

NO. 48112-0

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

STATE OF WASHINGTON, RESPONDENT

v.

SHAWN TILLERY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 14-1-01044-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial charged with first degree burglary (Ct. I), deadly weapon enhanced second degree assault aggravated by rapid recidivism (Ct. II), violation of a post-conviction no contact order

(Ct. III) and second degree theft (Ct. IV). CP 25. A certified copy of the order prohibiting him from entering the home where the assault occurred was admitted without objection. Ex. 3. The trial court refused to give a self-defense instruction because defendant was the first aggressor.¹ He was convicted for deadly weapon enhanced second degree assault with a recidivism aggravator, violation of a no-contact order and third degree theft. RP(1/21) 751-755. Unanimity was not reached as to the burglary, so a mistrial on that count was declared. *Id.*

A 48 month exceptional sentence was imposed for the assault. RP(9/3) 2-21. Written findings in support of the sentence were entered. CP 216. Defendant pleaded guilty to residential burglary. RP(9/9) 3-7. At sentencing he accepted responsibility for his conduct. RP(10/30) 8. Yet he nonetheless proceeds with a timely filed appeal of the assault conviction he received for stabbing an occupant of the home he burglarized, claiming his status as the first aggressor remains in dispute. RP 176.

2. Facts

Defendant's ex-girlfriend Corrina Twisselman shared an apartment with her children L.T. and C.M. RP(1/7) 77-78. Her relationship with defendant lasted around two years, during which he fathered the toddler, L.T. RP(1/7) 78, 80. Defendant usually stayed at Twisselman's apartment despite never contributing to expenses. RP (1/7) 82-83. That arrangement

¹ RP(1/20) 678-79; (1/21) 695-96.

ended January 1, 2014, when dissatisfaction drove her to end their dating relationship despite his desire for it to continue.² A post-conviction no-contact order issued that day. Ex. 3. Twisselman was the protected party.

It prohibited defendant from:

- A. Causing or attempting to cause physical harm ... and from ... harassing, threatening or stalking [her].
- B. Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means directly or indirectly [and]
- C. Entering or knowingly coming within or knowingly remaining within 500 ft (distance) of [her] ... residence.

Ex. 3; RP(1/8) 135-36. He was aware of the order. RP(1/7) 106-07; Ex. 3. Twisselman delivered defendant's property to his mother by the end of January, 2014. RP(1/7) 82; (1/20) 561-63.

On March 16, 2014, assault victim Christopher Martin took Twisselman bowling with her eight year old son.³ Bowling was followed by dinner at a buffet where she unexpectedly ran into defendant's brother. RP (1/7) 83-84; (1/8) 186. Twisselman was visibly nervous. RP(1/8) 187. A flurry of hostile text messages from defendant followed.⁴ At one point he wrote: "I hope you choke you fucking bitch." Ex.133-34. Another text announced his impending arrival. RP(1/7) 86; (1/8) 170.

² RP (1/7) 80-81, 106; (1/20) 561-62.

³ RP(1/7) 77-78, 83; (1/8) 186.

⁴ RP(1/7) 85-86; (1/8) 170; (1/20) 600' Ex. 133-34. Defendant's texts to Twisselman appear yellow. Twisselman's text messages to defendant appear blue. RP(1/8) 129-30; Ex. 133-34.

Twisselman ran outside to warn Martin. RP(1/8) 187. Not thinking much of it, Martin finished his cigarette. *Id.* Defendant approached Martin, but Martin tried to avoid getting into an argument since he was enjoying the date with Twisselman. RP(1/8) 187-89. Still, defendant was "[v]ery confrontational." RP(1/8) 189. He only left when Twisselman threatened to call police. RP(1/7) 86; (1/8) 189.

Twisselman's concern about his "unpredictable" behavior caused her to get their toddler from defendant's mother. RP(1/7) 87; (1/8) 150. Upon arriving, defendant's mother emerged yelling derogatory remarks at Twisselman. RP(1/7) 87; (1/8) 190-91. She was upset about Twisselman reporting defendant's violation of the court order. RP(1/8) 191. The yelling transitioned to assault when she pushed Twisselman. RP (1/7) 87-89.

Twisselman, Martin and the kids arrived at her apartment around 7:00 p.m. They finished their evening watching movies together. CP(1/7) 88-89; (1/8) 193. Both of the apartment's access doors—the front door and rear-sliding door—were locked.⁵ Twisselman retired to her bedroom with Martin around 11:00 p.m. RP(1/7) 90.

Meanwhile, defendant remained "angry" at "her being with another man." RP(1/20) 600. He initially conveyed that anger through another volley of hostile texts a little after 3:00 a.m.:

You like that dick.... I love it, baby.... Guess what's next.... Your name spreaded [sic] to foxes. **Your [sic] mine, Corrina. Just letting you know.** Smile....

