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

STATE OF WASHINGTON, RESPONDENT

v.

TERRELL RAKAI WALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 15-1-03750-3

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Jason Ruyf
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Did the court correctly admit the victims' emergency room remarks about the cause of their life threatening razor wounds as that medically relevant background was critical to care and admissible under ER 803(4)?
2. Were self-defense instructions rightly withheld from the burglary charge as defendant's illegal reentry into the victims' dwelling to cut them up with a razor did not support the defense, which was rejected when jurors convicted defendant of second degree assault?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant was charged with first degree burglary as he unlawfully entered an apartment armed with a deadly weapon (a boxcutter) he used to savagely assault Danae Lizotte and James Heim.¹ CP 40. Two counts of first degree assault were joined for those underlying attacks. CP 41. Seventy three exhibits, most documenting the razor wounds defendant undisputedly inflicted, were admitted through five witnesses.²

¹ 4RP 163-65, 259-61. 266; 5RP(6/8) 376-78.

² CP 264-69; 4RP 163-65, 259-61. 266; 5RP(6/8) 376-78.

That evidence included the descriptions of causation both victims gave to emergency medical personnel upon being admitted to the hospital.³ Those statements were admitted under ER 803(4)—Statements for Purposes of Medial Diagnosis or Treatment—over generic hearsay objections that did not claim the statements improperly attributed fault, which defendant claims on appeal. *Id.* Neither statement attributed fault to defendant. *Id.* Undisputed evidence he committed the razor attack was independently adduced through three witnesses, to include both ER 803(4) declarants.⁴

Defendant rested without presenting evidence. 5RP(6/8) 410. The court would not permit him to argue the burglary was an act of self-defense.⁵ Self-defense instructions were given as to the joined and underlying assault counts. *Id.* The defense was rejected through his convictions for assaulting both victims. 7RP 522. His notice of appeal was timely filed. CP 240.

2. FACTS

James Heim met defendant in high school. 4RP 229. They remained friends until the morning of September 17, 2015, when Heim was about 27 years old and dating 23 year old Danae Lizotte. 4RP 232, 259, 310. All three spent the evening before together socializing with others at a friend's house. 4RP 232. Defendant's childhood friend Caratachea was also there. 4RP 169.

³ 4RP 196-97, 206, 208-09.

⁴ 4RP 163-65, 259-61. 266; 5RP(6/8) 376-78.

⁵ 6RP 431, 444-50, 459; CP 169 (Inst. 18), 170 (Inst. 19).

By all accounts the evening was peaceful. *Id.*; 4RP 232. But it was not without awkwardness for Lizotte, as defendant asked her for nude photos. 4RP 315. She declined. *Id.* He grew rude. *Id.* She left with Heim around 10:00 p.m., claiming to be ill. *Id.* at 233. The couple spent the night at a Tacoma apartment Lizotte resided in with her parents. *Id.* at 233.

Lizotte awoke to a text message from defendant around 9:18 am. Punctuated with sad-face "emojis,"⁶ the text said defendant did not mean anything he said to her the night before. *Id.* at 323. She did not reply. *Id.* at 324. Defendant later disclosed his interest in Lizotte to his childhood friend Caratachea. *Id.* at 161. Defendant was upset, for according to him Lizotte lost interest in him and began cheating on Heim with someone else. *Id.* at 161-62. Defendant redressed his discontent by unexpectedly knocking on Lizotte's bedroom window an hour after texting his apology. *Id.* at 242, 325.

