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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KAZ MCKENZIE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted Mr. McKenzie's involuntary statements to police in violation of the Fifth Amendment and article I, § 9. CP 65-66.
2. The trial court's erroneous decision to exclude a defense witness prevented Mr. McKenzie from presenting self-defense in violation of the Sixth and Fourteenth Amendments, as well as article I, § 22. RP 268-69.
3. Prosecutorial misconduct prejudiced Mr. McKenzie's right to a fair trial in violation of the Sixth and Fourteenth Amendments, as well as article I, § 22.
4. The trial court erred in giving a "first aggressor" jury instruction, preventing Mr. McKenzie from presenting his theory of the case in violation of the Fourteenth Amendment and article I, § 22. CP 27.

II. ISSUES PRESENTED

1. Were *Miranda* warnings necessary where the defendant was not in custody at the time he was asked questions and the police were still investigating whether a crime had occurred?
2. Did the trial court's evidentiary decision to exclude a non-percipient defense witness' irrelevant and cumulative testimony prevent Mr. McKenzie from presenting his theory of self-defense?

3. Did the prosecutor commit misconduct resulting in prejudice that had a substantial likelihood of affecting the verdict?
4. Did the trial court err in giving the first aggressor instruction after the defendant admitted that he was the first aggressor?

III. STATEMENT OF THE CASE

The defendant, Kaz McKenzie, became upset because he believed that the victim, Wayne Foss, had called Spokanimal on his beloved dog, Twyla, and was making animal-abuse reports and allegations against him. RP 244. Having heard that Foss had made another call to Spokanimal on December 4, 2017, McKenzie became infuriated and confronted Foss in a common area of the apartment building where they both were tenants. RP 245. McKenzie swung his fist five or six times at Foss, who was seated in a chair, and who was unable to successfully counter the attack. RP 164-66, 327-28. McKenzie then placed Foss in a chokehold until Foss lost consciousness, and turned blue because his air supply was cut off. RP 164-66, 328, 333. After Foss was rendered unconscious, McKenzie went back to his apartment where his dog awaited him. RP 334. A jury found McKenzie guilty of second degree assault by strangulation. CP 24, 35.

IV. ARGUMENT

A. THE DEFENDANT WAS NOT IN CUSTODY AT THE TIME HE WAS ASKED QUESTIONS BY CORPORAL BALDWIN, WHO WAS STILL INVESTIGATING WHETHER A CRIME HAD OCCURRED; THEREFORE, NO *MIRANDA* WARNINGS WERE NECESSARY.

1. CrR 3.5 testimony.

The trial court conducted a hearing to determine the admissibility of the defendant's statements made to an officer during a conversation in the hallway just outside the defendant's apartment. RP 126-46.

Corporal Eugene Baldwin had twenty years of experience with the Spokane Police Department. RP 127. On December 4, 2017, just after midnight, he responded to an assault complaint from an apartment complex located at 327 ½ West Second, Spokane. RP 127. After taking statements from some witnesses, Corporal Baldwin and potentially one other officer¹ knocked on McKenzie's door. RP 129. McKenzie voluntarily stepped out into the hallway and freely talked with the officers regarding his side of the story. RP 129.² The officers were still trying to determine what had occurred

¹ The trial court found that at least one and possibly two officers were present at the discussion with Mr. McKenzie. CP 65, finding of fact 4.

² These facts support the trial court's findings of fact numbers 1 through 4 CP 65.

and whether they had probable cause for a crime. RP 130. McKenzie was not handcuffed, patted down, or searched at the time of this discussion.³ *Id.*

As the discussion with McKenzie continued, it became clear that there was an ongoing dispute over the ownership of the dog, Twyla, and that McKenzie claimed that Foss was harassing him by calling Spokanimal and by reporting animal abuse and other allegations against him. RP 131.

McKenzie freely admitted that there was an assault, and that he swung first. RP 131. However, he expressed his view that he felt justified in assaulting Foss based on the accusations he believed Foss was making and the ongoing dispute over the ownership of dog. *Id.* It was only after this conversation, and after the other witnesses had been interviewed, that McKenzie was arrested for the assault. RP 132.

McKenzie testified that he did not believe he was free to leave. RP 136. He agreed that he admitted that he had initiated the assault on Mr. Foss that night and that he felt no personal threat to his safety. RP 139-40. However, he felt a threat to his dog because he was under the impression that Foss was planning to steal his dog. RP 139-40.

³ These facts support the trial court's conclusions of law that the statements were made voluntarily, during an investigation of the assault allegation, and that no effort was made to at that time during the discussion to detain McKenzie. CP 66, conclusions of law 3, 4, 6, 7.

2. Standard of review.

The standard of review “to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.” *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). An appellate court defers to the trier of fact on credibility issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). “[T]his court must determine de novo whether the trial court ‘derived proper conclusions of law’ from its findings of fact.” *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

3. The defendant was not in custody for *Miranda* purposes when Corporal Baldwin asked to talk with him in the hallway and asked him questions as part of his investigation.

Under the Fifth Amendment of the United States Constitution, an individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amend. V; U.S. Const. amend. XIV; *Miranda v. Arizona*, 383 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). To protect this right,

law enforcement is required to provide *Miranda* warnings to a person in custody before that person is subjected to interrogation. *Miranda*, 384 U.S. at 479. *Miranda* warnings are required only where the defendant is (1) in custody, (2) being interrogated, (3) by a state agent.⁴ *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, *amended*, 837 P.2d 599 (1992). The absence of any one of the three conditions renders the giving of *Miranda* warnings unnecessary. *Id.* at 606.

“‘Custody’ for *Miranda* purposes is narrowly circumscribed and requires ‘formal arrest or restraint on freedom of movement of the degree associated with formal arrest.’” *Id.* In determining whether a suspect is in custody for purposes of *Miranda*, the court looks at the totality of the circumstances and determines whether a reasonable person in the suspect’s position would have felt that his or her freedom was curtailed to the degree associated with formal arrest. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Thus, not every contact between a police officer and a subject that leads to a limitation of that subject’s freedom of movement constitutes a custodial situation mandating the giving of *Miranda* warnings. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998) (citation omitted).