⁵ RP(1/7) 90; (1/8) 161, 196, 260-61.

RP(1/7) 118 (emphasis added). Twisselman did not respond. RP(1/7) 116-17; (1/20) 601; Ex. 136. Still "angry" he decided to enter her apartment in the dead of night. RP (1/20) 604. At trial, he admitted to forcing through her rear-sliding door. RP (1/20) 604-05.

Inside, defendant saw an Army uniform on the floor and responded by grabbing a seven and a quarter inch butcher knife from her kitchen for the stated purpose of using it to force her locked bedroom door open.⁶ He admitted to entering her bedroom, turning on the light and, *with knife in hand*, confronting Twisselman and Martin by "yelling:" "What the hell is going on?" RP(1/20) 606-08. Defendant conceded to being "definitely angry by th[at] point." RP(1/20) 632-33. He admittedly "took a couple of steps toward [Twisselman]," bringing him beside the bed where she was sleeping with Martin. RP(1/20) 633-34.

She awoke to light entering her bedroom through the locked door defendant forced from its frame.⁷ She opened her eyes to see him standing in the doorway holding a "butcher knife."⁸ As she tried to wake Martin, defendant said: "Oh, so you are military."⁹ Martin associated the pounding with C.M. getting ready for school. RP (1/8) 196. Martin then recognized defendant from their earlier encounter at the restaurant. RP(1/8) 197, 220.

⁶ RP(1/20) 605-06, 631-32, 646.

⁷ RP (1/7) 92-93; (1/8) 159-60, 180, 258; Ex. 67-69.

⁸ RP (1/7) 92; (1/8) 131, 161; (1/20) 649; 3RP 383; Ex.87, 89.

⁹ RP(1/7) 92, 95; (1/8) 198, 265.

The toddler was "screaming." RP (1/8) 197. Twisselman clamored for her phone to call 911 while trying to comfort the child.¹⁰ Martin caught sight of defendant's knife as defendant moved the fist in which it was clenched. RP(1/8) 198, 203. Twisselman saw him lunge at Martin.¹¹ Martin believed he was about to be stabbed. RP(1/8) 223-24. He recalled lunging from the bed for the knife while being struck from above.¹² Defendant admittedly approached Martin's side of the bed with the knife. RP(1/20) 634-35. They collided as Martin, who remained naked, leapt up. RP(1/7) 95; (1/8) 206. Defendant had "a lot of muscle;" whereas Martin was in "[d]ecent shape." RP(1/8) 153, 173. Their opposing force propelled them about the room. RP(1/8) 200, 225-26. They crashed into the closet door, which buckled under the strain.¹³

Defendant began stabbing Martin with the knife as Martin did what he could to control defendant's knife wielding arm.¹⁴ Defendant "start[ed] driving [the knife] into [Martin] at every angle he could get a chance at." RP(1/8) 198. One strike punctured Martin's underarm. *Id.* Another struck Martin behind the left shoulder. RP(1/8) 199. Another punctured the back of his neck. RP(1/8) 199. Martin struggled to minimize the impact. *Id.* He felt and could hear the knife penetrate his skin. RP(1/8) 201. He perceived he was "fighting for [his] life," doing what he could "to defend his life and

¹⁰ CP (1/7) 92, 96-98; (1/8) 150-51, 197-98; Ex.2.

¹¹ RP(1/7) 92; (1/8) 151, 153.

¹² RP(1/8) 198-99, 227; 3RP 337; Ex. 70-72.

¹³ RP(1/7) 94; (1/8) 151, 177, 200, 228; Ex. 67-69.

[Twisselman's] life.¹⁵" The stabbing did not appear accidental—it "was very direct," "very hostile" projecting great "malice." RP(1/8) 174. The blade broke free from the handle when it struck Martin's shoulder bone. RP(1/8) 199-200, 212-13; Ex. 104-05.

Only upon losing the knife, defendant decided to run.¹⁶ Martin pursued to hold him for police. RP(1/8) 201, 206, 222. Or as Martin put it:

Because he ... broke into the house and I am pretty sure that is illegal and, hell, he stabbed me five times. I would like the police to deal with that.

RP(1/8) 232. The fight progressed into the hallway, then the living room, then out the rear door. RP(1/7) 96; (1/8) 151, 205. Martin left a trail of blood behind him.¹⁷ Defendant put Martin on his back, landed several punches and ran away. RP(1/8) 201-02.

