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Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JAMES ROBERT SCHEIBE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01733-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly admitted Scheibe’s voluntary statements to the police after his lawful detention and arrest.**
- II. **Scheibe waived his new argument that “the police did not have reasonable articulable suspicion of criminal activity to justify the initial seizure” since he did not make that argument below, but in any event the trial court properly denied his motion to suppress his statements to the police.**
- III. **Defense counsel was not ineffective for not moving to suppress the shoulder holster that was recovered off of Scheibe’s person because it was seized pursuant to a lawful arrest.**
- IV. **The trial court did not violate Scheibe’s right to present a defense when it precluded him from offering irrelevant speculation that a third party framed him despite that person not being present at the scene of the crime or a witness at his trial.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Robert Scheibe was charged by second amended information with Assault in the Second Degree, Unlawful Possession of a Firearm in the Second Degree (“UPF”), Domestic Violence Court Order Violation (GM), and two counts of Reckless Endangerment for a continuing incident that occurred on or about June 16, 2018 and involved Maria Sexton and Sexton and Scheibe’s child W.S. CP 66-68. All of the

counts aside from the UPF included the special allegation of domestic violence, and the Assault in the Second Degree alleged the “sight or sound of the victim’s or the offender’s minor child[]” aggravating circumstance as well as a firearm enhancement. CP 66-68; RCW 9.94A.533; RCW 9.94A.535(3)(h)(ii); RCW 10.99.020.

Prior to trial, Scheibe filed a motion to suppress evidence that was found pursuant to a search of his backpack and a motion to suppress the statements that he made to the police. CP 7-8, 10-14. The trial court, the Honorable Robert Lewis, granted Scheibe’s motion to suppress the evidence that was found in his backpack and granted, in part, his motion to suppress his statements to the police.¹ CP 176-185.

The case proceeded to a jury trial before Judge Lewis, which commenced on April 15, 2019 and concluded on April 18, 2019 with the jury’s verdicts. RP 91-568. The jury found Scheibe guilty as charged to include the aggravating circumstance, the domestic violence special allegations, and the firearm enhancement. CP 116-124; RP 565-68. The trial court sentenced Scheibe to 50 months of total confinement. CP 134, 148; RP 582-83. Scheibe filed a timely notice of appeal. CP 156.

¹ The trial court only suppressed the first of three sets of statements Scheibe made to law enforcement. CP 179-185.

B. STATEMENT OF FACTS²

James Scheibe and Maria Sexton met and began a romantic relationship in Iron River, Michigan before moving to Clark County, Washington together. RP 262-63, 448-49. The couple had a son, W.S., who was about one year old at the time of the incident giving rise to this case. RP 262-63. Eventually, Scheibe and Sexton broke up, and Sexton sought and was granted a protection order, which prohibited Scheibe from contacting her. Ex. 3; RP 263-265. The protection order was properly served on Scheibe and he knew that he was prohibited by law from having contact with Sexton. Ex. 3; RP 218-220, 453-54, 472-75. Scheibe also knew that protection order prohibited him from possessing a firearm. Ex. 3; RP 472-75.

Despite the protection order, Sexton continued to have some contact with Scheibe. RP 264-65, 454. Sexton explained that she continued to see Scheibe because she “wanted my son’s father to be in his life and I was trying to do the right thing.” RP 265.

On June 16, 2018, Sexton drove to the property of a relative of hers at which Scheibe had been staying. RP 265-68. W.S. was in the backseat of Sexton’s vehicle in a car seat. RP 269. Sexton had a piece of

² Additional facts related to the assignments of error are developed in the Argument section.

legal mail³ for Scheibe regarding their son, and at least one of her reasons for going to the property that day was to deliver that piece of mail to Scheibe. RP 265-67. When Sexton arrived, she drove up the driveway, stopped by Scheibe, and began talking with him. RP 268-69.