Lizotte told Heim she thought defendant was there to apologize. *Id.* at 244, 322. Yet defendant appeared startled by Heim's presence. *Id.* at 245. Defendant asked to speak with Lizotte outside. *Id.* He grabbed her phone. *Id.* at 322. He accused her of cheating on Heim. 4RP 322; 5RP(6/8) 368-69. He cornered her against a wall, smashed her phone and pushed her. *Id.* She told him he must pay for the phone. *Id.* So, he pushed her again. *Id.* She

⁶ Emojis are small, stylized images used to express ideas and emotions or depict objects in electronic communications. *Graham v. Prince*, 265 F. Supp. 3d 366, 372 (S.D.N.Y. 2017).

screamed. *Id.* Heim ran outside upon hearing her cry out, "Stop hitting me," "give me back my phone." *Id.* at 248-50. Heim heard it hit the ground. *Id.* Still in underwear, Heim opened the door to Lizotte's porch. *Id.* Defendant turned to face him with clenched fists and an angry look. *Id.* Heim stood between defendant and Lizotte. *Id.* Defendant told Heim he needed to look for proof of infidelity on Lizotte's phone. *Id.* This description of events was confirmed by defendant's statements to Caratachea. *Id.* at 160-62.

Heim conveyed to Lizotte that they should go inside. 4RP 250-57; 5RP(6/8) 369-70. They thought the trouble had passed. *Id.* Lizotte followed Heim in the door. *Id.* She closed the door behind them. *Id.* But before it could be locked, it "flung open." And there was defendant, 5' 11," about 171 lbs., inside the apartment wearing Costco attire, which included his box-cutting tool.⁷ Lizotte told him to leave. 5RP(6/18) 374. He threw her down the hall with all the force he could muster. *Id.* at 255. She struck a counter. 5RP (6/8) 370-71. There was pain. *Id.* Then she blacked out. *Id.*

Lizotte awoke to see Heim buckling under defendant's attack. 5RP (6/8) 371-72. Moments before, Heim punched defendant to no effect. 4RP 257-59. Fists flew in both directions. *Id.* Lizotte tried to pull defendant off Heim, but defendant repeatedly struck her in the chest and head, then threw

⁷ 3RP 124; 4RP 158-59, 252.

her to the wall, causing her to fade out again. 5RP(6/8) 372-74. Heim felt a sharp sting; it was his right ear. 4RP 257-59. He reached up and "his finger went into [his] head and [he] felt [his] skull." *Id.* He "screamed, Oh my God, you punched my ear off... I'm bleeding ... call an ambulance." *Id.* Lizotte awoke to see Heim with an "ear hanging off his face" and defendant fleeing from the apartment. 5RP(6/8) 373.

Defendant admitted to attacking them while talking to Caratachea. 4RP 161. Defendant said he grew angry over something on Lizzote's phone, broke it, escalated, shoved her; Heim jumped in, so defendant shoved or hit Heim. *Id.* at 162-63. Defendant explained he "lost his temper and just kind of went crazy and then like ... snapped...." *Id.* He may have told Caratachea about attacking them with a boxcutter. *Id.* He ran upon realizing it had gone too far. *Id.* He admitted to pushing Lizzote into a wall. *Id.* at 165. He expressed remorse about hurting Heim when he got in the way. *Id.* He never described Heim as aggressive until Lizotte was pushed. *Id.* Defendant's hand was cut, he assumed by Heim but was not sure. *Id.* at 164. Yet Heim was unarmed, in his underwear, throughout their fight. *Id.* at 248-50, 283.

Heim profusely bled beneath blood spattered walls. RP(6/8) 362, 374-76. Lizotte tried to stop the bleeding from his ear with a towel only to discover more blood "gushing out of his back." *Id.* She pulled the tank top he was wearing "out of [his] back" to discover two long gashes." *Id.*; 4RP

266. Heim struggled to remain conscious as blood loss took its toll. 4RP 261, 267. Lizotte continued trying to stop his bleeding and called 911 despite the two long gashes running across her collarbone, right shoulder and chest. 5RP (6/8) 376, 378. An ambulance transported them to Tacoma General. 3RP 122. Defendant called 911 from a park not far from Lizotte's apartment. *Id.* at 125-26. During the call, defendant said he cut himself. 5RP (6/8) 392; 6RP 437; Ex.1.

