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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENSHON STOKES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gerald Costello

No. 17-1-03436-5

Brief of Respondent

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

1. Is taking another person's cell phone away from them and refusing to give it back an intentional act likely to provoke a belligerent response?

2. Does it matter that the "belligerent response" at issue in this case was the assault victim's attempt to grab her telephone back?

3. Are appellant's legal financial obligation claims well taken?

B. STATEMENT OF THE CASE.

This incident occurred on September 10, 2017.[1] Appellant (hereinafter "defendant"), confronted his wife, Kalia Brown, with "advances or questions of infidelity." 1/9/18 VRP 116-17. Defendant took Ms. Brown's phone and "and he went through [her] phone to see who else [she] was talking to, if it was like some type of extra relationship that was happening behind his back." 1/9/18 VRP 118. Ms. Brown did not stop defendant from taking the phone. 1/9/18 VRP 173. Defendant was looking

[1] The day and month are found in Kalia Brown's testimony at 1/9/18 VRP 115-16. The year is found at 1/9/18 VRP 113.

through Ms. Brown's phone. She was giving defendant the "quiet treatment . . . not really paying attention to him." 02/01/18 VRP 173. Defendant just grabbed the phone. 1/9/18 VRP 119. It was on the dining room table. *Id.* Ms. Brown told defendant that he could look through the phone. 1/9/18 VRP 173.

Ms. Brown asked defendant for her phone back. 1/9/18 VRP 119. Defendant said no. *Id.*

> He came back into the room with me and he was just steady asking the same questions, and I still really wasn't giving him any answers, and I was still asking for my phone back. I think that's really the only words that I did get out at that moment, just "can I please get my phone back; I really don't want to argue at all."

1/9/18 VRP 119. Ms. Brown tried to get her phone back, and defendant would not give it back. 1/9/18 VRP 120. The circumstances of the assault are described at 1/9/18 VRP 120-121:

> Q. You tried and he wouldn't give it back?
>
> A. Mm-hmm.
>
> Q. And you don't remember at all what happened after that?
>
> A. When he tried to like approach me, 'cause we were standing up at first and he tried to approach me, then he ended up grabbing my shirt to really get the answers out of me. He didn't like punch me or anything like that; he just grabbed my shirt, like, "Kalia, you need to tell me the truth; is there somebody else that you're talking to?" And I was just like "no."
>
> Q. When you say he grabbed you, did he grab you with one hand, two hands? Where was it at?

A. Just one on my collar. And he brought my collar up, but I didn't go off the ground or anything.

Q. Do you remember if you were wearing a T-shirt?

A. Yeah, it was just a white V-neck T-shirt.

Q. So he grabbed with one hand?

A. Mm-hmm.

Q. Do you remember what hand?

A. No.

Q. What did you do after he grabbed you?

A. I told him to get off me. I actually held both of my hands up and I was just like, "Shon, you need to back off."

Q. When you say you held both of your hands up, can you demonstrate how you did that?

A. (Demonstrating.)

Q. So your hands were up. They weren't forward; they were just up, I guess is what you were doing. Is that fair, Ms. Brown?

A. Yes, that's correct.

Q. And did the defendant, Mr. Stokes, ever push you, shove you?

A. In a sense when he did grab my shirt, it was kind of like the pushback, like just holding the shirt tighter, but I never got lifted up or dragged or anything like that.

Q. Do you remember if that was against the wall?

A. Yeah, in the back bedroom.

Q. So it was against the wall?

A. Mm-hmm.

Id.

Defendant testified that he grabbed Ms. Brown's phone and "just went through it" to get the answers he was looking for. 1/10/18 VRP 225. Defendant testified when he grabbed the phone, Ms. Brown told him to give it back to her. *Id.* Consistent with Ms. Brown's testimony, defendant testified that at first Ms. Brown did not try to stop him. *Id.* Defendant testified that eventually, Ms. Brown tried to get her phone back from defendant:

> A. Eventually, yes, she tried to get the phone back from me.
>
> Q. What happened there?
>
> A. So when she was trying to get the phone back from me, she was grabbing on my shirt and like scratching on my arm where the phone was, and so I had the phone up here and I kind of just extended my arm right here. That way she could stop grabbing onto me and scratching on my arm.
>
> Q. So you gestured you had the phone in your left hand?
>
> A. Yeah. So I was like this. I play a lot of basketball, so it was pretty much like this and like this.

