FILED
JAN 11, 2017
Court of Appeals
Division III
State of Washington

NO. 33299-3

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

JESUS DUARTE VELA

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

B. STATEMENT OF THE CASE 1

1. Substantive Facts 1

2. Procedural Facts 24

C. ARGUMENT 30

1. The defendant was not denied his right to present a defense 30

2.The Trial Court properly excluded irrelevant, remote, and false evidence that defendant attempted to admit 32

3. Evidence offered under the exception to the hearsay rule for "state of mind" that was untrustworthy, remote, and irrelevant to the murder, was properly suppressed 36

4.Non-expert opinion and speculation testimony offered by the defendant was properly excluded 40

5. The no-duty to retreat instruction was not supported by the evidence and the issue is waived on appeal when defense did not object to the failure to give the instruction 42

6. The objection to appeal costs and cost bill are premature 44

D. CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Chambers v. Mississippi,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 35
Johnson v. Caughren,
55 Wash. 125, 104 P. 170 (1909) 42
Raborn *v. Hayton,*
34 Wash.2d 105, 208 P.2d 133 (1949) 39
State ex rel. Carroll v. Junker,
79 Wash.2d 12, 482 P.2d 775 (1971) 34
State v. Adamo,
120 Wash. 268, 207 P. 7 (1922) 28, 41
State v. Aguirre,
168 Wash.2d 350, 229 P.3d 669 (2010) 36
State v. Alexander,
52 Wash.App. 897, 765 P.2d 321 (1988) 28
State v. Barklind,
82 Wn.2d, 557 P.2d 314 (1977) 47
State v. Bell,
60 Wn.App. 561, 805 P.2d 815 (1991) 41, 47
State v. Benn,
120 Wn.2d 631, 845 P.2d 289 (1993) 43
State v. Blank,
131 Wn.2d 230, 930 P.2d 1213 (1997) 45, 46, 47, 49
State v. Blank,
80 Wn. App. 638, 910 P.2d 545 (1996) 48
State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 48, 49
State v. Blight,
89 Wash.2d 38, 569 P.2d 1129 34
State v. Brower,
43 Wn.App. 893, 721 P.2d 12 (1986) 33
State v. Brush,
32 Wn. App. 445, 648 P.2d 897 (1982) 44
State v. Cloud,
7 Wn.App. 211, 498 P.2d 907 (1972) 41
State v. Fagalde,
85 Wash.2d 730, 539 P.2d 86 (1975) 44
State v. Farris,
26 Wash. 205, 66 Pac. 412 (1901) 41
State v. Frazier,
55 Wash.App. 204, 777 P.2d 27 (1989) 43
State v. Gregory,
158 Wash.2d 759, 147 P.3d 1201 (2006) 36
State v. Heath,
35 Wn.App. 269, 666 P.2d 922 (1983) 33
State v. Hughes,

106 Wn.2d 176, 721 P.2d 902 (1986) 29, 33
State v. Hutchinson,
135 Wn.2d 863, 959 P.2d 1061 (1998) 25, 28
State v. Janes,
121 Wash.2d 220 (2005) 28, 37
State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010) 34
State v. Kidd,
57 Wn. App. 95, 786 P.2d 847 (1990) 29, 33
State v. Lizarraga,
191 Wn. App. 530, 364 P.3d 810 (2015) 34, 35
State v. Lord,
117 Wash.2d 829, 822 P.2d 177 (1991) 45
State v. Mahone,
98 Wn. App. 342, 989 P. 2d 583 (1999) 45
State v. Mak,
105 Wash.2d 692, 718 P.2d 407 (1986) 45
State v. Mee Hui Kim,
134 Wash.App. 27, 139 P.3d 354 (2006) 36
State v. Mounsey,
31 Wn. App. 511, 643 P.2d 892 (1982) 34
State v. Nolan,
141 Wn.2d 620, 8 P.3d 300 (2000) 46
State v. Palmer,
104 Wash. 396, 176 Pac. 547 (1918) 41
State v. Parr,
93 Wn.2d 95, 606 P.2d 263 (1980) 38, 39
State v. Rehak,
67 Wash.App. 157, 834 P.2d 651 (1992) 36
State v. Riley,
137 Wn.2d 904, 976 P.2d 624 (1999) 33
State v. Sanchez-Guillen,
135 Wash. App. 636, 145 P.3d 406 (2006) 40
State v. Sinclair,
192 Wn. App. 380, 367 P. 3d 612 (2016) 46
State v. Thompson,
47 Wash.App. 1, 733 P.2d 584 44
State v. Trevino,
10 Wn. App. 89, 516 P.2d 779 (1973) 29
State v. Walker,
13 Wn. App. 545, 536 P.2d 657 (1975) 28
State v. Wasson,
54 Wn.App. 156, 772 P.2d 1039 (1989) 33
State v. Weaville,
162 Wn.App. 801, 256 P.3d 426 36
State v. Wingate,
155 Wn.2d 817, 122 P.3d 908 (2005) 33
State vs. McFarland,
127 W.2d 322, 899 P.2d 1251 (1995) 45
Strickland,
466 U.S. 45
United States v. Scheffer,
523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) 35

Statutes

article 1, section 22 of the Washington Constitution 36
RCW 10.01.160 . . . . . 47, 48

RCW 10.01.160(3) 48
RCW 10.01.170 47
RCW 10.73.160 . . . . . Passim
RCW 10.73.160(3) 51
RCW 10.73.160(4) 46, 48, 49
RCW 10.82.090 49
RCW 10.82.090(1) 49
RCW 10.82.090(2) 49, 50
RCW 4.56.110 49

Other Authorities

5C Wash. Prac., Evidence Law and Practice § 803.10 40
5C *Wash. Prac., Evidence Law and Practice* § 803.11 . . . . . 40, 41
WPIC 16.02 32
WPIC 16.04 32
WPIC 17.04 32
WPIC 17.05 43
WPIC 2.01.01 32

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the defendant denied his right to present a defense, when he was permitted to offer evidence of his and his wife' state of mind, and the jury was instructed on self-defense?

2. Did the trial court properly excluded irrelevant, remote, and false evidence that defendant attempted to admit?

3. Did the trial court properly limit some evidence offered under the exception to the hearsay rule for "state of mind" that was untrustworthy, remote, and irrelevant to the murder?

4. Did the trial court properly excluded non-expert opinion and speculation testimony offered by the defendant?

5. Did the trial properly deny the no-duty to retreat instruction that was not supported by the evidence, and was the issue waived on appeal when defense did not object?

