Supreme Court No. 99933-3
Court of Appeals No. 80522-3-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

ENCARNACION SALAS IV,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Encarnacion Salas, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The court issued its opinion on April 12, 2021. Mr. Salas filed a motion to reconsider. After calling for an answer from the State, the court denied the motion on June 2, 2021. The opinion and order are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED[1]

1. Self-defense instructions must make the law manifestly apparent to the average juror. A person has no duty to retreat or to decline combat when the person is at a place where they are lawfully—no matter how reasonable the alternative to force. While on a balcony, Mr. Salas was attacked by the decedent who wielded a knife. Even after Mr. Salas got control over the knife, the decedent continued his attack. Mr. Salas used the knife in self-defense. The prosecution elicited testimony that implied Mr. Salas could have retreated off the balcony and argued to the jury Mr. Salas should have tossed the knife off the balcony rather than use it in self-defense. Did the jury instructions fail to make the law of self-defense

[1] In addition to the two issues listed, Mr. Salas asks this Court to accept review of issues three, four, and five, which are stated in his opening brief. Br. of App. at 4-5. These are (1) error in admitting dog-tracking evidence; (2) violation of due process by the prosecutor's act of knowingly making a false and misleading claim to the jury on the why the dog-track was unsuccessful; and (3) cumulative error.

manifestly apparent where the trial court did not provide the jury a no-duty to retreat instruction? Is this manifest constitutional error?

2. Under ER 404(b), a prior act is inadmissible to prove that a person acted in conformity with the prior act on a particular occasion. About a couple months before the disputed events, Mr. Salas purposefully cut his own face. Mr. Salas moved to exclude this evidence under ER 404(b). The court ruled no ER 404(b) analysis was required to admit this evidence because this was not prior "misconduct." The prosecution argued to the jury that because Mr. Salas had cut his face before, the wound on Mr. Salas's arm must have been self-inflicted rather than inflicted by the decedent. Did the court err by admitting this propensity evidence?

C. STATEMENT OF THE CASE[2]

One late evening, Encarnacion Salas—a young man in his early 20s—was invited over by Jesse Lopez—a man in his mid-30s. RP 594, 879-80. The two were friends, but Mr. Lopez, who was bisexual, made unwanted sexual advances upon Mr. Salas. RP 692, 890-91, 897. Mr. Salas was conflicted about his sexuality and relationship with Mr. Lopez. RP 582, 920, 996-97. Mr. Lopez resided with his mother in an apartment.

[2] A complete recitation of the facts is set out in Mr. Salas's opening brief. Br. of App. at 5-17. In addition to the recitation in the decision for which review is sought, the underlying facts are set out in the previous decision by the Court of Appeals, which reversed Mr. Salas's conviction. State v. Salas, 1 Wn. App. 2d 931, 936-38, 408 P.3d 383 (2018).

RP 678.

Mr. Salas, who lived in the same apartment complex, accepted Mr. Lopez's invitation. RP 881. Mr. Salas brought his backpack, which contained a knife. RP 901. Mr. Salas usually brought his backpack and knife when he left home. RP 619, 644, 675, 885. Mr. Lopez sometimes played with Mr. Salas's knife, twirling or spinning it. RP 885.

At Mr. Lopez's, the two drank alcohol. RP 881-83. For a while, the mood was good. RP 882. However, the mood changed when Mr. Lopez started to make sexual advances, grabbing Mr. Salas's buttocks at one point. RP 882. Mr. Salas told Mr. Lopez that this made him uncomfortable. RP 882. For a while, the mood improved, but changed once they went out to the balcony of the apartment, which was on the third level of the building. RP 882-83. Mr. Lopez grabbed Mr. Salas's genital area. RP 883. Mr. Salas yelled at Mr. Lopez to stop. RP 883.

Moments later, Mr. Lopez struck Mr. Salas with what Mr. Salas initially thought was a bong, but was actually his knife. RP 883, 914-15. A struggle ensued. During the struggle, or when Mr. Lopez initially struck Mr. Salas with the knife, Mr. Lopez cut Mr. Salas's arm. RP 872-73, 919; Ex. 583.

Mr. Salas gained control over the knife, but Mr. Lopez kept trying to get it. RP 885-87. Mr. Salas feared if Mr. Lopez got the knife, Mr.

Lopez would kill him. RP 887-88. Mr. Lopez kept coming at him, so Mr. Salas used the knife to defend himself, striking Mr. Lopez multiple times. RP 887-88. The struggle moved from outside on the balcony to inside, and ultimately to the kitchen area, where Mr. Lopez fell. RP 888. Seeing blood everywhere and Mr. Lopez bleeding from the neck, Mr. Salas at first decided to apply pressure to the wound. RP 888. Mr. Lopez's mother appeared and started to pull Mr. Salas away. RP 908. Panicking, Mr. Salas went to the front door where his backpack, jacket, and shoes were located, planning to leave. RP 909, 917-18. While Mr. Salas was at the front door, Mr. Lopez's mother asked if he was going to help her. RP 908. Conflicted on whether he should stay or leave, but wanting to separate himself from Mr. Lopez, he went out to the balcony. RP 917-18. He took his jacket and backpack, but not his shoes. RP 918. Continuing to panic, Mr. Salas decided to leave. RP 889, 918. Because Mr. Lopez's mother locked him out on the balcony, he climbed down to the ground level. RP 917.

There was much blood in the apartment. RP 370. Mr. Lopez died. RP 371. According to the autopsy, Mr. Lopez bled to death from multiple knife wounds. RP 951. The forensic pathologist testified that no one wound would have incapacitated or immediately killed Mr. Lopez, and if Mr. Lopez been urgently treated, there would have been a good chance of survival. RP 953. Mr. Lopez had a blood alcohol level showing he had

been intoxicated and had consumed an estimated equivalent of about 12 alcoholic drinks. RP 959.

A forensic scientist called by the State to testify concluded that the blood at the scene showed two active bleeders: Mr. Lopez and Mr. Salas. RP 491-92. The location of bloodstains and movement of items indicated a major struggle. RP 491, 498-500. One blood sample tested belonged to Mr. Lopez and excluded Mr. Salas. RP 441. A second blood sample, derived from a drip stain near the entry door, matched Mr. Salas, not Mr. Lopez. RP 457-58. Only these two samples were tested. RP 441, 457-58.

After spending a night in the woods, Mr. Salas returned to his apartment. RP 888-89, 919 He was arrested that afternoon. RP 785-86, 819-22. Consistent with his testimony that Mr. Lopez attacked him with a knife and the blood evidence in the apartment, Mr. Salas had a large laceration on arm. RP 862-63, 869-74; Exs. 573-91.

The State charged Mr. Salas with first degree murder. CP 164-65, 246-49. Mr. Salas testified he acted in self-defense. RP 877-921. The jury convicted Mr. Salas of the lesser offense of second degree murder. CP 153. The Court of Appeals reversed the conviction due to prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. State v. Salas, 1 Wn. App. 2d 931, 940-53, 408 P.3d 383 (2018).

The prosecution elected to retry Mr. Salas on the same charges.

Denying Mr. Salas's pretrial motion, the trial court refused to exclude evidence that Mr. Salas had previously engaged in self-mutilation by cutting his own face about two months before the incident. RP 71-72.

Like in the first trial, the prosecution argued the jury should convict Mr. Salas of first-degree murder. Mr. Salas maintained he acted in lawful self-defense and that the prosecution had not met its burden to disprove otherwise. RP 1062-67. The prosecution argued Mr. Salas had not acted in lawful self-defense, contending that even if Mr. Lopez had been attacking Mr. Salas and trying to reclaim the knife, Mr. Salas should have tossed the knife off the balcony rather than wield it. RP 1037. The prosecution also theorized that the wound on Mr. Salas's arm had been self-inflicted after the fight. RP 1040. In support, the prosecution cited the evidence that Mr. Salas had previously cut his face on purpose. RP 1038-1040.

