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Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESUS DUARTE VELA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. Exclusion of relevant evidence regarding the defendant's mental state was relevant.
2. Exclusion as hearsay of statements not offered for their truth was error.
3. Exclusion of evidence offered under the "state of mind" exception to the hearsay rule was error.
4. Exclusion of non-opinion evidence as speculative was error.
5. Failure to give defendant's proposed jury instruction on the duty to retreat was error.

B. ISSUES

1. Did the court's exclusion of admissible evidence essential to the presentation of the defendant's case violate the defendant's right to present evidence that he acted in self-defense?
2. Did the exclusion of evidence the defendant had been told about the alleged victim's prior acts of violence violate the defendant's right to present a defense of justified homicide?

3. Did the exclusion of evidence of statements made to the defendant that caused him to fear the alleged victim violate the defendant's right to present a defense of justified homicide?
4. Did the exclusion of defendant's testimony as to his state of mind and his reasons therefore violate the defendant's right to present a defense of justified homicide?
5. Was the court's refusal to give defendant's proposed jury instruction on the duty to retreat prejudicial error?

C. STATEMENT OF THE CASE

Seventeen-year-old Jesus Menchaca heard someone knocking on the door in the early morning hours. (RP 167, 425) When he called out asking who was there, no one answered. (RP 167) The knocking continued, but at some point whoever it was went away. (RP 167)

At about seven in the morning, Jesus saw his father Antonio Menchaca hugging his little sister. (RP 95, 164) Jesus had not seen his father for many years. (RP 164) Apparently Mr. Menchaca had moved away from the area about seven years earlier. (1/20 RP 36) Jesus was

scared that his father was there, so he called his uncle Jesus Duarte¹ and asked him to come pick him up after school. (RP 165, 414, 599)

Mr. Duarte's wife Billie Jo Wilson was getting their children ready for school when her nephew Jesus telephoned. (RP 96) Ms. Wilson knew Mr. Menchaca's wife had said she didn't want anything to do with Mr. Menchaca, but Mr. Duarte did not appear to be very worried by the call. (RP 97)

In fact, Mr. Duarte left home, taking his wife's gun with him, and went directly to his sister's home to be sure his sister and nephew were all right. (RP 98, 599-600) His sister, Blanca, had been married to Mr. Menchaca. (RP 591) Mr. Duarte knew that Mr. Menchaca had threatened Blanca in the past. (RP 674-75) He was afraid of Mr. Menchaca and very fearful of Mr. Menchaca's being around his family. (RP 592, 599, 697)

Mr. Menchaca was the only person at the sister's apartment. (RP 425, 599-600) Mr. Duarte asked what his purpose was in returning to the family. (RP 415-16, 601) He told Mr. Menchaca that Blanca didn't want to be with him anymore, and asked him to stay away from his family. (RP 415-16) Mr. Menchaca said he was going take off for California and go

¹ Jesus Menchaca's uncle is Jesus Duarte Vela, the defendant in this case. He is addressed and generally referred to throughout the trial as Mr. Duarte. In this brief he will be referred to as Mr. Duarte to avoid confusion.

back to Fresno. (RP 415, 427, 601) Mr. Duarte felt relieved and went to work. (RP 416, 427, 601-02)

That afternoon, Ms. Wilson drove out to the highway with her two younger children to meet her daughter's school bus. (RP 98, 606) She parked in a turnout at the top of the driveway. (RP 99) A vehicle showed up and pulled in behind her. (RP 101-03) Ms. Wilson saw two people in the truck. (RP 104) They looked over at her and met her eyes. (RP 104) She recognized the passenger, whom she had last seen in 2007. (RP 105)

Mr. Duarte arrived and as he pulled into the turnout the other vehicle, a dark SUV, drove away. (RP 106-07) Ms. Wilson told her husband about the other vehicle and said it had made her uncomfortable. (RP 106, 439) She told him she was frightened because she believed Mr. Menchaca was in the SUV. (RP 107, 436, 439) She was upset and unsure what to do because she knew there had been family trouble with Mr. Menchaca some years earlier. (RP 439) Mr. Duarte was frightened for his children but he tried to reassure his wife, then drove away following the SUV. (RP 107, 418, 439, 607)