6. Is the defendant's request to waive appeal costs premature?

B. STATEMENT OF THE CASE

1. Substantive Facts

On February 20, 2014, the defendant shot and killed the victim, Antonio Menchaca-Naranjo. CP 206-209. At approximately 3:45 pm, Okanogan Sheriff's Dispatch received a 911 call of the shooting near the Chilliwist turn off from Old Highway 97, located two to three miles north of Malott, WA. RP 21, 43. The reporting

parties indicated that the victim had been shot and was possibly dead. RP 21.

While officers were in route, the defendant, Jesus Duarte Vela, called from a different location to report he had shot the victim. RP 22. Sgt. Gene Davis responded to the scene of the shooting and located the deceased victim. RP 22, 563-564. Sgt. Davis secured the scene and contacted witnesses, including Luis Martinez, and Robert Thoren. RP 22, 32, 35, 44, 45, 188.

Deputy Justin Weigel and Det. Rob Heyen arrived on scene shortly after Sgt. Davis. RP 23, 33, 44, 59. Witness Luis Martinez was patted down for weapons before being seated in a deputy's car. No weapons were found on his person. RP 241. Mr. Martinez's Chevy Blazer contained orchard loppers, and a fixed blade knife in a sheath that was located in the bottom of the vehicle's center console. RP 269, The victim did not re-entered the vehicle after he was confronted and shot by the defendant, and Mr. Martinez never removed the knife from the console, before or after the defendant confronted them. RP 269-270, 310, 562-563.

The victim was found on the ground away from the road and near some apple bins. RP 199-200, 268. Near the highway,

officers observed vehicle skid or acceleration marks that indicated a direction from south to north; and 380 auto shell casings on the roadside and on the roadway. RP 26-27, 31-32, 35, 192, 197-198, 245-246, 268-269. The skid / acceleration marks were located north of the Chevy Blazer driven by Luis Martinez. RP 189, 192, 194-195.

The shots from the 380 firearm were fired in close proximity to the location the defendant's vehicle had been. RP 198.

Detectives from the Washington State Patrol arrived on scene to assist in processing the crime scene. RP 24, 35-36, 47-48. The State Patrol detectives used Total Station to document the locations of tire marks, shell casings, and the victim's body. RP 178-179, 181-182. Sgt. Davis collected the cell phone used by Luis Martinez to make the initial 911 call as evidence. RP 28, 564.

Deputy Gisberth Gonzalez, a bi-lingual officer, arrived and took a statement from Luis Martinez. RP 33-34, 45, 141. At the scene, Deputy Gonzalez recognized the victim as a person to whom he had given a courtesy ride in the late evening of February 19 or early morning hours of February 20, 2014. RP 144, 145. The deputy had observed the victim approximately 2 miles north of

Brewster, WA, walking northbound on Old Highway 97. RP 146. Because the temperature was below freezing and the victim did not appear dressed for cold weather, Deputy Gonzales gave the victim a ride to the Chevron gas station in Okanogan. RP 146-147, 149-150. The victim identified himself as Fernando Duarte. RP 148. The victim showed the deputy a bus ticket from Fresno, CA dated February 18. RP 147, 253. Deputy Gonzales asked the victim if he could pat him down and check his backpack for weapons before he entered the deputy's car, and the victim agreed. RP 147-148. No weapons were found on the defendant or in his backpack. RP 148.

In February 2014, the victim had travelled from Mexico to his sister's home in Fresno. RP 401. When the defendant arrived at his sister's home, he had one change of clothes and a school type backpack. RP 403. His sister helped him purchase a bus ticket to travel to Washington. RP 400-402. The victim decided to continue on to Washington, rather than wait in Fresno until one of his sisters could travel with him, because he want to see his family and hug his daughter whom he had not yet met. RP 403-404.

Jesus Menchaca, who was the victim's son (and the defendant's nephew), testified at trial. RP 162. Jesus Menchaca

stated he first saw the victim while he was hugging Jesus's little sister (the victim's daughter) the morning of February 20 at the family's apartment. RP 164.

Mr. Menchaca said he called the defendant and told him that his dad (the victim) was there. He asked the defendant to pick him up after school that day. RP 165, 414. Mr. Menchaca said he did not want the defendant to pick him up that morning because he did not want something bad to happen, because the defendant was protective of the family. RP 165, 170.

The victim left the apartment, and was last seen by Mr. Menchaca as Mr. Menchaca got on the bus to go to school. RP 166, 170. The victim was happy to see his son (Jesus) because he had not seen him for seven years. RP 167-168.

Witness Luis Martinez lived in Okanogan and was currently working for Zirkle Fruit Company, in orchards located between Okanogan and Malott. RP 276. Mr. Martinez knew the victim and the defendant from growing up in the same area in Mexico. RP 276-277. On February 20, 2014, Mr. Martinez saw the victim walking along the roadway toward Okanogan and stopped to offer him a ride. RP 277-278. Mr. Martinez drove the victim to

Okanogan and they purchased sodas. RP 279. The victim asked Mr. Martinez if he would drive him to an orchard near Malott where he used to work, because he was still owed two weeks of back wages. RP 279, 314.

When Mr. Martinez and the victim arrived at the orchard, Mr. Martinez recognized it because he had also worked there in the past and had lived in the cabins located there. RP 280, 285. Mr. Martinez stopped his vehicle at a pullout, which he described as a parking / loading area off the highway. RP 281-282. Mr. Martinez parked his vehicle facing towards the orchard owner's residence. RP 282-283. Mr. Martinez recalled that the orchard owner's name was Kevin, and that Kevin had died a few years ago. RP 280. Mr. Martinez told the victim this information. RP 283, 315.

At the pullout, Mr. Martinez observed another vehicle driven by a woman that was parked to the north of his vehicle in the pullout. RP 283. Mr. Martinez did not know that the woman in the car was the defendant's wife. RP 340, 341. Neither he nor the victim attempted to contact the woman. RP 283, 314.

After they stopped at the pullout, Mr. Martinez told he victim that the defendant now lived at the orchard property - which the victim did not appear to know. RP 284-285, 326, 340.

Mr. Martinez then saw another truck turn in to the pullout. The victim then told Mr. Martinez, "Let's get out of here". RP 284, 288, 315. The truck was driven by the defendant, and was pulling in as Mr. Martinez drove away toward the south. RP 287. As they were leaving, the victim climbed into the back seat. RP 287,315-316, 336.

