SUPREME COURT NO. 102400-2

NO. 56139-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN BECKMEYER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

PETITION FOR REVIEW

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A. PETITIONER & COURT OF APPEALS DECISION

Petitioner John Beckmeyer seeks review of the Court of Appeals' August 22, 2023 unpublished decision in State v. Beckmeyer, appended to this Brief. ("App.").

B. ISSUES PRESENTED FOR REVIEW

1. In August of 2020, Beckmeyer shot and killed James McDonald but argued the use of force was justified in order to save Beckmeyer's life. Where an accused raises the defense of justifiable homicide, a trial court should admit evidence supporting their reasonable fear, because it is necessary for the jury stand as nearly as practicable in their shoes. Further, under the rules of evidence, statements made for medical diagnosis or treatment describing a source of harm, including identity, are admissible. Beckmeyer's statements to his and his girlfriend's medical providers, Wulff and Doyle, occurring weeks before the incident, describing prior violent acts by McDonald, were admissible under the rules of evidence. They were also necessary to the jury's consideration of his defense

and, specifically, Beckmeyer's subjective fear of McDonald. Did the trial court therefore err in excluding such evidence?

2. Similarly, did the trial court's exclusion of the evidence violate Beckmeyer's right to present a defense?

3. If review is not granted on the above issues, should this Court nonetheless remand for the trial court to strike the $500 victim penalty assessment (VPA) and $100 DNA fee from Beckmeyer's amended judgment and sentence pursuant to legislation that took effect while his appeal was pending?[1]

4. For similar reasons, should this Court also remand to determine whether interest on restitution should be imposed under factors set forth in RCW 10.82.090(2), legislation that also took effect while Beckmeyer's appeal was pending?

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[1] Between adoption of the legislation and its effective date, in June of 2023, Beckmeyer filed a motion to strike these legal financial obligations. But the Court of Appeals denied the motion, indicating in part that the request came too late in the appeal process "because the appeal of this case was considered on [March 9] and a written opinion is pending." Order Denying Motion to Strike Fees.

C. STATEMENT OF THE CASE

In 2017, Beckmeyer and girlfriend Danielle Boucher moved to property in rural Jefferson County after losing their Texas home to a hurricane. RP 1056, 1171, 1486-87. Beckmeyer's older sister Karen lived on the property with her elderly husband Aaron Benson. RP 1057, 1178, 1182, 1488. Karen had cancer. RP 1344.

Beckmeyer and Boucher cared for Karen until she died. RP 1056. Due to their poor financial situation, they remained on the property after Karen's death, living in a stationary "fifth wheel" trailer. RP 1056, 1058.

Unfortunately, Beckmeyer's medical condition, already poor, worsened. RP 1081. Deterioration of Beckmeyer's spinal column had led to a series of surgeries, including one in early 2020. RP 1081, 1129-30; see also RP 1592-99 (testimony of treating physician). Walking and climbing stairs were difficult. RP 1081, 1085, 1594.

Aaron Benson's granddaughter Randi and her boyfriend James McDonald, the decedent, also lived on the property. RP 1057-58. They resided in a motorhome parked across a grassy area from the fifth wheel until Randi's father died in early 2019, when they moved into the house. RP 1063-64, 1178, 1230.

Randi and McDonald, in their early twenties, socialized with Beckmeyer and Boucher, who were older. RP 1059-60, 1063-64, 1179. They barbecued, drank, and occasionally shot guns recreationally. RP 1062-63, 1066-69, 1182, 1186.

McDonald, however, had a violent, unpredictable streak. RP 1444, 1461. Previously, McDonald had exploded with anger and pointed a BB gun at Beckmeyer's head during an altercation about Beckmeyer's dog. RP 1075, 1124-26, 1461-64. McDonald had also thrown Boucher to the ground during an argument. RP 1078-80, 1126-27. Boucher sought medical treatment following the assault. RP 1080, 1128. Further, McDonald had been violent toward Randi and damaged property. RP 1343, 1464.