⁴ The State agrees that the defendant was “interrogated” by a “state agent”; thus, the only question on appeal, as in the trial court, is whether the defendant was “in custody” during questioning.

Under *Miranda*, “custody” is equated with a formal arrest, and questioning that takes place in public or private environments outside of police control frequently is not considered “custodial.” For example, juveniles questioned Spokane’s Riverfront Park security officers were not “in custody.” *Heritage*, 152 Wn.2d 210. An adult questioned in the course of a search of her apartment was not in custody. *State v. Rosas-Miranda*, 176 Wn. App. 773, 309 P.3d 728 (2013). A juvenile rape suspect questioned in his own home in his mother’s presence was not found to be “in custody.” *State v. S.J.W.*, 149 Wn. App. 912, 206 P.3d 355 (2009), *aff’d on other grounds*, 170 Wn.2d 92 (2010).

Additionally, courts have specifically held that investigatory detentions (*Terry*⁵ stops) that result in a limitation on a person’s freedom of action, short of arrest, are not custodial for purposes of *Miranda*. *See, e.g., Heritage*, 152 Wn.2d at 218 (citing *State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977)). As noted in *State v. Walton*, “[t]he fact that a suspect is not ‘free to leave’ during the course of a *Terry* stop does not make the stop comparable to a formal arrest for purposes of *Miranda*.” 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (citations omitted). A police officer who reasonably suspects an individual is violating the law is permitted to

⁵ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968).

conduct a stop and ask a moderate number of questions “to try to obtain information confirming or dispelling the officer’s suspicions.” *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Our Supreme Court has adopted the *Berkemer* test. *Heritage*, 152 Wn.2d at 217.

Accordingly, police do not have to give *Miranda* warnings when the questioning is part of a routine, general investigation in which the defendant voluntarily cooperates, but is not yet charged. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986); *Hilliard*, 89 Wn.2d at 436 (an investigative stop in public where a police officer asks questions to determine the identity and confirm or dispel the officer’s suspicions does not constitute custodial interrogation).

In *Hilliard*, police officers told an assault suspect that if the police could verify his story that he was only in the area to visit a certain person, he could leave. Our Supreme Court held that *Hilliard* was not in custody for *Miranda* purposes. The court found: “Mere suspicion, before the facts are reasonably developed, is not enough to turn the questioning into a custodial interrogation.” *Id.* at 436.

Similarly, in *Walton*, an officer responded to investigate an underage party; he contacted the juvenile defendant at an apartment complex on the second story landing. 67 Wn. App. at 128. Although the officer did not advise the suspect of his *Miranda* warnings, he asked the

juvenile how much he had to drink. *Id.* Even though the officer was “pretty sure” the suspect had violated the minor in possession/consumption law, the officer testified that, at the time he posed the question, he was still investigating whether an offense had occurred. *Id.* at 129. The court determined that the officer’s question was asked during the course of a typical *Terry* stop, and, although the officer acknowledged his intent to arrest the juvenile had he attempted to leave, this intent was not communicated to the suspect. *Id.* at 129. The court stated, “[t]his uncommunicated plan could not lead Walton, as a reasonable person, to believe that he was under arrest and in custody.” *Id.*; *see also Solomon*, 114 Wn. App. at 790 (a police officer’s unstated thoughts and plan are irrelevant to whether a person is in custody at the time of questioning).

Here, the facts do not demonstrate a formal arrest or restraint consistent with being “in custody.” Although Corporal Baldwin inquired of McKenzie for his side of the story, there was no evidence that he ever told McKenzie that he was not free to leave. *Cf. State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004) (an arrest takes place when “a reasonable detainee under [the] circumstances would consider himself or herself under a custodial arrest”). McKenzie was not handcuffed. There was no restriction on his movement that was indicative of a formal custodial arrest. He was talking with the officer’s in the hallway immediately outside

of his apartment, and no one stated or indicated he was not free to terminate the discussion at any time.⁶ As in *Heritage*, *Rosas-Miranda*, and *S.J.W.*, questioning of the defendant in the hallway of his residence, after he voluntarily exited the residence, bears none of the hallmarks of a formal arrest that could have turned this conversation into a custodial interrogation.

Furthermore, Corporal Baldwin was still investigating whether a crime had occurred at the time that he asked McKenzie un-Mirandized questions. While Corporal Baldwin asked McKenzie for his version of events, other deputies were speaking with other witnesses in the apartment complex.

The defendant claims that the presence of three officers on the scene bears heavily on whether he would have felt free to leave the scene. However, the defendant overstates the effect of the police presence during his discussion with Corporal Baldwin. There was no objective evidence, as now argued by the defendant, that the presence of the officers was “threatening” in any way. Br. of Appellant at 13.

⁶ Compare this Court’s decision in *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004). In *Radka*, this Court concluded that the defendant was not under custodial arrest. Although the officer told the defendant he was arrested and then placed him in a patrol car, the defendant was not handcuffed or frisked and he was allowed to use his cell phone, facts which would lead a reasonable person to believe that the arrest was not custodial. *Id.* at 50.

Here, the officers' conduct was nothing more than an investigatory detention. It did not rise to the level of a formal arrest. Such a detention is permissible under *Terry*, and *Miranda* warnings are not required for questions asked during such an investigatory detention. The trial court did not err in admitting the defendant's pre-*Miranda* statements to law enforcement.