The defendant began following Mr. Martinez and the victim, and caught up with them, while flashing his lights. RP 288. Mr. Martinez pulled over and stopped his vehicle. The defendant pulled along the driver's side of Mr. Martinez's vehicle and stopped. RP 289. Neither Mr. Martinez nor the defendant got out of their vehicles, and Mr. Martinez did not tell the defendant that the victim was in the vehicle. RP 289-290, 316. The defendant appeared agitated but finally drove off. Mr. Martinez then continued driving south. RP 246, 317. After a few miles, Mr. Martinez and the victim decided to drive back to Mr. Martinez's home in Okanogan, and then to some cabins in the Okanogan area so the victim could seek

work. RP 290, 317. The victim got back into the front seat as they drove. RP 291, 317.

As they drove north on Old Highway 97, they passed the same pullout and saw the defendant standing outside of his truck. RP 291, 317. Mr. Martinez and the victim did not make any contact with the defendant. They did not change their speed, or make any gestures as they passed. RP 291-292, 318, 342-343.

After passing the pullout, Mr. Martinez noticed that the defendant was following them again. RP 292. The defendant caught up to Mr. Martinez's vehicle and Mr. Martinez decided to stop to see what the defendant wanted. RP 292. Mr. Martinez began to stop his vehicle at another pullout, and the defendant passed and him and stopped his truck in front of them. RP 292, 293.

Mr. Martinez and the victim exited their vehicle as the defendant exited his truck. RP 293, 321. The defendant was angry and made comments about what were they doing at his home, and what was their problem. RP 294, 295, 308.

The victim began telling the defendant the he was just trying to get a check that was owed to him for past work, and that he had

not known that the defendant lived there. RP 294, 295, 308, 341. The victim took out a piece of paper and tried to show it to the defendant. RP 295, 296, 323, 324, 337, 348.

The defendant told the victim "What have I told you before? Don't go near my family", and then pulled out a gun and shot the victim. RP 295, 296, 324, 337. The defendant and victim were approximately 12 to 15 feet apart when the defendant shot the victim. RP 323. Neither the victim, nor Mr. Martinez, had made any threats to the defendant. RP 310. When the defendant shot, he was near the roadside, and the victim was near the front of Mr. Martinez's vehicle. RP 297. When he was shot, the victim cried out and ran away from the defendant toward the orchard. RP 297-298.

Mr. Martinez thought the defendant was then going to shoot him. RP 298. The defendant told Mr. Martinez "Don't mess with me. I'm usually calm. But if you mess with me...." RP 298. Mr. Martinez told the defendant that the victim had asked for a ride and that is why Mr. Martinez had the victim with him. RP 299. The defendant said he would call police, but then got in his truck and left. RP 299.

Mr. Martinez thought the victim had run into the orchard so he got in his vehicle to start looking for him. However, as soon as he began backing up his vehicle, he saw the victim lying face down in the orchard. RP 299, 300.

Mr. Martinez got out of his vehicle and ran to the victim. He tried calling 911 but had no service. RP 300. When Mr. Martinez went to the victim, he found that the victim had gotten his phone out and had it in his hand. Mr. Martinez used that phone to call 911. RP 300-301-306. While on the phone with the 911 operator, Mr. Martinez turned the victim over to his back in order to attempt CPR. RP 307.

The victim sustained one gunshot wound that went through his left bicep, through his ribs and chest, and lodged in his right arm. RP 252, 526-530. That bullet was recovered from the victim's right arm. RP 530. The shot that passed through the victim's left arm, chest, and into the right arm, indicated that victim's arms were down and that his left shoulder was facing the muzzle of the gun when he was shot. RP 531-532, 553.

The victim suffered a second, grazing gunshot wound to his right upper back. The grazing gunshot wound indicated the victim's back was facing the muzzle when that shot was fired. RP 538-540.

There was no evidence of soot or stippling on the victim, which indicated the muzzle of the gun was not in close contact with the victim's body. RP 536-538.

The recovered shell casings and bullet were compared to test fires from the pistol at the State Patrol Crime Lab. RP 363-364. The recovered shell casings and bullet were identified as having been fired from the pistol recovered from the defendant's trailer. RP 369, 418, 419.

Witness Robert Thoren, was the first person to arrive after the shooting He drove up and saw Mr. Martinez outside waving for help, while on a cell phone. RP 229. Mr. Martinez told Thoren that his friend was shot and then handed the cell phone to Mr. Thoren in hopes that Mr. Thoren could better communicate in English with the 911 operator. RP 229-230.

Shortly after Sgt. Davis and the other officers arrived upon the crime scene, Deputy Weigel and Deputy Brown travelled south to the defendant's residence, located at 954 Old Highway 97, in

order to make contact with the defendant. RP 23, 36-37, 60, 82-83, 413. The defendant's residence was located approximately three miles south of the crime scene. RP 62.

When Deputy Weigel and Deputy Brown arrived at the defendant's trailer, they observed the defendant standing alone on the porch outside the trailer and holding a phone. RP 62-63, 83. The defendant was asked about the location of the gun, and he told the deputies that the gun used in the shooting was a 380-auto pistol, and that it was in a closet inside the trailer along with a .22 caliber rifle. RP 65, 68, 83-84. The defendant stated his wife (Billie Jo Wilson) placed the pistol in the closet. RP 66. Ms. Wilson had owned the pistol for about one year. RP 92. The .22 rifle belonged to the defendant. RP 93.

The deputies obtained permission from the defendant and his wife to secure the firearms. RP 66-67. Ms. Wilson directed the deputies to a closet in the master bedroom and told them the pistol would be on the top shelf, and the rifle would be in the corner. RP 67.

The deputies secured the firearms, and found that there were no bullets in the pistol or its magazine. RP 69, 84. The

deputies asked the defendant where the bullets were, and the defendant told them that he unloaded the pistol and threw the bullets in the trash. RP 70, 566, 569. The defendant identified the truck that was parked near the trailer as the one he was driving at the time of the shooting. RP 71-72.

While at the trailer, Deputy Weigel obtained a recorded statement from Ms. Wilson. RP 73-74. At trial, Ms. Wilson testified she lived with her father in Oroville for part of 2007, and then lived with the defendant in Omak, and then in Okanagan, beginning in 2007. She and the defendant were married in 2008. RP 89.

On February 2014, she and the defendant were living in a trailer at 945-B, Old Highway 97. At the time of trial, she and the defendant had lived in the trailer for approximately 4 years. RP 89-90. The trailer and surrounding orchard was owned by Sharon Skirko. The property had been owned by Ms. Skirko and her husband, Kevin Skirko, but Kevin had passed away approximately a year after Ms. Wilson and the defendant moved into the trailer. RP 90-91. The Skirkos lived in a house on the property. RP 91, 100. The defendant's trailer was in close proximity to the Skirko residence and to several picker's cabins. RP 91.

