

NO. 44211-6-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KASEY FENTON,

Appellant.

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RESPONDENT'S BRIEF

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SUSAN I. BAUR  
Prosecuting Attorney  
JAMES B. SMITH/WSBA 35537  
Chief Deputy Prosecuting Attorney  
Representing Respondent

HALL OF JUSTICE  
312 SW FIRST  
KELSO, WA 98626  
(360) 577-3080

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## **I. INTRODUCTION**

The appellant was charged by information with two counts of assault in the first degree, stemming from an incident where he stabbed two men outside the Kelso McDonald's. At trial, the appellant admitted the assaults, but claimed he had acted in self-defense. The appellant proceeded to jury trial on October 23, 2012, before the Honorable Judge Marilyn Haan. On October 26, 2012, the jury returned guilty verdicts on both counts, along with special verdicts finding two deadly weapon enhancements. The instant appeal followed.

## **II. STATEMENT OF THE CASE**

### **a. Facts**

On the night of May 14, 2011, Justin Arthur and Larry McDonald went out for a night on the town in Kelso, Washington. Mr. Arthur works as a logger and Mr. McDonald in manufacturing. RP 133, 299. The two men have been good friends for several years, and decided to go out to have a few drinks and play videogames at a local bowling alley and bar. RP 134, 301. At the end of the evening, they left the bar and mingled near the rear entrance with a group of people. Mr. McDonald had called his girlfriend, who was going to pick them up. Outside, the appellant caught their attention, as he was "hollering" in the parking lot, shouting angry words and names at the group by the bar exit. RP 136-140, 307-308.

The two men saw the appellant push his wife to the ground, Mr. Arthur believed the appellant was also punching her. Mr. McDonald and Mr. Arthur ran over to intervene and became involved in a scuffle with the appellant. RP 140-142, 311. Mr. McDonald pushed the appellant away from this wife, knocking him to the ground. RP 314. The appellant then got back on his feet and prepared to swing on Mr. Arthur, who then punched the appellant in the face. RP 144-145. The men told the appellant they didn't want any more trouble, and tried to disengage. RP 146. Some other people in the parking lot broke up the fight, and Mr. Arthur and Mr. McDonald continuing walking to the nearby McDonald's. RP 147-148.

The two men reached the McDonald's, and were standing outside waiting to be picked up. RP 150. The appellant speed through the McDonald's drive-thru, and then circled around the building. RP 213-214. The appellant pulled up to the two men in his vehicle, a large pickup truck. The appellant began speaking to the two men, who walked closer to the truck to interact with him. RP 151-154, 320. When the two were within a few feet of the truck, the appellant lunged at Mr. McDonald and struck him with the knife. RP 323. Mr. McDonald suffered a minor stab wound to his chest. RP 325-326, 282-287. Mr. McDonald cried out "He's got a taser" to warn his friend, but the appellant quickly turned and thrust his knife into Mr. Arthur's abdomen. RP 156-157, 324.

Mr. Arthur felt severe pain, and watched as the appellant withdraw the blade of a long fillet knife from his body. RP 158. Mr. Arthur collapsed to the ground, and Mr. McDonald began banging on the door to McDonald's to get help eventually cracking the glass. RP 160, 328. Mr. Arthur lost consciousness, and was flown by helicopter to a trauma center where he was hospitalized for seven days. He suffered ongoing pain and physical limitations as a result of the stabbing. RP 161-163.

Jerry Moore, the manager of the bar, was working on the night of the incident. RP 49-50. Mr. Moore was sober that evening, and did not know either the appellant or Mr. Arthur or Mr. McDonald. Between midnight and one o'clock, Mr. Moore was closing up the bar when he was asked to come outside because of an altercation. RP 51-53. When Mr. Moore stepped outside, he found the appellant was angry and yelling threats at a group of men. RP 54. Though the appellant was very hostile and angry, the other men did not appear to be taking his threats seriously. RP 55. The appellant's wife was outside with him, and was attempting to get the appellant to leave. Mr. Moore observed the appellant pushing his wife away from him. RP 55.

