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I. INTRODUCTION

The appellant was charged by information with assault in the second degree for an incident at Kesler's Bar and Grill where he severely beat another man. The appellant admitted the assault, but claimed he had acted in self-defense. The appellant proceeded to jury trial on March 17, 2009, before the Honorable Judge James Stonier. On March 18, 2009, the jury returned a guilty verdict. The appellant was subsequently sentenced to serve seven months in the Cowlitz County jail. The instant appeal followed.

II. STATEMENT OF THE CASE

a. Trial Testimony

On September 13, 2008, a gentleman by the name of Phillip Bruechert went out for a night on the town with a female friend named Elizabeth Neves. Mr. Bruechert and Ms. Neves had once been engaged, but the engagement was broken off sometime prior. Nonetheless, the two remained on friendly terms. The evening of the 13th, Mr. Bruechert and Ms. Neves met for dinner in downtown Longview, after dinner Ms. Neves asked Mr. Bruechert if he would like to go dancing at Kesler's Bar and Grill. He agreed, and the two arrived at the club around eight o'clock that night. RP 65-66.

At Kesler's, Mr. Bruechert drank two beers. Initially, everything appeared to be going well, Mr. Bruechert and Ms. Neves were getting along well. After about an hour, Ms. Neves called some other people and asked them to come out to Kesler's. Shortly after the call, the appellant and two other people arrived at the bar. RP 68-69. The appellant and Mr. Bruechert had never met before that evening. As soon as the appellant arrived at the bar, he began glaring at Mr. Bruechert and flirting with Ms. Neves. RP 70-71. Mr. Bruechert was displeased with this turn of events, but did not confront or threaten the appellant, as the appellant was substantially larger than him.¹ RP 72.

After about twenty-five minutes, Mr. Bruechert asked Ms. Neves if she wanted to leave with him. Ms. Neves declined this request and told Mr. Bruechert he "needed to go." Mr. Bruechert then went out the rear entrance to the bar. RP 73-74. Though he initially intended to leave immediately, Mr. Bruechert ran into another female acquaintance named Cassandra Yuman in the parking lot behind Kesler's. He then sat down on the curb to speak with Ms. Yuman. RP 74-75.

While Mr. Bruechert was sitting on the curb smoking, the appellant and Ms. Neves came into the parking lot. The appellant approached Mr. Bruechert and stood over him glaring. Mr. Bruechert and the appellant

¹ Mr. Bruechert is 5'8", 180 lbs. The appellant is 6'3", 240 lbs. RP 126.

then engaged in a somewhat tense conversation, however there were no threats or profanities exchanged. RP 76-78. Mr. Bruechert had no memory of what happened next, as he was knocked unconscious by the appellant. RP 79. However, he suffered a broken jaw and facial fractures as a result of the beating. In addition, Mr. Bruechert sustained facial scarring, likely as a result of his head striking the curb. RP 81-82, RP 139-147.

The owner of Kesler's, Leo Kesler, was in the rear parking lot when the assault occurred. Mr. Kesler was speaking to one of his bouncers, Rudy Lopez, and was facing the back entrance to the bar. RP 30. Mr. Lopez appeared to see something happening behind Mr. Kesler, causing Kesler to turn around. Mr. Kesler then saw the appellant "clocking" Mr. Bruechert very hard in the head. RP 33-34. Mr. Kesler could tell that Mr. Bruechert had already been hit once and that he was "staggering." RP 41. The appellant's sudden violence surprised Mr. Kesler, as he had not heard any argument or dispute leading up to the assault. RP 36-37.

Rudy Lopez, the bouncer at Kesler's, also witnessed the appellant assault Mr. Bruechert. Mr. Lopez was watching the crowd in the rear parking lot. RP 44. Mr. Lopez noticed Mr. Bruechert sitting on the curb quietly smoking a cigarette, and also saw the appellant standing near him. RP 48-49. Mr. Lopez did not hear any argument, yelling, or threats,

exchanged between the appellant and Mr. Bruechert, nor did he see Mr. Bruechert act aggressively in anyway. RP 50. Mr. Lopez watched Mr. Bruechert stand up from the curb, at which point the appellant punched him in the face with a closed fist. RP 52. Mr. Bruechert was knocked down and tried to get back up. When Mr. Bruechert was “three-quarters” of the way back on his feet, the appellant punched Mr. Bruechert a second time in head with a closed fist. RP 53. Mr. Lopez then tackled the appellant and held him on the ground until Mr. Kesler was able to get the appellant’s name and information. RP 54-55.