The razor wounds Lizotte and Heim received were life threatening. 4RP 211, 215, 217-18. There was a lot of blood. 3RP 130-34. Lizotte was crying. *Id.* Heim was not crying, although he was visibly shaken. *Id.* Police photographed the "slash wounds" across his back. *Id.* at 136. Photographs were also taken of the lacerations across Lizotte's chest as well as the cut on her nose. *Id.* But the photos do not depict all the blood that poured from her wounds. *Id.* at 138. Both victims were treated by Tacoma General's Stanford trained Chief of Emergency Medicine, Dr. Constance. 4RP 173-75.

Constance described Heim as having a life threatening laceration across the base of his skull where high pressure vessels pump blood into the brain alongside nerves that control sensation, chewing and eye function. 4RP 180-189. Fortunately for Heim, defendant's razor just missed these critical structures. *Id.* But the cartilage defendant severed would be difficult to ever mend. *Id.* at 190. Heim would require surgical intervention to repair

the trauma to his ear and neck. *Id.* Heim also had two full thickness jagging lacerations down his back which posed a risk of long term nerve damage. *Id.* at 190-94, 217. Lizotte was a "very, very high acuity emergency patient," for defendant dragged his razor across an area where critical blood vessels passed into her neck. *Id.* at 200-203. The blade cut down to the "shiny membrane" covering the top of the subdural fat and muscle. *Id.* Another full thickness laceration cut over the top of her clavicle mere centimeters away from her windpipe, carotid artery and jugular vein. *Id.* at 204-206, 217.

Scaring caused by the razor attack remained with both victims when they testified nearly two years later.⁸ Lizotte remained scared as well as in pain. *Id.* During rehabilitation, she could not lift more than 10 pounds, which included the infant born to her and her then fiancé Heim. *Id.* Heim's ear was fused to his neck. 4RP 269. He still twitched and burned and had difficulty chewing. *Id.* at 274. He could not sleep on his back. *Id.* All this, and neither Lizotte nor Heim ever threatened defendant. *Id.* at 163-65, 276.

⁸ 4RP 269-274, 310; 5RP(6/8) 382-387.

C. ARGUMENT.

1. THE VICTIMS' EMERGENCY ROOM REMARKS ON THE CAUSE OF THEIR LIFE THREATENING RAZOR WOUNDS WERE RIGHTLY ADMITTED FOR THAT MEDICAL BACKGROUND WAS CRITICAL TO TREATMENT AND ADMISSIBLE UNDER ER 803(4).

"An out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if it is a statement made for purpose of medical diagnosis or treatment." *State v. Wood*, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001) (citing ER 803(4)). This medical treatment exception is applicable to statements reasonably pertinent to diagnosis or treatment, so it permits statements regarding causation, but typically not fault. *State v. Redmond*, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003). Remarks admitted pursuant to ER 803(4) are reviewed for an abuse of discretion. *Woods*, 143 Wn.2d at 602. So an ER 803(4) ruling should be affirmed unless it is proved to be manifestly unreasonable or based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Foundation was adduced through Dr. Constance explaining the role a patient's "subjective history" has in accurate diagnosis for treatment. 4RP 196-97, 206-09. According to that Chief of Emergency Medicine:

In the history of present illness, the patient's subjective history and the history that is provided by the patient is summarized as it pertains to the nature of the illness and it helps us in making a diagnosis and anticipating the potential injury. [4RP 196-97].

That explanation followed earlier discussion detailing the function of intake records in emergency care:

[State] Now, in the course of treating patients, however they come in, ... a significant amount of medical records ... are generated, would that be accurate?

[Doctor] That would be accurate.

[State] And is that something that you and your fellow medical professionals rely on in the course of your ability to treat?

[Doctor] Routinely.

[State] And is one of those things the notation of the information provided by patients in terms of the nature or mechanism of injury?

[Doctor] That is correct.

4RP 196. The State then inquired:

As it relates to Mr. Heim, do you know whether or not the medical records that pertain to his visit with you, do they indicate anything that he provided to medical staff relating to the nature of his injury in terms of how it was [sic] occurred, that sort of thing?