Martin "was bleeding everywhere." RP(1/7) 96. He went inside to apply pressure to his wounds. RP(1/8) 206-07. His consciousness faded as the bleeding continued. RP(1/20) 656. Yet he noticed his computer had been taken from where he installed it for the family to watch movies the night before. RP(1/7) 109; (1/8) 193, 207. Also gone was C.M.'s Nintendo and the MP3 player C.M. won playing ski ball at the bowling alley.¹⁸ All of which was recovered from defendant's car near a key chain bearing his

¹⁴ RP(1/7) 92-94; (1/8) 158, 198, 173, 204, 224, 229.

¹⁵ RP(1/8) 224; (1/20) 552, 556.

¹⁶ RP(1/8) 201-02, 226; 3RP 334-35; Ex. 43-46, 83.

¹⁷ RP(1/8) 258; 3RP 335; Ex. 50, 52.

¹⁸ RP(1/7) 109-10; (1/8) 215; (1/20) 547.

name.¹⁹ At trial, defendant admitted to taking the property during his first trip into the apartment, claiming he mistook it as his own. RP(1/20) 626-27. But according to Twisselman, he did not have similar property in the home. RP(1/20) 667-68.

Police responded to the apartment complex just after 5:00 a.m. RP(1/8) 237, 255. They coordinated containment. RP(1/8) 238-39. Officer Watters observed a shirtless suspect matching defendant walking "light-footed" toward the exit as if trying to avoid making noise. RP(1/8) 239-40. As Watters circled back, he found defendant hiding under a bush. RP(1/8) 241-42. Defendant exited on command. RP(1/8) 242, 263-64.

During an interview on scene defendant said he was in trouble and admitted to knowing he should not have gone to Twisselman's apartment. RP(1/8) 264. Defendant told police he entered via the unlocked rear slider, saw an Army uniform on the floor, thought: "What the fuck," went to the bedroom and was attacked by a knife wielding male. RP(1/8) 265. At trial, defendant admitted the statement placing a knife in Martin's hand was a lie. RP(1/20) 619, 642. The no-contact order was confirmed. 3RP 288-89; Ex.3. Defendant was taken to jail. RP(1/8) 265-66. At booking he did not give Twisselman's address as his own. RP (1/15) 428-30.

Police found Martin standing naked in the living room holding a bloody towel to his neck as "streams" of blood ran down his torso.²⁰

¹⁹ RP(1/8) 214-18, 266-67; (1/15) 477; 3RP 283, 299; (1/20) 546-48.

²⁰ RP(1/15) 498-99, 501; (1/20) 536.

Martin seemed "scared" and "worried about his cuts." RP(1/20) 537. The wound on the back of his neck was "pretty deep." RP(1/20) 538. "It looked like ... muscle [was] coming out of the skin" cut open on his left shoulder. RP (1/20) 538. His underarm was apparently punctured. RP (1/20) 538. The apartment was in complete disarray with blood all over the walls. RP(1/20) 536, 539-40. It appeared as if someone had been bleeding "for quite a long time." RP (1/20) 536.

Martin was transported to the hospital on a stretcher. RP(1/8) 209. Emergency personnel treated the wounds on the back of his neck, the top of his shoulder, upper arm, and underarm.²¹ Martin's wounds could have caused death. RP(1/15) 396-97, 399, 401. The three on his shoulder were stapled shut; the wound in his neck and underarm required sutures.²² He also had a small head wound as well as a fat lip. RP(1/8) 209. Martin's injuries caused the Army to place him on medical leave for two weeks, and light duty for a month. RP(1/8) 211. He returned to the doctor when exercise tore one wound open from the inside. RP(1/8) 211. The wounds had scarred by the time of trial. RP(1/5) 399; (1/20) 658. Both Martin and defendant agreed defendant was not injured in the fight.²³ The blood on defendant's face was transferred from an external source. RP(1/15) 492-93. The scratches on his body were from a sticker bush he encountered

²¹ RP(1/8) 208-09; (1/15) 393, 406; (1/20) 659.

²² RP(1/8) 208-09; (1/15) 395-96; 3RP 323-28; Ex. 20-28, 31.

²³ RP(1/8) 205, 226-27; (1/20) 639.

while fleeing through heavy brush behind the apartment.²⁴ The broken knife handle was recovered from the backyard through which he fled. *Id.*

Defendant called his older brother Thomas²⁵ and mother to testify before taking the stand. RP(1/20) 577, 586. Thomas claimed defendant lived with Twisselman, yet his account was undermined by the fact he lived in Roy, usually saw defendant in passing at their mother's house, loved his little brother, did not want him to be in trouble, and would help him in any way. RP(1/20) 579-83, 667-68. The times he saw defendant with Twisselman were consistent with their periodic visits in violation of the no-contact order, but at the time of the incident defendant did not have permission or a key to enter her apartment. RP(1/7) 102-06.