The driver of the SUV was Luis Martinez Duarte.² (RP 418) He had been driving home when he saw Mr. Menchaca walking along the road. (RP 277) He was acquainted with Mr. Menchaca so he stopped and

² Luis Martinez Duarte, a distant cousin of Jesus Duarte, uses the name Martinez. (RP 276)

offered him a ride. (RP 277-79) Mr. Menchaca asked to be taken to a ranch where he had previously worked. (RP 279-89) When they arrived, a Ms. Wilson was already parked there. (RP 283)

After they had stopped and parked, Mr. Duarte arrived in his truck. (RP 284) Mr. Menchaca then said: “Oh there he comes.” (RP 284) He climbed into the back seat and told Mr. Martinez, “Let’s get out of here.” (RP 284) As they were leaving, Mr. Martinez saw Mr. Duarte talking to the Ms. Wilson who was sitting in the parked car. (RP 286-87)

As they headed south, Mr. Martinez noticed that Mr. Duarte was following them and flashing his lights. (RP 288) Mr. Martinez pulled over, and Mr. Duarte drove up alongside him. (RP 288-89) Mr. Duarte told Mr. Martinez a couple had talked to his wife and asked if Mr. Martinez knew anything about that. (RP 289, 418-19) Mr. Martinez said he didn’t and that he was just on his way to Brewster. (RP 289) Mr. Duarte explained that he was concerned because his sister’s ex-husband had come back and Mr. Duarte didn’t know what his plans were. (RP 438) He said, “‘I have a family so I don’t want no trouble . . . [b]ecause my wife she say she saw two men.’ ” (RP 438) Mr. Martinez responded, “ ‘No. It’s only by myself.’ ” (RP 438) He did not mention anything about Mr. Menchaca being hidden in the back seat. (RP 289)

Mr. Duarte drove back to where his wife and children were parked. (RP 107) She was still frightened. (RP 421, 439, 441) As they were talking, they saw Mr. Martinez drive by with Mr. Menchaca. (RP 108, 610-11) Mr. Menchaca had gotten back in the front seat. (RP 291) Ms. Wilson could see Mr. Menchaca. (RP 109) Both he and the driver made eye contact with her, and held their gaze the entire time they were driving past. (RP 109, 130) Mr. Duarte recognized Mr. Menchaca and became alarmed. (RP 421, 441) He felt they were staring at him. (RP 463)

Mr. Duarte realized that he had been lied to: Mr. Menchaca had not returned to Fresno, and he had been concealed in Mr. Martinez's vehicle a few minutes earlier. (RP 441, 469) He was afraid they had come looking for him and he felt he had to do something. (RP 441, 443) Fearing that one of his children could be hurt, he decided to go talk to them and tell them to leave his family alone. (RP 614)

He again followed the vehicle, and when it stopped, he pulled in front of them. (RP 442) Mr. Menchaca got out of the vehicle and came toward him. (RP 445) Mr. Duarte didn't know whether they had any weapons so he was scared. (RP 464, 472) He asked, " 'Why do you guys -- why do you guys doing this, or what's going on -- the deal?' " and "What are you doing down by my family?" (RP 338-340, 474) Mr. Menchaca was saying something about someone owing him money, but

Mr. Duarte felt he no longer believed him. (RP 294, 446, 475, 490) Mr. Menchaca said something like, “ ‘You know what, *Puna?*’ ” He sounded angry. (RP 476) Mr. Duarte felt threatened so he took out his gun. (RP 476, 497, 618-19) Mr. Menchaca reached into his pocket, made some movement, and said “*sabes que cunya.*” (RP 348, 628-29) Mr. Duarte stepped back, shot him, went home and called the police. (RP 322, 479, 481-82, 629)

The State charged Mr. Duarte with murder. (CP 206-09)

The State moved *in limine* to exclude any evidence as to Mr. Menchaca’s prior bad acts including evidence of specific acts. (CP 172-74) Defense counsel explained: “Your Honor, I anticipate the defense witnesses to testify as to the interaction they had with the victim and then communicating that to my client which would go to his state of mind.” (1/20 RP 19)