Id. at 196-96 (emphasis added). Defendant's *generic hearsay objection* was overruled because the question called for a statement pertinent to diagnosis or treatment. *Id.* at 197. Dr. Constance responded:

From what I recall from reviewing my documentation in the History of Present Illness, upon arrival, the patient alleged that he was defending a female and was stabbed by what he believed to be a box knife.

Id. at 197 (emphasis added). No responsible party was identified. *Id.*

An analogous line of questioning focused on Lizotte. The inquiry was again permitted under ER 803(4) over defendant's hearsay objection:

[State] [N]ow, the same question as I relayed or asked about Mr. Heim: In terms of the medical records regarding Ms. Lizotte, did she offer any explanation in terms of the nature or the causation that she provided regarding how she sustained her medical injuries? ...

[Doctor] Yes. So as we can tell from the documentation, the patent alleges that she was involved in an altercation ... she had made comments about ... being surprised, being involved in an altercation, having, ... her gentleman friend also involved in this altercation, having been occurred [sic] with somebody that was a known entity as well, and I believe referred to him as a friend. ...

Yes. So this is a note that was taken at the bedside in real time by Emergency Department Nurse Camacho, and again, it states and collaborates [sic] that this is a laceration of the upper chest wall done within quotes, with a razor.

It is standard practice for our emergency department nurses to objectively record the information as they hear it, particularly when in quotations. And also states that it was done by a friend. Patient also reports she was punched in the face.

4RP 208-09 (emphasis added). Jurors heard a more detailed account of how those injuries were inflicted by defendant (via his childhood friend), both ER 803(4) declarants and two 911 calls.⁹

⁹ 4RP 162-65, 167-69, 248-62; 5RP(6/8) 369-73, 388-90; Ex.1, 76.

- i. Victim statements that attributed the stabbing to a person without blaming an individual rightly described human causation, not fault.

ER 803(4) allows statements about injury causation, but generally not attributions of fault. *Redmond*, 150 Wn.2d at 496. Providing medical information about a causal agent of injury without more does not attribute *fault* to the agent. Treatment strategies differ depending on whether injuries are caused by humans, animals, autonomous machines or forces of nature.¹⁰ As there are differing limits to the force each brings to bear. Lacerations caused by a person (accidentally or otherwise) with a handheld blade would raise different concerns to those caused by a dirty animal claw or venomous fang. Pit bulls, for example, "[b]ite with a force of 1800 to 2000 pounds per square inch."¹¹ Lacerations caused by machines generating unnatural force, or exerting it in unnatural ways or contaminated with unnatural materials carry their own challenges to treatment. *E.g.*, *Hoffman v. Gamache*, 1 Wn.App. 833, 886, 465 P.2d 203 (1970) (hand drawn into chopper blades).

And all can injure without fault. "Fault" legally denotes:

[a]cts or omissions ... that are in any measure negligent or reckless toward the person or property of ... others....

¹⁰ Restatement (Second) of Torts § 522 (1977);

¹¹ Sallyanne K. Sullivan, Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional, 13 U. Dayton L. Rev. 279, 283 (1988).

RCW 4.22.015. "Fault" commonly denotes acts *wrongfully* done by people. *Newby v. Gerry*, 38 Wn.App. 812, 690 P.2d 603 (1984); Webster's Third International Dictionary 829 (2002) ("responsibility for wrongdoing....").

Attributions of agency are not always attributions of fault, for fault is an attribute of context. The distinction appears in *Redmond*, where an inappropriate attribution of fault was not found in a statement the declarant:

[w]as struck in the face and his jaw was smashed against the side of the car....

Redmond, 150 Wn.2d at 497, n.5. It would matter to treatment, but would not attribute fault, to clarify the injury was caused by a person outside or driving the car, for a blameless explanation could attend the pedestrian and motorist alike. Each statement *Redmond* found to attribute fault described the victim as "accosted," which means confronted. *Id.* at 497, n.4; Webster's Third International Dictionary 12 (2002). That verb cast the other as an aggressor; thereby, attributing fault to him.