In any event, the admission of Mr. McKenzie's statements was harmless. Admission of an involuntary confession obtained in violation of *Miranda* is subject to treatment as harmless error. *State v. Reuben*, 62 Wn. App. 620, 626-27, 814 P.2d 1177 (1991) (citing *Arizona v. Fulminante*, 499 U.S. 279, 292 & n.6, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938 (1991)). To find an error affecting a constitutional right harmless, the court must find it harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 295; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

The assault was observed by many witnesses. Pictures were introduced showing Foss's swollen eye and neck corroborating that testimony. Ex. P1, P2;⁷ RP 196-97, 242, 251. Moreover, McKenzie's trial

⁷ Both photographs were admitted at RP 196.

testimony did not differ in any material way from his previous discussion with Corporal Baldwin in the hallway. He testified he swung first, without asking questions, and swung about six times before Foss could respond. RP 327-28. He admitted to placing Foss in a choke hold causing Foss to lose consciousness. RP 333. He also admitted that the dog he was concerned with was in his apartment at the time of this assault. RP 334. Thus, even if the admission of the defendant's statements was in error, it was harmless beyond a reasonable doubt.

B. THE TRIAL COURT'S EVIDENTIARY DECISION TO EXCLUDE A NON-PERCIPIENT DEFENSE WITNESS' IRRELEVANT AND CUMULATIVE TESTIMONY NEITHER PREVENTED MCKENZIE FROM PRESENTING HIS THEORY OF SELF-DEFENSE, NOR VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

McKenzie claims his right to present a claim of self-defense was denied by the trial court's evidentiary decision to exclude testimony that may or may not have been relevant as "habit evidence" under ER 406. Here, McKenzie conflates his constitutional right to present his defense with the trial court's evidentiary ruling to exclude the ER 406 habit evidence or, more properly, reputation testimony offered by a non-percipient witness. These two claims will be separately addressed.

1. The right to present evidence.

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. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant’s right to an opportunity to be heard in his defense and cross-examine the witnesses against him and offer testimony is basic to our system of jurisprudence. *Id.* This Court reviews a claim of Sixth Amendment rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

This Court generally reviews a trial court’s evidentiary rulings for abuse of discretion. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017), *review denied sub nom. State v. Vela*, 190 Wn.2d 1005, 413 P.3d 11 (2018). But if the lower court excluded relevant defense evidence, the appellate court determines as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

The more the exclusion of defense evidence prejudiced the defendant, the more likely a reviewing court will find a constitutional violation. *Jones*, 168 Wn.2d at 720-21. However, these rights are not absolute. *Id.* Evidence that a defendant seeks to introduce must be minimally relevant; there is no constitutional right to present irrelevant

evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *as corrected* (Dec. 22, 2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). Even if relevant, evidence may still be excluded if the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Importantly, the constitutional right to present a defense means that the “defense theory must be allowed when there is admissible evidence to support it.” *Duarte Vela*, 200 Wn. App. at 331 (Korsmo, J. dissenting) (citing *Jones*, 168 Wn.2d 713).

There is a fine line between admissible evidence and evidence that *must* be admitted. ... That constitutional right does not mean that *any and every bit of evidence* offered by the defense in support of its theory is required to be admitted... [J]udges still retain discretion under ER 401, ER 403, and all of the other evidentiary rules to consider the necessity of the evidence in light of the case record and the proffered theory of admissibility. The Rules of Evidence exist for a reason, and both sides are entitled to a fair trial. We count on trial judges to apply the rules and afford them great discretion in doing so.

Id. (emphasis in original) (internal citations omitted).

Here, the record indicates careful consideration by the trial court of whether to admit the reputation⁸ evidence. Apparently, the trial court would

⁸ As explained below in the section dealing with the court’s evidentiary ruling excluding Kinchler’s testimony, the only basis argued by the

have allowed Mr. Kinchler to testify if he had observed Foss carrying the knife at any time during the day of the offense:

THE COURT: You said something that maybe might have swung it for me. So his testimony would be that that day he saw Mr. Foss wearing that knife?

MS. GRAY: I don't believe he interacted with him that day, Your Honor. I can go and ask again. I don't think he -- I don't think I can say he saw him that day, but I can check. Do you mind if I have a moment with him?

THE COURT: Yes. No, that's fine if you go check, because that changes it. Because I'm thinking it's too attenuated otherwise.

MS. GRAY: Your Honor, I've spoken with Mr. Kinchler, and he did not have any interactions with Mr. Foss on December 4th, the day in question.

THE COURT: Okay. I'm going to sustain the State's objection.

RP 269.

The trial court fully allowed all percipient witnesses to testify as to whether Foss possessed the knife or regularly carried the knife.⁹ The trial court did so even though McKenzie's legal defense theory is hard to fathom in this case because he admitted that he began punching the victim, Foss, at

defendant for the admissibility of this testimony was to establish Foss had a reputation for intimidating others by carrying a lawful self-defense weapon, a Bowie knife.

⁹ Loretta Gayman, RP 221; Shawn Mack, RP 162; Amber Lawsha, RP 278-80; Rick Brown, RP 340-41; Defendant McKenzie, RP 326.

least six times,¹⁰ without waiting for a response because he divined that Foss was planning to steal his dog at some point in the future, and also confessed that his dog was secured in his apartment at the time of the assault. RP 327-28, 334. McKenzie also described how he strangled Foss as he took him to the ground, rendering him unconscious, believing Foss may be reaching for a knife for self-protection. RP 329, 333-34. The assault on Foss was continuous and uninterrupted – McKenzie was the admitted first aggressor so he has no true claim to self-defense.¹¹ This alone makes any error in refusing to admit Kinchler’s non-percipient testimony harmless beyond a reasonable doubt. *See State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991) (It is “the well established law of this state that even constitutional errors may be so insignificant as to be harmless”).

¹⁰ Clearly making him the first aggressor.