The jury again did not convict Mr. Salas of first degree murder, but convicted Mr. Salas of second degree murder. CP 54, 51.

On appeal, Mr. Salas argued primarily that (1) the jury instructions failed to completely set out the law of self-defense by omitting a no-duty to retreat instruction; and (2) the trial court erred by admitting evidence that Mr. Salas had previously cut his face on purpose without complying with ER 404(b). Br. of App. at 18-31. The Court of Appeals refused to

review the first claim, holding the claimed error did qualify as manifest constitutional error under RAP 2.5(a)(3) and could not be raised for the first time on appeal. Slip op. at 5-9. On the second issue, the Court of Appeals reasoned the "trial court incorrectly determined that ER 404(b) applies only to misconduct." Slip op. at 14. Still, the court concluded the ruling was correct, reasoning that the evidence of self-mutilation was not "introduced for the purpose of showing [Mr. Salas's] propensity to engage in criminal activity." Slip op. at 14 (emphasis added).

Mr. Salas filed a motion to reconsider both of these holdings. The Court of Appeals called for an answer by the State. Following the State's answer, the court denied Mr. Salas's motion to reconsider.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The law of self-defense must be made manifestly apparent to the jury. This Court should grant review to decide whether the omission of a no-duty to retreat instruction is manifest constitutional error where the prosecution argues the defendant should have retreated off a balcony or disarmed himself by tossing the knife he was attacked with off the balcony.

a. After being invited over by Mr. Lopez and rebuffing unwanted sexual advances, Mr. Salas acted in self-defense when he was attacked by Mr. Lopez on the balcony.

It was undisputed that Mr. Salas was invited to Mr. Lopez's apartment. What was in dispute was whether Mr. Salas acted in lawful self-defense against Mr. Lopez in the apartment.

Viewed in Mr. Salas's favor, the evidence showed that after Mr. Salas rebuffed Mr. Lopez's unwanted sexual advances, Mr. Lopez attacked Mr. Salas with a knife on the patio balcony. RP 883, 914-15. He cut Mr. Salas's arm. RP 872-73, 919; Ex. 583. Mr. Salas gained control over the knife, but Mr. Lopez continued his attack. RP 885-87. Fearing that Mr. Lopez would take the knife and use it to kill him, Mr. Salas struck Mr. Lopez with the knife multiple times. RP 887-88.

Based on this and other evidence, including the evidence that Mr. Salas suffered a large laceration to his arm, the parties and the trial court all agreed that Mr. Salas was entitled to have the jury instructed on self-defense. RP 1018-19. This was correct because once there is some evidence of self-defense, due process requires the State to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

b. Notwithstanding the prosecution's contention that Mr. Salas should have retreated off the balcony or disarmed himself by throwing the knife off the balcony, the court did not provide the jury a no-duty to retreat instruction. Seizing on this, the prosecution argued Mr. Salas did not act in self-defense based on these actions.

But critically, the court did not provide the jury a no-duty to retreat instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.08 (4th

Ed); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.05 (4th Ed).[3] It is the long-standing rule of Washington that a person has no duty to retreat or to decline combat when the person is at a place where they are lawfully, no matter how reasonable the alternative to force. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Meyer, 96 Wash. 257, 264-66, 164 P. 926 (1917); State v. Williams, 81 Wn. App. 738, 743-44, 916 P.2d 445 (1996). If it is possible for the jury to speculate that there was a reasonable alternative to the use of force, such as flight, the jury should be provided an appropriate no-duty to retreat instruction. State v. Redmond, 150 Wn.2d 489, 494-95, 78 P.3d 1001 (2003); Williams, 81 Wn. App. at 744. Failure to do so means that the law of self-defense was not manifestly clear to the jury and the jury may erroneously reject self-defense in violation of due process. Walden, 131 Wn.2d at 478; State v. Ackerman, 11 Wn. App. 2d 304, 312-15, 453 P.3d 749 (2019); State v. Espinosa, 8 Wn. App. 2d 353, 364, 438 P.3d 582 (2019).

Here, the evidence required a no-duty to retreat instruction lest

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[3] It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he] [she] is being attacked to stand [his] [her] ground and defend against such attack by the use of lawful force.

[The law does not impose a duty to retreat.] [Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."]

the jury misunderstand the law of self-defense and the prosecution's burden to disprove self-defense. The instruction was necessary to make the law of self-defense manifestly apparent to the jury.

During the prosecution's cross-examination of Mr. Salas, the prosecution asked Mr. Salas why he did not leave using the balcony instead of continuing to fight with Mr. Lopez at the threshold between the balcony and the inside of the apartment:

> Q. So you say you have the knife. He's keeping you from coming back into the house. Why don't you just leave the balcony then?
>
> A. It didn't occur to me at the time.
>
> Q. So he doesn't want you in his house at that point?
>
> A. Correct.
>
> Q. And so it doesn't occur to you, then, to go off the balcony, but it occurs to you when you're at the front door getting your stuff, but instead of going out the front door you're going to go out the balcony?
>
> A. I wanted to stay. I wanted to tell them what happened but I couldn't, I wanted to leave.

RP 916-17 (emphases added). While retreating from a third floor balcony might seem unreasonable, the prosecution elicited evidence that Mr. Salas enjoyed climbing, and introduced pictures of Mr. Salas climbing trees. RP 605, 650-51, 893-94, 996-97; Ex. 561-63. And Mr. Salas in fact later climbed down the balcony. In other words, the prosecution implied that

Mr. Salas should have retreated off the balcony during the altercation rather than use force against Mr. Lopez in self-defense.

Additionally, while the prosecution never asked Mr. Salas if he considered throwing the knife off the balcony so that Mr. Lopez could not take it and use it against him (again), the evidence permitted the inference that this was possible. In fact, the prosecution used this inference to argue during its closing argument this was not a case of self-defense because Mr. Salas could have taken the knife "out of the equation" by tossing it off the balcony:

> Also defies logic that if there is this ongoing threat from this person that he has pinned against the wall, why he feels the need to inflict those injuries. He's on the balcony. A small space, third floor. He has the knife, according to him, in the right hand. Some of that's -- that evidence is inconsistent. Toss it off the balcony. Take the knife out of the equation. This isn't self-defense.

RP 1037 (emphasis added).

As with the prosecution's contention that Mr. Salas should have retreated off the balcony, this was an arguable alternative to the use of lethal force. Mr. Salas, however, was in a place where he had the lawful right to be because Mr. Lopez had invited him over. Mr. Salas had a right to defend himself when Mr. Lopez, who had attacked Mr. Salas with the knife, continued his attack. Mr. Salas believed that Mr. Lopez was trying to take back the knife, and feared Mr. Lopez would use it to kill him. The

law did not require that Mr. Salas retreat. Neither did the law require that he cast away his means of self-defense. So that the jury would not erroneously reject Mr. Salas's claim of self-defense on a misunderstanding of the law, the court was required to provide a no-duty to retreat instruction. Redmond, 150 Wn.2d at 494-95; Williams, 81 Wn. App. at 744; State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997).

c. The failure to properly instruct the jury on self-defense was manifest constitutional error and properly raised for the first time on appeal under RAP 2.5(a)(3). The Court of Appeals' holding that the failure to give a no-duty to retreat instruction is not manifest constitutional error is contrary to precedent.

A party may raise a claim of manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3); State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019). Due process requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt. Ackerman, 11 Wn. App. 2d at 310. For murder, the State must disprove the absence of self-defense when there is "some evidence" in support. State v. Acosta, 101 Wn.2d 612, 617-618, 683 P.2d 1069 (1984). Thus, the error is constitutional in nature. Ackerman, 11 Wn. App. 2d at 310.