Like distinction is detectable in the example defendant offers:

Thus, statements as to causation ("I was hit by a car") would normally be allowed, but statements as to fault ("...which ran a red light") would not.

Woods, 143 Wn.2d at 602 (quoting 5A Karl b. Tegland, Wash. Prac. § 367, 224 (2d ed. 1982)); Def.Br. at 9. Human agency behind the wheel of that imagined car is implied as self-driving cars were sci-fi concepts in 1982

when the example was published. The implication of fault derives from the context of someone driving the car against a red light. So it is the context in which an unidentified person drove, not a driver's implied role as the causal agent, that improperly attributes fault to the driver.

If the emergency room statements about causation made by either victim in this case exceeded the scope of ER 803(3), it was not in revealing the causal agent to be a person. Whether the injury was inflicted by human or mechanical force is a fault-neutral factor pertinent to medical care. The remarks of Lizotte neutrally described an "altercation" among her "friend" and a "gentlemen friend," in which she was lacerated by a razor and punched. Those remarks neared the one approved by *Redmond* as neither implied an aggressor. Reference to being injured amid an altercation among friends is a contextual way of excusing an injury as accidental.

Declarant statements about a responsible person's identity is seldom pertinent to treatment. *State v. Butler*, 53 Wn.App. 214, 220, 766 P.2d 505 (1989). An exception appears in quasi-domestic violence episodes, where, as here, relationships among the participants influence treatment strategies. See *Woods*, 143 Wn.2d at 602; *State v. Sims*, 77 Wn.App. 236, 239, 890 P.2d 521 (1995); *State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993). Identification of a familiar assailant may be pertinent to hospital security. *United States v. Lukashov*, 694 F.3d 1107, 1115 (9th Cir. 2012).

Unlike Lizotte's statement, existence of a knife wielding other must be surmised from Heim's statement since grammatically he described being stabbed by a box knife. 4RP 197. This part of Heim's statement matches one approved in *Redmond*, which described the declarant's face being smashed against a car. *Redmond*, 150 Wn.2d at 497, n.5. Heim's description of himself "defending a female" could attribute fault, but only if the stabbing was blamed on one who provoked that defense. Instead, two events were described without context beyond sequence. Without reading knowledge of this case into those events, one could not know if he described being stabbed by someone or an unfortunately placed object; if a person, whether it was the referenced female or an implied other, and whether the stabbing was accidental or intentional. So the statement is too vague to attribute fault.

- ii. To the extent Dr. Constance exceeded the scope of ER 803(4) by attributing fault in his response, the error should have been the subject of a motion to strike and curative instruction.

If an aspect of a witness's answer proves objectionable, the opposing party is entitled to make a specific object, move to strike and request the jury be instructed to disregard. *Lundberg v. Baumgartner*, 5 Wn.2d 619, 625, 106 P.2d 566 (1940); *State v. Peyton*, 29 Wn.App. 701, 711, 630 P.2d 1362 (1981); ER 103. Error cannot be based on admission of an answer in its entirety if the opponent fails to request that relief. *Id.* Courts are "entitled

to be informed of the grounds for objection, enlightened on the theories of law which support the objector's position and given the opportunity to correct a mistake in time to avoid unnecessary retrials." *Ryan v. Westgrad*, 12 Wn.App. 500, 510, 530 P.2d 687 (1975).

Defendant interposed two generic hearsay objections when the State asked Dr. Constance to recite statements the victims made to nurses about the razor injuries being treated. But defendant did not claim the statements improperly attributed fault. A proffer of Constance's anticipated answer was not presented. So the court overruled defendant's generic hearsay objection based on its awareness of the ER 803(4) exception, which applied to the question posed. To the extent Constance's answers exceeded ER 803(4)'s scope by attributing fault, a second objection specifically challenging that aspect of the answers should have been made. Particularly since it is not a limitation explicit in the rule, but rather a product of interpretive decisions.