Both Boucher and Beckmeyer reported their concerns about McDonald, and how it affected their living situation, to medical providers. See CP 132-22. But the trial court excluded medical provider testimony regarding Beckmeyer's statements to each provider—made weeks before the incident—that would have corroborated Beckmeyer's post-shooting claims he feared McDonald. CP 77-78, 82-83, 132-33, 233-36; see RP 130-33, 1259-66. Meanwhile, the prosecution repeatedly argued Beckmeyer wasn't afraid of McDonald and shot him out of anger. E.g., RP 2111 (rebuttal argument).

On the evening of August 26, 2020, Beckmeyer and Boucher were barbecuing in the lawn area between the fifth wheel and the motorhome. RP 1092-94. Boucher turned up the volume on the music. Beckmeyer asked her to turn it down. Boucher refused. Beckmeyer slapped her on the side of the head. RP 1097-99. Boucher, although not injured, was shocked and embarrassed. RP 1118.

McDonald, present for the barbecue, attempted to grab Beckmeyer. RP 1118, 1445, 1503. Beckmeyer, despite his mobility issues, managed to dodge McDonald and retreated into the "cabover" bedroom area of the thin walled fifth wheel. RP 1039, 1452-53. Looking out the louvered window near the bed, he saw McDonald approaching the fifth wheel with a long gun. RP 1453-54, 1514, 1520-24. Beckmeyer believed it was a .22-caliber rifle or a shotgun. RP 1454. It turned out to be a 12-gauge shotgun. RP 952.

Beckmeyer fired his .22-caliber pistol out the louvered window. RP 1458-60, 1523; Ex. 288. He believed he aimed at the ground. RP 1431; see also RP 681. However, the bullets struck higher, some hitting the abandoned motorhome. RP 912, 923, 932-37, 1691. McDonald was struck twice in the chest, causing fatal wounds. RP 778-89, 795-96.

Beckmeyer told a responding police officer he fired because McDonald was coming at him with a rifle. RP 661, 671-72, 681. Further, Beckmeyer said McDonald had a history of

domestic violence. RP 661. McDonald had assaulted Boucher about six weeks earlier. RP 681-82. However, as stated, the court excluded testimony by medical providers corroborating Beckmeyer's longstanding fear. CP 77-78, 82-83, 132-33, 233-36; RP 130-33, 1259-66.

The State charged Beckmeyer with first degree murder or, alternatively, second degree murder; two counts of first degree assault (firing near Randi and Boucher); and fourth degree assault (slapping Boucher). As to the first three charges, the State alleged Beckmeyer was armed with a firearm. CP 6-9.

The court instructed the jury on the defense of justifiable homicide, which applied to the first three counts. CP 333-37. The court also instructed the jury on lesser charges of manslaughter (count 1) and second degree assault (counts 2 and 3). CP 327, 332, 349-50.

The jury convicted Beckmeyer of second degree murder and two counts of second degree assault, as well as fourth degree

assault. As to the first three charges, the jury found Beckmeyer was armed with a firearm. CP 361-76.

Following conviction, Beckmeyer appealed to Division Two of the Court of Appeals, arguing that the trial court erred by excluding statements to medical providers. The Court of Appeals affirmed in an unpublished decision, although it agreed community supervision fees should be stricken. App. at 8-20.

Beckmeyer now asks that this Court grant review and reverse. Meanwhile, Beckmeyer, is in his 60s, disabled, indigent, and serving a lengthy prison sentence. Thus, if review is not granted on the primary issue, he asks that this Court remand for the trial court—which must strike the community custody supervision fee—to also, pursuant to 2023 legislation, strike the VPA and the DNA collection fee and to consider whether interest on restitution is appropriate. CP 443 (amended judgment and sentence).

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(1).**

Review is appropriate under RAP 13.4(b)(1) because the decision conflicts with decisions from this Court.