Almost immediately the two began arguing about Father's day plans—whether Scheibe was going to see W.S.—and the legal mail. RP 269-271. They began “calling each other every name in the book” as Scheibe proclaimed that he was going to see W.S. one way or another and Sexton told him that he could not. RP 271. At that point, Scheibe reached underneath his arm and grabbed a handgun from his shoulder holster, continued “yelling and screaming” at Sexton, hit Sexton's truck a couple times, and then pointed the gun at Sexton as she put her “truck in reverse and slammed on the gas.” RP 272-73, 275, 290, 294. Sexton feared that Scheibe may shoot her. 282.

As a frightened Sexton was maneuvering to get out of the driveway she heard a gunshot, but did not see where Scheibe was aiming. RP 274-75, 282, 293-94, 300. Scheibe then jumped onto Sexton's vehicle and continued screaming at her as she put her truck into drive to exit the driveway onto the road to leave. RP 276-79, 289, 294-95. Scheibe's

³ Sexton described the mail as containing child support paperwork, while Scheibe claimed that it was about future family court dates. RP 270, 463.

position on the truck blocked Sexton's view so that when she was pulling into the road she did not see the approaching car. RP 279. Scheibe jumped off of Sexton's truck and yelled at her to stop, but it was too late and the two vehicles collided. RP 279.

Sexton suffered multiple cuts to her forehead and W.S. had seatbelt rash on his neck. RP 256-58, 260, 279, 327. The other driver was also injured to include a severe contusion to her sternum. RP 161-62, 258. At some point after exiting her vehicle, that driver overheard a man yelling to another "don't leave, they know you have a gun, you'll be in trouble, it's better if you stay." RP 167. Meanwhile, Sexton observed Scheibe walk towards the woods and throw the gun under a Conex box⁴ though he did not leave the scene. RP 281-82, 296-97. Sexton testified that the gun that the police found and retrieved from under the Conex box was the same gun that Scheibe pointed at her. RP 273, 301.

Neighbors who heard a gunshot followed by a crash called 911. RP 125-26, 131, 139-140, 142, 146-47.⁵ One neighbor heard Sexton explaining that she had pulled out of the driveway because someone jumped onto the hood of her vehicle, while that neighbor's husband heard Sexton ask Scheibe "why are you shooting me?" as the two continued to

⁴ A Conex box is a shipping container.

⁵ The neighbors reported that the gunshot sounded closer than the gunshots that they had been accustomed to hearing. RP 142, 146-47

argue. RP 132-33, 150. That same neighbor also reported that it appeared that Scheibe wanted to run but that others were telling him to stay and not run. RP 151.

The police responded to the scene after receiving multiple 911 calls reporting shots fired and a traffic accident. RP 224-25, 325. When the police arrived at the scene, and before they issued any commands, Scheibe, who matched the description given by dispatch, walked out into the middle of the street with his hands up. RP 227-29. Scheibe was handcuffed and the police found multiple knives, syringes, and a handgun holster on his person. RP 232-34, 248-49, 311, 390-96, 467-68. The police observed that Sexton appeared visibly upset, scared, and worried about her child. RP 246, 327.

The police began searching the scene and located the .45 caliber handgun, which contained multiple rounds in the magazine, under the Conex box, a spent .45 caliber shell casing, and tire tracks that appeared to corroborate Sexton's description of how she attempted to leave the scene. RP 235-46, 307, 312, 315, 327-28, 330, 348-351, 378, 390. When one of the responding deputies asked Scheibe about the gunshot Scheibe replied that "when she hit me, the gun went off." RP 310-11. When asked if the gun was in Scheibe's holster or hand when it went off, Scheibe said it was in a holster. RP 311-12.

Scheibe testified at trial and denied possessing or firing a gun on the day in question. RP 468-69. And multiple witnesses testified that the gun that was recovered was owned by one Zachary Randall.⁶ RP 285, 442-43, 469.

ARGUMENT

I. Scheibe waived his new argument that “the police did not have reasonable articulable suspicion of criminal activity to justify the initial seizure” since he did not make that argument below, but in any event the trial court properly denied his motion to suppress his statements to the police.