With its 28 exceptions, many with interpreted elements, the hearsay rule is like our time-for-trial rule in that specific objections are needed to know precisely how hearsay statements are being challenged. *See State v. Frankenfield*, 112 Wn.App. 472, 476, 49 P.3d 921 (2002); ER 803 (1)-(23); ER 804 (b) (1)-(6). Any attribution of fault in Dr. Constance's answers could have been corrected through a motion to strike, curative instruction and replacement with redacted remarks. As defendant's appellant challenge to

the statements' alleged attribution of fault was not clear in the context of the generic hearsay objections made at trial, this nonconstitutional claim of evidentiary error should fail without review of its merits.

- iii. Any wrongly admitted testimony was a cumulative restatement of evidence rightly admitted before and afterward.

Nonconstitutional evidentiary error cannot support reversal absent a reasonable probability it materially affected the result. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.2d 161 (2015). The error is harmless if the evidence is cumulative. *State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008).

The challenged statements made to emergency medical personnel consist of vague references to an altercation in which both victims were stabbed and one was punched by what can most generously be described as an unidentified assailant. Prior to that vague medical testimony, defendant's friend testified about a phone call in which defendant admitted to attacking them, probably with a boxcutter, without provocation. 4RP 162-67.

Immediately after the vague statement Heim made to his doctor was admitted, Heim took the stand and provided a far more detailed account of the attack that unequivocally and unobjectionably attributed fault to defendant. 4RP 246-76. Lizotte's testimony corroborated the blame Heim placed on defendant for the attack. 5RP (6/8) 362-74. Their testimony was corroborated by 911 calls. *Id.* at 388-92; 6RP 431; Ex.1. And the challenged

remarks could probably have been alternatively admitted under the excited utterance and present impression exceptions.¹² Dr. Constance also took care to qualify them as what Heim "alleged" and Lizotte "alleges," so they were only presented as statements Constance considered, not the truth of what occurred. The challenged rulings could not be more than harmless, if error.

2. THE SELF-DEFENSE INSTRUCTIONS WERE RIGHTLY WITHHELD FROM THE BURGLARY CHARGE BECAUSE DEFENDANT'S ILLEGAL REENTRY INTO THE VICTIMS' DWELLING TO CUT THEM UP WITH A RAZOR COULD NOT SUPPORT THE DEFENSE, WHICH HIS JURORS REJECTED WHEN THEY CONVICTED HIM OF THE JOINED SECOND DEGREE ASSAULTS.

The right to 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.* Refusal to instruct on self-defense is only reviewable for abuse of discretion when based on a factual dispute. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Rejection as a matter of law is reviewed *de novo*. *Id.*

¹² ER 803(1): "A statement describing or explaining an event ... made while the declarant was perceiving the event ... or immediately thereafter[;]" ER 803 (2): "A statement relating to a startling event ... made while the declarant was under the stress of excitement caused by the event....;" *State v. Cervantes*, 169 Wn.App. 428, 433, 282 P.3d 98 (2012) ("A trial court's decision may be affirmed on any basis....").

After exiting his victims' apartment, defendant violently forced his way back in through a closed or nearly closed door. 4RP 250-57; 5RP(6/8) 369-70. Lizotte told him to leave. 5RP(6/18) 374. So he threw her down the hall, shook off Heim's best effort to defend her, then defendant's boxcutter attack began. 4RP 255-59. Defendant admitted to attacking them while talking to Caratachea. 4RP 161. Defendant said he grew angry over something on Lizzote's phone, broke it, escalated, shoved her; Heim jumped in, so defendant shoved or hit Heim. *Id.* at 162-63. Defendant never described Heim as aggressive until Lizotte was pushed. 4RP 165.

Defendant's argument for a self-defense instruction was based on the claim Heim may have used a knife during the altercation:

Your Honor, so the facts that we're relying on for self-defense, and, obviously, the Court is aware that if the instruction is given, that it's the State's burden to disprove it, but we do have to show some evidence, show at least a scintilla of evidence.