2. **The trial court violated the rules of evidence and denied Beckmeyer his right to present a defense when it excluded testimony regarding his statements to medical providers establishing his longstanding fear of the decedent**.

The trial court erred when it excluded testimony from Beckmeyer's medical provider, Wulff, and Boucher's medical provider, Doyle, which would have established Beckmeyer's longstanding fear. Such evidence was essential to evaluate the subjective component of justifiable force—to stand as nearly as practicable in the defendant's shoes. The error was not harmless under either evidentiary or constitutional error standards as to counts 1 through 3. This Court should grant review and remand for a new trial.

In evaluating a claim that a trial court violated the right to present a defense, this Court undergoes a one- or two-step process, depending on the result of the first step. First, this Court examines whether the trial court's evidentiary decision was an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds, including error of law. See Wash. State Physicians Ins. Exch. & Assn v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). If the trial court abused its discretion, and such error affected the outcome of trial, the inquiry ends, and the defendant has prevailed. Jennings, 199 Wn.2d at 59.

If, however, the defendant has not shown prejudice under the evidentiary error standard, this Court next examines, in the second step, whether the trial court's decision violated the right to present a defense, reviewing that matter de novo. Id. at 58. The right of an accused person to present a complete defense is guaranteed by both the federal and state constitutions. U.S.

CONST. amend. VI; CONST. art. I, § 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]" ER 401. A trial court does not violate an accused's constitutional right to present a defense by excluding irrelevant evidence. But assuming evidence meets the relatively low bar for relevance, the reviewing court must evaluate whether the evidence was "so prejudicial as to disrupt the fairness of the factfinding process at trial," and, if so, whether the State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); accord State v. Orn, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). "Prejudicial" means the State has the burden of showing that the

evidence is so prejudicial as to disrupt the fairness of the fact-finding process. State v. Darden, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002). If the State fails to show this, the analysis ends, and the exclusion of the relevant, nonprejudicial evidence violated the defendant's Sixth Amendment right to present a defense; that exclusion is then subject to constitutional harmless error analysis. Orn, 197 Wn.2d at 356. If, on the other hand, the evidence is prejudicial, the State must show that it had "a compelling interest to exclude that outweighs the defendant's need to present it. Darden, 145 Wn.2d at 621.

Two additional points must be made. For a constitutional violation to occur, the exclusion of such evidence need not eliminate the accused person's "entire defense." Jennings, 199 Wn.2d at 63-65. Moreover, as stated, "prejudicial" to the State is not merely that the evidence would tend to undermine its case. See Hudlow, 99 Wn.2d at 15.

As for the first inquiry, contrary to the Court of Appeals erroneous view of the law, the trial court's ruling violated the

rules of evidence. Further, the error was not harmless. Beckmeyer's defense was that the force used against McDonald (and inadvertently against the two women) was justifiable because Beckmeyer feared for his life. Important to Beckmeyer's defense was his ongoing fear of McDonald. There was no dispute McDonald was armed with a firearm when Beckmeyer shot him. But evidence differed as to where McDonald stood in relation to the fifth wheel; whether he pointed the gun at the fifth wheel; and, relatedly, whether his gun was ready to fire. As will be explained, self-defense has both objective and subjective components. To evaluate Beckmeyer's subjective fear of the armed McDonald—and to rebut the State's claim that it was feigned—the jury was entitled to hear that Beckmeyer's expressed fear of McDonald was not simply fabricated to justify his actions, but rather longstanding.

Regarding lawful use of force, homicide is lawful when the defendant reasonably feared the decedent was about to inflict death or great personal injury, and there is imminent danger of

such injury. RCW 9A.16.050(1); State v. Brightman, 155 Wn.2d 506, 520, 122 P.3d 150 (2005). There are three elements to lawful use of force: (1) The defendant subjectively feared imminent harm; (2) this fear 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). Further, an imminent danger is not necessarily an *immediate* danger, but rather danger that is "'menacingly near."' State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130, 1129 (1976)).