In 2007, when Ms. Wilson last saw the victim, she and the defendant did not live at 945-B, Old Highway 97. RP 125. Ms. Wilson had not known that the victim had previously worked for the Skirko orchard before he left the area in 2007. RP 124-125.

When the defendant returned home after the shooting, he asked Ms. Wilson to put the gun away. RP 93, 121, 132. Ms. Wilson stated she did not unload the pistol, but she saw the defendant unload it. RP 93, 121.

Ms. Wilson told the deputy who interviewed her that she *thought* the victim's name was Antonio, and stated that she had never spoken with him. RP 95-96. Ms. Wilson told the deputy that she was not present when the defendant received a call (the morning of the shooting) from his nephew, but she believe the defendant was planning to pick up his nephew school. RP 96-97, 124, 110-111. Ms. Wilson told the deputy that the defendant was not worried about the defendant that day. RP 97.

Ms. Wilson believed the defendant went to work as normal that day, but later received a call from the defendant who told her that he had gone to his sister's house and spoke with the victim.

RP 98. The defendant told Ms. Wilson that Blanca was not there when he had spoken with the victim. RP 98.

Ms. Wilson stated that later that day she drove up to a pullout off Old Highway 97, and stopped next to the highway to meet the school bus. RP 99-100, 127. From this pullout, there is access to the Skirko house, the picker's cabins, and the trailer where the defendant and Ms. Wilson lived. RP 101. The pullout was not marked as private, or with no-trespassing signs. RP 105-106. The turnout was used to load and un-load apple bins, and provided access to the Skirko house and worker cabins; and was used by orchard workers, and by people coming to look for work at the orchard. RP 105-106, 125. The pullout was also used by motorists to pull off the highway. RP 106.

Ms. Wilson told the deputies that while she waited for the school bus, a vehicle drove into the pullout, travelled behind her, and drove as far as they could go on the pullout, then stopped facing towards the Skirko house. RP 102-103. At trial, Ms. Wilson claimed that the other vehicle stopped behind her car; but that her vehicle was not blocked or prevented from moving in anyway. RP 126. At trial Ms. Wilson at trial claimed she was scared, but did

move her car, call 911, or seek any assistance regarding the other vehicle. RP 126.

On re-direct when confronted with her recorded statement, Ms. Wilson again changed her description of where the other vehicle was, and claimed it was facing north and was perpendicular to her car. RP 127-129. However, Ms. Wilson could not describe (and claimed to not have seen) how the other vehicle would have moved from this position in order to drive south on the highway. RP 138.

Ms. Wilson admitted that the other vehicle would have been facing toward the Skirko house, and not toward her vehicle, or her trailer, based on where it was stopped. RP 128-130, 137, 138.

Shortly after the other vehicle arrived, the defendant travelled southbound on Old Highway 97 and drove into the pullout. RP 103. Ms. Wilson told the deputies in her interview that the other vehicle contained two people and they never made contact with her. RP 103-105. At trial, Ms. Wilson said they made "eye contact" with her for a few seconds. RP 104, 131. On cross-examination, Ms. Wilson said the other vehicle was behind her, and then

alternatively said she saw them in her review mirror, and that she could not see them in her review mirror. RP 114.

At trial, Ms. Wilson indicated the victim was the passenger in the other vehicle, RP 104, 111-12.

The vehicle driven by Mr. Martinez at no time attempted to drive to, or toward, the defendant's trailer. RP 106. Mr. Martinez's vehicle stayed only a few minutes, before leaving the turnout and traveling south on Old Highway 97. RP 107, 116.

Ms. Wilson stated she told the defendant that she thought the victim, Antonio, *might* have been in the vehicle, but she had not seen him since 2007. RP 107, 104, 111-12. Ms. Wilson stated that she and the defendant did not really have any discussion about the other vehicle. RP 118.

The defendant then left the pullout to follow Mr. Martinez's vehicle southbound. RP 107. Ms. Wilson said the defendant came back to the pullout in less than a minute while she was still in her car waiting for the bus. RP 107, 118-119. The defendant told Ms. Wilson he did not see "them" at all. RP 108.

While the defendant was stopped next to Ms. Wilson, the vehicle with Mr. Martinez and the victim travelled on the highway heading northbound past the pullout. RP 108. The vehicle did not stop or even slow down as it passed the pullout and the occupants made no hand gestures. RP 108-109, 119. No one in the vehicle attempted to make contact with Ms. Wilson or the defendant. Ms. Wilson testified they made "eye contact". RP 109. The defendant then drove out of the turnout and followed the vehicle northbound. RP 109, 120.

At the time that Ms. Wilson saw the defendant leave to follow the vehicle, she did not know he had taken her pistol from the trailer earlier that day. RP 109-110. Ms. Wilson said the defendant returned to the trailer a few minutes later, indicating he shot someone. RP 95, 110, 120.

The defendant was interviewed by Sheriff's Detective Kreg Sloan on February 20 and February 21, 2014. RP 408-409, 411-412. The defendant said that after his nephew called him in the morning, he went to "confront" the victim. RP 415, 425, 427. The defendant took his wife's 380 pistol with him to confront the victim.

RP 423, 424, 668, 669, 671-673, 674, 676. The defendant did not have a firearms license or a concealed weapons permit. RP 484.[1]

That morning, the defendant went to the victim and told the victim that the victim's wife (defendant's sister) did not want him around anymore, and he needed to stay away; despite the fact that defendant had not been told that by his sister. RP 415, 498-499, 697. The defendant said he and the victim agreed and everything was fine. RP 488, 702. But the defendant also stated he told the victim that if his sister wanted to be with the victim, "that's fine, I'm okay with it". RP 498, 512, 666.

The defendant said when he arrived later that day at the pullout where his wife was at, he saw a guy (Luis Martinez) that he knew. RP 416-417. The defendant then clarified that he only saw the vehicle and not Mr. Martinez (or the victim), because it was kind of far away. RP 430, 432, 689, 703-704. The defendant described the vehicle as located on the south end of the turn out and that the vehicle was facing south. RP 433-434. The defendant said his

[1] The defendant was not legally admitted to the U.S. and had been previously deported. RP 393-395.

wife did not know anything about it and did not know who the people were, but that they "stared" at her. RP 416-417, 436, 510.