Ms. Cassandra Yuman, an acquaintance of Mr. Bruechert, also observed the appellant attack him. Ms. Yuman was sitting on the curb smoking with Mr. Bruechert when the appellant approached. RP 96-98. Ms. Yuman did not hear any argument or threats exchanged between the two men, and never saw Mr. Bruechert act aggressively towards the appellant. RP 98-99. Instead, she saw the appellant punch Mr. Bruechert in the face, knocking him to the ground. RP 100. Ms. Yuman then tried to get out of the way, and did not see if the appellant struck Mr. Bruechert a second time. She did, however, see the appellant “go after” Mr. Bruechert after he was knocked down. RP 100-101.

The appellant then called Ms. Neves to testify on his behalf. She claimed on direct examination that Mr. Bruechert started the fight by

trying to punch the appellant. RP 156. On cross-examination, Ms. Neves admitted that she only remembered “bits and pieces” of the night. RP 159. Ms. Neves also stated that she “wasn’t the best witness” and that the bouncers and “the girl on the curb” (Cassandra Yuman) had a better view of what happened. RP 164-165. Ms. Neves account was later impeached with prior inconsistent statements she had made to the police and a private investigator hired by the appellant. RP 210-214. Ms. Neves had previously told these witnesses that she was too drunk to remember what happened and had only “heard” that Mr. Bruechert swung first. Id.

Finally, the appellant took the witness stand. He claimed that Mr. Bruechert had been glaring at him inside the bar, and that he ran into Mr. Bruechert in the rear parking lot. RP 178-179. The appellant claimed Mr. Bruechert was angry and hostile towards him and an argument erupted. The appellant further claimed that “F-bombs” were being exchanged between the two men. RP 186. Mr. Bruechert then swung at the appellant but missed. The appellant then claimed he punched Mr. Bruechert, knocking him down, but that Mr. Bruechert “popped up” again so he punched Mr. Bruechert a second time. RP 180-181.

b. Procedural History.

The State agrees with the procedural history as stated by the appellant.

III. ISSUES PRESENTED

1. Did the Trial Court Violate the Appellant's Right to a Speedy Trial Under CrR 3.3?
2. Did the Trial Court Improperly Instruct the Jury on the Issue of Self-Defense?

IV. SHORT ANSWERS

1. No.
2. No.

V. ARGUMENT

I. **The Appellant's Trial Commenced within the Time Allowed by CrR 3.3.**

The appellant argues that the postponing of his trial date by one day violated his right to a speedy trial and therefore requires his conviction be dismissed with prejudice. The appellant had previously requested several continuances, and only objected to the final one day delay of his trial. Unfortunately for the appellant, his argument ignores the plain language of the speedy trial rule, CrR 3.3, and should be rejected by this Court.

CrR 3.3(b)(2) states that:

Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

- (i) 90 days after the commencement date specified in this rule, or
- (ii) the time specified in subsection (b)(5).

An appellate court reviews the application of CrR 3.3 to a particular case de novo as a question of law. State v. Hardesty, 110 Wn.App. 702, 706, 42 P.3d 450 (2002). This court also construes CrR 3.3 to, whenever possible, avoid unnecessary dismissal with prejudice. Hardesty, 110 Wn.App. at 706.

As the appellant was out of custody, the 90 day time period applies to his case, unless there was an excluded period under subsection (b)(5). The appellant was arraigned on October 1, 2008, at which time a trial date was set for December 15, 2008. CP 90. Prior to the first trial date, the appellant moved on November 19, 2008, for a continuance of the trial date and filed a written waiver of his right to a speedy trial. This waiver set a new commencement date of December 1, 2008, thus extending the allowable time for trial to February 28, 2009. CP 13-14. The trial court then set a second trial date of February 25, 2009. CP 91.

On February 19, 2009, the appellant again moved for a continuance of his trial date, asking the trial court to delay the trial until March 11, 2009. The trial court granted the appellant's request, and set a third trial date of March 11, 2009. CP 93. Under, CrR 3.3(e)(3), any delay granted due to a continuance request is excluded in computing the time remaining for trial. Thus, the appellant's continuance request extended the

time allowed for trial to March 11, 2009. Furthermore, CrR 3.3(b)(5) states that:

If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

Therefore, this provision further extended the appellant's time for trial by *at least* 30 days from March 11, 2009. State v. Lackey, 153 Wn.App. 791, 799, 223 P.3d 1215 (2009); State v. Saunders, 153 Wn.App. 209, 217, 220 P.3d 1238 (2009); State v. Flinn, 154 Wn.2d 193, fn. 1, 110 P.3d 748 (2005).