Defendant's mother also said he lived at Twisselman's apartment. RP(1/20) 588. Yet she too conceded limited contact with the residence. RP(1/20) 588. Meanwhile, she was clear about disliking Twisselman since January 1, 2014, which was the day defendant was kicked out of the apartment and the no-contact order issued.²⁶ Defendant's mother admitted enabling violations of that order.²⁷ And just like his brother, she loved defendant, would do anything to help him and did not want him to get in trouble. RP(1/20) 596.

²⁴ RP(1/8) 201-02, 244, 268; 3RP 294-97, 305-06, 329, 332-35; (1/20) 607, 639; Ex. 48-49, 99-100, 159-62.

²⁵ Defendant's brother will be referred to by his first name for clarity as he shares defendant's last name. No disrespect is intended.

²⁶ RP(1/7) 80-81, 106; (1/20) 561-62; (1/20) 587; Ex.3.

²⁷ RP(1/20) 587-88, 592-93, 597-98.

Defendant testified at trial. RP(1/20) 599. He admitted to engaging Twisselman in a heated argument over her dinner date "angry" about "her being with another man." RP(1/20) 600. He claimed to live with her in violation of the no-contact order even though he knew it had been in effect since January, 2014, and would not expire until January, 2016. RP(1/20) 601, 622-24. He admitted knowing it prohibited him from being within 500 feet of her residence. RP(1/20) 622. According to defendant, he lied about his address at booking so he could continue living at her apartment in violation of Section 8 regulations. RP(1/20) 602.

Defendant said he only forced Twisselman's locked bedroom door open to get his clothes, despite conceding he was angry about her being with another man and was prompted to grab the knife by the sight of a man's uniform on the floor outside the room. RP(1/20) 604-05. Defendant described Martin as sitting up and tackling him into the closet as if Martin closed the gap between them in the room, but defendant later clarified he had already approached the side of the bed where Martin was sleeping when Martin responded. RP(1/20) 606-07, 633-35. Defendant claimed he inadvertently cut Martin's neck when he "pushed off" Martin's shoulder. RP(1/20) 635, 652. Defendant admittedly did not drop the knife upon seeing the wounds it was inflicting. RP(1/20) 652. He also admitted lying to avoid jail. RP(1/20) 619.

C. ARGUMENT.

1. DEFENDANT'S MERITLESS CLAIM OF SELF-DEFENSE IS COLLATERALLY ESTOPPED AS HE PLEADED GUILTY TO THE BURGLARY THAT PROVOKED AGGRESSIVE CONTACT WITH THE SLEEPING VICTIM HE WOKE AND STABBED INSIDE A HOME DEFENDANT WAS LEGALLY PROHIBITED FROM ENTERING.

"[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge." *State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993); *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). Evidence must establish a confrontation not provoked by the defendant. *Id.* A trial court's refusal to instruct on self-defense is only reviewable for an abuse of discretion when based on a factual dispute. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Refusal to instruct on self-defense is reviewed *de novo* when based on a ruling of law. *Id.*

- a. Defendant is collaterally estopped from claiming self-defense as his guilty plea proves he provoked the confrontation with Martin through an aggressive act of residential burglary.

"[C]ollateral estoppel ... appl[ies] in criminal cases." *State v. Dupard*, 93 Wn.2d 268, 273-74, 609 P.2d 961 (1980). The doctrine bars relitigation of facts or issues resolved by a judgment to prevent relitigation of determined causes. *Id.*; *State v. Sherwood*, Wn. App. 481, 488-89, 860

P.2d 407 (1993). Application of collateral estoppel is a two-step operation: the first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether those issues are sought to be barred in a subsequent action. *Dupard*, 93 Wn.2d at 273-74.

Defendant claims the trial court incorrectly refused to instruct on self-defense since: "Whether [he] was attacked by [Martin] and reasonably fought back, or ... [he] attacked [Martin] was for the jury to determine." App.at 10. Whatever the truth of that premise prior to him pleading guilty to the aggressive act of residential burglary, it is no longer so, for the plea resolved his status as the provocateur of his confrontation with Martin.

i. Defendant's status as the aggressor was resolved by his burglary plea.