1/10/18 VRP 226. Defendant denied grabbing Ms. Brown's shirt. *Id.*

After that incident, an incident with a shotgun took place. Ms. Brown testified that the defendant held a shotgun in her presence, but she did not see him point it at her. 1/9/18 VRP 125-30. Contrary evidence was presented by Ms. Brown regarding the shotgun incident. 1/9/18 VRP 153, 156-157, 203-04. Defendant denied pointing a shotgun at Ms.

Brown. 1/10/18 VRP 231. Defendant was later found not guilty on the assault in the second degree charge predicated upon that conduct. CP 109. Immediately upon seeing the shotgun, Ms. Brown fled to a parking lot outside.

Ms. Brown eventually did get her phone back—it was cracked:

> Once it was cracked, yeah. That was the only time. Once he threw it over the balcony and it was completely shattered on the ground, then I picked my phone up off the ground. That was the last -- well, the official time that I got my phone back, after it was broken.

1/9/18 VRP 120. Ms. Brown was outside when her phone was thrown by defendant over the balcony at her house onto the ground. 1/9/18 VRP 118. She was able to contact police with her phone.

C. ARGUMENT.

1. GIVEN THE FACTS OF THIS CASE, TAKING ANOTHER PERSON'S CELL PHONE WAS AN INTENTIONAL ACT REASONABLY LIKELY TO PROVOKE A BELLIGERENT RESPONSE.

a. Evaluating the evidence in the light most favorable to the State, the first aggressor instruction was appropriate.

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." ***State v. Fernandez-Medina***, 141 Wn.2d 448, 455–56, 6

P.3d 1150, 1153 (2000). The trial court in this case gave the following first aggressor instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 98 (Jury Instruction No. 16). This instruction is a proper statement of the law. ***State v. Wingate***, 155 Wn.2d 817, 821, 122 P.3d 908 (2005).

Viewing the evidence in the light most favorable to the State (the party requesting the first aggressor jury instruction in this case), defendant retained Ms. Brown's cell phone without her permission.[2] 1/9/18 VRP 119-121. Ms. Brown tried to grab it out of defendant's hands. 1/9/18 VRP 174. That is when defendant grabbed Ms. Brown's shirt. 1/9/18 VRP 174. Contrary to appellant's brief—which does not present the facts in the light most favorable to the State—Ms. Brown employed no unlawful force upon defendant. She just—one time—tried to grab her phone back out of defendant's hands.[3] 1/9/18 VRP 174. That was when defendant grabbed her shirt. *Id.*

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[2] That much was admitted by defendant. 1/10/18 VRP 226.

[3] *See also* 1/9/18 VRP 121 for further evidence that Ms. Brown did not display aggressive behavior toward defendant.

Defendant expends considerable effort seeking to demonstrate that the defense of property was unavailable to Ms. Brown when she sought to grab her phone out of defendant's hand. Appellant's Brief at 9-14. The availability of the defense of property defense to attempts to recover (rather than defend) property is an "interesting"—and open—question. ***State v. Yelovich***, 191 Wn.2d 774, 775, 426 P.3d 723 (2018).[4] This court does not need to resolve that question in this case, because viewing the facts in the light most favorable to the State, Ms. Brown never directed any unlawful force which required application of the defense of property defense. The standard definition of assault was used in the jury instructions given in this case:

> An assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

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[4] Defendant's reliance upon ***State v. Yelovich*** is misplaced. The Supreme Court explicitly said that it was not addressing the "many interesting questions" about the availability of the defense of property defense and based its holding upon the narrower ground that a "defense of property jury instruction is not available when there is a valid court order prohibiting the defendant from contacting the protected party." ***State v. Yelovich***, 191 Wn.2d at 775.