Mr. Moore approached the appellant, who promptly threatened to assault him. Mr. Moore told the appellant he needed to leave or the police would be called. RP 56. Rather than leaving, the appellant continued to

angrily curse and yell at the crowd, boasting that he was richer and drove a better car. While this was happening, the appellant's wife continued to try to get him to back away, but the appellant repeatedly shoved her out of the way as he aggressively came at Mr. Moore and the group. RP 57-59. Eventually, the appellant and his wife walked into the parking lot. Mr. Moore thought the incident had ended, so he went back inside the bar. RP 60-64.

As the appellant and his wife walked away, he continued to be angry with the group of men at the bar exit. The appellant continued to attempt to go towards the men, and was pulled back by his wife. RP 62-64, 108-110. A man in the parking lot area, Eric Fielding, observed the appellant's wife run towards him and then fall to the ground. Mr. Fielding believed the appellant had flung his wife to the ground. RP 111. Mr. Fielding noticed that the appellant was angry, and his wife was attempting to calm him down. RP 115-116.

When the police arrived at the McDonald's, they found both Mr. Arthur and Mr. McDonald were injured and bleeding from stab wounds. RP 268-267. The appellant's wife was also present and was providing aid to the men. RP 269. The police learned the appellant had likely fled the scene, and went to a nearby hotel where he was staying. However, the police did not find the appellant at his hotel room. RP 370. Soon after, the

police learned that the appellant had actually fled to a location off Interstate 5. There, the police found the appellant's pickup truck parked on the shoulder of the road. The appellant was located in a wooded area further up the hillside and arrested. RP 372-373. The appellant's truck was later searched, and the fillet knife with a six inch blade used to stab Mr. Arthur and Mr. McDonald was found inside it. RP 377-380. DNA matching Mr. Arthur was found on the knife's blade. RP 540-556.

After his arrest, the appellant was interviewed by the police. Though intoxicated, the appellant was able to communicate and provide an account of what he claimed had occurred. RP 586. In the course of his recorded interview, the appellant claimed that he had been severely beaten in the parking lot behind the bar, and that after this beating he decided to drive to McDonald's to get breakfast. RP 593-594. At McDonald's, the appellant claimed he was further accosted by Mr. Arthur and Mr. McDonald, and that he "did not remember" stabbing the two men. RP 595-599.

**b. Jury Instructions**

At trial, the court instructed the jury on the law of self-defense. Instruction No. 20, based on WPIC 17.02, 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 towards the person of another is lawful when used by a person who

reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, 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 appear 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 has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charge.

RP 833.

Instruction No. 21, based on WPIC 17.04, stated:

A person is entitled to act on appearances in defending himself. If he believes in good faith and on reasonable grounds that he is actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

RP 834.

Instruction No. 22, based on WPIC 17.05, stated:

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 is being attacked to stand his ground and defend against such attack by the use of lawful force.

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.

RP 834.

In addition to these instructions, the State proposed a jury instruction based upon WPIC 16.05 and State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999), which read:

Self-defense is an act that must be necessary. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended. The right of self-defense does not permit action done in retaliation or revenge.

RP 834-835. The appellant objected to only the final sentence of the instruction, the portion drawn from Studd, 137 Wn.2d at 550. RP 804-807, appellant's brief at 7. The trial court overruled this objection, and gave this instruction was given to the jury as No. 23.

The trial court also instructed the jury, in Instruction No. 1, that it was not making any comment on the evidence in the case. Specifically, the jury was instructed that:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of the testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard this entirely.

RP 823-824.

### **III. ISSUES PRESENTED**

1. Did the Trial Court Instruct the Jury Improperly on the Law of Self-Defense?
2. Does Testimony Regarding the Content of Video or Photographic Evidence Require a New Trial?
3. Did the Trial Court Err by Imposing Certain Legal Financial Obligations?