The error is also "manifest," meaning Mr. Salas plausibly shows that the failure to fully instruct the jury on the law of self-defense "had practical and identifiable consequences on the jury's deliberations." Id. at

310. The incomplete self-defense instructions relieved the prosecution of its burden to disprove self-defense. The prosecution elicited evidence that suggested Mr. Salas could have retreated from the balcony or thrown the knife from it rather than use force against Mr. Lopez. RP 1036-37. The evidence and argument invited the jury to find the absence of self-defense on an impermissible basis. A no-duty to-retreat instruction was required.

Notwithstanding RAP 2.5(a)(3), the Court of Appeals held that the failure by the trial court to give a no-duty to retreat instruction cannot be raised for the first time on appeal. Slip op. at 6. In support, the court cited State v. Lucero, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), where the court did refuse to review the appellant's claimed error about the lack of a no-duty to retreat instruction. But Lucero did not analyze RAP 2.5(a)(3). Lucero relied on McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963), an ancient opinion from this Court in a civil tort suit that predated the Rules of Appellate Procedure. After McGarvey this Court recognized that instructional errors will be considered for the first time on appeal if related to an accused's constitutional rights. State v. McHenry, 88 Wn.2d 211, 213, 558 P.2d 188 (1977).

The Court of Appeals also reasoned that the evidence did not support a no-duty to retreat instruction. The court incorrectly reasoned that, even viewing the evidence in the light most favorable to Mr. Salas,

his license to be in Mr. Lopez's apartment had been revoked. Slip op. at 8-9. In support, the court cited the evidence that *Mr. Lopez was blocking* Mr. Salas from leaving the balcony and going back inside the apartment. Slip op. at 8. In other words, if one is invited over to another's home, is attacked by the inviter, and prevented from leaving, the guest must (somehow) retreat rather than act in self-defense. This is not the law. Invited guests who are attacked by a resident are entitled to stand their ground because they are licensed to be there. State v. McCourt, No. 53367-7-II, noted at 16 Wn. App. 2d 1013, 2021 WL 196405 at *7 (2021) (unpublished)[4] (holding trial court erred by not giving a no-duty to retreat instruction because defendant who was gathering belongings to leave was still licensed to be there when he exercised self-defense). Mr. Salas's testimony entitled him to a no-duty to retreat instruction.

d. Review should be granted to hold that the failure by the trial court to provide a no-duty to instruct instruction may be raised for the first time on appeal if it is manifest constitutional error.

The Court of Appeals' holding that the failure by the trial court to provide a no-duty to retreat instruction cannot be raised for the first time on appeal under RAP 2.5(a)(3) is contrary to precedent from this Court and the Court of Appeals. Review should be granted to overrule it and

[4] GR 14.1(a) (cited as persuasive authority).

Lucero. RAP 13.4(b)(1), (2). Whether a no-duty to retreat instruction must be given under the circumstances of this case to make the law of self-defense manifestly clear to the jury is a significant constitutional question meriting review. RAP 13.4(b)(3). And because self-defense claims are often made, and will be made under facts where a person was invited over to another's residence, this is an issue of substantial public interest. RAP 13.4(b)(4). Review should be granted.

2. Review should be granted to reaffirm that ER 404(b) bars admission of evidence of *any act* used in order to show action in conformity therewith. The Court of Appeals' contrary holding is in direct conflict with this Court's decision in Everybodytalksabout, meriting review.

a. Evidence that Mr. Salas purposefully cut his face—used by the prosecution to argue that Mr. Salas also purposefully cut his arm after the fight—was propensity evidence admitted in violation of ER 404(b).

Under ER 404(b),[5] evidence of other acts is inadmissible to prove that a person has a propensity to act in a particular manner, although such evidence may be admitted for other purposes. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The rule is a "categorical bar to

[5] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." Id.

Before trial, Mr. Salas moved in limine to exclude evidence that he purposefully cut his face about a couple of months before the disputed incident. CP 94; RP 62-63. Mr. Salas argued this was evidence of prior misconduct that was legally irrelevant under ER 404(b) and (assuming legal relevance) that any probative value was substantially outweighed by a risk of unfair prejudice. RP 63-64, 66-67. The prosecution argued it was unsure if this evidence "rises to the level of prior misconduct." RP 64-66.

The trial court ruled that ER 404(b) did not apply and denied Mr. Salas's motion to exclude the evidence. RP 72. The court reasoned that evidence of self-mutilation "does not appear to be the type of misconduct that's contemplated at all by the rule, and it's certainly not for purposes of showing his propensity to engage in criminal activity because it's not a criminal activity." RP 72.

Based on this evidence, the prosecutor argued to the jury that Mr. Salas had a propensity to cut himself when feeling conflicted about Mr. Lopez and that he had done so again by cutting his own arm after the fight:

> Maybe ask yourself, well, how did they occur and who caused them? The defendant. The defendant cut his own arm. Just like he cut his own face. The defendant was

> conflicted about his sexuality with [Mr. Lopez]. He was the source but not the cause. I make decisions, is what he said. How conflicted do you think he is about murdering his friend? He cut his own arm.

RP 1040. If true, this greatly weakened Mr. Salas's self-defense claim.

b. The Court of Appeals' holding that ER 404(b) is limited to evidence used to show a "propensity to engage in criminal activity," rather than simple propensity to engage in any activity, is contrary to Everybodytalksabout and other precedent.

The trial court misinterpreted ER 404(b). The rule states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b) (emphasis added). Consistent with its plain language, this Court has interpreted the scope of ER 404(b)'s broadly, holding that the act need not be "misconduct." State v. Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002). In Everybodytalksabout, the Court concluded "that 'acts' inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion." Id. at 466 (emphasis added). Thus, prior acts evidence offered to show the "qualities of leadership" by the defendant, and that the defendant "acted in conformity with those qualities" was inadmissible under ER 404(b). Id. at 468.

The Court of Appeals acknowledged the trial court's ruling was

contrary to Everybodytalksabout. Slip op. at 14 ("The trial court incorrectly determined that ER 404(b) applies only to misconduct."). But based on federal case law interpreting the federal analog to Washington's ER 404(b), the Court of Appeals reasoned "the trial court correctly determined that the evidence that Salas had cut his own face was not excluded by ER 404(b) because it was not being introduced for the purpose of showing his propensity to engage in criminal activity." Slip op. at 14 (emphasis added).

This rule and reasoning is contrary to Washington precedent. Whatever federal precedent says about the federal version of ER 404(b), it is not binding on either this Court or the Court of Appeals on what ER 404(b) means. State v. Brown, 113 Wn.2d 520, 547-48, 782 P.2d 1013 (1989) (emphasis added) (plurality); id. at 558 (Utter., J., concurring); Orwick v. Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984).

This Court's holding in Everybodytalksabout on ER 404(b) controlled. This holding applies to any evidence of an act that the prosecution seeks to use for a propensity purpose even if the propensity purpose is not about engaging in criminal activity. Everybodytalksabout, 145 Wn.2d at 468; State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007) ("The State is incorrect when it asserts that the drawings of tags and most of the photographs fall outside the scope of ER 404(b)

because they do not show criminal conduct or bad acts.") (emphasis added). "[T]he rule prohibits admitting evidence to show a person's character to prove the person acted in conformity with that character on a particular occasion." State v. Ruiz, 176 Wn. App. 623, 645, 309 P.3d 700 (2013) (citing Everybodytalksabout, 145 Wn.2d at 466); accord State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) (citing Everybodytalksabout, 145 Wn.2d at 466). Thus, the Court of Appeals has held the admission of evidence about a defendant's "participation in mountain climbing and other extreme sports as prior bad acts under ER 404(b)" because "it ultimately operated as propensity evidence." State v. Briejer, 172 Wn. App. 209, 223, 227, 289 P.3d 698 (2012); see also State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813 (2010) (defendant's statements that she did not want child in school's gifted program and statements she did not want to pay for child's foster care constituted propensity evidence and should not have been admitted without an ER 404(b) analysis).