On March 5, 2009, the appellant appeared before the trial court, at which time the presiding judge set a fourth trial date of March 16, 2009. The appellant did not object to this date, instead stating that that trial date "works" and "would be a good date." RP 1-2. Again, on March 12, 2009, the appellant appeared in court. At that time, the State proposed a new trial date of March 17, 2009, due to issues with the availability of the State's witnesses, including medical doctors. RP 3-4. The trial court at that time also inquired of other cases set for trial, in an attempt to maximize the number of cases that could go to trial the following week. RP 5.

After hearing information regarding the other cases, the trial court postponed the appellant's trial by one day to March 17, 2009. At that time, the appellant objected to the one day postponement. However, the

appellant also erroneously claimed that he had objected to the prior continuance to March 16, 2009. RP 7-8. As conceded by appellate counsel, there was in fact no objection to the continuance to the 16th.

When the full provisions of CrR 3.3 are applied to the instant case, it is indisputable that the appellant's trial began within the time period allowed by the court rule. The appellant requested a continuance until March 11, 2009. Under CrR. 3.3(b)(5), this request allowed the appellant to be tried within at least 30 days of March 11, 2009. See Lackey, 153 Wn.App. at 799. As the appellant's trial began on March 17, 2009, well within the time allowed, there is no basis for dismissal under CrR 3.3.

Moreover, even if the final trial date was somehow outside the limits of CrR 3.3(b), the trial court had the authority under CrR 3.3(g) to continue the trial date for up to 28 days beyond the allowed time. See Saunders, 153 Wn.App. at 220. As the delay that the appellant finds objectionable was only for one day, the cure period of CrR 3.3(g) would operate to prevent dismissal.

Finally, dismissal is not warranted in this case as the appellant has failed to argue or identify any prejudice from the one day postponement of the trial. The appellant was out of custody, and cannot be said to have been "oppressed" by the continuance. Similarly, there is no claim that the brief delay prevented him from calling witnesses or presenting his case.

Due to the lack of any discernable prejudice to the appellant, this Court should construe CrR 3.3 to avoid dismissal. Hardesty, 110 Wn.App. at 706.

II. The Trial Court Properly Instructed the Jury on the Law of Self-Defense.

The appellant claims that the trial court erred by giving Instruction No. 14, which defined the term “necessary” as it pertain to self-defense. The appellant intertwines this argument with a claim that the trial court should have given, *sua sponte*, a “no duty to retreat” instruction. However, the appellant did not object to the jury instruction at trial, and is therefore barred from raising this claim on appeal. Even if this Court should consider this issue, the appellant’s arguments are without merit.

a. The Appellant Failed to Preserve This Issue for Review.

At trial, the appellant did not object to the trial court’s jury instructions, and similarly did not request any additional instructions. RP 209. As he failed to object at trial, the appellant must now show the alleged instructional error was “manifest” as defined by RAP 2.5(a)(3). A manifest error must have practical and identifiable consequences apparent on the record that would have been reasonably obvious to the trial court. State . Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Whether an unpreserved claim of error in instructing the jury on the law of self-

defense is manifest is determined on a case-by-case basis. State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009) (abrogating prior rule that instructional error regarding self-defense was automatically manifest error).

Instructional errors that have been found to be manifest include: directing a verdict, shifting the burden of proof to the defendant, failure to define “beyond a reasonable doubt,” failure to require jury unanimity, and omitting an element of the crime charged. O'Hara, 167 Wn.2d at 103. Conversely, instructional errors that have not been found to be manifest include failure to instruct on lesser included offenses and failure to define individual terms. Id.; see also State v. Scott, 110 Wn.2d 682, 690-691, 757 P.2d 492 (1988). Applying this standard, the Supreme Court held that the failure to fully define the term “malice” for the purposes of self-defense was not a manifest error that could be asserted for the first time on appeal. O'Hara, 167 Wn.2d at 107-108. The Supreme Court explicitly rejected a claim that the failure to give this instruction relieved the State of its burden to prove an element of the crime. Id.

Here the appellant argues that the trial court's failure to spontaneously give a “no duty to retreat” instruction was manifest error. The appellant attempts to frame this error as relieving the State of its burden to prove the crime beyond a reasonable doubt, the same claim

explicitly rejected in O'Hara. Contrary to the appellant's arguments, the jury was correctly instructed on the law of self-defense.