Prior to trial, Scheibe filed two motions to suppress evidence. CP 7-8, 10-14. The first challenged the search by the police of Scheibe’s backpack. CP 7-8. The trial court agreed with Scheibe that the search of the backpack was not a valid search incident to arrest and suppressed the evidence found within. CP 178; RP 69-70. The second motion to suppress challenged the admission of Scheibe’s statements⁷ and argued that he did not waive his *Miranda* rights before speaking with the police. CP 10-14.

⁶ Randall’s relationship to the case is further explored in the argument section.

⁷ Scheibe made three sets of statements to the police: one upon initially being detained, another after requesting a deputy to come speak with him, and the third in a police car while being transported to jail. RP 20-22, 54-55.

At the hearings on the motion⁸, Scheibe expanded his argument and claimed that he was arrested without probable cause prior to speaking with the police and that the unlawful arrest required the suppression of all his statements to the police. RP 61-66. After additional testimony was taken regarding the seizure of Scheibe, he specifically argued that:

[m]y position *still* is that he was illegally -- *illegally arrested* based upon the evidence before the Court. I am not aware of any case law that would hold that a person is just a -- it's just a *Terry* stop if a person is handcuffed, ordered to their knees, handcuffed, searched, set on the curb for half an hour that that's not an arrest. . . . So, I submit to the Court *that he was illegally under arrest* and that was -- and so that was an illegal seizure, which taints subsequent statements made by him later.

RP 106-07 (emphasis added). Scheibe did not argue that “the police did not have reasonable articulable suspicion of criminal activity to justify the initial seizure,” or that the police could not have lawfully seized him under a *Terry* theory. RP 61-62, 106-07. Instead, he implicitly conceded that a *Terry* stop was appropriate but that the police exceeded their authority by arresting him without probable cause. Accordingly, the State argued that “[w]hen Mr. Scheibe was put into handcuffs, that was a *Terry* detention

⁸ Suppression issues were considered over multiple days. RP 4, 90.

for officer safety purposes and to control the scene” rather than an arrest predicated on probable cause. RP 107-09.⁹

Ultimately, the trial court suppressed Scheibe’s first set of statements to the police under *Miranda* since the “defendant never expressly waived his right to remain silent” and the State did not “prove[] that the defendant impliedly waived his right to remain silent.” CP 182. But the trial court found the second and third set of Scheibe’s statements to the police admissible¹⁰ because there “was a lawful *Terry* detention” that ripened into a “subsequent lawful arrest” and, by that point, Scheibe’s actions “demonstrate[]d an implied waiver of his right to remain silent.” CP 181, 184; RP 63-66, 109-112.

Scheibe now argues at length that the police “conducted an impermissible *Terry*” stop by primarily attacking the information the 911 callers provided to law enforcement as insufficient to establish a “reasonable articulable suspicion that Scheibe was engaged in criminal activity.” Br. of App. at 21-28. Scheibe did not present this argument to the trial court. *Compare* CP 7-8, 10-14; RP 61-62, 106-07, 109 *with* Br. of

⁹ The State also offered brief argument on the propriety of the *Terry* stop itself and concluded that “[t]here is at least reasonable suspicion to believe that he [(Scheibe)] committed the crime, which would justify the *Terry* stop in the first place.” RP 108.

¹⁰ The trial court commented that “the second set of statements and third set of statements is being challenged on the grounds that he was illegally arrested at the time that he was placed into handcuffs and told to sit down in an area away from everyone else and questioned at that time.” RP 110.

App. at 21-28. Nor does Scheibe raise issue preservation or brief and argue RAP 2.5(a)(3) to explain why he should be able to raise this argument for the first time on appeal. As a result, this Court should consider the argument waived.

a. Waiver

The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citation omitted). This “rule reflects a policy of encouraging the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted). Our courts “will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Scott*, 110 Wn.2d at 685 (citation omitted). The theory of issue preservation by timely objection also “facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.” *State v. Lazcano*, 188 Wn.App. 338, 356, 354 P.3d 233 (2015) (citing *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177 (2013)).