### **IV. SHORT ANSWERS**

1. No.
2. No.
3. No.

### **V. ARGUMENT**

#### **I. 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. 23, based on WPIC 16.05 and Studd, 137 Wn.2d 533. However, the appellant only objected to a portion of this instruction at trial, and is therefore barred from raising a new argument on appeal. Even if this Court should consider this issue, the appellant's arguments are without merit as the trial court properly instructed the jury on the law of self-defense.

a. **The Appellant Failed to Preserve for Review Any Alleged Error for the First Sentence of Instruction No. 23.**

At trial, the appellant did not object to the first sentence of Instruction No. 23, which read “[s]elf-defense is an act that must be necessary”. The appellant only objected to the final sentence, “[t]he right of self-defense does not permit action done in retaliation or revenge.” RP 804-807, appellant’s brief at 7. Where a party fails to object, or attempts to raise a new issue on appeal, it well established law that “an appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); State v. Lyskoski, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). Despite this long standing rule, the appellant argues for the first time on appeal the initial sentence of Instruction No. 23 was an incorrect statement of the law. Appellant’s brief at 14-16.

The appellant claims that instructional errors may be raised for the first time on appeal, citing to State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009). However, Kyllo dealt with a claim of ineffective assistance by trial counsel for proposing faulty jury instructions on a claim of self-defense. 166 Wn.2d at 861-63. Subsequent to the Kyllo decision, the Washington Supreme Court decided State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), holding that instructional errors regarding self-defense, outside a

claim of ineffective assistance, were not automatically manifest errors that could be raised for the first time at appeal. Thus O'Hara, not Kyllo, controls the scope of this Court's review and the application of RAP 2.5(a)(3), allowing "manifest constitutional errors" to be raised for the first time on appeal.

The Supreme Court held in O'Hara that 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. 167 Wn.2d at 100-02. O'Hara abrogated the prior rule set forth in State v. Lefaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), that instructional error regarding self-defense was automatically manifest error. O'Hara, 167 Wn.2d at 101. Therefore, having 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 v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

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).

The O'Hara court noted that

Additionally, there is nothing in the case law suggesting an erroneous self-defense jury instruction is akin to other types of erroneous jury instructions that we have deemed automatically of a constitutional magnitude. As noted above, the examples of manifest constitutional errors in jury instructions include: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. On their face, each of these instructional errors obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict. In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is—not constituting manifest constitutional error—include the failure to instruct on a lesser included offense and failure to define individual terms. In each of those instances, one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion. Looking at those prior cases, there is nothing about erroneous self-defense jury instructions, in whatever form, automatically putting them in the group of cases where we reviewed the error as compared to the group where we did not.

167 Wn.2d at 103.

Applying this rationale, 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 addition of the sentence "[s]elf-defense is an act that must be necessary" to WPIC 16.05 was error. However, the appellant does not argue, and cannot show, that this instruction, even if erroneous, was manifest error such that it could be raised for the first time on appeal. The appellant claims this sentence "undermined the subjective component of self-defense" and "suggested force is only available to those in real danger". Appellant's brief at 16. These claims ignore the full text of Instruction No. 23, which stated:

Self-defense is an act that must be necessary. Necessary means that, under the circumstances *as they reasonably appeared to the actor* at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended. The right of self-defense does not permit action done in retaliation or revenge.

RP 823-24 (emphasis added). As can be seen, the plain language of this instruction set forth the correct standard for self-defense. See State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The appellant's claim that the first sentence undermines the subjective standard is wholly without support. Similarly, the appellant's claim that the first sentence restricted self-defense to only persons who are in real danger is meritless, given the instruction's statement that the jury should consider the

circumstances “as they reasonably appeared” to the appellant. Also, the jury was instructed in Instruction No. 21, based on WPIC 17.04, that “actual danger is not necessary for the use of force to be lawful.” RP 834.

Considering this, the appellant has failed to identify any “practical and identifiable” consequences from the giving of the first sentence of Instruction No. 23 that would have been so reasonably obvious to the trial court to require it to strike this sentence without any objection by the appellant. See Kirkman, 152 Wn.2d at 935. On this record, it cannot be said that the purported error was manifest and the Court should find the appellant waived any error related to the first sentence of Instruction No. 23 by failing to object before the trial court. The Court should only consider the merits of the appellant’s arguments based upon the final sentence of Instruction No. 23.