Objective evaluation of a self-defense claim requires "the jury to use [information presented] to determine what a reasonably prudent person similarly situated would have done." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). But the subjective portion of the standard is important as well and must be made apparent to the average juror. Id. at 477.

In considering the use of force, the jury must therefore consider all of the facts and circumstances known to the defendant. State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984) (decedent's pattern of violence, not just actions immediately preceding death, relevant to self-defense claim). In the case of a defendant who has been subjected to a history of violent behavior, the jury should consider the defendant's actions in light of that history. Id. Because the "'vital question is the reasonableness of the defendant's apprehension of danger,'" the jury must stand "'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (plurality opinion) (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)); State v. Duarte Vela, 200 Wn. App. 306, 319, 402 P.3d 281 (2017).

Further, evidence is relevant and admissible if it demonstrates the defendant's reason for fear and the basis for using force. State v. Walker, 13 Wn. App. 545, 549, 536 P.2d

657 (1975). Thus, evidence of an alleged victim's violent actions may be admissible to show the accused's state of mind at the time of the crime and to indicate whether they had reason to fear bodily harm. State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting State v. Adamo, 120 Wash. 268, 269, 207 P. 7 (1922)).

Finally, "[w]hen a defendant raises self-defense, the State bears the burden to disprove it" beyond a reasonable doubt. State v. Jordan, 158 Wn. App. 297, 301, 241 P.3d 464 (2010), aff'd, 180 Wn.2d 456, 325 P.3d 181 (2014).

Turning next to the principles applicable to the disputed evidence, "[h]earsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Whether an out-of-court statement is hearsay depends on the purpose for which the statement is offered. Duarte Vela, 200 Wn. App. at 319.

Specifically, evidence is not excluded as hearsay if it is a statement of a declarant "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4).

"There is a generally accepted two-part test to aid in deciding whether statements proposed for admission under ER 803(a)(4) are reliable: (1) was the declarant's apparent motive consistent with receiving medical care; and (2) was it reasonable for the physician to rely on the information in diagnosis or treatment." State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999).

Appellate courts hold that, although not always admissible under the rule, statements attributing fault in the case of household violence are pertinent to preventing reinjury, and thus such statements are reasonably pertinent to diagnosis and treatment. E.g., State v. Sims, 77 Wn. App. 236, 239, 890 P.2d

521 (1995), abrogated on other grounds by State v. Burke, 196 Wn.2d 712, 478 P.3d 1096, cert. denied, 142 S. Ct. 182 (2021); State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505 (1989).

As one federal court stated, discussing the analogous federal rule,

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. . . . In short, the domestic sexual abuser's identity is admissible under [Fed. R. Evid.] 803(4) where [their] identity becomes "reasonably pertinent" to the victim's proper treatment.

United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir.1993), cert. denied, 510 U.S. 1184 (1994). Although that case involves sexual abuse occurring in a household, the logic applies equally to household nonsexual violence.

Further, ER 803(a)(4) does not require that the statements be made by the person receiving medical treatment. State v.

Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). "[T]here is nothing in [ER 803(a)(4)] to suggest that the hearsay exception applies only to statements describing the patient's own symptoms or medical history. The instant hearsay exception may apply, for example, [t]o statements by some other third person, who was seeking to convey information about a patient to a physician." 5C Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.20 (6th ed.).

As the cited cases indicate, safety planning is part of treatment. Indeed, "[m]edical scholarship confirms that identifying attackers is integral to the standard of care for 'medical treatment' of domestic abuse victims." Ward v. State, 50 N.E.3d 752, 761 (Ind. 2016). For example, "[d]octors and nurses in various clinical settings are instructed they . . . 'must be prepared to engage patients around the issue of [Intimate Partner Violence] and provide assessment and referral.'" Id. (quoting Nancy Sugg, MD, MPH, Intimate Partner Violence: Prevalence, Health Consequences, and Intervention, 99 MED. CLIN. N. AM.