And while a party need not intone magic words in order to preserve an argument for appeal, a party does need to at least make the essential argument and the “argument should be more than fleeting.” *Id.* at 355; *State v. Wilson*, 108 Wn.App. 774, 778, 31 P.3d 43 (2001). This rule also applies to suppression motions as, “[e]ven if a defendant objects to the introduction of evidence at trial, he or she ‘may assign evidentiary error on appeal only on a specific ground made at trial.’” *State v. Hamilton*, 179 Wn.App. 870, 878, 320 P.3d 142 (2014) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)); *State v. Higgs*, 177 Wn.App. 414, 423-24, 311 P.3d 1266 (2014); *State v. Garbaccio*, 151 Wn.App. 716, 731, 214 P.3d 168 (2009) (holding that because defendant’s “present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal”).

An exception to this rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. “In order to benefit from this exception, ‘the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]’s rights at trial.’” *State v. Grimes*, 165 Wn.App. 172, 180, 267 P.3d 454 (2011) (alterations in original) (quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)) (quoting *State*

v. *O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). The “manifest error” standard is exacting: “[t]he record must contain ‘nearly explicit’ facts demonstrating a constitutional violation.” *State v. Ramirez*, 5 Wn.App.2d 118, 132-33, 425 P.3d 534 (2018) (citation omitted). Accordingly, “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Furthermore, in order to show actual prejudice regarding a suppression issue, the defendant “must show the trial court likely would have granted the motion if made.” *Id.* at 333-34.

More than that, however, is required; in order to take advantage of one of the RAP 2.5(a) exceptions on appeal, a defendant must actually present a RAP 2.5 argument to this Court and bears the burden of proving an exception exists. *State v. Lindsey*, 177 Wn.App. 233, 247, 311 P.3d 61 (2013); *State v. Knight*, 176 Wn.App. 936, 951, 309 P.3d 776 (2013); *State v. Bertrand*, 165 Wn.App. 393, 400-03, 267 P.3d 511 (2011).

Here, as noted above, Scheibe’s argument that the “police did not have reasonable articulable suspicion of criminal activity to justify the initial seizure” was not argued to the trial court. Unsurprisingly then, Scheibe did not argue the cases he now cites as determinative of the issue nor did he spend any time discussing the relevant legal standard or arguing

about the reliability of the 911 callers or of the information provided by them. *See* RP 61-62, 106-07. And Scheibe fails to present this Court with an argument as to why he can raise the propriety of the *Terry* stop for the first time on appeal. Alone, these reasons should preclude review. But the State was also prejudiced by the late coming argument because the State could have presented (1) more evidence supporting the reliability of the 911 callers—we know at least one of the callers was named and known¹¹ as they testified at trial—and (2) the exact information known to the responding officers,. *Lazcano*, 188 Wn.App. at 356 .

For the purpose of Scheibe’s trial argument, all the State had to show was that the seizure did not rise to the level of an arrest. Scheibe’s new argument seeks to take advantage of the vacuum that arguably exists between his new argument and the evidence the State presented below to defeat his old argument. Nevertheless, Scheibe’s new argument cannot be considered for the first time and succeed because he cannot show that “the trial court likely would have granted the motion if made.” *McFarland*, 127 Wn.2d at 333. Based on the evidence presented in the CrR 3.5 and CrR 3.6 hearings the trial court concluded that the “*Terry* detention” of Scheibe was lawful, that the circumstances “created a reasonable suspicion that the defendant was a person involved in criminal activity,” and that the length

¹¹ Darlene and Robert Miller called 911. Exhibit 1 (CRESA 911 call log); RP 132, 149, 280.