The defense proposed to offer the testimony of Mr. Duarte’s brother Alphonso, who would testify that he had a telephone conversation while Mr. Menchaca was in prison two or three years earlier during which Mr. Menchaca had threatened to come to Okanogan and kill Mr. Duarte’s entire family, and that he told Mr. Duarte of these threats (1/20 RP 19, 24, 28; 1/27 RP 10) The court ruled this testimony was too uncertain and

remote and thus inadmissible absent evidence as to when Mr. Menchaca got out of prison. (1/27 RP 12-13)

The defense sought to offer the testimony of Mr. Duarte's younger sister Maricruz that Mr. Menchaca had abducted her in 2007 when she was fifteen years old, that she was afraid of him. (1/20 RP 29, 37) Based on the State's argument that both Maricruz and Mr. Duarte had later retracted some of the accusations, and that the testimony was not relevant to Mr. Duarte's state of mind, the court ruled the testimony was irrelevant and inadmissible. (1/20 RP 29-31)

The defense sought to offer testimony from Mr. Duarte's wife, Ms. Wilson, stating that five or six years earlier she had witnessed acts of domestic violence perpetrated by Mr. Menchaca against his wife Blanca, who was Mr. Duarte's sister. (1/20 RP 34; 1/27 RP 8) The court excluded the evidence because the events were too remote in time or the timing was uncertain. (1/27 RP 8-9)

The defense sought to offer Blanca's testimony that she had been assaulted for a number of years by Mr. Menchaca and had told Mr. Duarte about domestic violence that had occurred even after she and Mr. Menchaca moved to Fresno and that she had told her brother that she lived in fear of her former husband. (1/20 RP 35-37, 1/27 RP 9) The court ruled the evidence was too remote to be relevant. (1/27 RP 9-10)

D. ARGUMENT

This court reviews the decision of a trial court to admit or refuse evidence for an abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A decision based on an error of law is based on an untenable ground and may constitute an abuse of discretion. See *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). The trial court abuses its discretion if it relies on unsupported facts or applies the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

1. THE SIXTH AMENDMENT PROTECTS THE DEFENDANT'S RIGHT TO PRESENT EVIDENCE THAT HE ACTED IN SELF-DEFENSE.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). A claimed denial of the right to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (an error of constitutional magnitude cannot be deemed harmless unless it is “harmless beyond a reasonable doubt”); *State v. Maupin*, 128 Wn.2d 918, 928–29, 913 P.2d 808 (1996); *State v. Anderson*, 112 Wn. App. 828, 837, 51 P.3d 179 (2002).

Evidence that constitutes a defendant’s entire defense is so highly probative that no State interest is compelling enough to preclude its introduction. *Jones*, 168 Wn.2d at 721.

2. EVIDENCE THE DEFENDANT HAD BEEN TOLD ABOUT THE ALLEGED VICTIM’S PRIOR ACTS OF VIOLENCE IS RELEVANT TO A DEFENSE OF JUSTIFIED HOMICIDE.

The threshold to admit evidence relevant to the defense theory of the case is very low, and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). “Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.” ER 401. Under ER 402, “[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.”

The State’s interest in excluding prejudicial evidence “must be balanced against the defendant’s need for the information sought, and only if the State’s interest outweighs the defendant’s need can otherwise relevant information be withheld.” *Darden*, 145 Wn.2d at 622. Evidence Rule 403, which requires balancing the probative value of evidence against the danger of prejudice, cannot be used to exclude “crucial evidence relevant to the central contention of a valid defense.” *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987). No state interest can be compelling enough to preclude the introduction of highly probative evidence. *Hudlow*, 99 Wn.2d at 16.

Whether a homicide is justified by self-defense depends on whether the accused acted out of fear and whether that fear was reasonable. A defendant may lawfully use force in self-defense if he reasonably believes he would be imminently harmed by the victim. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)).

Evidence of a victim’s prior acts of violence that are known by the defendant is relevant to a claim of self-defense “ ‘because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at that time, had reason to fear bodily harm.’ ” *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting *State v. Adamo*, 120 Wn. 268, 269, 207 P. 7 (1922)). Thus, such evidence is admissible to show the defendant’s reason for apprehension and the basis for acting in self-defense. See *State v. Walker*, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975); *Cloud*, 7 Wn. App. at 217.