The defendant described no other action on the part of the persons in the vehicle. RP 510. The defendant did not see, or know, that the victim was in the vehicle. RP 435. The defendant said he was mad and angry because Mr. Martinez was there. RP 418, 419, 699. When Martinez left, the defendant followed him to find out what was going on. RP 419-420. The defendant testified he chased down Mr. Martinez's vehicle the first time because he was "provoked" by it being in the pullout. RP 691. The defendant said he took off pretty fast after the vehicle and it pulled over because of him. He then pulled up next to Martinez's vehicle. RP 436-437, 501, 704.

After confronting Martinez, the defendant returned to the pullout. The defendant stated that his wife told him that she was pretty sure it was your sister's husband in the vehicle, and he responded "Forget about him. As long as he's not doing anything to us or anything, that's fine." RP 705.

He then saw Mr. Martinez and the victim pass by on the highway. RP 421, 440, 469. The defendant said they drove by

normally, and they "stared". RP 463, 713, 736. The defendant said he chased after them because he was mad and wanted to confront them again. RP 421, 463-464, 469, 670. The defendant said he just freaked out and was thinking stuff in his head, and decided "I got to do something." RP 441, 470, 705. The defendant stated he did so because his *wife* was scared and to protect his kids. RP 706, 730. The defendant again testified he chased after them because "...they provoked me with their movements." RP 614, 708.

The defendant believed that Mr. Martinez's vehicle slowed down and pulled over again because they saw him following them, and that he then pulled in front of Mr. Martinez's vehicle. RP 442, 470, 615.

The defendant at one point said he did not remember who got out first, but that he was angry. RP 444-445, 471, 710-711. The defendant said he exited his truck before the victim exited the Blazer. RP 616. The defendant testified he armed himself with the firearm before he exited his truck, because of Luis Martinez got out of his car, and not because of the victim. RP 617-619. The defendant also said he grabbed the gun and took it with him when

he got out of his truck, because he did not want to give them a chance, *then they got out.* RP 465, 473, 678.

The defendant walked back toward Martinez's vehicle, and did not see that Martinez or the victim had any weapons. RP 464, 474, 730-731. The defendant described and demonstrated how he pulled the gun out and racked the slide of the gun to load a bullet in the chamber. RP 481, 682-685, 712. The defendant said when he pulled out the gun the victim was not really moving and that Mr. Martinez was just staring. RP 482, 487, 510-511, 685-686, 712.

The defendant said that he got out of his truck, that he was arguing, and then shot the guy. RP 464, 476, 701, 713-714. The defendant got angry because they lied to him, and he shot the victim. RP 422, 465, 469, 470, 497, 735-736. The defendant used the 380 to shoot the victim two or three times. RP 423, 482, 701. The defendant claimed he shot the victim from about six or more feet away. RP 423, 685-86, 723. After he shot the victim, he said the victim ran away. RP 477, 478.

The defendant admitted, to the detective: "...now I think I didn't do the right thing probably..." RP 513, 718.

The defendant stated he heard the victim tell him that his (the defendant's) boss owed the victim money and that's why he was there. RP 445-446, 465-466, 474-475, 483, 689, 733. The defendant told the victim he did not believe him and told him he was lying. RP 722, 733. Yet, the defendant knew the victim had previously worked for Skirko's orchard, and admitted that his boss lives at the same location where the defendant now lived. RP 466, 483, 720-721, 737. The defendant stated he did not live at 954 Old Highway 97 when the victim was last working there. RP 448.

After the defendant returned home, he emptied the gun, threw the remaining bullets in the garbage, and gave the gun to his wife to put away. RP 479. The defendant said his wife actually called 911. RP 634, 681

The defendant said he had had no problems with the victim before the day he shot the victim. RP 448, 713. The defendant also stated he had had no previous problems with Luis Martinez. RP 449, 513, 690.

The defendant testified he had last seen the victim 7 years prior. RP 591, 663. The defendant stated he was fearful *for* the victim to even be around the defendant's family. RP 592.[2]

Over the State's objection, the defendant was permitted to testify about his wife's statements, her state of mind, and her alleged fearfulness. RP 607-608.

The defendant testified that when he had armed himself and confronted the victim the morning of February 20, he was not fearful of the victim. RP 602, 665.

2. Procedural Facts

The Court heard pretrial motions on January 20, 2015, and on January 26, 2015. The defendant stated they were not seeking to offer character evidence or propensity evidence about the victim. RP (1/20/15), 17-18.

Defense sought to call the defendant's brother, Alphonso Duarte, for the purpose of making an allegation that Alphonso

[2] During this portion of direct, the Court again inquired if the defense was trying to elicit events from years ago that the court had ruled on. Defense responded they were seeking to elicit the defendant's feelings, and were not seeking to ask about prior acts. RP 594-595.

Duarte had received a phone call from the victim in which the victim made threats to him. RP (1/20/15), 27. The defense argued that it sought to offer Alphonso Duarte's testimony to establish *Alphonso Duarte's* state of mind. RP (1/20/15), 28. The court invited defenses to present some exception to the hearsay rule before trial that would allow admission of such testimony. RP (1/20/15), 28-29.

Defense sought to call Maricruz Duarte, the defendant's sister, to allege she was "kidnapped" by the victim when she was 15, and feared the victim. RP (1/20/15), 29. The State obtained the police reports form the investigation that included Maricruz Duarte's statement and the *defendant's* statement, which showed the testimony defense sought to offer at trial was false. RP (1/20/15), 30-31. The Court suppressed the proposed testimony based on relevance and because there was no showing that it bore on the defendant's state of mind. RP (1/20/15), 31.

Defense sought to call Billie Jo Wilson, the defendant's wife, to testify she had once seen bruises on the victim's estranged wife (Blanca Duarte), and that *Ms. Wilson* would try to attribute the bruising to domestic violence. RP (1/20/15), 33-34. The Court initially reserved ruling about whether to admit or exclude the

testimony, pending further review of *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998). RP (1/20/15), 34-35.

The defense sought to call Blanca Duarte, the defendant's sister, to testify the victim confronted her at work and that she had been a victim of domestic violence when she lived in Fresno California at an unidentified date and time – possibly 2006. RP (1/20/15), 35, 36-37. The court initially reserved ruling on suppression, but expressed concern about the remoteness of the allegation from at least seven or more years prior to the murder. RP (1/20/15), 38.

The defense sought to call Efren Duarte to allege the victim was a member of "the Mexican cartel", despite there being no evidence of any gang or cartel related affiliation, or of any gang connection to the crime. RP (1/20/15), 38-39, 40. The Court suppressed testimony of Efren Duarte about allegations that the victim was a cartel member or had some gang affiliation. RP (1/20/15), 41.