of the detention was reasonable. CP 185. Consequently, even had Scheibe made his current *Terry* argument the trial court would have determined the seizure of Scheibe lawful and declined to suppress Scheibe's other statements. Scheibe's new *Terry* argument is waived.

b. Terry Stop¹²

Even assuming Scheibe preserved his argument or may raise it for the first time on appeal, his argument fails because the police lawfully seized him. When a defendant challenges a trial court's denial of a suppression motion, "an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Findings of fact are verities on appeal when unchallenged¹³ or provided that "there is substantial evidence to support the findings." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). "Substantial evidence exists where there is a sufficient quantity of evidence in the

¹² "In a challenge to the validity of a *Terry* stop, article I, section 7 generally tracks the Fourth Amendment analysis." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015).

¹³ Scheibe assigns error to a number of the trial court's findings of fact. Br. of App. at 1-2. But other than a conclusory statement that the "trial court's findings that the officers had a general description of the involved person and that Scheibe matched that description is not supported by substantial evidence" Scheibe does not address the findings of fact to which he assigned error. Br. of App. at 28. This is insufficient. A party that offers no argument in its opening brief on an assignment of error to a finding of fact waives the assignment of error. *State v. Radcliffe*, 139 Wn.App. 214, 220, 159 P.3d 486 (2007).

record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* A trial court’s conclusions of law following a suppression hearing are reviewed de novo. *Garvin*, 166 Wn.2d at 249.

It is well-settled that “[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct.” *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). “[R]easonableness is measured not by exactitudes, but by probabilities.” *State v. Samsel*, 39 Wn.App. 564, 571, 694 P.2d 670 (1985). Moreover, while an “‘inchoate hunch’ is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions.” *State v. Santacruz*, 132 Wn.App. 615, 619–20, 133 P.3d 484 (2006). In fact, “‘the courts have repeatedly encouraged law enforcement officers to investigate suspicious situations.’” *State v. Howerton*, 187 Wn.App. 357, 365, 348 P.3d 781 (2015) (quoting *State v. Mercer*, 45 Wn.App. 769, 775, 727 P.2d 676 (1986)).

In determining whether the grounds for which an officer decided to stop someone were well-founded, courts must look at “the totality of circumstances known to the officer at the inception of the stop.” *State v. Lee*, 147 Wn.App. 912, 917, 199 P.3d 445 (2008) (quotation omitted); *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (holding that

courts reviewing the reasonableness of a *Terry* stop “must evaluate the totality of circumstances presented to the investigating officer” while keeping in mind the “officer’s training and experience”). The same standard—the totality of the circumstances—pertains when a stop is “precipitated by an informant.” *Z.U.E.*, 183 Wn.2d at 618, 620-21. This “flexible approach” can be satisfied when:

- (1) circumstances establish[] the informant’s reliability or
- (2) some corroborative observation, usually by the officers, [] shows either (a) the presence of criminal activity or (b) that the informer’s information was obtained in a reliable fashion. These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual’s appearance. . . .

Id. at 618-19, 621 (internal citations omitted) (citing *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). Moreover, “when a tip involves a serious crime or *potential danger*, less reliability may be required for a stop than is required in other circumstances.” *Id.* at 623 (emphasis added). Similarly, “the law does not require the same showing of reliability of citizens’ complaints that pertain to informant’s tips.” *State v. Rice*, 59 Wash. App. 23, 28, 795 P.2d 739 (1990).

Rice is instructive. 59 Wn.App. 23. There an officer responded to a report of shots fired at a particular address and responded to that address where he observed the defendant amongst a group of juveniles in a

parking lot. *Id.* at 27. At that point, the defendant “had done nothing that would give any indication of criminal behavior other than simply being in the parking lot” and the officer “had no reason to single out [the defendant] as a criminal suspect.” *Id.* Nonetheless, “in order to investigate the report of shots fired, the officer had to talk to the only person who seemed available to him at the time and that was” the defendant. *Id.*

In holding that the officer’s seizure of the defendant was a permissible *Terry* stop *Rice* stated:

When [the officer] initially spoke to [the defendant], his purpose was to learn what he could about the validity of the report that shots had been fired and, if so, the origin or reason for the shots and, if possible, who fired them. A police officer investigating a report of *shots fired* can do no less if a responsible response to the citizen’s report is to take place. It follows that the initial effort to question [the defendant] did not violate the constitutional prohibition of unreasonable seizures. Justification was present, and the intrusion was minimal.