If the accused “is defending . . . on the ground that at the time of the homicide he believed, and had good reason to believe, that he was in danger of his life or great bodily harm . . .” then evidence of the victim’s violent actions or reputation may be admissible to show the defendant’s state of mind at the time of the crime and to indicate whether he had reason to fear bodily harm. 7 Wn. App. at 218.

[A] defendant charged with homicide may show by third persons that they had previously had quarrels with the deceased, and show the conduct of the deceased on those occasions, if such prior occurrence or occurrences were made known to the defendant before the commission of the crime for which he is being tried, because such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he at that time had reason to fear bodily harm. (Citations omitted.)

7 Wn. App. at 218 (quoting *Adamo*, 120 Wn. at 269). In *Adamo*, the accused sought to present testimony of a witness who had quarreled with the deceased victim about five years before the homicide, and the accused was aware that the victim had “made a movement to his hip as if to draw a gun and made threats of violence against the witness” 120 Wn. at 8. (citing *State v. Palmer*, 104 Wn. 396, 176 P. 547 (1918)). The *Adamo* Court held the prior incident was too remote in time to be relevant. In *Palmer*, the accused was involved in an altercation and sought to claim he acted in self-defense. 104 Wn. at 397. In support of his claim he sought to introduce testimony of a witness regarding threats made against the accused about ten years earlier. 120 Wn. at 269. The statements were held “too ancient to be admissible.” 104 Wn. at 405. Appellant has found no case that cites *Adamo* for the proposition that otherwise relevant evidence should be excluded based solely on the passage of time.

A pattern of behavior in the course of an abusive relationship may well give rise to a belief that additional threats will be carried out. *State v.*

Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993) (citing *State v. Negrin*, 37 Wn. App. 516, 521, 681 P.2d 1287, *review denied*, 102 Wn.2d 1002 (1984)). “Threats and intimidation coupled with possession of a firearm, for example, . . . could be a sufficient basis for a self-defense claim because the circumstances created a reasonable expectation of imminent danger.” 37 Wn. App. at 521.

In the present case, Mr. Duarte sought to produce evidence that his sister Blanca told him she had been abused repeatedly by Mr. Menchaca, that Mr. Duarte’s sister Maricruz had told him Mr. Menchaca had abused or frightened her, that his brother Alfonso had told him that Mr. Menchaca had made threats to kill Mr. Duarte’s family, and that since those occurrences Mr. Menchaca had been incarcerated for an unknown period of time during which he would have been unable to carry out further abuse or threats. These repeated incidents of abusive behavior and threats, over a period of time, and involving various members of Mr. Duarte’s immediate family, would not, taken together, be too remote to cause Mr. Duarte to fear bodily harm from Mr. Menchaca. Thus they were not too remote to be relevant.

The court’s pretrial rulings on admissibility of witness testimony related to Mr. Menchaca’s history of violence and threats appeared to be framed in terms of the relevance of evidence of specific acts of violence or

specific threats. Yet from the outset defense counsel made it clear that in each case the witness would be testifying to what he or she had told Mr. Duarte. Whether the acts and statements described by the witnesses were true, their relevance arose from the fact that they had been described to Mr. Duarte and such descriptions affected his state of mind.

The court's pretrial rulings precluded witnesses from telling the jury about statements they had made to Mr. Duarte that would likely have caused him to fear Mr. Menchaca. Deprived of that evidence, Mr. Duarte was compelled to justify his actions in the context of what appeared to be Mr. Menchaca's minimal or trivial deception by concealing himself in Mr. Martinez's vehicle and bare expressions of apparently unfounded fear by Mr. Duarte's wife and Mr. Menchaca's nephew.

The court's relevance rulings effectively barred Mr. Duarte from presenting a defense and thus violated his rights under the Federal and State constitutions.

**3. STATEMENTS MADE TO THE DEFENDANT
THAT CAUSED HIM TO FEAR THE ALLEGED
VICTIM ARE NOT HEARSAY.**

ER 801(c) defines "hearsay" as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted.” Hearsay is generally inadmissible in court unless it falls within certain exceptions.