**b. Instruction No. 23 Was Not a Comment on the Evidence.**

The appellant argues at length that Instruction No. 23 was a comment on the evidence by the trial court, and thus violated Art. IV, §16 of the Washington State Constitution. Appellant’s brief at 9, 12, 13, and 16. A trial court comments on the evidence by charging the jury with respect to matters of fact or expressing a personal attitude about the evidence. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The

appellant claims the final sentence of Instruction No. 23 “[t]he right of self-defense does not permit action done in retaliation or revenge” was a comment on the evidence. Though the appellant repeats this claim at length, he reduces to a foot-note the controlling case-law on this point: State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). Appellant’s brief at 15.

In Studd, the Washington Supreme Court addressed the exact phrase the appellant complains of in the instant case. The Supreme Court held that the inclusion of the phrase “[t]he right of self-defense does not permit action done in retaliation or revenge” was a correct statement of the law and was not “in any way, [a] comment on the evidence.” 137 Wn.2d at 550; citing State v. Janes, 121 Wn.2d 220, 240, 850 P.2d 495 (1993). Studd is dispositive on this claim, and the appellant’s argument this was a comment on the evidence is wholly without merit. The phrase at issue was an unbiased statement of the relevant law. It did not communicate the trial court’s personal views regarding whether the State had met its burden to disprove self-defense, any more than the giving of several instructions on self-defense implied the trial court believed the appellant had acted in self-defense. See also State v. Thompson, 47 Wn.App. 1, 733 P.2d 584 (1987) (rejecting a claim the trial court commented on the evidence by giving an aggressor instruction). Also, the trial court explicitly disavowed

in its instructions to the jury any possible comment on the evidence. RP 823-824. The jury is presumed to follow this instruction. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Furthermore, an instruction does not constitute an impermissible comment on the evidence when there is sufficient evidence to support it and when the instruction accurately states the law. State v. Sampson, 40 Wash.App. 594, 699 P.2d 1253 (1985). Here the evidence supported a conclusion the appellant attacked Mr. Arthur and Mr. McDonald in retaliation for the earlier scuffle, and the instruction was an accurate statement of the law under Studd.

The appellant also argues the final sentence “unduly emphasized” the State’s theory of the case, and was so “repetitious and overlapping” that it deprived him of a fair trial. Appellant’s brief at 10. The appellant provides no support for his claim the instruction was “repetitious” other than the simple accusation it was. It strains credulity to find that the inclusion of one sentence in a total of twenty-four jury instructions was “repetitious” or created an “extreme emphasis” on the State’s theory.

Finally, each party at trial is entitled to have the trial court instruct upon its theory of the case if there is sufficient evidence to support the theory. State v. Theroff, 95 Wash.2d 385, 622 P.2d 1240 (1980). The trial court correctly instructed the jury that self-defense does not allow for

retaliation or revenge, which was part of the State's theory, and also instructed the jury far more extensively on the general law of self-defense, which was the appellant's theory of the case. The giving of one sentence cannot plausibly be argued to have tipped the scales in favor of the State, and is an argument that the Supreme Court has already rejected in Studd. This Court should reject these arguments as without legal or factual merit.

**c. Instruction No. 23 Was a Correct Statement of the Law, and the Jury Was Properly Instructed on Self-Defense.**

Next, the appellant argues that the final sentence of Instruction No. 23 removed the subjective component of self-defense and contradicted the other instructions. This claim fails in light of the actual instructions given and the relevant law. In fact, the jury was properly instructed on the law of self-defense, and found the appellant guilty upon that basis

Jury instructions must be read as a whole. State v. Etheridge, 74 Wn.2d 102, 110, 443 P.2d 536 (1968); State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). 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). When an appellate court reviews a preserved challenge to a jury instruction, the trial court is afforded great deference in the wording of its instructions. Ng, 110 Wash.2d at 41, 750 P.2d 632;

citing Roberts v. Goerig, 68 Wash.2d 442, 455, 413 P.2d 626 (1966); see also O'Hara, 167 Wn.2d at fn.4. Additionally, the trial court has broad discretion in the number and specific wording of the instructions. State v. Ortiz, 52 Wash.App. 523, 530, 762, 762 P.2d 12 P.2d 12 (1988).