We do have the testimony about the cut on our client's hands possibly being a defensive wound; we do have testimony from Nick Caratachea, accounting for [defendant's] statements that he believed or thought that he'd been cut on the hand and he presumed [Heim] had done it. We also have the fact that Mr. Heim was known to carry a knife, had a knife with him that day, in fact, mere feet away. Liked to carry knives and liked to use them. So, while I acknowledge that it's definitely not the strongest self-defense claim that's ever been proffered before the Court, it does meet the burden, I think, in allowing us to at least argue the instruction to the jury and let the jury decide whether or not it's been, whether or not self-defense has been overcome.

As to the charges, obviously, as to assault in the first degree and burglary in the first degree has an element of either carrying a deadly weapon or assaulting somebody therein, and it could negate that element of that charge.

6RP 432-33. The Court responded:

It could negate which element? I mean, there's no dispute at all that he had a deadly weapon. I mean, I haven't heard any fact at all suggesting that he didn't, not the least of which is his statement to 911 that "I cut my friend with a box cutter." So I'm not sure how self-defense would negate anything about the burglary. [6RP 433.]

Defendant added:

The element that, you know, immediate flight from the building, was armed with a weapon, or assault of a person, so it would go to that specific either/or element, I would assert that. Obviously, assaulting a person, that would be whether somebody was lawfully assaulted, and I guess one could lawfully be armed with a deadly weapon. So I think the burglary in the first degree can be considered when one's considering self-defense, and I'm asking the Court to instruct likewise.

6RP 433, 437. More colloquy followed:

[Court] [W]hen I was listening to the 911 tape, ... they said how did you get injured? And I thought [defendant] said he cut himself, he might have cut himself with the box cutter. That was his statement.

[Defendant] Correct. I was focusing on what ... Caratachea said.... I'm not balancing everything. Obviously, there's some statements on the 911 tape that contradict.

6RP 437-38. The testimony from Caratachea was defendant assumed he was cut with Heim's knife, but was not sure. 4RP 164. Yet defendant was sure Heim did not respond aggressively until defendant shoved Lizzote. *Id.* at 165. Despite defendant's "attenuate[d]" claim to self-defense, the court permitted him to raise it against his assault counts but not his burglary count. 6RP 444, 449-50. It was a defense rejected by the assault verdicts.

- i. Burglars are aggressors who cannot invoke self-defense to justify injuries they inflict upon the lawful occupants of burgled dwellings without first manifesting clear intent to withdraw.

Burglary is an aggressive act. *State v. Dennison*, 115 Wn.2d 609, 616-18, 801 P.2d 193 (1990). That initially aggressive act prevents burglars from justifying as "self-defense" force used to commit burglary. *Id.*; *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, 673 P.2d 200 (1983); RCW 9A.16.020. The purpose of the burglary statute is to protect the occupancy and habitation of a home. *Wilson*, 136 Wn.App. at 608. Burglars do not revive their forfeited right to self-defense unless they surrender, manifest good faith intent to withdraw and remove the occupant's fear. *Dennison*, 115 Wn.2d at 618-19.

A burglar's inability to invoke self-defense to use force accords with the occupant's right to stand her ground and use force to repel 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 ... a dwelling ... in which he or she is." RCW 9A.16.050(2). And the right of an occupant to forcefully repel or detain a burglar extends to her 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).

The unrefuted evidence proved defendant violently forced his way into the victims' apartment. He then went about the grisly work of cutting the objects of his envy to pieces with a boxcutter after being asked to leave. At no point did he manifest a desire to withdraw or remove his victims' fear. As explained in *Dennison*:

[I]f [defendant] had truly intended to withdraw from the burglary and communicated his withdrawal to the decedent, he would have dropped his gun or surrendered.