CP 90 (Instruction No. 8); ***State v. Cardenas-Flores***, 189 Wn.2d 243, 268, 401 P.3d 19 (2017). Viewing Ms. Brown's testimony in the light most favorable to the State, Ms. Brown intended neither harmful nor offensive contact. All she did was unsuccessfully grab for her own cell phone out of her husband's hands. 1/9/18 VRP 174. There is nothing unlawful about that.

Defendant argues that "words only" provoked the confrontation between himself and Ms. Brown.[5] This conclusion is unsupported by the facts as viewed in the light most favorable to the State. Defendant was retaining Ms. Brown's cell phone against her will and refusing to return it to her. That is not "words only" conduct. It is an "intentional act reasonably likely to provoke" Ms. Brown into trying to grab her cell phone back.

In ***State v. Hawkins***, the Supreme Court concluded that "[w]hile appellant may not have been the aggressor in the sense of striking the first blow, he manifestly was the aggressor in the sense that his actions brought on the affray..." ***State v. Hawkins***, 89 Wash. 449, 455, 154 P. 827, 829 (1916). ***In re Harvey***, 3 Wn.App. 3d 204, 415 P.3d 253 (2018) concluded that the following facts warranted a first aggressor instruction:

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[5] This argument is made at Appellant's Brief at 14-19.

> Viewing the evidence in the light most favorable to the State, Mr. Harvey—knowing Mr. Lamere to be volatile and violent—told Ms. Richardson to move his flatbed truck into a position to block Mr. Lamere's egress from the parking lot and then stepped out of the truck and demanded his "f***ing Blazer" without having returned Mr. Lamere's Cadillac. While words alone will not constitute sufficient provocation for the giving of a first aggressor instruction, the act constituting the provocation need not be the striking of a first blow. ***State v. Hawkins***, 89 Wn. 449, 455, 154 P. 827 (1916); ***State v. Bea***, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

In re Harvey, 3 Wn.App. at 221-22. In ***State v. Bea***, the aggressor was a guest who refused to leave a bathroom, blocked the bathroom door, and wreaked damage behind the closed bathroom door. ***State v. Bea***, 162 Wn.App. at 576.

Defendant, in the midst of a marital dispute where each spouse was accusing the other of cheating,[6] grabbed his wife's cell phone to look through it.[7] When his wife had enough of it, and wanted her cell phone back after a few minutes, defendant told his wife "no, you're not going to get it back," and kept the phone. 1/9/18 VRP 174. This Court should conclude that those <u>actions</u> were reasonably likely to provoke Ms. Brown to try to grab her phone back. If defendant was entitled to a self-defense instruction viewing the evidence in the light most favorable to him (based

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[6] 1/9/18 VRP 172.
[7] 1/9/18 VRP 173.

on her grabbing for her cell phone)[8], the State was entitled to a first aggressor instruction because defendant's action in retaining her phone provoked that grabbing. Viewing all the evidence in the light most favorable to the State, the first aggressor instruction was proper.

b. The first aggressor instruction was a proper statement of the law.

The first aggressor instruction given in this case is a proper statement of the law. ***State v. Wingate***, 155 Wn.2d 817, 821, 122 P.3d 908 (2005); ***State v. Riley***, 137 Wn.2d 904, 914, 976 P.2d 624 (1999). The Supreme Court stated that the instruction is appropriate because it "properly directs the jury to determine whether the defendant's acts precipitated a confrontation with the victim." *Id.*

This case falls outside ***State v. Kee***, 6 Wn.App. 2d. 874, 431 P.3d 1080 (2018) because no reasonable juror could have concluded that Ms. Brown's words alone provoked Ms. Brown to grab for her phone. Ms. Brown grabbed for her phone because defendant held the phone (an act she wanted to undo by grabbing her phone back). There isn't any other way to fairly look at the evidence. ***State v Kee***, 6 Wn.App. 2d at 881.

[8] As defendant argues in his brief: "There is no question that, as she physically tried to grab it from him, he held it away from her." Appellant's Brief at 12.

c. The prosecutor's unobjected-to closing argument does not present reversible error.