Instruction No. 12 stated:

It is a defense to a charge of assault that the force used was lawful, as defined in this instruction. The use of force upon or toward the person of another is lawful when used by a person who reasonably believed that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State have not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 41. Considering this instruction, the appellant has failed to identify any "practical and identifiable" consequences that would have been so reasonably obvious to the trial court to require it to give a "no duty to retreat" instruction that was unrequested by the appellant. See Kirkman, 152 Wn.2d at 935. Indeed, the best evidence that this instruction was not necessary or desirable is trial counsel's failure to propose it. On this record, it cannot be said that the purported error was manifest and the Court should find the appellant waived this issue by failing to object before the trial court.

b. The Trial Court's Instructions Were Proper.

If this Court should reach the issue of whether a “no duty to retreat” instruction was required, it will quickly become apparent that neither the law nor the facts of the instant case necessitated such an instruction.

The appellant claims that the State implied that the appellant should have retreated rather than defended himself. The appellant complains that the State implied this duty to retreat in the portion of cross-examination found from RP 197-199. However, this claim does not survive a review of the trial record. Instead, the focus of the State's questions was to show that the appellant used excessive and unnecessary force, not that the appellant should have retreated or fled:

State: So, you punched him a second time?

Appellant: I did.

State: You could have just shoved him again, couldn't you have?

Appellant: I guess I could have.

State: You could have grabbed him and tried to wrap him up?

Appellant: I guess I could have.

State: He's – he's a – well, let's face it. He is smaller and he is not as strong as you, right?

Appellant: I don't know what his strength is.

State: But, he is smaller, right?

Appellant: Correct.

State: So, you could have shoved him, knocked him down but instead, the second time you hit him with all your strength.

Appellant: I never said I hit him with all my strength.

State: Well, you – you hit him a good –

Appellant: I swung at him.

State: You hit him a good blow.

Appellant: I hit him.

RP 198-199. This exchange contains no mention, implication, or even innuendo that the appellant should have retreated.

The appellant similarly claims that the State argued in rebuttal that the appellant should have retreated rather than used force. This claim again blatantly misconstrues the actual substance of the argument. The actual focus of the State's rebuttal was that, even if self-defense was justified, the appellant had used excessive force:

And, finally, I think we got the claim that the defendant strikes him and Phil pops right back up. Well, when you get hit with enough force to break your jaw, I don't think anybody is popping right back up. That doesn't make any sense. That's not what Rudy saw. That's not what Mr. Kesler saw. Because he didn't pop back up. At best, he staggers back. He is barely on his feet. He is reeling when the defendant hits him a second time. Hits him a

second time. It is not reasonable. It is not self-defense. And, even – even if for some reason you want to credit his version, you know, we will just – maybe Phil threw the first punch although really it is only the defendant saying that and he has an obvious reason to say that. Even – let’s – even if you want to think that Phil, against all the evidence, did throw the first punch, is what he did reasonable – is what the defendant says he did reasonable? Did he have to hit him? Did he have to punch him twice? Did he have to knock him down like that? Couldn’t he have just pushed him away? Couldn’t he have shoved him? Couldn’t he have done what Rudy Lopez did? Does Rudy Lopez come over here and deck him? Knock him out? Beat him up? No. Rudy tackles him. Rudy restrains him. What does he get? He gets a scrape on his elbow. Even if you want to think he was acting in self-defense, he still – you can’t use excessive force. He can’t crush a guy. He can’t destroy him when you could have just wrapped him up and could have done what Rudy did.

RP 256-258. As with the cross-examination of the appellant, this argument in no way suggested that the appellant had a duty to retreat before using force.

The appellant claims that retreat was somehow an issue in the case, but provides no citation to any section of the record that actual supports this argument. Similarly, the appellant argues that the trial court was required to spontaneously give a “no duty to retreat” instruction that the appellant did not request. Again, the appellant provides no authority to support this claim. An appellate court will not review issues lacking in any legal support. RAP 10.3(a)(5).

Significantly, the court in State v. Lucero, 152 Wn.App. 287, 217 P.3d 369 (2009), dealt with this exact issue. There, the defendant argued

on appeal that the trial court should have given a “no duty to retreat” instruction, but he had not requested this instruction at trial. The court rejected this claim, holding that there was no authority to require the trial court to give such an instruction absent the defendant’s request. Lucero, 152 Wn.App. at 292. The court also noted that when a party fails to request an instruction it “cannot predicate error on its omission.” Id.; citing McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963). This Court should follow Lucero and hold that the trial court was not required to give an instruction that neither party requested or offered.