Dennison, 115 Wn.2d at 618. And so it was here: If defendant had intended to withdraw he would have conveyed surrender and dropped his boxcutter. Instead he cut his way through the victims' lives, leaving a lifetime of pain and scaring in his wake. If there was error in this case, it was in allowing

him to argue self-defense against the assaults absent evidence to support the theory. The instruction was rightly withheld from the burglary.

- ii. Regardless of whether a self-defense instruction is available to a burglar on the attack, the instruction was rightly withheld in defendant's case as he was admittedly a first aggressor.

Self-defense cannot be invoked by a 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. It is equally unavailable to one who sets in motion events culminating in a physical altercation. *Walker*, 40 Wn.App. at 663. A victim's response to attack cannot support her assailant's claim of self-defense. *Id.* at 664; *Currie*, 74 Wn.2d at 199; *Janes*, 121 Wn.2d at 240.

Yet that is precisely the evidence defendant based his self-defense claim on here. There is no evidence from which to infer force Heim used was anything but defensive. Both Heim and Lizotte described defendant's act of forcing his way into the apartment to attack. Defendant admitted Heim only intervened when defendant shoved Lizotte. Defendant admitted to cutting Heim. So it is immaterial whether Heim used a knife to fend off that attack, yet Heim made it clear he did not. 4RP 276, 283. Defendant's vicious act of burglary was not self-defense.

- iii. And even if burglary could be called *defensive* in these topsy-turvy times, the instruction was rightly withheld as he used far more force than necessary to carve up the couple he attacked.

A defendant must overcome the initial burden of adducing credible proof of self-defense for the jury to be instructed on that theory. *Walker*, 40 Wn.App. at 662. The evidence must show he perceived a reasonable threat of imminent harm. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980); *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002). The responsive force must be no more than necessary from the perspective of a reasonable person confronted with the situation defendant perceived. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); *State v. Walden*, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997). If an element is unsupported, the theory is unavailable. *Walker*, 136 Wn.2d at 773; *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 779 (1979). When supported, the State must disprove it. *State v. Acosta*, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984).

Defendant never articulated subjective fear of his victims, much less objectively reasonable fear. Neither attribute can be inferred from what he said about attacking his friends, or their description of the attack. And even if it is possible they in some way threatened him through their struggle for survival, he surely could have stopped short of cutting off Heim's ear, or twice dragging his blade across each victim's body.

- iv. The omitted self-defense instruction was harmless, for jurors rejected the defense as to the assaults underlying his challenged burglary.

A failure to properly instruct on defense of self is not automatically constitutional error much less presumptively prejudicial. *State v. O'Hara*, 167 Wn.2d 91, 102-03, 217 P.3d 756 (2009). Even where a presumption of prejudice lies, the error may prove harmless if the omission could not have affected the trial's outcome. *Id.*; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999); *State v. Robinson*, 38 Wn.App. 871, 876, 691 P.2d 213 (1984).

The jury was instructed on self-defense as to defendant's assaults:

It is a defense to charges 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 believes that he or she 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 of 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. ...

CP 169 (Inst.18). The jury's rejection of the defense through the assault convictions makes it illogical to conclude the defense would have justified the burglary if extended to that count. And it was the victims who were empowered to defensively stand their ground, not defendant. CP 170.

D. CONCLUSION.

The Chief of Emergency Medicine who treated the life threatening razor wounds defendant inflicted was rightly allowed to recount medically-relevant ER 803(4) statements of causation. Neither statement provided context enough to attribute fault as first claimed on appeal. They were also harmless, if error, for the vague altercation described was proved with unobjectionable evidence. Defendant's claim of instructional error is no less flawed, as his act of burglary barred his invocation of self-defense. His two convictions for assault, despite a self-defense instruction on those counts, prove the decision not to extend that defense to the related burglary was harmless, if error. His convictions should stand.

RESPECTFULLY SUBMITTED: April 23, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Jason Ruyf
Deputy Prosecuting Attorney
WSB # 38725

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.

4/24/18 [Signature]
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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