Indeed, the Court of Appeals has reached *the opposite* conclusion about the application of ER 404(b) to prior acts of self-harm. State v. Dukes, noted at 184 Wn. App. 1051, 2014 WL 6790334 (2014)

(unpublished).[6] In an assault prosecution, the Court of Appeals upheld the exclusion of evidence that the victim previously attempted to commit suicide. Id. at *4-5. This evidence tended to show that the victim set herself on fire (rather than the defendant setting her on fire), but was inadmissible as propensity evidence under ER 404(b). The Court of Appeals cited Everybodytalksabout as support. Id. at *5, n.3. Like in Dukes, the evidence that Mr. Salas engaged in self-harm was propensity evidence and should have been excluded under ER 404(b).

c. Review should be granted to resolve the direct conflict and because the issue is one of substantial public interest.

The Court of Appeals' decision on this issue squarely conflicts with precedent, including Everybodytalksabout. Proper, fair, and uniform interpretation of ER 404(b) is an issue of substantial public interest. Review should be granted. RAP 13.4(b)(1), (2), (4).

E. CONCLUSION

For the foregoing reasons, this Court should grant review.

Respectfully submitted this 28th day of June, 2021.

Richard W. Lechich – WSBA #43296
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[6] Cited as persuasive authority. GR 14.1(a).

Appendix

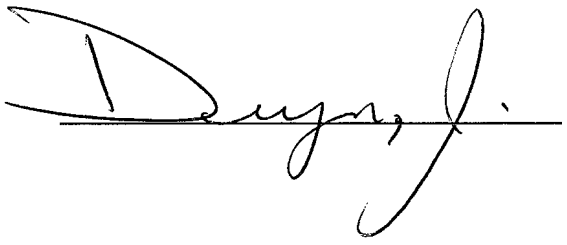
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ENCARNACION SALAS IV, Appellant.	DIVISION ONE No. 80522-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

For the Court:



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4/12/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ENCARNACION SALAS IV, Appellant.	DIVISION ONE No. 80522-3-I UNPUBLISHED OPINION

DWYER, J. — Encarnacion Salas appeals from his conviction of murder in the second degree with a deadly weapon. Salas contends that the trial court erred by (1) not instructing the jury sua sponte that he had no duty to retreat, (2) admitting certain evidence in violation of ER 404(b), and (3) admitting certain testimony that generally regarded dog tracking. Salas also asserts that the prosecutor violated his due process right to a fair trial by eliciting "misleading" testimony and making a false argument to the jury. Finally, Salas avers that the trial court mistakenly ordered him to pay supervision fees to the department of corrections. We remand the judgment for the trial court to strike the requirement that Salas pay supervision fees. In all other respects, we affirm.

I

Salas lived in a unit of an apartment complex with his two aunts, Ruby and Cristal Salas. Jesus Lopez lived with his mother, Antonia Lopez, in the same apartment complex. According to trial testimony, Salas and Lopez became

friends and spent time together. They enjoyed drinking alcohol, smoking marijuana, talking, and watching television shows. After some time, their relationship became, in Salas's words, "kind of homosexual." Salas described a time around August 2014 when Lopez made a sexual advance. Salas informed Lopez that he was "uncomfortable with that" and "not ready."

Salas owned several knives and hatchets. He frequently carried a knife with him. Sometime in August 2014, Salas purposefully cut his own face with a knife because he felt conflicted about his sexuality and relationship with Lopez.

Around 9:00 p.m. on October 24, 2014, Lopez sent several text messages to Salas asking whether he wanted to drink alcohol. Salas went to Lopez's apartment and the two began consuming alcohol. Salas brought a backpack, which contained alcohol and a knife. Lopez and Salas had, on occasion, played with the knife. They would "sometimes twirl it, spin it around." Salas and Lopez listened to music for a couple of hours.

Salas testified that, at one point during the evening, Lopez "made a pass" at him. Salas told Lopez that he was "uncomfortable" and "not ready for that step in the relationship." Thereafter, Salas and Lopez "maintained a little distance," and Salas continued to drink. Salas and Lopez subsequently went onto the balcony of the apartment where Lopez grabbed Salas's genital area. Salas repeated his reservations, but this time did so "more aggressively." According to Salas, Lopez then "hit" him with the knife. Salas stated that he reacted by hitting Lopez against the door. Salas then retrieved the knife from Lopez. Salas

testified that he and Lopez started "wrestling" on the balcony. Salas then stabbed Lopez "a couple times" with the knife.

Antonia Lopez was present that evening. She testified that she "heard something" and exited her bedroom. Antonia stated that she saw Lopez at the door of the balcony where he was "holding himself up on the border of the door." Her son was "bleeding a lot." Salas was standing on the balcony and "was trying to pull" Lopez out onto the balcony.

Salas testified that, while Lopez was standing at the door of the balcony, Salas was "trying to go in, and pushing him, and he's pushing back." Salas had the knife in his hand. At this moment, Salas knew that Lopez did not want him to enter or remain at the apartment:

> [The State]: And at the point whereby [Lopez]'s got his hand up against the wall, was trying to prevent you from pulling him onto the balcony, and why are you doing that? He's trying to get away from you.
> [Salas]: I don't believe he was doing that. I think he was -- I was trying to come in and he was there.
> [The State]: You were trying to come in and he was there?
> [Salas]: The apartment.
> . . . .
> [The State]: So you say you have the knife. He's keeping you from coming back into the house. Why don't you just leave the balcony then?
> [Salas]: It didn't occur to me at the time.
> [The State]: *So he doesn't want you in his house at that point?*
> [Salas]: *Correct.*

(Emphasis added.)

According to Salas, "the next thing I know, we're inside." Once they were inside, Salas kicked Lopez, punched Lopez, and "push[ed] the knife in his direction." Lopez did not get control of the knife. The struggle persisted into the

dining room and kitchen. According to Salas, he knocked Lopez to the floor and noticed blood coming from Lopez's neck. He stated that he "applied pressure" to stop the bleeding. Salas saw "blood everywhere." Lopez was not moving.

Antonia's recollection differed from Salas's testimony. She testified that, when Salas and Lopez were inside of the apartment, she pulled Lopez away from Salas. She then leaned Lopez against the kitchen bar. Salas went to the front door and put on his backpack and shoes. Antonia did not notice any injuries to Salas.

According to Antonia, Lopez then fell to the floor. Lopez pleaded, "Mother, help me, I'm dying." Salas then "grabbed something" from his backpack and "jumped on" Lopez. From Antonia's perspective, Salas was "cutting him" and "doing something to his neck." Antonia pulled on Salas's ears and "squeezed his nose really hard." Salas then "took off" and left the apartment via the balcony. Antonia locked the balcony door.

Looking back at Lopez, Antonia knew that he was dead "because there was blood everywhere." Antonia left the apartment and asked several neighbors for help. Shortly thereafter, police officers arrived.

Lopez had extensive injuries. These included (1) four stab wounds on the side of his chest, (2) two stab wounds on his upper chest, (3) several incise wounds on the neck, one of which went "into the yellow, fatty tissue beneath the skin" and two of which "severed the external left jugular vein," and (4) an incise wound on the chin that went "to the surface of the . . . jaw bone."

Salas spent the night in the woods, where he remained for approximately 14 hours. A police-led dog track of Salas was unable to locate him. The next day, Salas returned to his apartment. Once there, he showered and treated a wound on his arm. He began to gather his belonging to "go to the mountains." However, a neighbor telephoned the police to report that Salas was at the apartment. Police officers soon arrived at the apartment and arrested Salas.