Self-defense cannot be invoked by the first aggressor. *Janes*, 121 Wn.2d at 240; *State v. Currie*, 74 Wn.2d 197, 199, 443 P.2d 808 (1968); *State v. Callahan*, 87 Wn. App. 925, 930, 943 P.2d 676 (1997); *Walker*, 40 Wn. App. at 662; RCW 9A.16.020. Burglary is an aggressive act which prevents burglars from justifying force used to commit that crime as self-defense. *State v. Dennison*, 115 Wn.2d 609, 616-18, 801 P.2d 193 (1990); *State v. Wilson*, 136 Wn. App. 596, 608-11, 150 P.3d 144 (2007); *State v. Bolar*, 118 Wn. App. 490, 495, 78 P.2d 1012 (2003); *State v. Stinton*, 121 Wn. App. 569, 241, 673 P.2d 200 (1983); RCW 9A.16.020(2)-(4).

Between the court's refusal to give defendant's instruction on self-defense and this direct appeal, his status as the one who provoked the conflict with Martin through an aggressive act of burglary was resolved by his plea to deadly weapon enhanced residential burglary. CP 159, 161, 169. Since it was a traditional plea admitting actual guilt for the crime, it is binding under the doctrine of collateral estoppel. *In re Det. of Stout*, 159 Wn.2d 357, 365-66, 150 P.3d 86 (2007); *Currie*, 74 Wn.2d at 199.

ii. Defendant's appeal wrongly seeks to relitigate the resolved fact of his status as the first aggressor.

To convict defendant of second degree assault as charged in Count II, the jury found each of these two elements were proved:

- (1) That on or about March 27, 2014, the defendant:
 - (a) **Intentionally assaulted Christopher Martin** and thereby recklessly inflicted substantial bodily harm;
or
 - (b) **Assaulted Christopher Martin** with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

CP 67 (Inst.18); RCW 9A.36.021. These same elements would be at issue if the retrial defendant requests were granted.

Defendant claims a jury should be instructed to decide whether he used force against Martin in self-defense. But defendant's plea resolved he provoked the conflict through an aggressive act of burglary, making the force he used against Martin assault as a matter of law. Collateral estoppel

bars defendant from arguing the same force was self-defense. *Stout*, 159 Wn.2d at 365-66; *Dennison*, 115 Wn.2d at 616-18.

- b. Defendant's self-defense instruction was properly refused as it had no support in the record.

Appellate courts apply one of two lens of review depending on the reason a self-defense instruction was refused. Refusal based on disputes of fact are reviewed for abuse of discretion. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005); *State v. Read*, 174 Wn.2d 238, 243-44, 53 P.3d 26 (2002). *De novo* review is applied to refusals grounded in law. *Id.* Under either standard, the ruling can be affirmed on any supported basis. See *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

Defendant proposed WPIC 17.02's instruction on self-defense. RP(1/20) 675. The State objected as the theory was not supported. RP(1/20) 675-76, 678. By all accounts defendant forced his way into Twisselman's locked bedroom armed with a butcher knife, with which he approached Martin's side of the bed.²⁸ Defendant admitted to breaking in angry about Martin's presence in the bedroom. RP(1/20) 604-05. Defendant stabbed Martin as Martin tried to wrest the knife from defendant, even though defendant characterized it as inadvertently cutting

²⁸ RP(1/7) 92; (1/8) 131, 151, 153, 161, 198-99, 203, 227; (1/20) 605-07, 631-35, 646, 649, 675-76; 3RP 337, 383; Ex. 70-72, 87, 89.

Martin by pushing off his shoulder.²⁹ RP(1/20) 635, 652. And, by all accounts, defendant was not injured during the encounter. RP(1/8) 205, 226-27; (1/20) 639.

Defendant's argument for the instruction focused on the statement Martin made about tackling him; however, defendant neglected to recall the context of that statement, for Martin made it clear he launched that response from the bed as a knife strike was bearing down upon him, so the account actually accorded with defendant's concession that Martin responded with force after defendant approached him. RP(1/20); 677-78; (1/21) 695; *supra*. The court determined defendant was the first aggressor. RP(1/20) 678-79; (1/21) 695-96. Because the ruling turned on a disputed fact, it should be affirmed as a proper exercise of discretion.

**i. Defendant was the first-aggressor;
the instruction was rightly refused.**

To receive a self-defense instruction, a defendant must produce some credible evidence of self-defense. *Walker*, 40 Wn. App. at 662. It is unavailable to those who set in motion a chain of events that culminate in a stabbing. *Id.* at 663. The victim's physical response to attack is not a basis capable of supporting his assailant's claim of self-defense. *Id.* at 664; *Currie*, 74 Wn.2d at 199; *Janes*, Wn.2d at 240.

²⁹ RP(1/7) 92-94; (1/8) 158, 198-99, 173, 204, 224, 227, 229; (1/20) 635, 652; 3RP 337.