¹¹ *See State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005), where the court explained:

In *Craig*, a defendant who stabbed and killed a cab driver during a robbery sought a self-defense instruction because the cab driver attempted to hit the defendant with a lug wrench in the course of the robbery. We upheld the trial court’s denial of a self-defense instruction because the defendant’s conduct had given the victim good cause to believe that he was threatened with bodily harm, and the defendant had not abandoned his threatening behavior. *See Craig*, 82 Wn.2d [777] at 783-84, 514 P.2d 151 [1973]. *Craig* holds that one who provoked the altercation cannot invoke the right of self-defense. *Id.* at 783, 514 P.2d 151; *see also Riley*, 137 Wn.2d [904] at 909, 976 P.2d 624 [1999].

Even assuming McKenzie had a viable claim of self-defense, he was able to present his theory that Foss was carrying a large knife, an eponymous Bowie knife,¹² at the time of the assault, without the testimony of Mr. Kinchler. Even Foss's fiancé or wife, Loretta Gayman, a percipient witness to the assault,¹³ admitted that Foss usually carried this knife, because "[h]e's allowed to"; "it's part of his heritage." RP 221. However, she testified that he had that knife in his bedroom that night and not in the common area.¹⁴ *Id.* Foss's cousin, Shawn Mack, also a percipient witness to the assault, testified that Foss was sitting in the common area preparing to go to bed when McKenzie appeared. RP 162. Mack stated that, at that time his (Mack's) Bowie knife was sitting on the table in the common area, but that Foss's Bowie knife was in his room on the bed. RP 182.

No one denied that Foss usually carried a Bowie knife; the debate was whether he was carrying the knife when he was assaulted. Amber Lawsha, McKenzie's apartment manager, and the girlfriend of McKenzie's brother, RP 259, testified that she saw the big knife on Foss's left hip as he

¹² Witness Shawn Mack related how the Bowie knife was named after the famous Jim Bowie, who fought at the Alamo. RP 181-82.

¹³ RP 210.

¹⁴ The common area is surrounded by twelve apartments, one of which belonged to Foss and Gayman. This common area was directly accessible from Foss's apartment. RP 161.

was assaulted. RP 278-80. Rick Brown, McKenzie's younger brother, also testified that he saw the Buck or Bowie knife on Mr. Foss's belt when he was assaulted. RP 340-41.

Quoting *Jones*, 168 Wn.2d at 721, the defendant suggests that Kinchler's testimony was integral to the truth finding process. Br. of Appellant at 21. In *Jones*, the court reversed a conviction because the defendant had not been able to present his version of the events. *Id.* at 724. There, the entire subject matter, a consent defense to the rape allegation, had been excluded. That was not the case here, nor did defense counsel ever make such a claim to the trial judge. It may be that McKenzie was not able to present all of the supporting evidence he desired to offer, but he was able to present his defense. *Jones* simply cannot stand for the proposition that the defense is entitled to put in all relevant evidence it possesses in support of the defense. *Cf. Duarte Vela*, 200 Wn. App. at 329-30.

Here, the defense provided ample evidence to raise its unusual self-defense theory and supported that theory with the defendant's testimony and the testimony of other percipient witnesses to the assault. The defense was allowed to offer everything it desired, other than this marginally relevant evidence, and it had enough to make its case. That is all that the constitution requires. The trial court could have, but was not required to, allow this

peripheral evidence. *See, e.g., State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011).¹⁵

There are instances where the admission of too little corroborating evidence might effectively foreclose a defense, but this was not one of those occasions. There was no denial of the defendant's constitutional right to a fair trial.

2. Evidentiary rules.

The trial court did not abuse its discretion in excluding Mr. Kinchler's peripheral testimony that on a different day, or days, the

¹⁵ As noted by Judge Korsmo in his dissent in *Duarte Vela*:

Illustrative is a subsequent case authored by Justice Owens, the author of the *Jones* opinion. *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011). There the defense to allegations of rape by two of the defendant's adoptive daughters "was centered on a theory that the girls were lying." *Id.* at 811, 265 P.3d 853. The defense sought to show that the girls were willing to take "extreme actions" to be removed from homes, "potentially including lying about rape." *Id.* The defense was allowed to offer evidence about house rules that the girls did not like, but the trial judge excluded evidence that the girls had committed arson to get moved out of a foster home. *Id.* The Supreme Court affirmed, noting that while the trial judge could have admitted the evidence under the rules, the court did not abuse its discretion in excluding the evidence. *Id.* at 816-17, 265 P.3d 853. The trial court was in the same position here. The trial judge could have, but was not required to, allow the corroborating evidence.

Duarte Vela, 200 Wn. App. at 330-31.

victim, Foss, carried a Bowie knife. Mr. Kinchler was not present at the assault and could not have testified to whether Foss had the knife on his belt when he was assaulted by McKenzie. The expressed reason the State objected to Kinchler's testimony was that such testimony would inappropriately introduce irrelevant "intimidation" evidence which would improperly malign Foss's character, and that the evidence would be introduced by a non-percipient witness:

MR. TREECE [prosecutor]: Your Honor, it's my understanding that [Kinchler's] the overall manager of the apartments. And Ms. Gray proffered to me that he would be called to testify about the knife that Mr. Foss carries.

And I did have a chance to speak with Mr. Kinchler on the phone last week, and he confirmed that, yes, he had spoken to Ms. Gray and her investigator. And he anticipated the testimony that he would come in to testify about is that Mr. Foss carries a big knife that he's concerned about that intimidates him and that, whenever Mr. Foss comes and pays the rent, that he's always intimidated by the big knife.

I don't think that's relevant. I don't think it's proper. I think it, you know, maligns the character of Mr. Foss and unduly weighs in the favor of self-defense, when Mr. Kinchler was not a part of the events that happened on December 4th, 2017.

RP 266.