The defense sought to call Jesus Duarte Madrigal, the defendant's father, to offer: the false allegations about their "15 year old" daughter (Maricruz Duarte) being taken by the victim;

statements that his grandson had told him – not to the defendant; and allegations of an assault by the victim *sometime* before 2007, but without any other description, specific dates or time frames. [3] RP (1/20/15), 42-43. The Court found that on the specific acts alleged there was insufficient information provided by defense to make a ruling. RP (1/20/15), 44, 45-46. The Court noted the defense had not provided any applicable hearsay exception and specifically suppressed testimony from Jesus Duarte Madrigal or Elisa Duarte about statements told to them by others. RP (1/20/15), 44, 45. RP (1/26/15) 5.

The defendant then sought to call Raul Duarte to allege the victim had been in trouble with police in the past, and about statements made to *him* by others about allegations of domestic violence and a threat; and an allegation that he saw the victim assault Maricruz Duarte when she left with the victim. RP (1/20/15), 46-47. However, the assertions offered by defense during the pre-trial motion attributed to Raul Duarte, did not even match the statements that defense had provided in discovery regarding which relative was supposedly assaulted. RP (1/20/15),

[3] Defendant co-listed Elisa Duarte, the defendant's mother, for the same offer of proof, but her basis of knowledge and possible testimony was even less clear.

47. Additionally no time fames were provided, the allegation of an assault would have had to have been 2007 or earlier based on the statements. RP (1/20/15), 47-48. The court suppressed the testimony of Raul Duarte, finding hearsay, lack of firsthand knowledge, and that the allegations were too vague to admit. (1/20/15), 48.

The Court after hearing additional argument and considering *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), *State v. Alexander*, 52 Wash.App. 897, 765 P.2d 321 (1988), *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), and *State v. Adamo*, 120 Wash. 268, 207 P. 7 (1922); suppressed the proposed testimony of Blanca Duarte regarding allegations of remote specific acts, and continued to reserve a ruling regarding Alfonso Duarte. RP (1/26/15), 6-17, 19-24, RP 5 -14.

The State subsequently made an offer of proof of when the victim had been returned to Mexico, putting into serious doubt any claim by Alfonso Duarte about receiving a threatening phone call from the victim. RP 221-223. Defense then withdrew Alfonso Duarte as a witness. RP 223.

At trial, after the defendant testified, the defense request for self-defense instructions was granted over the State's objection. RP 745, 755-756. The State argued that the defense had not even met the low burden of producing some evidence of reasonable apprehension of great bodily harm, citing *State v. Janes*, 121 Wash.2d 220 (2005) . RP 639-642. The State also argued that Washington has not adopted the so-called imperfect self-defense doctrine, that allows self-defense based on an honest but unreasonable belief, and cited to *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902, 908–09 (1986).

That State also object to the giving of instruction 32 (acting on appearances), citing *State v. Kidd,* 57 Wn. App. 95, 786 P.2d 847 (1990). RP 756.

The State also argued that the defendant could not assert defense of others (i.e. his wife and children) when they were not present, citing *State v. Trevino*, 10 Wn. App. 89, 99, 516 P.2d 779, 785 (1973).

The Court did not give the defendant's proposed instruction 7 (no duty to retreat), and defense did not object to that, or any other instruction. RP 747, 756.

The defendant was found guilty of second-degree murder, alien in possession of a firearm, carrying a conceal weapon, and unlawful carrying of a loaded pistol in a vehicle. CP 81. The defendant was also found to have been armed with a firearm at the time of the commission of the murder. CP 80.

C. ARGUMENT

1. The defendant was not denied his right to present a defense.

The defendant was not denied the right to present a defense. The defendant was permitted to present his claim of self-defense, and the jury was so instructed. [4]

---

[4] The court gave Jury Instruction 30:

> It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the slayer when:
>
> 1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
>
> 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
>
> 3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilt. WPIC 16.02. CP 70.

The first aggressor instruction (#33) was properly given. A first aggressor instruction is appropriate in cases in which the defendant claims self-defense and there is evidence that the defendant's conduct or acts provoked or precipitated the incident for which self-defense is claimed. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999); *see also State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005) (re-affirming *Riley* and affirming the use of a first aggressor instruction when the evidence was disputed as to who precipitated the confrontation); *State v. Heath*, 35 Wn.App.

The Court gave Jury Instruction 31:

> Great personal injury means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person. WPIC 2.01.01. CP 71.

The Court gave Jury Instruction 32:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
> Actual danger is not necessary for the use of force to be lawful. WPIC 17.04. CP 72.

The court also gave Jury Instruction 33

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill or use, offer, or attempt to use force upon or toward 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. WPIC 16.04. CP 73.

269, 666 P.2d 922 (1983); *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986); State v. Kidd, 57 Wn.App. 95, 786 P.2d 847 (1990); *State v. Wasson*, 54 Wn.App. 156, 772 P.2d 1039 (1989); *State v. Brower*, 43 Wn.App. 893, 721 P.2d 12 (1986).

Based on the instructions given, the State had the sole burden to prove beyond a reasonable doubt that the homicide was *not* justifiable; and to prove beyond a reasonable doubt that the defendant *was* the aggressor.

Despite the facts to the contrary, and the jury instructions given, the defendant argues on appeal that he was denied his right to present a defense. This argument attempts to improperly characterize the Court's evidentiary rulings as a complete denial of his defense in order to argue that review should be de novo instead of abuse of discretion.[5]

2. <u>The Trial Court properly excluded irrelevant, remote, and false evidence that defendant attempted to admit.</u>

---

[5] The defendant cites to *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576, 579–80 (2010) for authority. However in *Jones*, a rape case, the trial court refused to let the defendant testify or cross-examine witnesses about the events on the night of the alleged sexual encounter, by incorrectly believing the rape shield statute barred such evidence. See also defendant's citation to *State v. Mounsey*, 31 Wn. App. 511, 643 P.2d 892, 898 (1982)(some evidence excluded under inapplicable rape shield statute).

In the present case, the defendant was not only permitted to testify and to cross-examine witnesses regarding the events that precipitated the shooting, he received jury instructions on self-defense.