Whether an out-of-court statement is hearsay depends upon the purpose for which the statement is offered. *State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.2d 176 (1990). A statement offered to prove the mental or emotional state of the individual hearing the statement is not hearsay because it is not being used to prove the truth of the matter asserted. *State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.2d 176 (1990); *State v. Mounsey*, 31 Wn. App. 511, 522 n. 3, 643 P.2d 892, *review denied*, 97 Wn.2d 1028 (1982); 5K. Tegland, Wash. Prac. § 336 (3d ed. 1989). Out-of-court statements offered to prove the mental state of the person who hears the comments are not hearsay and therefore are admissible. *Id.*

Mr. Duarte testified in an attempt to convey to the jury his fear of Mr. Menchaca and the reasons therefore. (RP 594) He unsuccessfully tried to relate the many things his family members had told him that caused him to fear Mr. Menchaca and to believe Mr. Menchaca presented a continuing threat to the family. The court repeatedly sustained the State’s objections to such testimony.

Defense counsel asked Mr. Duarte whether he had received any information about Mr. Menchaca from members of his family. (RP 592)

Mr. Duarte testified that he had, and counsel asked “was this information positive or negative?” (RP 592) The court sustained the State’s objection. (RP 592) Mr. Duarte then testified that he was fearful for Mr. Menchaca to be around his family, defense counsel asked him why, and the court sustained the State’s objection. (RP 592) The court explained that, because the apparent reasons for Mr. Duarte’s fear were statements that had been made to him about events the court considered too remote, testimony about such statements would be inadmissible. (RP 595)

Mr. Duarte testified that he felt he needed to arm himself before he went to talk with Mr. Menchaca. (RP 600) Defense counsel asked him why and the court sustained the State’s hearsay objection. (RP 600) The question clearly called for a statement of the reason for Mr. Duarte’s mental state, admissible under *Hamilton* and *Cloud*, and did not call for hearsay.

Similarly, asked why he followed the car driven by Mr. Martinez, Mr. Duarte answered: “Yes, for the reason that my wife assured me that my ex-brother-in-law was there.” (RP 608) His wife’s assurances pertained to Mr. Duarte’s mental state and the reason for his actions. They were not offered for the truth of the matter asserted, and thus were not hearsay. Nevertheless, the court sustained the State’s hearsay objection. (RP 608)

Mr. Duarte testified that he had told Mr. Martinez that Ms. Wilson had told him she was sure there were two people in the car. (RP 609) The court sustained the State's hearsay objection, although the testimony clearly related primarily to Mr. Duarte's mental state, namely his belief that there were two people in the car, a belief that was relevant to explain how his mental state would be affected by being told that Mr. Martinez was alone.

Defense counsel asked what Mr. Duarte was feeling after he saw the two men drive past and Mr. Duarte explained that, because Mr. Martinez had told him Mr. Menchaca was not there, he "thought something bad [might happen]." (RP 613) The court sustained the State's hearsay objection to Mr. Duarte's testimony. Yet Mr. Martinez's statement was obviously not offered for the truth of the matter asserted; rather, it was offered to prove Mr. Duarte's mental state, which was one of disbelief and possibly fear. (RP 613)

Asked to explain why he was fearful, Mr. Duarte began by mentioning that Mr. Martinez had said Mr. Menchaca was not there. (RP 618) The court sustained the State's objection. (RP 618) The deceptive statement by Mr. Martinez was not offered for its truth. The statement was relevant only insofar as it was demonstrably false and thus tended to show Mr. Duarte's mental state, namely that he believed he was being

deceived. A false statement offered to prove the defendant's reasonable belief was not hearsay.

Asked about a conversation with his wife a few minutes before the homicide, Mr. Duarte said she had told him that "when they [referring to Mr. Martinez and Mr. Menchaca] pulled in they were looking at her with, like, a threatening look." (RP 607) The court sustained the State's objection. But Ms. Wilson's statement showed a reason for Mr. Duarte's apprehension, regardless of the truth of the matter asserted, and thus was not hearsay. Indeed, for purposes of showing Duarte's state of mind, "it would not have mattered if the testimony was false, so long as it tended to prove what [the defendant] was told." *State v. Mounsey*, 31 Wn. App. 511, 523, 643 P.2d 892 (1982).