The defendant agreed that this was the purpose of the testimony:

MS. GRAY: Well, Your Honor, I think, as Mr. Treece himself mentioned, Mr. Kinchler's testimony is that -- I expect it to be that Mr. Foss is always openly carrying this knife, that it's a large blade, that it's prominently displayed

right in the area of where his belt buckle is, that it is intimidating, and that it has caused apprehension even in Mr. Kinchler when he's interacted with Mr. Foss. And Mr. - - Mr. Kinchler being manager of the building obviously has had a lot of interactions with Mr. Foss with collecting the rent. This incident happened at the apartments. To me, there seems to be a pretty clear nexus there. So that would be my basis.

...

THE COURT: Kinchler. If he were the one establishing the self-defense, that would be relevant to his. I'm just -- I'm struggling with some other random person in a different location at a different time, how that testimony is relevant to what your client felt that night in that room.

MS. GRAY: Your Honor, I guess we would just be offering it as just further -- further evidence that he has a reputation for carrying the knife, that he -- that he was, in fact, carrying the knife on the night in question and not in the manner that Mr. Foss has testified to today. And, again, we have conflicting stories from the other witnesses.

THE COURT: You said something that maybe might have swung it for me. So his testimony would be that that day he saw Mr. Foss wearing that knife?

MS. GRAY: I don't believe he interacted with him that day, Your Honor. I can go and ask again. I don't think he -- I don't think I can say he saw him that day, but I can check. Do you mind if I have a moment with him?

THE COURT: Yes. No, that's fine if you go check, because that changes it. Because I'm thinking it's too attenuated otherwise.

MS. GRAY: Okay. I'll be right back. Thank you.

MS. GRAY: Your Honor, I've spoken with Mr. Kinchler, and he did not have any interactions with Mr. Foss on December 4th, the day in question.

THE COURT: Okay. I'm going to sustain the State's objection.

RP 268-70.

On appeal, defendant claims the trial court's denial of Kinchler's reputation testimony was improper, claiming the evidence was admissible because it was "habit evidence under ER 406." Br. of Appellant at 20-21. However, nowhere in the transcript is ER 406 cited, and, moreover, the only time "habit" is mentioned in the entire trial is when defendant's attorney, Ms. Gray, stated: "I have a *really bad habit* of wandering away from the mic[rophone]." RP 96 (emphasis added). Defendant now attempts to present a different evidentiary argument under a different evidentiary rule than the one offered at trial. This is not proper.

An appellate court will not reverse a trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on a different rule. *State v. Powell*, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009) (plurality opinion); *State v. Kilponen*, 47 Wn. App. 912, 918, 737 P.2d 1024 (1987), *review denied*,

109 Wn.2d 1019 (1987).¹⁶ Accordingly, error may be assigned only on the same basis asserted at trial. *Guloy*, 104 Wn.2d at 422; RAP 2.5(a). Because the argument now raised was not raised below, it is not preserved for appeal under RAP 2.5.¹⁷

Here, McKenzie's stated purpose for introducing the apartment managers observation that the victim, Foss, was carrying a knife the day before he was assaulted and was known to often carry such a weapon was to establish that he had a reputation for carrying a knife, that he intimidated the manager because he carried the knife. The trial court properly excluded the reputation evidence that the defendant was "intimidating." Whether the

¹⁶ Additionally, McKenzie's offer of proof at the time of the argument did not clearly articulate the reason for the admission of the evidence. "[A]n offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review." *State v. Burnam*, 4 Wn. App. 2d 368, 377, 421 P.3d 977, *review denied*, 192 Wn.2d 1003 (2018) (citations omitted).

Here, as in *Burnam*, the defendant's offer of proof failed to inform the trial judge of the specific nature of the offered evidence. Mr. McKenzie's offer of proof repeatedly suggested it was based upon reputation evidence, and no mention was made of the belatedly offered "habit" argument, now the source of the defendant's evidentiary complaint.

¹⁷ *See, e.g., State v. Stoddard*, 192 Wn. App. 222, 227-28, 366 P.3d 474 (2016) (quoting *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992)) ("permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts").

defendant was “intimidating” in reputation, if such a reputation exists, has no relevance in this case where the defense is self-defense. Moreover, the attempted admission of the fact the defendant lawfully carried a self-defensive weapon to create a presumption that he was “intimidating” would result in an improper comment on Foss’s constitutional right to carry a Bowie knife for self-defense purposes. It seems well-settled that a Bowie knife is the type of weapon commonly used for self-defense and has gained the protection of federal and state guarantees of the right to bear arms.¹⁸ There was no evidence that Foss’s possession of a knife was other than lawful. Thus, as stated in *State v. Rupe*, 101 Wn.2d 664, 707, 683 P.2d 571 (1984):

¹⁸ See *City of Seattle v. Montana*, 129 Wn.2d 583, 601 n.9, 919 P.2d 1218, (1996) (Alexander, J., concurring, noting the Oregon State Supreme Court in *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984), set forth a detailed history of the “fighting knife” and concluded that, historically, certain knives, for example, bowie knives and swords, have been commonly used for self-defense and, therefore, may be considered arms under article I, section 27 of the Oregon constitution, which provides that “[t]he people shall have the right to bear arms for the defence (sic) of themselves, and the State”); and see *State v. Kessler*, 289 Or. 359, 368, 614 P.2d 94 (1980) (“Therefore, the term ‘arms’ as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term ‘arms’ was not limited to firearms, but included several handcarried weapons commonly used for defense”); and see *City of Seattle v. Evans*, 184 Wn.2d 856, 869-70, 366 P.3d 906 (2015) (the Washington Constitution’s guarantee of the right to bear arms protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense).

[he was] entitled under our constitution to possess weapons, without incurring the risk that the [defense] would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use.

Cf. State v. Tarango, __ Wn. App. 2d __, 434 P.3d 77, 83 (2019) (“Since openly carrying a handgun is not only not unlawful, but is an individual right protected by the federal and state constitutions, it defies reason to contend that it can be the basis, without more, for an investigative stop).