Since [the defendant’s] companions had quickly vacated the parking lot and [the defendant] appeared to [the officer] to be considering running away, [the officer] directed him to walk toward him. Assuming this command amounted to a seizure, it was justified as a *Terry* stop. *The firing of shots indicates* the presence of firearms and *probable illegal conduct*. While [the defendant] argues there was no evidence that the report of shots being fired was reliable, the law does not require the same showing of reliability of citizens’ complaints that pertain to informant’s tips. . . . There is no constitutional violation in allowing a police officer to assume a citizen’s report has some basis when he is conducting an initial investigation of that complaint.

Id. at 28 (emphasis added).

Here, even more so than in *Rice*, the totality of the circumstances provided a reasonable suspicion that Scheibe was involved in criminal activity and that these circumstances justified briefly seizing him for questioning. The police responded to multiple 911 calls describing a disturbance involving a gunshot or gunshots and, at the same location, a traffic accident. Ex. 1; RP 16-17, 53, 94-95. Such was the perceived danger that the police approached the scene using a “rolling bunker” maneuver to “provide cover for the officers that were approaching on foot.” RP 17, 31, 94. Upon their arrival, officers also observed a damaged vehicle—corroborating the reports of a collision involving a vehicle—along with a number of people in the same general area. RP 23-24, 26, 38, 95.

At this point, Scheibe came out into the middle of the street with his hands up despite not being asked to do so by the police. RP 17, 25, 30-31. “[B]y his actions and *description*, [the police] identif[ied] him as the person that was the subject of the call.” Ex. 1; RP 95-97. (emphasis added).¹⁴ Only then did the police command Scheibe to the ground and handcuff him. RP 17, 95. Immediately thereafter, Scheibe was frisked for

¹⁴ That Scheibe matched the description provided by the 911 callers was explored more completely at trial. RP 227-29. Had Scheibe challenged the propriety of the *Terry* stop as part of his CrR 3.6 motion to suppress, the State plainly would have produced a better record on this point as evidenced by the discussion at trial.

weapons—multiple knives were found—other officers started contacting witnesses, and a responding deputy “tried to begin a conversation” with him. RP 17, 32, 97-98. Additionally, the responding deputy indicated that as this was occurring that he was “still trying to figure out what’s going on [and] trying to make the scene safe.” RP 18, 94.

All of the above support the trial court’s conclusion that “[d]etaining the defendant under these circumstances and asking questions was a lawful *Terry* detention.” CP 185. And because the situation presented as the possibility of “a serious crime or potential danger” the responding officers had more than enough information to seize Scheibe especially in the light of the fact that by putting his hands up and walking out into the middle of the street as the police approached Scheibe identified himself as a person involved in the reported disturbance. *Z.U.E.*, 183 Wn.2d at 623. Accordingly, Schieble was lawfully detained and, as a result, none of the subsequent statements and evidence admitted against him at trial, specifically his second and third sets of statements to the police and his shoulder holster¹⁵, was improperly admitted.

¹⁵ The State does not directly address Scheibe’s ineffective assistance of counsel claim regarding the shoulder holster because it is dependent on this Court finding that he was unlawfully seized.