It also went to her state of mind and thus fell within the "state of mind" exception. ER 803(a)(3)³; *Cloud* at 217.

Mr. Duarte testified: "I asked him if he was with my brother-in-law because he was back in Washington and I didn't -- I did not want to have

³ While most hearsay testimony is inadmissible, an exception exists for testimony as to the declarant's state of mind:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive design, mental feeling, pain and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed . . .

ER 803(a)(3).

any problems with anyone. And he told me he had not seen him nor did he have any idea he was in Washington.” (RP 610) Once again the court sustained the prosecutor’s hearsay objection although the testimony consisted, in part, of statements of Mr. Duarte’s mental state and also of a statement attributed to Mr. Martinez that was obviously not offered for its truth. (RP 610)

Mr. Duarte testified that when he returned from talking with Mr. Martinez, and told his wife Mr. Martinez said he had not seen Mr. Menchaca, she was upset because she said she knew Mr. Menchaca was there. (RP 610) The court sustained the State’s hearsay objection. (RP 610) Mr. Martinez’s statement was obviously not offered for its truth and thus was not hearsay. ER 801(c). Ms. Wilson’s statement was offered to prove her state of mind and was thus admissible under the exception for statements as to the declarant’s state of mind. ER 803(a)(3).

4. DEFENDANT’S TESTIMONY AS TO HIS OWN STATE OF MIND WAS NOT SPECULATIVE.

The question of admissibility of speculative testimony generally arises in the context of expert opinion evidence:

The courts, however, will not tolerate an opinion that seems to lack any reasonable basis whatsoever. The courts have often said that an expert’s opinion is inadmissible if it amounts to no more than conjecture or speculation. When testimony is excluded on this basis, it is

usually because the court has concluded that the expert is not adequately familiar with the facts and data essential to forming an opinion, or because the expert has strayed beyond the area of his or her expertise.

5B Wash. Prac., Evidence Law and Practice § 702.22 (5th ed.).

Mr. Duarte testified that after he saw Mr. Martinez coming towards him he felt something was wrong because “it couldn’t have been with very good intentions. He had no reason to get out of the car.” (RP 617) The State objected that the testimony was speculative and the court sustained the objection. (RP 617)

Mr. Duarte then testified that he feared bodily injury, and when defense counsel asked whether he believed the bodily injury would be serious the court sustained the State’s objection that the question was leading. (RP 618) Defense counsel then asked what type of bodily injury he feared and the court sustained the State’s objection that the testimony would be speculative. (RP 619)

Mr. Duarte’s opinion of his own state of mind, including his beliefs about Mr. Martinez’s actions, and the nature of his own fear, was not expert opinion testimony. In any event, he was certainly familiar with the facts and data essential to forming an opinion about his state of mind, and in expressing those opinions he remained well within the area of his own expertise. Even in the light of a record that is severely limited by the

court's improper exclusion of relevant evidence, his opinion cannot be said to lack any reasonable basis whatsoever.

By excluding all evidence supporting Mr. Duarte's claim that he acted in self-defense the court violated Mr. Duarte's right to present a defense. Mr. Duarte's claim of self-defense rested on his fear of the victim arising from numerous statements made to him regarding Mr. Menchaca's alleged violent tendencies, acts of violence directed at members of Mr. Duarte's family, and threat to kill all members of Mr. Duarte's family. It is improbable that any reasonable jury would have reached the same result in the absence of these evidentiary errors. See *Chapman v. California*, 386 U.S. at 24.

5. FAILURE TO GIVE DEFENDANT'S PROPOSED
JURY INSTRUCTION ON THE DUTY TO
RETREAT WAS ERROR.

Once the defendant produces some evidence of self-defense, the burden of proof is on the State to disprove self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). A defendant is entitled to a "no duty to retreat" instruction when the evidence indicates that flight was a reasonable alternative. *State v. Williams*, 81 Wn. App. 738, 742, 916 P.2d 445 (1996).

Defense counsel proposed a “no duty to retreat” jury instruction. (CP 151) The court declined to give the proposed instruction. (RP 756)

The court explained:

I am not going to allow your proposed number 7 which is the “duty to retreat” instruction. And the reason that I’m not allowing that is because Mr. Duarte testified that at some point he did retreat, that he did back up. And so as I read that instruction and I read the case law and the comments on that instruction, it seems to me that it is not applicable, and I’m not going to allow it.