Here, the jury was instructed extensively on the law of self-defense. The jury was instructed that the State bears the burden of disproving self-defense, and was repeatedly instructed on the subjective component of self-defense. Instruction No. 20 and 21, RP 833-34. Despite this, the appellant seizes upon isolated sentences and attempts to argue these phrases were improper. However, this Court must view the instructions as a whole. Etheridge, 74 Wn.2d at 110; Ng, 110 Wn.2d at 41. When viewed as a whole, it is apparent there was no confusion as to the standard the jury must employ, and that this standard was a correct statement of the law. See Studd and Janes. As argued above in section A, the full text of Instruction No. 23 sets forth the correct, partially subjective, and standard for self-defense. The appellant attempts to isolate phrases within the instruction and argue they incorrectly state the law. This approach is meritless, as many instructions will contain phrases that, viewed in isolation, may appear incorrect. The full text of the instruction, and their interrelation with the totality of the instructions, must be considered.

Here, Instruction No. 23, along with the entirety of the court's instructions, provided an accurate statement of the law. The appellant pressed his claims before the jury, under the law and the facts of the case. Unfortunately for him, the jury rejected his arguments. Displeased with this outcome, the appellant now attempts to overturn the jury's verdict by arguing the jury was improperly instructed. This claim is contrary to the decisions of the Washington Supreme Court in Studd and the plain text of the instructions. This Court should similarly reject these claims and uphold the jury's verdict.

**II. The Trial Court Did Not Err by Allowing Testimony as to the Content of Photographic and Video Evidence.**

The appellant argues the trial court erred by allowing two of the investigating officers, Officer Brian Clark and Officer Ken Hochhalter, to "narrate" three surveillance videos that were admitted into evidence. However, the appellant did not preserve this claim for appeal, as he failed to object to this testimony at trial. Also, the appellant identifies no authority to support his position. Finally, any error in the admission of this testimony was harmless.

At trial, surveillance video from the bar, the rear entrance to the Department of Licensing (DOL), and McDonald's were admitted into evidence. RP 402, 437, 572. These videos did not capture the actual

stabbing of Mr. Arthur and Mr. McDonald, but did capture some of the events leading up to the final incident. Each of these three videos was played for the jury to view. RP 388-496, 563-636.

The first video presented was the DOL video, exhibit 7A. RP 405. Ofc. Hochhalter testifies to the content of the video as it was played, including orienting the jury to the location and angle of the camera. Ofc. Hochhalter also identified the appellant and his wife when they appeared in the video. RP 405-408. The appellant did object to this testimony at one point, but the trial court did not rule on the objection and the appellant did not renew or press his objection. RP 409. The second video presented was the bar video, exhibit 5A. RP 437-438. Again, Ofc. Hochhalter's testimony oriented the jury to the video, and identified certain persons within the video. RP 439-443. The appellant did not object to any portion of this testimony. RP 439-452. Indeed, during cross-examination, the appellant elicited further testimony from Ofc. Hochhalter that described the content of the two videos. This testimony included identifications of the persons appearing the videos, description of their actions, and a discussion of how this interrelated with the other evidence. RP 460-490, 492-496.

The final surveillance video presented was from McDonald's, exhibit 8A. RP 571. This video was played for the jury, and Ofc. Clark

testified regarding its content. RP 572-577. Again, the appellant did not object to any portion of this testimony. Id.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Fischer, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). However, an appellate court will not consider issues raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); State v. Kirkman, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007); RAP 2.5(a).<sup>1</sup> RAP 2.5(a) enshrines the longstanding principle that "an issue, theory, or argument not presented at trial will not be considered on appeal." State v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979), quoting Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978).

The purpose of this rule is to require defendants to bring purported errors to the trial court's attention, thus allowing the trial court to correct them, rather than staying silent in an attempt to "bank" the issue for appeal.<sup>2</sup> See State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975); State v. Madison, 53 Wn.App. 754, 762-63, 770 P.2d 662 (1989). Indeed, a decision not to object is often tactical. Madison, 53 Wn.App. at 762-63.

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<sup>1</sup> Manifest errors affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a) (3). This rule does not apply, as the appellant only asserts a violation of the Rules of Evidence.

<sup>2</sup> Requiring defendants to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error. To allow defendants to bring forth new claims on appeal denies the State the ability to make a full record.