The State charged Salas with murder in the first degree with a deadly weapon, "to wit: knife." The case proceeded to a jury trial. Ultimately, the jury did not reach a verdict on the charge of murder in the first degree, but did find Salas guilty of murder in the second degree with a deadly weapon. On appeal, we reversed on the bases of prosecutorial misconduct and ineffective assistance of counsel. State v. Salas, 1 Wn. App. 2d 931, 953, 408 P.3d 383 (2018).

On remand, the case proceeded to trial again. Again, the jury did not reach a verdict on the charge of murder in the first degree, but found Salas guilty instead of murder in the second degree with a deadly weapon. The trial court imposed a sentence of 244 months of incarceration.

Salas appeals.

II

Salas presented a defense of self-defense. On appeal, he asserts that the trial court erred by not providing a no-duty-to-retreat instruction sua sponte. According to Salas, the absence of a no-duty-to-retreat instruction gives rise to a manifest error affecting a constitutional right. We disagree.

Salas did not request a no-duty-to-retreat instruction at trial. Nevertheless, he claims that he was entitled to the following instruction:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he] [she] is being attacked to stand [his] [her] ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.08 (4th ed. 2016).

Salas's claim of error fails for three reasons. First, we have already held that error cannot be assigned to a trial court for not giving an unrequested no-duty-to-retreat instruction:

> [Defendant] . . . argues that the court erred in failing to instruct the jury that he had no duty to retreat. But, he never requested that instruction and does not cite any case that would require the trial court to give it *sua sponte*. In fact, the Washington Supreme Court has held that when a party fails to request an instruction, it "cannot predicate error on its omission."

State v. Lucero, 152 Wn. App. 287, 292, 217 P.3d 369 (2009) (quoting McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963)), rev'd on other grounds, 168 Wn.2d 785, 230 P.3d 165 (2010).

Second, Salas unconvincingly asserts that he was entitled to a no-duty-to-retreat instruction because, without it, the law of self-defense was not manifestly apparent to the average juror. In support of this argument, he cites to State v. Ackerman, 11 Wn. App. 2d 304, 309, 453 P.3d 749 (2019), in which we explained that a "trial court erred by giving instructions that failed to make the self-defense standard manifestly apparent to the average juror." However, in Ackerman, we stated that "[w]e analyze unpreserved claims of error regarding

self-defense instructions on a case-by-case basis to determine whether they constitute a manifest constitutional error." 11 Wn. App. 2d at 309. As such, here we must analyze the instructions that were actually given by the trial court in order to determine whether those instructions made the relevant legal standard manifestly apparent. Ackerman, 11 Wn. App. 2d at 312. Contrary to Salas's contention, Ackerman does not stand for the proposition that a defendant is always entitled to assign error to a self-defense instruction that he or she did not request.

Finally, based on the evidence in the record and the applicable legal standard, a no-duty-to-retreat instruction was not warranted in this case. Generally, we will not consider an issue raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). When determining whether an error is manifest,

> [i]t is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009).

Here, the evidence in the record did not support a no-duty-to-retreat instruction. Indeed, Salas testified that he knew that he no longer had permission to remain at Lopez's apartment prior to killing Lopez:

> Q. And at the point whereby [Lopez]'s got his hand up against the wall, was trying to prevent you from pulling him onto the balcony, and why are you doing that? He's trying to get away from you.
> A. I don't believe he was doing that. I think he was -- I was trying to come in and he was there.[1]
> Q. You were trying to come in and he was there?
> A. The apartment.
> . . . .
> Q. So you say you have the knife. He's keeping you from coming back into the house. Why don't you just leave the balcony then?
> A. It didn't occur to me at the time.
> Q. *So he doesn't want you in his house at that point?*
> A. *Correct.*

(Emphasis added.)

In other words, even viewed in the light most favorable to Salas, his own testimony demonstrates that his license to remain at Lopez's apartment had been revoked and that he was aware of this.[2] Yet "[a] defendant is entitled to a no duty to retreat instruction when evidence supports a finding that the defendant was assaulted in a place where the defendant was *lawfully entitled to remain*." State v. Williams, 81 Wn. App. 738, 742, 916 P.2d 445 (1996) (emphasis added). Given the evidence in the record and the applicable legal standard, the trial court could not have reasonably given a no-duty-to-retreat

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[1] On direct examination, Salas testified, "I'm trying to go in, and pushing him, and he's pushing back, and the next thing I know, we're inside."

[2] See Conaway v. Time Oil Co., 34 Wn.2d 884, 893, 210 P.2d 1012 (1949) ("A license authorizes the doing of some act or series of acts on the land of another . . . and justifies the doing of an act or acts which would otherwise be a trespass."); Proctor v. Huntington, 146 Wn. App. 836, 852, 192 P.3d 958 (2008) ("[A] license is revocable . . . and created by the licensor's oral, written, or implied consent."), aff'd, 169 Wn.2d 491, 238 P.3d 1117 (2010).

instruction. Salas fails to establish that he was prejudiced. Thus, there is no manifest error.

Accordingly, Salas's assignment of error fails.

III

Salas next contends that the trial court erred by admitting evidence that he cut his own face approximately two months before the incident in dispute. This is so, he asserts, because the evidence should have been excluded pursuant to ER 404(b). We disagree.

We review the trial court's evidentiary decisions for abuse of discretion. State v. Bajardi, 3 Wn. App. 2d 726, 729, 418 P.3d 164 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

As a general rule, "[a]ll relevant evidence is admissible." ER 402. ER 404(b) provides an exception to this general rule:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As a noted scholar has explicated, "Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a dangerous person or a 'criminal type' and is thus likely to have committed the crime for which he or she is presently charged." 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE

§ 404:7 (2019 ed.). The policy behind this rule is that, "[b]ecause of the State's burden of proof in a criminal case, the law is uncomfortable with the notion of once a criminal, always a criminal." 5D TEGLAND, supra, § 404:8. Indeed, we have previously explained that "ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime." State v. Cook, 131 Wn. App. 845, 849, 129 P.3d 834 (2006), abrogated on other grounds by State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).

Although the traditional rule is primarily concerned with evidence of the defendant's prior *misconduct*, our Supreme Court has determined that the "acts" contemplated by ER 404(b) are not necessarily limited to misconduct. Instead, the "'acts' inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion." State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

In that case, "the trial court permitted the State to introduce the testimony of [a police officer] that . . . [the officer] often saw [the defendant] and [the co-defendant] together . . . and that [the defendant] would usually carry conversations with the officer while [the co-defendant] stood back or walked away." Everybodytalksabout, 145 Wn.2d at 462-63. The State then "relied upon that testimony to establish that [the defendant] was liable as an accomplice" to a murder. Everybodytalksabout, 145 Wn.2d at 465.

Our Supreme Court explained that the evidence of the defendant's prior acts was inadmissible propensity evidence under ER 404(b) because the

evidence was admitted to establish a trait of the defendant's character in order to prove that he acted in conformity with that trait of character in committing the crime charged:

> Although [the defendant's] prior "acts" about which the detective testified were not misconduct, unpopular or disgraceful, they were offered to show his qualities of leadership; that he acted in conformity with those qualities at the time [the victim] was killed; and he therefore somehow participated with [the co-defendant] in killing [the victim]. The evidence is inadmissible under ER 404(b).

Everybodytalksabout, 145 Wn.2d at 468.

It is well-established that the purpose of ER 404(b) is to prevent the introduction of evidence to establish the character of the defendant in order to prove that the defendant had a propensity to commit the crime charged or is otherwise a bad person. Indeed, in referring to Federal Rule of Evidence 404(b),[3] Judge Richard Posner explained:

> The aim of the rule is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry overmuch about the strength of the government's evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and the draftsmen did not try to list every possible other use.