Even if this Court determined that the defendant’s objection preserved the now-presented “habit” argument, the trial court did not abuse its discretion in disallowing such “habit” evidence, as the evidence the defendant often carried a Bowie knife was testified to by almost every percipient witness, so the less informative Kinchler testimony regarding knife possession days earlier at a different location would be cumulative. Moreover, any error in this regard is harmless, as Mr. Kinchler could not have testified as to whether Mr. Foss had his sheathed knife on his person at the time of the assault.

This Court reviews the “trial court’s evidentiary rulings for abuse of discretion and defer[s] to those rulings unless ‘no reasonable person would take the view adopted by the trial court.’” *Clark*, 187 Wn.2d at 648 (citation omitted). A trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling

contrary to law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

This abuse of discretion standard applies to the trial court's decision on whether the "habit" evidence was irrelevant to the defendant's self-defense claim based upon the trial court's reasoning that Kinchler did not know whether the victim, Foss, was armed at the time of the assault, and whether the evidence was cumulative to every percipient witness's testimony.¹⁹

A reviewing court may not hold that a trial court abused its discretion simply because it would have decided the case differently – it must be convinced that no reasonable person would take the view adopted by the trial court. *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). Recently, our State Supreme Court reiterated this principle, that under the abuse of discretion

¹⁹ See *Washington State Physicians Ins. Exchange & Ass'n*, 122 Wn.2d at 325 (in a medical malpractice action in which the defendant/physician filed a cross-claim against a drug manufacturer, one of the issues was whether the drug company's sales representative discussed the dangers of a certain drug with the physician. The trial court acted within its discretion in excluding testimony offered by the drug company, to the effect that the sales representative was in the habit of always discussing the dangers with physicians. The Supreme Court, citing McCormick on Evidence, stated that to be admissible, the conduct in question must consist of "semi-automatic, almost involuntary and invariably specific responses to fairly specific stimuli").

standard, one court's evidentiary ruling may be opposite to another court's evidentiary ruling under the same facts and both would be sustained on appeal. *See L.M. by & through Dussault v. Hamilton*, No. 95173-0, 2019 WL 1303292 at *11 (Wash. Mar. 21, 2019). The trial court did not abuse its discretion after considering, but denying, defendant's request to introduce attenuated reputation or habit evidence. The exclusion of that evidence did not prejudice the defendant's constitutional right to present a defense. Moreover, any error in this regard is harmless because the defendant admitted he was the aggressor in the assault.

C. THE PROSECUTOR DID NOT COMMIT MISCONDUCT RESULTING IN PREJUDICE THAT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT.

1. Credibility of a witness Ms. Lawsha.

McKenzie complains that the prosecutor improperly commented on the credibility of Ms. Lawsha's testimony. Ms. Lawsha was the building manager and paramour²⁰ of the defendant's brother. She testified on direct that the common area dayroom where the assault took place had a surveillance camera, but that "the camera just went out, actually." RP 278-79.

²⁰ RP 282 (but denies they were dating at the time of the assault).

On cross-examination, after many objections by the defendant – some sustained and some overruled,²¹ the prosecutor inquired:

Q. Ms. Lawsha, don't you think it's a little bit convenient that the cameras for this dayroom went out just before this happened?

A: Actually, no, I don't.

Q. Yeah? You don't think it's convenient that you and another assistant manager just managed to show up with someone else who assaulted another tenant and the cameras just magically happened to stop working?

A. No, because the cords were cut by mice. We had mice in the building and they had eaten the cords. We have previously replaced them since then, sir.

Q. I'm sure that's what happened.

RP 294-95.

There was no objection to this questioning. If the defense attorney believed this was both improper, and harmful, she would have objected as she had done on six prior occasions during the cross-examination. It is more likely she believed she thought her case became stronger because the

²¹ RP 287-88 (Objection overruled); RP 290-91 (Objection sustained); RP 292 (request that prosecutor could be less antagonistic and sarcastic, sustained by court “vigorous cross is allowed but no badgering”); RP 293 (MS. GRAY: “Objection, Your Honor. That’s not what she [Lawsha] testified to.” THE COURT: “I’m going to overrule the objection because she did talk about how she stopped the fight with the word. And so it’s overruled”); RP 293-94 (Objection “calls for speculation” sustained by court); RP 294 (Objection “calls for speculation” overruled by court).

questioning was ineffective. “Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor’s misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993), *as amended on denial of reconsideration* (Apr. 14, 1993). Any error in this regard could have been cured with a curative instruction and was harmless in that the evidence given by the defendant himself was that he punched the seated victim five or six times without asking him any questions, and then choked him out and left him unconscious.

McKenzie also complains that the prosecutor called Ms. Lawsha a liar during closing argument:

MR. TREECE: And you heard from Amber Lawsha. I went hard at her, not so much at Rick Brown. At least Rick Brown told the truth. Yeah, I was going over there to see my brother.

MS. GRAY: Objection, Your Honor. Counsel’s vouching for the credibility of witnesses.

THE COURT: Sustained. Stay away from that.

MR. TREECE: At least Rick Brown told something that you might consider more credible. He went over there to see his brother. He got a phone call a little bit after midnight on December 4th, 2017, and he went over to go see his brother, and his brother, Mr. McKenzie, let him in. And right after

his brother, Mr. McKenzie, let him in, Mr. McKenzie attacked the victim.

RP 383.

Here, there was an objection, sustained by the trial court, with the admonishment to “stay away from that.” There was no motion for mistrial, request for a curative instruction, or any expression of a further need to readdress the issue. Where the defendant does object or moves for mistrial on the basis of alleged prosecutorial misconduct, appellate court’s will give deference to the trial court’s ruling on the matter. ““The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial.”” *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)).

The point the prosecutor was trying to establish was that Ms. Lawsha testified that someone she could not remember called her to respond to the common area²² – denying it was the defendant, while her paramour Rick Brown, McKenzie’s brother, testified he went there to see his brother after his brother called him.²³ This ancillary issue²⁴ – why

²² RP 287 (Lawsha received a call and she asked Rick Brown to go with her to the common area).