The trial court rightly refused defendant's request for a self-defense instruction as it cannot be rationally maintained he was anything other than the first aggressor. Undisputed evidence proved he illegally entered Twisselman's apartment. Once inside, he armed himself with a butcher knife in response to seeing another man's clothing on the floor. Defendant forced his way in the locked bedroom where they were sleeping; then, he admittedly approached Martin with butcher knife in hand as Martin laid naked in bed. By those provocative acts, defendant vested Martin with the right to repel or subdue him while simultaneously divesting himself of a right to resist those efforts. The challenged refusal to instruct on self-defense should be affirmed.

ii. The aggressive act of burglary was an alternative basis to refuse the instruction irrespective of how the physical violence unfolded.

"The purpose of a burglary statute is to protect the occupancy and habitation of a residence." *Wilson*, 136 Wn. App. at 608. Burglars who use force against a home's occupants during the commission of a burglary are typically incapable of claiming self-defense. *Dennison*, 115 Wn.2d at 617. To revive the right to self-defense, a burglar must clearly manifest a good faith intent to withdraw from the burglary or remove the occupant's fear. *Id.* at 618-19. A burglar's inability to use force in self-defense accords with the occupant's right to stand her ground and use force against the

burglar to defend herself, others or the invaded premises. *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); *State v. Bland*, 128 Wn. App. 511, 513, 116 P.3d 428 (2005); RCW 9A.16.020(2)-(4); RCW 9A.16.050.

Homicide is even justified if committed "[i]n ... actual resistance of an attempt[ed] felony ... upon the slayer, in his or her presence, or upon or in a dwelling ...in which he or she is." RCW 9A.16.050(2). At the same time the right of homeowner or tenant to forcefully repel or detain burglars extends to their guests, for inherent in the invitation is shelter from all but the host and her guests. *See Id.*; *Minnesota v. Olson*, 495 U.S. 91, 99, 110 S. Ct. 1684 (1990); *Dennison*, 115 Wn.2d at 613, 616-18; RCW 9A.16.020(2)-(4), .050(2).

A court order prohibiting a person from entering the residence of a protected party is a predicate of residential burglary. *Wilson*, 136 Wn. App. at 610; *State v. Stinton*, 121 Wn. App. 569, 571, 89 P.3d 717 (2004). It is irrelevant whether the protected party previously invited the burglar into the home in violation of the order. *State v. Sanchez*, 166 Wn. App. 304, 308, 271 P.3d 264 (2012). This rule's purpose of protecting victims from having to face their assailants coincides with the burglary statute's purpose of preventing all unwelcome people from entering a home. *Id.* at 609. The prospect of tough charges under these rules accords with the Legislature's intent as manifested by the burglary anti-merger statute and

inference of intent statute, whereby an unlawful entry into a building may be inferred to be accompanied by the intent to commit a crime against a person or property inside. *State v. Spencer*, 128 Wn. App. 132, 140, 114 P.3d 1222 (2005); RCW 9A.52.050.

The challenged refusal to instruct on self-defense was not solely based on defendant's status as a burglar inside the home in violation of a no-contact order precluding him from Twisselman's apartment, but it could have been. For that unlawful entry, followed by his decision to confront Twisselman and her guest, proved he entered in violation of the order's residence prohibition to violate its contact prohibition. Through the resulting burglary, he vitiated any right to use force against any occupant's effort to repel or detain him.

Defendant's ability to act in self-defense was never revived, for he never "clearly manifested a good faith intention to withdraw from the burglary or remove the [occupants'] fear." *Dennison*, 115 Wn.2d at 618. Like *Dennison*, if he "truly intended to withdraw from the burglary, and communicated his withdrawal ..., he would have dropped his [knife] or surrendered." *See Id.* at 618. But he advanced, struggled with Martin and maintained control of the knife, even after observing it cut into Martin's flesh. RP(1/20) 652. Defendant only decided to retreat when he lost his advantage through the unexpected separation of the seven and a quarter

inch blade he was wielding from its handle. By the time defendant decided to run, Martin was exercising his lawful right to detain his assailant for police. This is another reason to affirm the challenged ruling.

iii. Defendant's unreasonable resort to deadly force is yet another.

If any element of self-defense is not supported by the evidence, the theory is not available to a defendant. *Walker*, 136 Wn.2d at 773 (citing *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 779 (1979)). A defendant can only claim a use of deadly force was self-defense if he can prove he reasonably believed he was threatened with death or great personal injury. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); *Walker*, 136 Wn.2d at 777. The jury should not be instructed on self-defense where a reasonable person in defendant's circumstances could not have perceived anything more than the threat of ordinary battery. *Id.* at 773, 777.