Additionally, even where a defendant has requested a “no duty to retreat” instruction, it is not error to refuse this instruction if the facts of the case do not implicate retreat. In State v. Frazier, 55 Wn.App. 204, 777 P.2d 27 (1989), the defendant requested a “no duty to retreat” instruction but was denied by the trial court. The appellate court held this was not error:

Appellant's argument implies that a no-duty-to-retreat instruction is necessary in every case in which there is sufficient evidence to support a self-defense instruction. This court, however, recently declined to construe Allery so broadly. In State v. Thompson, 47 Wn.App. 1, 733 P.2d 584 (1987), the defendant was convicted of manslaughter and assault following a shooting incident. On appeal, the defendant assigned error to the trial court's refusal to give a no-duty-to-retreat instruction and to an instruction defining “necessary” as it pertained to the use of force. We distinguished Allery and rejected the defendant's claim that the trial court should have given a no-duty-to-retreat instruction. After

noting that the instruction in Allery was critical to the defendant's theory of "battered woman syndrome," Thompson at 6, 733 P.2d 584, we observed that neither side had raised the issue of retreat and that Thompson's own testimony was that he was actively retreating at the time of the shooting, rendering a no-duty-to-retreat instruction superfluous. Thompson.

Despite some difference in the facts, we find Thompson persuasive here. The primary issue below was the identity of the initial aggressor. As in Thompson, whether the defendant should have retreated was simply not an issue. In addition, the trial court's unchallenged self-defense instruction in the instant case implied that the defendant did not have a duty to retreat.

Frazier, 55 Wn.App. at 207-208. The instruction that the court found implied the defendant had no duty to retreat was identical to Instruction No. 12 in this case. Id. at fn. 1. Given this, the court held that there was no need to give a specific "no duty to retreat" instruction and that it was wholly speculative to believe the defendant was prejudiced by this omission. Id. at 208-209.

As in Frazier, there was no issue of retreat in this case. Despite the appellant's protestations, there was no evidence or argument that the appellant should have fled rather than used force against Mr. Bruechert. Instead, the actual issues in the case were who was the aggressor and whether the appellant had used excessive force. Given this, even if the appellant had requested a "no duty to retreat" instruction, the trial court could have properly denied his request. See also State v. Studd, 137

Wn.2d 553, 549, 973 P.2d 1049 (1999) (“no duty to retreat” instruction not required where facts of case did not implicate retreat.)

Finally, the jury instructions in this case, when read in their totality, properly briefed the jury on the law of self-defense. As noted in Frazier, Instruction No. 12 itself implies that there is no duty to retreat before using force to defend oneself. Also, Instruction No. 14, which the appellant complains of, expressly sets forth a subjective standard by requiring the jury to assess whether force was necessary “under the circumstances as they reasonably appeared to the actor at the time.” Jury instructions are sufficient if, when read as a whole, they properly inform the jury of the applicable law. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Here, the instructions properly set forth the law, and the appellant pressed his claims before the jury. Unfortunately for him, the jury rejected his arguments. Displeased with this outcome, the appellant now attempts to overturn the jury’s verdict by arguing, without any citation to authority, the trial court was required to *sua sponte* instruct the jury on an issue of no relevance to the case. This Court should similarly reject the appellant’s claims and uphold the verdict of the jury.

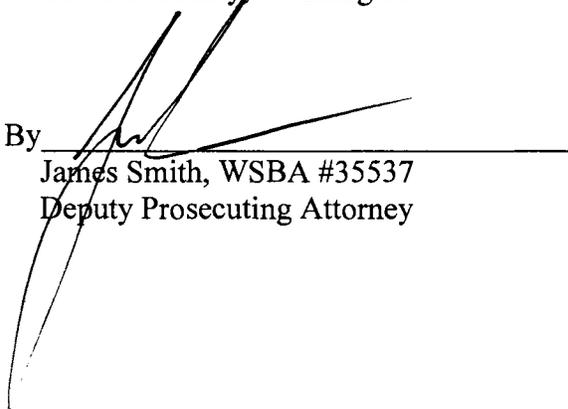
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests this Court deny the instant appeal. The appellant's trial commenced within the time allowed by CrR 3.3 and the jury was properly instructed on the issue of self-defense. The appellant's conviction should stand.

Respectfully submitted this 13th day of April, 2010.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 JAMES AARON WENNER,)
)
 Appellant.)
 _____)

NO. 39104-0-II
Cowlitz County No.
08-1-01085-3

CERTIFICATE OF
MAILING

BY [Signature]
DEPUTY

I, Michelle Sasser, certify and declare:

That on the 14th day of April, 2010, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, Brief of Respondent, addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 14th day of April, 2010.

[Signature]
Michelle Sasser