²³ RP 337.

²⁴ RP 287.

Ms. Lawsha and Mr. Brown responded in time to see the assault, had little relevance to whether Foss was attacked by McKenzie as confessed to by McKenzie.

To succeed on a prosecutorial misconduct claim, “a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion). In order to show prejudice, a defendant must show there is a substantial likelihood the misconduct affected the jury’s verdict. *State v. Vassar*, 188 Wn. App. 251, 256, 352 P.3d 856 (2015). If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, the inquiry ends. The evidence in this case was overwhelming regarding the assault. It was confessed to by the defendant and neither Ms. Lawsha or Mr. Brown refuted the McKenzie’s self-confessed action of walking up to Foss and hitting him without provocation five or six times prior to taking him to the ground and rendering him unconscious.²⁵

²⁵ See *Padilla*, 69 Wn. App. at 301 (In determining whether these questions are harmless, courts consider several factors including “whether the prosecutor was able to provoke the defense witness to say that the State’s witnesses must be lying, whether the State’s witness’s testimony was believable and/or corroborated, and whether the defense witness’s testimony was believable and/or corroborated”).

There was no significant prejudice engendered by the prosecutor's improper use of the word "truth" when attempting to compare the testimony of the defendant's two witnesses for ancillary issue of why they were able to appear at the common room to observe the assault.

2. The prosecutor's use of the word "vigilante" to describe McKenzie's assault on Foss was not improper and was supported by the trial record.

The defendant complains about the prosecutor's use of the term "vigilante" during his closing argument. Br. of Appellant at 26. A "vigilante" is defined as "a member of a volunteer committee organized to suppress and punish crime summarily (as when the processes of law are viewed as inadequate)." <https://www.merriam-webster.com/dictionary/vigilante>. (Last visited March 29, 2019). The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *Gregory*, 158 Wn.2d at 860 (citing *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)).

The evidence in this case overwhelmingly supports the analogy of the term "vigilante" with the defendant's actions. The defendant admitted he was upset and mad because he believed Foss had been calling animal

control,²⁶ that he was tired of dealing with the non-responsive law enforcement²⁷ to his complaints about the arguments over the possession of his beloved dog, and that he decided to prevent any further incursions into his property rights by taking the matter into his own hands, with his own hands. There was nothing improper about the use of a proper, commonly understood word, to effectively describe what had occurred. Moreover, there was no objection to the term by the defendant.

²⁶ Defendant told Corporal Baldwin that he believed at the time that Foss was harassing him by calling Spokanimal by reporting animal abuse and making other allegations against him. RP 244, 246.

²⁷ *See* RP 317-18:

Q.[By Ms. Gray] Did you report those incidents [of Foss or Gayman ever taking the dog Twyla without your permission] to law enforcement or to management?

A [Mr. McKenzie]. To both. Once to management and a total, from myself, of three phone calls to law enforcement over it. I also directed Mary once, as I was not home, to make the same phone call.

Q. Okay. Did the police respond to your calls?

A. No.

Q. Okay. Did management respond to your calls?

A. I'm not even entirely sure that the head management ever got ahold of my written complaint.

...

Q. Okay. But the police never came?

A. No.

Where, as here, a defendant fails to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Under this stringent standard of review the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Here, the term vigilante was grammatically proper, and, in any event, any objection to the term was waived by a failure to object.

3. The State is generally afforded wide latitude in making closing arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. Defendant's claim the prosecutor improperly referred to facts not in evidence during closing argument is not supported by the record, was waived, and in any event, cured by the trial court's instruction to disregard any argument not supported by the record.

The defendant claims, for the first time on appeal, that the prosecutor referred to facts not in evidence. First, the State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *Gregory*, 158 Wn.2d at 860

(citing *Gentry*, 125 Wn.2d at 641). Here, the evidence supported the argument that McKenzie knew he wanted to assault Foss, and notified McKenzie's brother and his paramour (the managers) to keep any others out of the assault. Both "managers" serendipitously appeared prior to the assault and McKenzie, himself, testified he assaulted Foss without asking any questions. Appellant claims no evidence supported any statement that either Ms. Lawsha or Mr. Brown were called to the affray, however, paramour Rick Brown, McKenzie's brother, testified he went to the apartments after his brother called him. RP 337.²⁸

Moreover, there was no objection to this argument. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). However, as here, when the defendant does not object at trial, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61; *Stenson*, 132 Wn.2d at 727. Under

²⁸ When asked by defendant's counsel why he was at the premises of the New Washington Apartments on December 4, 2017, Rick Brown testified the he had received a phone call from his brother, Kaz, saying he wanted to have a conversation with him. Thereafter, the State objected to this line of questioning based on hearsay, but there was never a motion to strike the response.

this heightened standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” *Thorgerson*, 172 Wn.2d at 455.

In making this determination, the court focuses less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *Emery*, 174 Wn.2d at 762. Here, the defendant’s argument fails to establish that no curative instruction would have cured any alleged misstatement.

Finally, the jury was instructed that it “must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions” CP 17 (Instruction 1). This informed the jury that counsel’s remarks were not evidence and that the jury must decide the case based on the evidence produced in court. There is no reason to believe the jury did not follow those instructions. Indeed, the appellate court presumes juries follow the trial court’s instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

4. The defendant’s argument regarding the prosecutor’s reference to taking his shoes off in Hawaii was relevant and had no prejudicial effect.

The defendant claims that the prosecutor’s closing-argument-reference to the victim not being a threat when he was removing his shoes

was improper because it was “irrelevant to the facts” and included an improper reference to his military service. Br. of Appellant at 28-29. First, it was relevant, as many witnesses testified that Mr. Foss was taking off his boots or shoes in preparation for retiring to bed – perhaps vulnerable – when he was attacked. RP 164, 167 (Mr. Mack), 191-92 (Mr. Foss), 215 (Ms. Gayman). Second, there was no objection, and any claim is thereby waived. RAP 2.5, *Stoddard, supra*. Third, a curative instruction could have cured any imagined prejudice engendered by the brief analogy to service in red-dirt country. *Thorgerson*, 172 Wn.2d at 455.