II. The trial court did not violate Scheibe’s right to present a defense when it precluded him from offering irrelevant speculation that a third party framed him despite that person not being present at the scene of the crime or a witness at his trial.

a. Standard of Review

When a defendant claims that an evidentiary ruling resulted in a violation of his or her right to present a defense, appellate courts employ a two-step standard of review. *State v. Arndt*, --- Wn.2d ----, 453 P.3d 696, 703 (2019) (citing *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)). First, the trial court’s evidentiary rulings are reviewed for an abuse of discretion and then “the constitutional question of whether these rulings deprived [the defendant] of [his or] her Sixth Amendment right to present a defense” is reviewed de novo. *Id.* RP 403-05. A court abuses its discretion when “no reasonable person would take the view adopted by the trial court.” *Clark*, 187 Wn.2d at 648 (internal quotation omitted).

b. The right to present a defense

Defendants have a constitutional right to present a defense. *Arndt*, 453 P.3d at 703. This right is not absolute, however, as defendants do not have a “constitutional right to present irrelevant evidence.” *State v. Burnam*, 4 Wn.App.2d 368, 376, 421 P.3d 977 (2018). More pointedly, our Supreme Court has remarked that “judges ‘must not abdicate our gatekeeping role by receding from difficult decisions and letting the jury

decide how much weight to give to evidence that is in fact irrelevant.”

Arndt, 453 P.3d at 710-11 (quoting *State v. Ellis*, 136 Wn.2d 498, 540, 963 P.2d 843 (1998)). Consequently, a defendant’s right to present a defense is still “subject to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *State v. Blair*, 3 Wn.App.2d 343, 415 P.3d 1232 (2018) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973)). For example, a defendant must still inform “the trial judge of the specific nature of the offered evidence” and cannot just provide “repeatedly vague” offers of proof and still be heard to complain later that his right to present a defense was violated when such evidence is excluded. *Burnam*, 4 Wn.App.2d at 377-78.

Furthermore, even relevant defense evidence can be excluded provided that the State shows that the “evidence is so prejudicial as to disrupt the fairness of the fact-finding process.” *Id.* at 376. This shift—from the evidence rules controlling the admissibility of the evidence—occurs when evidence, which otherwise would or could be excluded by the evidence rules, is central to the defense. *State v. Duarte Vela*, 200 Wn.App. 306, 320, 402 P.3d 281 (2017); *State v. Young*, 48 Wn.App. 406, 413, 739 P.2d 1170 (1987).

Moreover, the constitutional right to present a defense does not mean that any and every bit of relevant evidence offered by the defense in support of its theory *is required* to be admitted. *Arndt*, 453 P.3d at 711-12; *State v. Perez-Valdez*, 172 Wn.2d 808, 814-16, 265 P.3d 853 (2011). In other words, a court may “properly exercise[] its gatekeeping function” and limit the evidence presented by the defense, even significantly, without violating a defendant’s right to present a defense when the defendant was still “able to present relevant evidence supporting [his or] her central defense theory.” *Id.*; *Perez-Valdez*, 172 Wn.2d at 816. Thus, in determining whether the exclusion of defense evidence “violated the defendant’s Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist.” *Duarte Vela*, 200 Wn.App. at 326; *Burnam*, 4 Wn.App.2d at 375 (noting that the “more the exclusion of defense evidence prejudiced the defendant, the more likely we will find a constitutional violation”).

Here, Scheibe contends that he was prevented from offering evidence of a conspiracy between Sexton and Zachary Randall (Sexton’s ex-boyfriend, Scheibe’s girlfriend’s (Frias) ex-boyfriend, and owner of the relevant .45 caliber firearm) to frame him and that this denial resulted in a violation of his right to present a defense. Br. of App. at 20-21, 38-40.