(RP 747) Defense counsel did not object to the court’s decision. (RP 756)

The comment on the pattern instruction does not support the court’s analysis:

A “no duty to retreat” instruction need not be submitted if the defendant was actively retreating at the time of the fatal act. *State v. Thompson*, 47 Wn.App. 1, 5–6, 733 P.2d 584 (1987). Care must be taken, however, to distinguish a full-fledged retreat from the “ebb and flow” or “circling” common in a street fight. See *State v. Williams*, 81 Wn.App. 738, 742–43, 916 P.2d 445 (1996). Failure to give a “no duty to retreat” instruction in the latter circumstance is error. *State v. Williams*, 81 Wn.App. at 744.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.08 (3d Ed). The record contains no evidence that Mr. Duarte was “actively retreating” during the confrontation, let alone engaging in a “full-fledged retreat.” *Id.* He merely testified that when Mr. Menchaca put his hand in his pocket, he pulled out his weapon and stepped back a little. (RP 629)

The trial court's refusal to give such an instruction can be considered harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error. *State v. Aumick*, 126 Wn.2d 422, 430-31, 894 P.2d 1325 (1995). But in the absence of a "no duty to retreat" instruction, a jury may conclude that self-defense does not apply because flight is "a reasonably effective alternative to [the victim's] threatened use of force." *State v. Wooten*, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997). Here, such a conclusion was possible. Mr. Duarte was close to his own vehicle, which would have provided a means of retreat. The failure to give this instruction was error. *Id.*

Mr. Duarte contends that by proposing a proper instruction on the duty to retreat he has adequately preserved this issue for appeal. The cases do not clearly establish whether defendant's proposal of a jury instruction, if rejected by the court, is sufficient to preserve the error for appeal. See *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 490-91, 302 P.3d 500 (2013) ("the record reflects that SVR did not object to the trial court's refusal to give its proposed instruction on 'internal procedures.' We conclude that this argument is not preserved for appellate review."); but see *State v. Mullen*, 186 Wn. App. 321, 327, 345 P.3d 26 (2015) ("Mullen preserved this argument when he proposed a jury instruction that

required proof ‘beyond a reasonable doubt that the prior incident was alcohol or drug related.’ ”); see also *Brown v. Dahl*, 41 Wn. App. 565, 579, 705 P.2d 781 (1985). If this court concludes trial counsel was required to object to the trial court’s refusal to give the proposed instruction, then Mr. Duarte contends he received ineffective assistance of counsel contrary to his Sixth Amendment right to counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

6. IF THE STATE PREVAILS IT SHOULD NOT BE AWARDED THE COSTS OF THIS APPEAL.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider *important factors . . . such as incarceration* and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—*e.g.*, ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

If Mr. Vela’s conviction is affirmed he will be incarcerated for about twenty years. (CP 18) He has a wife and three children all under the age of seven years. (CP 29) His only assets are two vehicles, subject to completion of payments totaling \$7000. (CP 29) He has no sources of income, and owes \$1100. (CP 30-31) The trial court declined to impose any discretionary costs and expressly found Mr. Vela’s indigence was not temporary. (Sentencing RP 923; CP 20)

In light of Mr. Vela’s indigent status, and the presumption under RAP 15.2(f) that he will remain indigent “throughout the review” unless the trial court finds that his financial condition has improved, this court should exercise its discretion to waive appellate costs. RCW 10.73.160(1).

E. CONCLUSION

The conviction should be reversed and the matter remanded for a new trial at which defendant's proposed relevant evidence is presented to the jury.

Dated this 31st day of August, 2016.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 332993-3-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JESUS DUARTE VELA,)	
)	
Appellant.)	

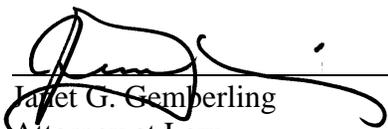
I certify under penalty of perjury under the laws of the State of Washington that on August 31, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Karl Sloan
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I certify under penalty of perjury under the laws of the State of Washington that on August 31, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on August 31, 2016.


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