5. The defendant’s argument that the State misstated the law in closing is incorrect.

The defendant argues that the State improperly, and without legal support, argued that some immediacy of the threat of the taking of property or imminence of danger is necessary for self-defense to apply. Br. of Appellant at 29-30. The State’s argument was proper. There are three elements to a claim of self-defense: (1) the defendant subjectively feared imminent danger of bodily harm [or interference with property], (2) the defendant’s belief was objectively reasonable, and (3) the defendant exercised no more force than reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). If the evidence fails to support any one of these elements, the defendant is not entitled to present a self-

defense theory to the jury. *State v. Walker*, 136 Wn.2d 767, 773, 966 P.2d 883 (1998). The State’s argument explained that you cannot assault someone for past acts. RP 385-86. The threat has to be “there in front of you.” RP 386. The argument was proper under the facts of this case, and any imagined impropriety was also cured by the trial court orally advising counsel and the jury that the jury would “be instructed to follow the law that’s in the instructions.” RP 385. Retaliation is not self-defense. There was no demonstrable prejudice incurred by this argument.

D. THE EVIDENCE SUPPORTS THE TRIAL COURT’S DECISION TO GIVE THE FIRST AGGRESSOR INSTRUCTION.

As relevant here, the trial court instructed the jury on self-defense,²⁹ a person is entitled to act on appearances,³⁰ there is no duty to retreat,³¹ and, over McKenzie’s objection,³² gave the “first aggressor” instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense or defense of another 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

²⁹ CP 28 (Instruction 11).

³⁰ CP 32 (Instruction 15).

³¹ CP 30 (Instruction 13).

³² Defense objected to the instruction. RP 303-04.

and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 27 (Instruction 10).

Defendant claims that “this so-called ‘first aggressor’ instruction was improperly given because there was no evidence presented that McKenzie provoked the need to act in self-defense.” Br. of Appellant at 34.

1. Standard of review.

When the record includes credible evidence from which a reasonable juror could find that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Whether the State produced sufficient evidence to justify an aggressor instruction presents a question of law this court reviews de novo. *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction – here, the State. *Wingate*, 155 Wn.2d at 823 n.1. “[A]n aggressor or one who provokes an altercation” cannot successfully invoke the right of self-defense. *Riley*, 137 Wn.2d at 909.

Although not favored, an aggressor instruction is proper where (1) the jury can reasonably determine from the evidence that the defendant

provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). The provoking act must be intentional conduct reasonably likely to provoke a belligerent response. *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). It cannot be words alone. *Riley*, 137 Wn.2d at 912-13. And, it cannot be the charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

2. Discussion.

The evidence presented at trial supports the court's decision to give the first aggressor instruction. The defendant's own testimony establishes that he was the first aggressor.³³ He testified he swung first, without asking questions, and swung about six times before Foss could respond. RP 327-28. Foss, who was seated in a chair, was unable to successfully counter the attack. RP 164-66. McKenzie's testimony was that it was only after he struck Foss five or six times in the head and was in the process of taking him down to the ground that he acted in self-defense – strangling Foss – because he believed that Foss was then attempting to reach for his knife.

³³ As above, Mr. Foss, Ms. Gayman and Mr. Mack also testified that McKenzie struck Foss without provocation.

Even under the defendant's theory of the case, his five or six strikes to Foss's unprotected head constituted the provoking act that caused Mr. Foss to reach for his weapon to protect himself. Those five or six strikes to the head preceded the *only* charged crime – that of assault by strangulation. CP 1. Therefore, McKenzie's own testimony provided credible evidence from which a jury could reasonably determine that he provoked the need to act in self-defense, and, therefore, an aggressor instruction was appropriate. *See State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); *Kidd*, 57 Wn. App. at 100. The evidence supports the trial court's decision to give the first aggressor instruction, especially where, as here, the trial court also gave the "no duty to retreat" instruction.

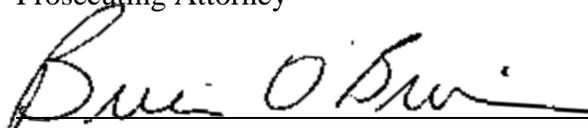
Defendant's contention that the first aggressor instruction lessened the State's burden is also without merit. The instruction given in this case is in the language of the pattern instruction. *Compare* WPIC 16.04 with CP 27 (instruction no. 10). It is in the exact language approved by our State Supreme Court in *Riley*. *See Riley*, 137 Wn.2d at 908-09. Its use requires a finding of "beyond a reasonable doubt" that the defendant was the aggressor. This burden of proof does not lessen the State's burden, and is a correct statement of the law. The defendant's contentions otherwise are without merit.

V. CONCLUSION

McKenzie's claims on appeal have little merit. The *Miranda* warnings were unnecessary because he was not in custody at the time he was asked questions, and the police were still investigating whether a crime had occurred. The trial court's evidentiary decision to exclude a non-percipient defense witness' irrelevant and cumulative testimony did not prevent the defendant from presenting his theory of self-defense. The prosecutor did not commit misconduct resulting in prejudice that had any substantial likelihood of affecting the verdict. Finally, the trial court did not err in giving the first aggressor instruction after the defendant admitted that he was the first aggressor. The State respectfully requests this Court affirm the defendant's conviction.

Dated this 12 day of April, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

KAZ MCKENZIE,

Appellant.

NO. 36038-5-III

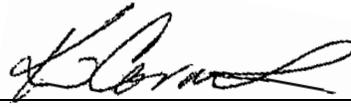
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 12, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jessica Wolfe
wapofficemail@washapp.org

4/12/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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