Here, the appellant objected initially to Ofc. Hochhalter's description of the video's content, but failed to pursue the objection or obtain a ruling from the trial court. RP 409. The appellant never raised any further objections to the alleged "narration" and in fact extensively cross examined Ofc. Hochhalter to elicit further descriptions and arguably opinions about what the videos showed. RP 460-496. By failing to object, the appellant has waived this issue on appeal. RAP 2.5(a); McFarland, 127 Wn.2d at 332-33. Also, as the trial court was never presented with an opportunity to make a decision, there is no error by the court from which an appeal may be had.

Indeed, the record is plain that the appellant actively sought the admission of the type of testimony of which he now complains via his cross examination of the witnesses. The appellant clearly believed admitting such testimony would further his case, and made a tactical decision not to object. Madison, 53 Wn.App. at 762-63.

Finally, the appellant offers no authority for his proposition that the officer's testimony as to the content of the videos was improper or opinion evidence. The appellant cites to State v. George, 150 Wn.App. 110, 206 P.3d 697 (2009), for the proposition that a lay witness may not typically opine as to the identity of a person on a video. However, there was no dispute at trial as the identity of the person that stabbed the Mr.

Arthur and Mr. McDonald. Thus George is inapplicable. The appellant provides no authority that would prevent a witness from describing the content of a video or photograph. Such a description is essential to the record of the trial, as it allows an appellate court to easily understand the information presented at trial and provides key information to the jury. The appellant does not argue that the descriptions were somehow deceptive, inaccurate, or faulty, and thus cannot establish he was prejudiced by this testimony. Even if this testimony was improperly admitted, despite the lack of any defense objection, it was of such minor significance that any error was harmless. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). This Court should deny the appellant's request for a new trial on this issue.

### **III. The Trial Court Did Not Err by Requiring the Appellant to Pay Certain Legal Financial Obligations.**

In addition to his direct appeal, the appellant filed a personal restraint petition asking this Court to either terminate his legal financial obligations (LFOs) or remand for a hearing on his ability to pay. The appellant cites to State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011), to support his position. However, the appellant did not object to the imposition of the LFOs at trial, and the record reflects that he did have the ability to pay.

In Bertrand, this Court addressed an argument that the trial court erred by finding the defendant had the present or future ability to pay LFOs. 165 Wn.App. at 404. Notably, the defendant in Bertrand was indisputably disabled. Id. Subsequently, this Court has noted that a defendant's failure to object to a finding of ability to pay will result in a bar on the issue being raised for the first time on appeal. RAP 2.5(a); State v. Blazina, 174 Wn.App. 906, 301 P.3d 492 (2013). As the appellant did not object to the imposition of the LFOs, this Court should decline to consider the issue.

Additionally, unlike the disabled defendant in Bertrand, the appellant testified that he was a full time college student and senior enlisted member of Washington Army National Guard. RP 702. There was no evidence to suggest he was unemployable. Finally, there is no evidence that the State has yet attempted to enforce the trial court's LFO order and collect from the appellant. Thus, his challenge is not yet ripe and is not properly before this Court. State v. Lundy, 2013 WL 4104978, No. 42886-5-II (2013).

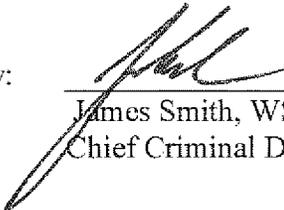
**VI. CONCLUSION**

Based on the preceding argument, the State respectfully requests this Court deny the instant appeal. The jury was properly instructed on the issue of self-defense and there were no other errors justifying a new trial. The appellant's convictions should stand.

Respectfully submitted this 12<sup>th</sup> day of September, 2013.

Susan I. Baur  
Prosecuting Attorney  
Cowlitz County, Washington

By:

  
\_\_\_\_\_  
James Smith, WSBA #35537  
Chief Criminal Deputy Prosecuting Attorney

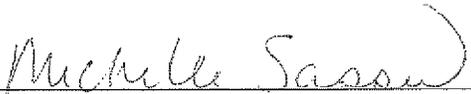
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund  
Attorney at Law  
P.O. box 6490  
Olympia, WA 98507  
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 12<sup>th</sup>, 2013.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## September 12, 2013 - 4:27 PM

### Transmittal Letter

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Court of Appeals Case Number: 44211-6

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Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

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