions. See In re Personal Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998) (counsel not required to call all available witnesses); see also State v. Mannering, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (decision not to call defense expert witness was tactical). The expert testimony at issue would not have established that Harrell was unable to form the intent to commit assault in the second-degree. And the failure to call the witness did not preclude the argument that the effects of drug use played a role in the crime. Harrell fails to demonstrate constitutionally ineffective representation.

Harrell also claims that defense counsel performed deficiently by contradicting his testimony. It is true that Harrell testified that he intended to cut the heroin in order to sell it, whereas counsel's closing remarks indicated that he intended to prepare an injection. But the critical facts of Harrell's testimony were that he retrieved the knife to cut heroin, not to attack Outen, and he provoked Outen by refusing her demand for drugs. Harrell offers no persuasive

explanation as to why he was prejudiced by the discrepancy with regard to an inconsequential detail of his testimony.

Harrell also alleges ineffective assistance with respect to other evidence that he believes might have been helpful to his case. But this claim involves facts outside the record, cannot be resolved on direct appeal, and may be raised only in a personal restraint petition. See State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). In addition, Harrell's appellate counsel's brief adequately presents his claim regarding the failure to give his proposed self-defense instruction. We decline to further address that issue. See State v. Johnston, 100 Wn. App. 126, 132, 996 P.2d 629 (2000).

Finally, Harrell argues that cumulative error deprived him of a fair trial. But, as here, where the appellant demonstrates no errors, the cumulative error doctrine does not apply. See State v. Clark, 187 Wn.2d 641, 655, 389 P.3d 462 (2017).

Affirmed.

Coburn, J.

WE CONCUR:

Mann, C.J.

Dwyer, J.

NIELSEN KOCH P.L.L.C.

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