A trial court abuses its discretion if its discretionary decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *State v. Blight,* 89 Wash.2d 38, 41, 569, 569 P.2d 1129 P.2d 1129 (1977) (citing *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). In other words, discretion is abused if no reasonable person would take the view adopted by the trial court. *Id.*

The defendant's right to present testimony is also not absolute. The accused does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810, 822–23 (2015), *as amended* (Dec. 9, 2015), *review denied,* 185 Wn.2d 1022, 369 P.3d 501 (2016)

The defendant's right to present a defense is subject to established rules of procedure and evidence designed to assure both fairness and *reliability* in the ascertainment of guilt and innocence. *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Evidentiary

rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *Scheffer,* 523 U.S. at 308, 118 S.Ct. 1261. Accordingly, a defendant's interest in presenting relevant evidence may bow to accommodate other legitimate interests in the criminal trial process. *Scheffer,* 523 U.S. at 308, 118 S.Ct. 1261.

For example, in *State v. Lizarraga*, 191 Wn. App. 530, (2015), The Court of Appeals found that the trial court did not violate the defendant's constitutional right to present a defense by refusing to admit the out-of-court hearsay statements, even though it had a significant impact on the defense that was being offered.

A defendant has a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory,* 158 Wash.2d 759, 786 n. 6, 147 P.3d 1201 (2006). See also, *State v. Aguirre,* 168 Wash.2d 350, 362–63, 229 P.3d 669 (2010) (inadmissible evidence); *State v. Mee Hui Kim,* 134 Wash.App. 27, 41, 139 P.3d 354 (2006) (defendant has a right to present a defense consisting of relevant evidence that is not otherwise inadmissible (quoting *State v. Rehak,* 67 Wash.App. 157, 162, 834 P.2d 651 (1992)).

If the evidence is not relevant, neither the Sixth Amendment nor article 1, section 22 of the Washington Constitution require the trial court to admit it. *See State v. Weaville,* 162 Wn.App. 801, 818, 256 P.3d 426, *review denied,* 173 Wn.2d 1004 (2011).

In the present case, the defendant claims the Court improperly excluded evidence. Yet, the evidence excluded was not only remote, but defense could not provide specific time periods, or even provide consistent versions of the evidence being offered. Moreover, defendant tried to offer evidence that was at best highly inaccurate, and at worst a knowing fabrication.[6]

The defendant's reliance on *State v. Janes*, 121 Wn.2d 220, 227, 850 P.2d 495, 498 (1993), to assert a pattern of behavior in an abusive relationship provides defense a basis for self-defense, is misplaced. In *Janes*, the defense made a claim of self-defense based on the defendant suffering from "battered child syndrome". Unlike this case, the prior acts alleged in *Janes* were committed against the *defendant*.

---

[6] As discussed above in the Procedural Facts section, the assertions made in Appellant's Brief at pg. 14, were not supported by the defendant's offer of proof at trial, and were properly excluded.

Even then, the *Janes* Court found that testimony that a defendant suffers from the battered child syndrome, standing alone, does not ensure that the defendant's belief in imminent harm was reasonable. That the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury. In short, the existence of the battered child syndrome does not eliminate the defendant's need to provide some evidence that his or her belief in imminent danger was reasonable at the time of the homicide. *State v. Janes*, 121 Wn.2d at, 240–41.

In the present case, the defendant provided absolutely no evidence that he was *ever* assaulted or threatened by the victim in the past, or at the time of the shooting. He asserted no evidence to support his belief of imminent danger was reasonable at the time of the shooting. Yet, he apparently seeks to argue he should have been able to assert a right to self-defense by proxy.

3. Evidence offered under the exception to the hearsay rule for "state of mind" that was untrustworthy, remote, and irrelevant to the murder, was properly suppressed.

Case law does not support the defendant's assertion that even a false statement should be admitted to a jury, as long as it is

proffered for "state of mind".[7] It has long been established that an exception is made to the rule excluding hearsay when the state of mind or intention of a person is in question, if the court finds that two circumstances concur: (1) if there is some degree of necessity to use out-of-court, un-cross examined declarations, and (2) if there is circumstantial probability of the trustworthiness of the out-of-court, un-cross examined declarations. *State v. Parr*, 93 Wn.2d 95, 98–99, 606 P.2d 263, 265 (1980) (citing Raborn *v. Hayton*, 34 Wash.2d 105, 208 P.2d 133 (1949)). If the circumstances do not import trustworthiness, such evidence may be inadmissible unless there is some other corroborating evidence. *Id.* The *Parr* Court aptly stated: "This court has been mindful that evidence of this type may be misused by the jury and is easily fabricated". *Parr*, 93 Wn.2d at 98–99.

An extra-judicial declaration of fear is admissible under the state of mind exception to the hearsay rule, only if there is a manifest need for such evidence, i. e., if it is relevant to a material

---

[7] The exception is found in ER 803(3) (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

issue in the case, and a limiting instruction is necessary. However, where there is a substantial likelihood of prejudice in the admission of such testimony, it is inadmissible if it bears only a remote or artificial relationship to the legal or factual issues raised in the case. *Parr,* 93 Wn.2d at 99-100. Yet, even where there is substantial relevance, the additional factual matters in the statement may simply be too explosive to be contained by the limiting instruction, in which case exclusion of the testimony is also necessitated. *Parr*, 93 Wn.2d at 99–100. Such evidence, even if the defendant could show its relevance, would be properly excluded under 403.[8]

Rule 803(a)(3) creates a hearsay exception for statements describing a then-existing emotions or feeling ("I am happy," "I am afraid," or the like). The hearsay exception includes only statements describing the declarant's own emotions or feelings, not those of another person. The hearsay exception does *not* include statements describing emotions or feelings occurring in the past. To be admissible, the emotion or mental feeling must be relevant in

[8] ER 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the case in which it is offered. 5C Wash. Prac., Evidence Law and Practice § 803.10 (6th ed.)

The hearsay exception does *not* include statements describing emotions or feelings the declarant had in the past. 5C *Wash. Prac., Evidence Law and Practice* § 803.11 (6th ed.); *State v. Sanchez-Guillen*, 135 Wash. App. 636, 145 P.3d 406 (2006)

Nor does the hearsay exception include statements describing other facts occurring in the past. The rule refers collectively to these rules when it states that statements of "memory or belief" are not admissible to prove the fact remembered or believed (with one exception relating to wills). 5C *Wash. Prac., Evidence Law and Practice* § 803.11 (6th ed.) [9]

The defendant was permitted to offer evidence of his and his wife's "state of mind", and more, despite the limitations of the rule. The other evidence the defendant sought to offer was far outside

---

[9] Remoteness is another basis to exclude such testimony. *State v. Cloud,* 7 Wn.App. 211, 218, 498 P.2d 907 (1972); *See State v. Adamo*, 120 Wash. 268, 270, 207 P. 7, 8 (1922) (occurrence that happened five years before the commission of the offense charged was too remote.) (also citing *State v. Farris*, 26 Wash. 205, 66 Pac. 412 (1901) and *State v. Palmer*, 104 Wash. 396, 176 Pac. 547 (1918)).

the rule and was an attempt to circumvent the limitations to admit inadmissible character evidence about the victim.[10, 11]

Charter evidence is inadmissible to prove conformity on a particular occasion. ER 404(a). Evidence offered by a defendant to support a self-defense theory must be relevant. *State v. Bell,* 60 Wn.App. 561, 564, 805 P.2d 815 (1991) (citing ER 402). But the trial court can exclude relevant evidence of the victim's past violent acts if it determines that its probative value is outweighed by the risk of prejudice, is cumulative, confusing, or misleading to the jury. ER 403.