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[3] "'Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance' in interpreting the state rule." Washburn v. City of Federal Way, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013) (quoting Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998)). Fed. R. Evid. 404(b) is analogous to ER 404(b):

> **Other Crimes, Wrongs, or Acts.**
>
> **(1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Thus, Washington courts have analyzed federal case law concerning Fed. R. Evid. 404(b) in order to interpret ER 404(b). See, e.g., State v. Arrendondo, 188 Wn.2d 244, 261, 394 P.3d 348 (2017); State v. Norlin, 134 Wn.2d 570, 580-81, 951 P.2d 1131 (1998); State v. Donald, 178 Wn. App. 250, 258-64, 316 P.3d 1081 (2013).

United States v. Taylor, 522 F.3d 731, 735-36 (7th Cir. 2008) (citation omitted).[4]

Here, the State elicited testimony from Salas that he had purposefully cut his own face with a knife approximately two months before killing Lopez:

Q. Okay. And this?
A. What about it?
Q. On your face.
A. Yes.
Q. That happened in August?
A. Yes.
Q. Did you do that to yourself?
A. I did.
Q. Why?

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[4] Other federal appellate courts are in agreement. Indeed, the Ninth Circuit Court of Appeals has opined:

> The Federal Rules of Evidence start from the proposition that "[a]ll relevant evidence is admissible." Fed. R. Evid. 402. Rule 404(b) makes an exception for "[e]vidence of other crimes, wrongs, or acts" where that evidence "prove[s] *only* criminal disposition." *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977). But we have held that Rule 404(b) is "one of inclusion," and if evidence of prior crimes bears on other relevant issues, 404(b) will not exclude it. *Id*.

United States v. Cruz-Garcia, 344 F.3d 951, 954 (9th Cir. 2003); see also United States v. Donovan, 984 F.2d 507, 512 (1st Cir. 1993) ("Rule 404(b) is a rule 'of inclusion which allows the introduction of evidence of other crimes, wrongs, or acts unless the evidence tends to only prove criminal disposition.'" (quoting United States v. Fields, 871 F.2d 188, 196 (1st Cir. 1989))); United States v. Dupree, 870 F.3d 62, 76 (2d Cir. 2017) ("Under our Circuit's 'inclusionary approach,' prior act evidence is admissible if offered 'for any purpose other than to show a defendant's criminal propensity.'" (internal quotation marks omitted) (quoting United States v. Mejia, 545 F.3d 179, 206 (2d Cir. 2008))); United States v. Green, 617 F.3d 233, 249 (3d Cir. 2010) ("[T]he purpose of Rule 404(b) is 'simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person'" and "'[*n*]*o other use* of prior crimes or other bad acts is forbidden by the rule'" (quoting Taylor, 522 F.3d at 735-36)); United States v. Siegel, 536 F.3d 306, 317 (4th Cir. 2008) ("'Rule 404(b) is viewed as an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove *only* criminal disposition.'" (quoting United States v. Young, 248 F.3d 260, 271 (4th Cir. 2001))); United States v. Johnson, 439 F.3d 884, 887 (8th Cir. 2006) ("Rule 404(b) is . . . 'a rule of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition.'" (quoting United States v. Simon, 767 F.2d 524, 526 (8th Cir. 1985))); United States v. Merritt, 961 F.3d 1105, 1111 (10th Cir. 2020) ("Rule 404(b) admits 'all evidence of other crimes or acts except that which tends to prove *only* criminal disposition.'" (quoting United States v. Brooks, 736 F.3d 921, 939 (10th Cir. 2013))).

The policy behind Fed. R. Evid. 404(b) is summarized within the advisory committee's notes:

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Johnson, 439 F.3d at 887 (quoting Fed. R. Evid. 404 advisory committee notes (1972)).

A. When we attempted that relationship kind of messed with me, and thinking to myself, you know, what are you doing? Or, dude, you should be, like, with a woman or something. I was drunk, all that's just running through my mind, and I end up cutting myself.
Q. With your knife?
A. With one of my knives, yes.
Q. Okay. So you were really conflicted about this?
A. Yes.
Q. And [Lopez], was he at the source of that?
A. He was the source, but not the cause. I make decisions.
Q. Okay. And you were so conflicted about it, so upset about it that you did that to your face?
A. I did.

During closing argument, the State referenced this testimony in order to persuade the jury to conclude that Salas was willing to cut his own arm after murdering Lopez in order to have evidence in support of his claim of self-defense:

> Maybe ask yourself, well, how did [the cut on Salas's arm] occur and who caused [it]? The defendant. The defendant cut his own arm. Just like he cut his own face.

In a pretrial ruling, the trial court determined that ER 404(b) did not preclude the evidence from being admitted:

> THE COURT: Actually, if you take a look at [Section] 404:7 in Tegland's, it . . . says [ER] 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a dangerous person or a criminal type and is thus likely to have committed the crime for which he or she is presently charged.
> . . . .
> THE COURT: In other words, the defendant's misconduct not charged in the present case is not admissible to demonstrate the defendant's general propensity for misconduct.
> So this does not appear to be the type of misconduct that's contemplated at all by the rule, and it's certainly not for purposes of showing his propensity to engage in criminal activity because it's not a criminal activity. And so that's what, at least, Tegland's references.

> At this point I'm going to deny the motion to exclude the evidence.

The trial court incorrectly determined that ER 404(b) applies only to misconduct. See Everybodytalksabout, 145 Wn.2d at 466. However, the trial court correctly determined that the evidence that Salas had cut his own face was not excluded by ER 404(b) because it was not being introduced for the purpose of showing his propensity to engage in criminal activity. See, e.g., Donovan, 984 F.2d at 512 ("Rule 404(b) is a rule 'of inclusion which allows the introduction of evidence of other crimes, wrongs, or acts unless the evidence tends to only prove criminal disposition.'" (quoting Fields, 871 F.2d at 196)).

Here, the evidence that Salas had previously cut his own face was not designed to prove Salas's character or that he had a propensity to commit the crime charged. Indeed, the State did not use this evidence to argue that, because Salas had cut his own face, he possessed a certain character trait—such as violence or aggression—and acted in conformity with that character trait by murdering Lopez. Instead, the State proffered the evidence to show that Salas was willing and mentally capable of inflicting pain upon himself *after* he had already killed Lopez.

This evidence was properly used to rebut the natural presumption that people ordinarily do not willingly inflict pain upon themselves. In support of his self-defense theory, Salas argued that Lopez had inflicted the cut on his arm. A juror might naturally believe that a serious knife wound on an arm would be caused by the other person involved, not by the person who suffered the wound. However, evidence of Salas's willingness to inflict a knife wound on himself gave

a more complete picture of the situation. Coupled with the 14-hour period during which he disappeared and after which he possessed the wound, the jury was faced with a reasonable factual alternative to Salas's self-defense narrative. Accordingly, ER 404(b) did not preclude the admission of the evidence.

IV

Salas next asserts that the trial court erred by admitting testimony regarding dog tracking. According to Salas, this testimony was inadmissible because it was irrelevant, failed to satisfy certain foundational requirements, and violated a pretrial ruling regarding the disclosure of expert testimony. We disagree.

Again, we review the admission of evidence by a trial court for abuse of discretion. State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). However, on appeal, a party may not advance a claim of evidentiary error that was not properly preserved at trial. State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." Powell, 166 Wn.2d at 82. "The appellant may assign error in the appellate court only on the specific ground of the evidentiary objection made at trial." State v. Henson, 11 Wn. App. 2d 97, 102, 451 P.3d 1127 (2019) (citing Powell, 166 Wn.2d at 83). Indeed, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike is made, stating the specific ground of objection." ER 103(a)(1).

During the trial, Detective Ted Betts, a former "accredited K-9 deputy," testified generally about dog tracking. He did not testify about the particular dog track that was performed during the investigation of this case. When Detective Betts was asked about the "environmental factors" that a K-9 detects during a dog track, Salas objected on the ground of relevancy:

> Q. Sure. Are there environmental factors -- first off, what does a K-9 detect when you're doing a K-9 track?
> [DEFENSE COUSNEL]: I guess I'm going to object to relevance at this point, Your Honor.
> THE COURT: Overruled on that basis.