The prosecutor's argument relating to the first aggressor instruction was brief and presented without objection:

> It indicates that no person can basically provoke a response where somebody is naturally going to create a physical altercation between the two of them. So the prototypical example of this is if you get up into somebody's face in a bar and start cussing them out, when a fight ensues, you don't get to say self-defense when you punched them because you provoked that fight with your language and your demeanor.
>
> This case is an even better example. You don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues. She has a right to that phone and a right to get it back. You don't get to do that. As such, the defendant was the primary aggressor in this case and he's not entitled to the self-defense instruction. Your analysis would end there. But it's my job to walk you through all of it, so I will also explain why the self-defense doesn't apply.

1/10/18 VRP 270-71. The prosecutor in this argument did not maintain that verbal acts alone can constitute provocation sufficient to transform the speaker into an aggressor. The prosecutor, in a hypothetical situation, coupled verbal acts with "get[ting] up in somebody's face in a bar" and "demeanor." *Id.* The prosecutor did not further argue what might constitute aggressive demeanor in the "prototypical" case. *Id.* The prosecutor argued, in the following paragraph, the facts of this case amply provide non-verbal aggressive behavior. *Id.* Viewed in context, the prosecutor's argument was entirely centered around defendant's retention

of his wife's cell phone—and that this situation was an "even better example" than the "prototypical" bar fight. *Id.*

Alternatively, any error in the argument presented in this case is harmless. The prosecutor did not ask the jury in this case to find that the "prototypical" situation discussed in the hypothetical scenario applied to this case and did not ask the jury to analogize the facts of this case to the "prototypical" situation. The prosecutor based his entire first aggressor on his "better example" that "[y]ou don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues." This argument, for the reasons discussed above, is not problematic. If there was any legal imprecision in the way the prosecutor got to that argument, any such imprecision was harmless.

Alternatively, defendant has waived any objection to the prosecutor's argument. Defendant did not timely object to the prosecutor's first aggressor argument.

> If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. ***State v. Stenson***, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." [***State v. Thorgerson***, 172 Wash.2d 438, 455, 258 P.3d 43 (2011)].

State v. Emery, 174 Wn.2d 741, 760–61, 278 P.3d 653, 664 (2012). The prosecutor's hypothetical argument was neither emotionally charged nor related to the facts of this case. Any error in that argument results only from a lack of precision—a lack of defining what was meant by "up in somebody's face" or "demeanor." Had the jury been told to disregard that argument, there was no chance of residual prejudice because the argument was connected neither logically nor emotionally to the facts of this case. The prosecutor's hypothetical briefly discussed a "prototypical" scenario which bore no factual resemblance to this case. 1/10/18 VRP 270-71. This case was a factually well developed marital dispute occurring in the privacy of the home.

The prosecutor's hypothetical argument was exactly the kind of argument that could have been neutralized by an instruction from the trial court to the jury to disregard that argument. When analyzing prejudice, appellate courts do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). In this case, a curative instruction could have cleanly severed the hypothetical argument presented from the argument related to the real facts of this case. Given that jurors are presumed to follow the

trial court's instructions,[9] a curative instruction would have remedied any possible prejudice.

2. DEFENDANT'S LEGAL FINANCIAL OBLIGATION ARGUMENTS ARE WELL TAKEN.

Respondent agrees the "court costs" should be deleted from the judgment and sentence. Respondent also agrees that the interest accrual provisions located at CP 116 should also be deleted. No restitution was ordered in this case, so interest on restitution is not an issue.

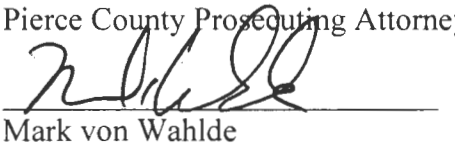
D. CONCLUSION.

The first aggressor instruction in this case was warranted by the facts. The first aggressor instruction given in this case is supported by the law. The prosecutor fairly argued the first aggressor instruction. Any error in the prosecutor's closing argument was either harmless or waived.

Defendant's legal financial obligation claims are well taken.

DATED: May 23, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



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[9] ***State v. Anderson***, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

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5-23-19 Theresa Kai
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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