That defendant unreasonably met Martin's attempt to wrestle him to the ground with deadly force is another reason to affirm the challenged ruling. In describing the threat he perceived from Martin, defendant said Martin "tackled [him] into the closet door." RP(1/20) 650. As the fight progressed, defendant perceived Martin was "tackling [him] and trying to get [him] down...." RP (1/20) 650. Defendant referred to the altercation as "wrestling." RP (1/20) 645, 653. As in *Read*, where the victim's aggressive

advance could not justify a deadly response, defendant had no excuse to use the butcher knife as a deadly weapon against Martin even if he anticipated being injured by Martin's efforts to tackle and wrestle him to the ground. See *Read*, 147 Wn.2d at 243-44.

An analogous inability to claim self-defense appears in *Walker*, where the self-defense claim rested on the assertion Walker began fearing for his life as a result of a beating he was allegedly receiving from the victim. Identical to defendant's case, there was no evidence of Walker sustaining significant injuries. *Walker*, 136 Wn.2d at 778-79; RP(1/8) 205, 226-27; (1/20) 639. Amid conflicts comparable to fist fights, each man responded by stabbing his rival five times. *Id.* at 778-79. Our Supreme Court held Walker's deadly force was not reasonable as any reasonable person in his shoes would have perceived that only ordinary battery was threatened. *Id.* So it was proper for the court to refuse Walker's self-defense instruction. *Id.* at 779. The same is true of defendant's case.³⁰

³⁰ The trial court's refusal to instruct on self-defense was also harmless, if error, since overwhelming evidence proved defendant's guilt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Grimes*, 165 Wn. App. 172, 187-88, 267 P.3d 454 (2011); *United States v. Davis*, 237 F.3d 942, 945-46 (8th Cir. 2001).

2. DEFENDANT ASSIGNS ERROR TO AN ILLUSORY CALCULATION ERROR AS IT ONLY PERSISTS SO LONG AS ONE SHARES HIS MISREADING OF TIME IMPOSED FOR HIS ENHANCEMENT AS BASE SENTENCE ADDED TO PUNISH HIM FOR BEING A RAPID RECIDIVIST.

Appellate courts apply *de novo* review to alleged miscalculations affecting the duration of a defendant's sentence. *See State v. Rodriguez*, 183 Wn. App. 947, 953, 335 P.3d 448, 451 (2014). Judgments are interpreted through rules of construction applied to statutes and contracts. *See Stokes v. Polley*, 145 Wn.2d 341, 346-47, 37 P.3d (2001). They are to be construed as a whole, with meaning and effect given to each provision. *Id.* Words used have the legal effect understood when the judgment was entered, but are otherwise assigned ordinary meaning. *Id.* Where language is used in one instance but not another, differing intent is presumed. *Id.* Miscalculated sentences should be remanded for correction. *Id.* at 950.

The challenged sentence was imposed September 3, 2015. CP 138; RP(9/3) 2. Defendant's second degree assault conviction had a maximum prison term of 10 years. CP 139. He received one point for an out-of-state conviction for "sexual abuse of a child in the second degree." RP(9/3) 6; CP 139. His misdemeanor history, which included DV assault, was not factored. *Id.* 12 months flat time for the weapon enhancement attending defendant's use of a knife to stab Martin was added and defendant's rapid

recidivism aggravator was used to impose an exceptional base sentence beyond the high end sentence of 12 months. RP(9/3) 6-9; CP 139-40.

In its oral ruling, the trial court "impose[d] 36 months plus the 12 months flat for a total of 48 months...." RP(9/3) 17. The ruling was first reduced to writing in Section 4.5 of the judgment. CP 144. The 36 month base sentence could only consist of the high end sentence of 12 months plus 24 additional months for the aggravator. CP 144. This is so as the 12 months imposed beneath it is textually linked to "[a] special finding ... indicated in Section 2.1", which is the section where the "Enhancement type* D ... (D) Other deadly weapon" is addressed. CP 139. This section does not pertain to aggravating factors as defendant claims.

Aggravating factors are covered by Section 2.4—"Exceptional Sentence," which was first left blank, but later checked *nunc pro tunc* in the corrected judgment to reflect the finding of substantial-compelling reasons for an exceptional sentence. CP 237.³¹ The fact Section 2.4, and not 2.1, applies to the aggravating factor further exposes defendant's error. In sum, the 12 month term written below the 36 month term in Section 4.5 represents the enhancement and not the aggravator. Further proof that the 12 month term is the enhancement, appears beneath, where two notes run

³¹ Citation to Clerk's Papers above CP 236 reflect the State's estimate of how its supplemental designation will be numbered.

the "[s]entence enhancemen[t]" as consecutive flat time, consistent with the title and operation of RCW 9.94A.533(4)(b) enhancements, not RCW 9.94A.535(3)(t) aggravators. CP 144. The only space in Section 4.5 to impose time outside the standard range pursuant to the aggravator is that provided for base sentences, which is the space where the challenged "36 months" appears. CP 144.