Detective Betts then described a K-9's capability to detect scents as well as certain environmental factors that may have an impact on that ability. On appeal, although Salas did not interpose an objection at trial to the following testimony, he asserts that it was also irrelevant:

> Q. And, Detective, one last question about K-9 tracking. If a person were actively bleeding as they left the scene of an incident, how might that affect a K-9's ability to track that person?
> A. Oh, I've experienced that, where a person who's bleeding heavily, especially, it's essentially a pretty easy track because that blood is -- you know, we've heard the term blood trail, it's a real thing. When the blood is being dropped on the ground, especially if there's a lot of blood being dropped on the ground, the dog is picking that up very quickly. And the dog works very quickly through a track of that nature because that scent is much more enhanced than even sweat or skin cells, for instance. So the blood is going to be picked up very quickly by a dog.

The trial court did not err by overruling Salas's relevancy objection. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to

admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Detective Betts's testimony was relevant because it provided an explanation as to why the attempted dog track of Salas may have been unsuccessful in locating him. Indeed, during closing argument, Salas's defense counsel argued that the individuals who investigated the murder did "some bad police work." Detective Betts's testimony provided an explanation, aside from there being a sloppy police investigation, as to why a dog track may not result in the perpetrator being found. For example, Detective Betts testified that, when an individual is "bleeding heavily" "it's essentially a pretty easy track." According to Detective Betts, "[w]hen the blood is being dropped on the ground, especially if there's a lot of blood being dropped on the ground, the dog is picking that up very quickly." By contrast, Detective Betts testified, "[s]mall amounts [of blood] . . . are going to be picked up with less ease than larger amounts, but it still gets picked up." This testimony was material to an explanation of why the investigation of Salas may have initially been unsuccessful in locating him. Thus, the trial court did not err by overruling Salas's relevancy objection.[5]

Salas contends that Detective Betts's testimony was not relevant under our Supreme Court's decision in State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007). According to Salas, the Lord decision requires that, for "dog-tracking evidence" to be relevant, (1) the individual who conducted the dog track in question must testify, and (2) that individual must also testify that the scent in

[5] Similarly, the testimony that came in without objection does not provide a basis for appellate relief.

question originated from the date that the crime occurred. He is wrong. In Lord, the court held that a trial court did not abuse its discretion by excluding as irrelevant testimony by a dog handler when "[t]he dog handler could not narrow the date of the scent trail followed by his dogs beyond a two week window." 161 Wn.2d at 294. The court explained that the victim "had been to the [area in question] many times during that period, and the dog handler could not definitively testify that the track his dog followed was made on the day that [the victim] disappeared." Lord, 161 Wn.2d at 295. Because the dog handler could not "express an opinion to a reasonable degree of probability, . . . [the handler's] opinion [did] not make [any] material issue more or less likely." Lord, 161 Wn.2d at 295 n.16.

Lord did not announce a requirement that, for *any* testimony concerning dog-tracking to be admissible, the witness must have actually conducted a dog track in relation to the case. Rather, it provided that, when such an individual testifies about a scent detected by a tracking dog, the witness must express an opinion within a reasonable degree of probability as to when the scent followed was originated, particularly when other evidence indicates that the scent may have been left at the scene on another date. Lord, 161 Wn.2d at 295.

Detective Betts's testimony was materially distinguishable. Rather than explain how a tracking dog located Salas, his purpose in testifying was to set forth reasons why that had not occurred. Such testimony did not require the same predicate testimony.

Salas next asserts that Detective Betts's testimony was not relevant because the State did not satisfy the foundational requirements for dog-tracking evidence set forth in State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983). Not so. In Loucks, our Supreme Court explained that, in order for evidence that is derived from a dog track to be admitted, the following foundational requirements must be satisfied:

> "(1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow."

98 Wn.2d at 566 (quoting State v. Socolof, 28 Wn. App. 407, 411, 623 P.2d 733 (1981)).

The Loucks opinion is of no aid to Salas. Salas did not object to Detective Betts's testimony on the specific ground of lack of foundation. Thus, his assignment of error is waived. See Henson, 11 Wn. App. 2d at 102; ER 101(a)(1); RAP 2.5(a). Moreover, even if Salas had objected on the ground of foundation, his objection would have been correctly overruled. The foundational requirements described in Loucks apply when a dog handler testifies about evidence that results from an actual dog track. See 98 Wn.2d at 564 (dog-tracking evidence in question was "evidence provided by police dog Tally of the Seattle Police Department's canine unit"). These requirements do not apply when a witness testifies generally about dog tracking.[6]

[6] Salas also asserts that "dog-tracking evidence" requires the trial court to provide a cautionary instruction when requested by the defense. See State v. Wagner, 36 Wn. App. 286,

Finally, Salas contends that the trial court erred by admitting Detective Betts's testimony because the testimony violated a pretrial ruling. Based on a pretrial agreement between the parties, the trial court entered a ruling, which—without naming particular witnesses—"[e]xclude[d] expert witness or expert testimony not previously disclosed to the defense." Salas avers that, because Detective Betts was not identified as an expert witness, no objection was required on his part in order to preserve the claim of error. However, in order to preserve the claim of error on appeal, Salas must have raised an objection that would have provided the trial court "the opportunity to correct the error." Powell, 166 Wn.2d at 82. That did not happen here. Indeed, the trial court was not called on to determine whether Detective Betts's proposed testimony fell within the pretrial ruling. Thus, the claim of error was waived. RAP 2.5(a).

The trial court did not err by admitting Detective Betts's testimony.

V

Salas next contends that the prosecutor engaged in misconduct by eliciting "misleading" testimony from Detective Betts and using this testimony to make a "false" argument to the jury. Salas claims that the prosecutor's asserted misconduct deprived him of his due process right to a fair trial. We disagree.

The United States and Washington Constitutions guarantee persons accused of a crime the right to a fair trial. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, §§ 3, 22. "We review alleged due process violations de

287-88, 673 P.2d 638 (1983). Even if Salas had requested a cautionary instruction, he would not have been entitled to such an instruction. Indeed, Detective Betts did not testify about any evidence derived from the tracking dog that was used during the investigation. Rather, he testified generally about dog tracking.

novo." State v. Seward, 196 Wn. App. 579, 584, 384 P.3d 620 (2016). "A defendant arguing that prosecutorial misconduct violated his or her right to a fair trial has the burden of showing the prosecutor's conduct was both improper and prejudicial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015).

It is well established that a prosecutor "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269. Furthermore, "when it should be obvious to the Government that [a] witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury." United States v. Harris, 498 F.2d 1164, 1169 (3d Cir. 1974). "'Mere inconsistency' between witnesses' testimony is not necessarily perjury, and not every contradiction is material." United States v. Martin, 59 F.3d 767, 770 (8th Cir. 1995) (quoting United States v. Nelson, 970 F.2d 439, 443 (8th Cir. 1992)). A new trial is required if the uncorrected false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." Napue, 360 U.S. at 271.

Salas asserts that the prosecutor violated his due process right to a fair trial by stating the following during closing argument:

> What's also inconsistent is the K-9 track. The K-9 unsuccessfully tracked the defendant, didn't actually track him. What did Detective Betts tell about a dog track? Someone, an active bleeder, super easy to track. Literally following a trail of

> blood. It's inconsistent. Those injuries didn't occur there and they didn't occur at the hands of [Lopez].

Salas concedes that "this argument appears to be supported by the evidence." Indeed, Detective Betts testified that "it's essentially a pretty easy track" when the person being tracked is "bleeding heavily." Moreover, Salas testified that, as he was leaving Lopez's apartment, Salas was "bleeding a lot" and he did not wrap up his wound until he returned to his apartment 14 hours later. Throughout the night, Salas slept in "the woods," where he remained for approximately 14 hours. However, the dog track did not result in Salas being located. In the State's framing of the evidence, the tracking dog's failure to locate Salas was inconsistent with Salas suffering the knife cut at the hand of Lopez.