Notwithstanding the false information defendant sought to offer, the evidence of prior acts should have been excluded under ER 803 and 403.

4. Non-expert opinion and speculation testimony offered by the defendant was properly excluded.

---

[10] As Tegland noted: It has often been said that if statements of memory or belief were admissible, the hearsay rule would be virtually eliminated. *Wash. Prac., Courtroom Handbook on Wash. Evidence* § 803.8 (2016-2017 ed.)

[11] Contrary to the Appellant's Brief at page 17, and 18, the record repeatedly shows that the defendant was not prevented from offering testimony about his wife claiming to see two people in the other vehicle; that one of them may have been the victim; and she was fearful. Additionally, the defendant was allowed to offer testimony over the State's objection about his mental state and "fear" of Mr. Martinez.

On appeal defendant argues that objections to his speculative, opinion testimony should not have been sustained.

ER 701 restates the standard requirement that a lay witness must testify only from personal, firsthand knowledge and then adds that lay opinion testimony is limited to opinions or inferences which aid in a clear understanding of the testimony or the determination of a fact in issue. Both requirements must be satisfied before an opinion or inference is admissible under the rule. *See, e.g., Johnson v. Caughren*, 55 Wash. 125, 104 P. 170 (1909) (it is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge when the opinion involves the very matter to be determined by the jury, and the facts are capable of being presented to the jury on which the witness founds his opinion).

The defendant was permitted to testify repeatedly that he was fearful, despite the absence of any threats to him. However, the Court properly sustained objections when the defendant tried to testify about his opinion as to what the victim and Mr. Martinez thought, or what would they would do. The improper opinion and

speculative testimony was property excluded by ER 701 and ER 402.

5. The no-duty to retreat instruction was not supported by the evidence and the issue is waived on appeal when defense did not object to the failure to give the instruction.

Defendant claims the Court erred when it did not give his proposed instruction regarding no duty to retreat, based on WPIC 17.05. However, the Court properly rejected the proposed instruction where the instruction was unsupported by the evidence. *State v. Benn*, 120 Wn.2d 631, 659, 845 P.2d 289, 305–06 (1993). *See also*, *State v. Frazier,* 55 Wash.App. 204, 208, 777 P.2d 27 (1989)(holding that trial court did not err by not giving "no duty to retreat" instruction when primary issue was identity of initial aggressor, no evidence was presented that raised retreat issue, self-defense instruction adequately implied lack of such duty, and no argument was made that other instructions were inadequate); *State v. Thompson,* 47 Wash.App. 1, 733 P.2d 584, *review denied,* 108 Wash.2d 1014 (1987) (holding that "no duty to retreat" instruction unnecessary because defendant testified that he was retreating).

In the present case, there was no evidence that anyone other than the defendant was the original aggressor. The defendant chased down the victim to confront him, exited his truck with the pistol, and shot the victim who was trying to answer the defendant's question about why they had stopped at the pullout. He was not entitled to the instruction, and he was not prevented from arguing his theory of the case.

Generally, the failure to object at trial will operate as a waiver of the right to assert that error on appeal. *State v. Brush*, 32 Wn. App. 445, 456–57, 648 P.2d 897, 903 (1982) (citing *State v. Fagalde*, 85 Wash.2d 730, 731, 539 P.2d 86 (1975) . An established exception to this general rule exists when there is a "manifest error affecting a constitutional right". RAP 2.5(a) (3). In this case, there was no such exception. *Id.*

Trial counsel was not ineffective for failing to object to the unsupported instruction. Our courts strongly presume that trial counsel's representation was effective. *State vs. McFarland*, 127 W.2d 322, 899 P.2d 1251 (1995). The burden is on the Defendant to overcome the strong presumption of competency and to show deficient representation. *McFarland* at 335. The presumption of effective assistance cannot be rebutted if trial counsel's conduct

can be characterized as legitimate trial strategy or tactic. *State v. Mak*, 105 Wash.2d 692, 731, 718 P.2d 407 (1986), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Lord*, 117 Wash.2d 829, 885, 822 P.2d 177 (1991).

In determining whether defense counsel was deficient, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland 466 U.S. at 689.*

6. The objection to appeal costs and cost bill are premature.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an

appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

> A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward

the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons

convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship". *See* RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, *supra*, at 242, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at

the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

> (2) The court may, on motion by the offender, following the offender's *release from total confinement*, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090(emphasis added). The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

> (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
> (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
> (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good*

> *faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period,* excluding any payments mandatorily deducted by the department of corrections;
> (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations.* The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel". Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

The question for the Court is not whether the Legislative

intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

D. CONCLUSION

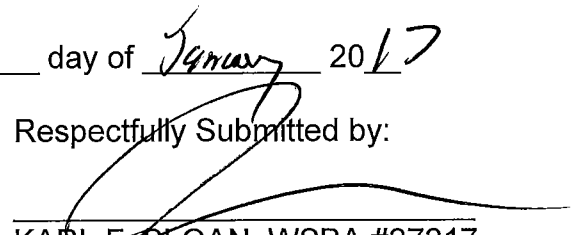
The Courts evidentiary rulings were not an abuse of discretion. The denial of the not duty to retreat instruction was proper and any claim of error was not preserved for appeal.

Indigent defendants are required to pay toward cost of appeal, and the challenge is premature, as no cost bill has been filed.

The defendant's convictions should be affirmed.

Dated this 11 day of January 2017

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on January 11, 2017, I provided by email service a true and correct copy of the Respondent's Brief to:

E-mail: jan@gemberlaw.com
admin@gemberlaw.com

Janet Gemberling PS
PO Box 8754
Spokane, WA 99203

Shauna Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290