The court reiterated this sentence in its written conclusions of law: "[Defendant] shall be incarcerated ... for a period of 36 months plus 12 months deadly weapon enhancement []." CP 216 (CL No. 3). Conclusion No. (1) references the aggravator, again leaving no room for reading the "36 month" term as anything other than an intentional aggregation of the 12 month standard base term combined with a 24 month exceptional base term for the aggravator. The 12 month term for the enhancement was then run consecutive to the 36 month exceptional base term for the 48 month total orally pronounced and twice reduced to a written order. Defendant is serving the precise sentence intended and unequivocally expressed, so remand for resentencing is unwarranted.

3. DEFENDANT'S CLAIM THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS ON HIS EXCEPTIONAL SENTENCE IS WRONG AS THEY WERE ENTERED SEVEN MONTHS BEFORE HIS APPEAL.

Our Supreme Court held entry of written findings is essential when a court imposes an exceptional sentence. *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280 (2015). The remedy for omitted findings is remand for their entry. *Id.* at 397. Defendant's assignment of error mistakenly claims the court only issued oral findings in support of his exceptional sentence. Supp.Br. at 1. But the "Agreed Findings of Fact and Conclusions of Law for Exceptional Sentence ..." were included in the Clerk's Papers prepared for him on November 25, 2015. CP 216-28. He does not assign error to the written findings, so they are verities. He does not challenge the conclusions, so they should not be reviewed. This assignment of error appears to be an oversight. The exceptional sentence should be affirmed.

4. IT WOULD BE JUST TO AWARD APPELLATE COSTS AGAINST AN ABLE-BODIED MAN TO REPAY THE PUBLIC FOR THE COST OF HIS DECISION TO APPEAL A WELL PROVED LAWFUL CONVICTION FOR STABBING HIS EX-GIRLFRIEND'S LOVER DURING A FIT OF JEALOUS RAGE.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of legal financial obligations has been historically perceived to be an appropriate method of ensuring able-bodied

offenders "repay society for a part of what it lost as a result of [their] commission of a crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). More recently, this community-centric concept of restorative justice has been subordinated to offender-centric concerns focused on the difficulties attending repayment. *E.g. State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). "Ability to pay is ... an important factor[], but ... not necessarily an indispensable factor." *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016).

Albeit the record clearly showed defendant prefers being provided for by his mother, brother, and ex-girlfriend, it also proved him to be an able-bodied man, apparently with "a lot of muscle,"³² who manifested the mental and physical prowess to break into an apartment, steal electronic devices from his ex-girlfriend's lover and her eight year old son, attack a sleeping soldier, overcome the soldier's brave effort to restrain him, and flee through thick brush across wooded terrain before hiding in a bush to avoid apprehension. The record proved his capacity to repurpose the car his ex-girlfriend lent him and misuse modern technology to harass her in violation of a court order prohibiting such conduct. Each act showcased an ill-directed capacity, which he could redirect to gainful employment.

No doubt convictions for sexually abusing a child, DV burglary, and assaulting another with a knife, combined with associated periods of

³² RP(1/8) 153, 173.

imprisonment, limit defendant's prospects. But those are problems entirely of his own making, and if he directed to payment of costs through prison or post-release labor some of the physical and mental energy he has so far devoted to hurting people, he might, in some small measure, repay the community for the substantial resources it has and continues to expend on his behalf. Self-induced and prison-based indigency for conduct within his power to avoid should not be a barrier to appellate costs. Ordering a felon to repay his full debt to society is not injustice; it approximates the definition of justice by restoring balance to the scale. The alternative is to shift those costs to law abiding, hardworking, already overburdened taxpayers who rarely if ever avail themselves of the scarce judicial resources recidivists like defendant too regularly consume.

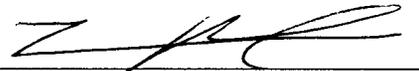
D. CONCLUSION.

Collateral estoppel and defendant's status as the first aggressor in the confrontation underlying the challenged assault conviction leave him without any legitimate claim to the self-defense instruction he maintains was wrongly withheld. His exceptional sentence was correctly calculated and is supported by written findings as required by statute. He should not

be freed from reimbursing our community for the cost of his appeal. His conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED: August 22, 2016

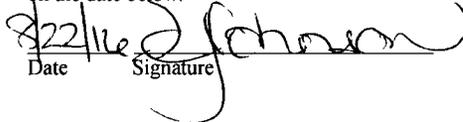
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/22/16 
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PIERCE COUNTY PROSECUTOR

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