Nevertheless, Salas contends that, in light of expert testimony that was elicited during the first trial, but not admitted at the second trial, the prosecutor's argument was "false and misleading." According to Salas, the "prosecutor deliberately elicited misleading expert testimony in order to support an argument to the jury that the prosecutor knew to be false." The case law and record do not support Salas's contention.

First, we note that "the State [was] free to present new evidence at retrial." State v. McKee, 193 Wn.2d 271, 278, 438 P.3d 528 (2019). Thus, the State was free to present, and argue reasonable inferences from, Detective Betts's testimony. See State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d (2011) ("In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence.").

Second, the prosecutor's argument was neither false nor misleading in light of the expert testimony at the first trial.[7] During the first trial, Deputy Matthew Boice, a dog handler, testified about dog tracks that he had conducted near Lopez's apartment. According to his testimony, Deputy Boice initiated a dog track at Lopez's apartment building where he observed "a bloody handprint on the side of the building which kind of ran downward" and "blood droplets" that were located "underneath the building." Deputy Boice also noticed that "there were foot impressions in the ground." The police dog, Kilo, detected a scent. Kilo then led Deputy Boice to building 18 of the apartment complex.[8] Deputy Boice and Kilo circled the exterior of building 18 but "the track ended at Building 18" and they "did not locate a specific person." Deputy Boice then "ran [Kilo] around the entire exterior of [the] whole complex . . . trying to locate where [the] scent went." Kilo "did not give any indications." This led Deputy Boice to conclude that "whoever [they] were tracking either went into one of the apartments inside Building 18 or . . . got picked up at a vehicle from that general area."

Deputy Boice also testified that, after Kilo had tracked the scent to building 18, he and Kilo were "pulled off [that] track" in order to "look at some other location" "on the west side of the complex." Deputy Boice commanded Kilo to look for the same scent at that location and, over the course of an hour to an

[7] The testimony elicited during the first trial is available to us but is not formally part of the record of this case. See, e.g., State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977) ("We may not speculate upon the existence of facts that do not appear in the record."). However, because the State does not contest the propriety of our consideration of the first-trial testimony, we will consider it in resolving this claim.

[8] Salas's apartment was located inside building 18. Lopez's apartment was located inside building 13.

hour and a half, Kilo did not detect the scent on the west side of the apartment complex.

Deputy Boice and Kilo then returned to building 18. Upon their return, Deputy Boice noticed that the scene around building 18 had become contaminated. He determined that there were "scents of dozens of other people, weather, wind, other animals, [and] cars." At that moment, according to Deputy Boice, "it would [not] be realistic for [Kilo] . . . [or] any other dog to re-engage that exact same track."

Salas asserts that Deputy Boice's testimony established that "the failure of the track was not because Mr. Salas was not bleeding heavily, but because of an error by the police in removing the dog from the track and the conditions of the area." However, Deputy Boice's testimony did not conclusively establish that Kilo was unable to locate Salas for either of those reasons. Rather, Deputy Boice's testimony was entirely consistent with the prosecutor's argument that the dog track was unsuccessful because Salas was not actively bleeding. Indeed, Kilo was able to track the scent only from the exterior of Lopez's apartment to building 18. Kilo was not able to track the scent *anywhere else* within the apartment complex, even though Deputy Boice "ran him around the entire exterior of [the] whole complex." Yet Salas testified that, after he departed from Lopez's apartment, he was "bleeding a lot" and did not return to his apartment until 14 hours later. Throughout the night, Salas slept in "the woods," where he remained for approximately 14 hours. Salas stated that he did not wrap up his wound until he returned to his apartment.

Despite the fact that Salas claims to have been "bleeding a lot" and that he fled to "the woods," Kilo did not pick up on Salas's scent anywhere surrounding the exterior of the apartment complex. Thus, the prosecutor's argument in the second trial was neither false nor misleading in light of Deputy Boice's testimony in the first trial.

Additionally, case law does not support Salas's contention that the presentation of Detective Betts's testimony violated his right to due process. Indeed, Salas does not assert that Detective Betts's testimony was false. See Miller v. Pate, 386 U.S. 1, 7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."). Rather, Salas contends that the testimony was "misleading" in light of Deputy Boice's testimony in the first trial.

In support of this contention, Salas cites to a Michigan appellate court's decision in People v. Smith, 498 Mich. 466, 870 N.W.2d (2015). In that case, a witness "had been compensated for his assistance in a [law enforcement] inquiry into [the victim]'s murder and a suspected criminal enterprise involving the defendant." Smith, 498 Mich. at 471. However, the witness testified that "he was not paid for his cooperation in relation to 'this case,' i.e., the *prosecution* of the defendant for [the victim]'s murder." Smith, 498 Mich. at 472 (emphasis added). Knowing that the witness had been compensated for assisting in the criminal investigation that regarded the case, the prosecutor, in an argument to the jury, "cement[ed] the false notion that [the witness] had only been paid for his

cooperation in *other cases*." Smith, 498 Mich. at 474. The court explained that "[t]he overall impression conveyed [by the testimony] was false" and that "[i]nstead of rectifying this false impression . . . the prosecutor capitalized on and exploited it." Smith, 498 Mich. at 478. Thus, the court held, the prosecutor violated the "duty to correct false testimony." Smith, 498 Mich. at 480.

No such thing happened in Salas's second trial. As already explained, Deputy Boice's testimony in the first trial was not contrary to the State's argument in the second trial that the dog track did not successfully locate Salas because Salas was not bleeding heavily. Detective Betts's testimony did not convey a false impression. The testimony was not misused by the prosecutor in closing argument.

Salas's claim of error fails.[9]

VI

Salas finally asserts that the trial court mistakenly ordered, as a condition of community custody, that he pay supervision fees. We agree.

RCW 9.94A.703(2) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . (d) Pay supervision fees as determined by the department." Because "the supervision fees are waivable by the trial court they are discretionary [legal financial obligations]." State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020).

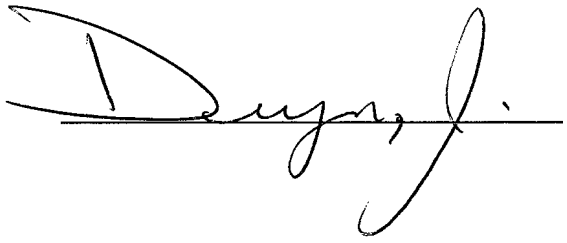
[9] Salas also asserts that cumulative error deprived him of a fair trial. "The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant a fair trial." State v. Jackson, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). Because no trial errors occurred, there was no cumulative error.

At sentencing, the court found Salas to be indigent, and stated:

> Since Mr. Salas is incarcerated, I'll have him pay a minimum of $10 per month on the financial obligations.
> I'll waive everything except for the $500 victim penalty assessment, the $100 biological sample fee, and if there's restitution.

The trial court did not mention supervision fees. However, the judgment and sentence signed by the judge required Salas to "pay supervision fees as determined by [the Department of Corrections]." Pursuant to Dillon, this requirement must be eliminated on remand.

The conviction is affirmed. The judgment is reversed and remanded to the trial court to eliminate the requirement of payment of supervision fees.



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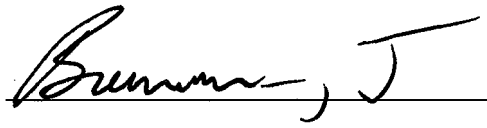

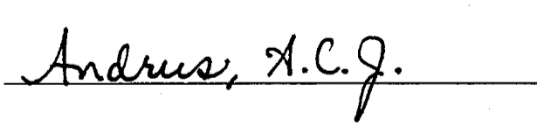

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