More specifically, Scheibe claims that the trial court denied him the opportunity to testify that “Randall shot his own .45 into the air and then placed it under the Conex box in order to frame Scheibe.” Br. of App. at 21, 38 (Scheibe “was not allowed to explain that Randall shot his own .45 into the air. . . .”).¹⁶

As a preliminary matter, Scheibe’s offer of proof to the trial court does not support his contention on appeal. *Compare* RP 208-216 with Br. of App. at 20-21, 38-40. Scheibe’s counsel speculated that “[p]erhaps [Randall] fired the shot when he saw them arguing[,] . . . worried about what he had done[,] and hid the gun . . .” but, as per his own offer of proof, no witness, including Scheibe, saw Randall fire the gun, hide the gun, or even present at the scene contemporaneous to the incident.¹⁷ RP 208-216 (emphasis added), 445, 460-61, 471. Nor was any witness able to offer evidence of communication between Sexton and Randall just before or after the incident, which left the offer of proof bereft of any “facts supporting his theory that Sexton and Randall conspired to frame him. . . .” Br. of App. at 20. And, finally, Randall was not called as a witness by

¹⁶ The trial court specifically indicated that if Scheibe’s “theory is that [Randall] has a pistol and therefore, he’s the person who fired the shot and not Mr. Scheibe and he’s the person that ditched the gun and not Mr. Scheibe, that testimony from a witness [(Frias)] that she’s personally aware . . . then she can testify to that.” RP 213. But Frias had no such personal knowledge since she was not present at the scene on June 16, 2018. RP 445.

¹⁷ Sexton testified that Randall was not present at the scene on June 16, 2018. RP 298-99.

either party. RP 212. Accordingly, the trial court did not abuse its discretion when it prevented him from offering irrelevant speculative testimony for which there was no evidentiary support.

The same can be said about Scheibe's desire to admit evidence that Randall had previously accused him and/or Frias of stealing Randall's gun. RP 210-11; Br. of App. at 20, 38. While Scheibe claimed that this evidence would show that the incident "may have been a continuation of that attempt to get him [(Scheibe)] in trouble," the offer of proof¹⁸ on the matter was vague, speculative, and, realistically, more inculpatory than exculpatory. RP 210-11. The more reasonable inference is that Randall called the police to report that his firearm was stolen by Frias and Randall because he believed it was stolen and that in this incident that Scheibe had, once again, swiped Randall's firearm. And, again, Randall wasn't even present during this incident. It strains all credulity to believe that somehow Randall sought to frame Scheibe for the shooting but also hid the firearm under the Conex box; his entire scheme dependent on the attentiveness of the police during their investigation. This evidence was properly excluded.

¹⁸ From Scheibe's offer of proof: "there was an allegation made by Mr. Randall who called the police and said that Charlotte Frias, Mr. Scheibe's current girlfriend and/or Mr. Scheibe took Mr. Randall's .45 pistol, which is the same pistol found in this case. That incident was investigated back in April, no charges arose out of it because Mr. Randall eventually called the -- there was a search of the Scheibe of Ms. Frias' vehicle for the gun. What's relevant there to us is they found a holster that day, no pistol from -- no .45 caliber pistol." RP 210

Moreover, the same exclusion of evidence did not violate Scheibe's right to present a defense. As mentioned above, the excluded testimony was not supported by evidence and, thus, irrelevant. Second, as in *Arndt*, Scheibe was still "able to present relevant evidence supporting" this defense theory.¹⁹ 496 P.3d at 711-12. Scheibe called Frias as a witness and she testified about (1) Zachary Randall; (2) her relationship with him; (3) Sexton's relationship with him; and (4) his ownership and possession of the relevant Colt .45 firearm. RP 441-45. Similarly, Scheibe offered his own testimony about Randall, to include his claim that Randall wanted to get back together with Frias, who was at the time dating Scheibe, and that Randall possessed the relevant firearm. RP 450-51, 469. This testimony allowed Scheibe's counsel to argue in closing that perhaps Randall, the owner of the gun, was the one to actually fire it that day. RP 542. Consequently, the trial court did not violate Scheibe's right to present a defense.

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¹⁹ Scheibe did present other theories for why he should be found not guilty. His entire defense, or even his central defense, was not dependent on evidence related to Randall. See RP 536-551.

CONCLUSION

For the reasons argued above, Scheibe's convictions should be affirmed.

DATED this 7th day of February, 2020.

Respectfully submitted:

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