629, 640 (2015)). Experts urge doctors and nurses to acknowledge violence, assess patient safety, refer the victim for additional treatment or services, and document the injuries and the abuser. Ward, 50 N.E.3d at 761 (citing Sugg, 99 MED. CLIN. N. AM. at 641-44).

Here, the trial court said Beckmeyer's statements to providers were not related to medical diagnosis or treatment and were otherwise inadmissible through the providers. RP 1265-66. But Beckmeyer's statements expressing his concerns to both Wulff and Doyle—who both testified about other matters—were admissible under the hearsay exception because they were pertinent to treatment. ER 803(a)(4). Contrary to the Court of Appeals' discussion of the matter, App. at 10, part of patient care is assessment of whether the patient is safe in their home environment. That is what occurred here. Beckmeyer told Boucher's provider Doyle that he had experienced McDonald's violence, as well. CP 132. His statement was relevant to treatment and safety planning for Boucher, who had been

assaulted by McDonald, a member of her household. RP 1078-80, 1126-27; see 5C WASH. PRAC. § 803.20 (ER 803(a)(4) also applies to statements by third person seeking to convey information about a patient to a physician).

As for the statement to Beckmeyer's provider, a month before the incident, Beckmeyer told Dr. Wulff that he was experiencing violence by McDonald to the extent that he felt compelled to stay in motel. CP 133. This was relevant to medical care for the physically vulnerable Beckmeyer because the potential source of harm was a member of his household. See Ward, 50 N.E.3d at 761. Therefore, it was admissible under ER 803(a)(4).

Returning to the overarching reason for the admission, such evidence is relevant to a jury's full understanding of the defendant's state of mind in regard to the danger they face. Wanrow, 88 Wn.2d at 235; cf. Duarte Vela, 200 Wn. App. at 320 (decedent's "past domestic violence" was not admissible to show that the allegation was true, "but rather for the very relevant

purpose of showing the reasonableness of" defendant's fear of decedent).

The trial court's exclusion of the statements to medical providers was erroneous under the evidentiary rules and established law relating to justifiable use of force. It was also prejudicial. Within reasonable probabilities, had the error not occurred, the outcome of the trial would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Here, pointing to inconsistencies in Beckmeyer's statements, the State—which bore the burden of disproving lawful use of force—argued that Beckmeyer was dishonest about feeling fearful of McDonald. RP 2028-31, 2046, 2049 (closing argument); RP 2111 (rebuttal). Beckmeyer's statements to medical providers conveying such apprehension long before the events in question were likely to persuade the jury Beckmeyer's fear of McDonald was not a recent fabrication.

In summary, the trial court abused its discretion under the rules of evidence in excluding the statements, and the error was

prejudicial as to counts 1-3. This Court should reverse those counts and remand for a new trial.

The trial court's exclusion of the evidence also violated Beckmeyer's constitutional right to present a complete defense. The evidence was relevant; evidence that establishes the reasonableness of a defendant's fear of a decedent is "highly probative." Duarte Vela, 200 Wn. App. at 320. Where, as here, such evidence is relevant, a reviewing court must weigh the accused's right to produce such evidence against the State's interest. Hudlow, 99 Wn.2d at 16; accord Orn, 197 Wn.2d at 353. The State has the burden to show that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process. Darden, 145 Wn.2d at 621-22. If the State fails to show this, exclusion of the relevant, nonprejudicial evidence violated the right to present a defense. Orn, 197 Wn.2d at 356. This Court must then evaluate whether the State can prove the violation was harmless beyond a reasonable doubt. Id.

Here, Beckmeyer's statements to providers presented a fuller picture of the household dynamics, the threat of violence posed by McDonald, and Beckmeyer's fear. This was not disruptive, inflammatory, or likely to confuse jurors. Cf. Hudlow, 99 Wn.2d at 5, 15-16 (excluding rape complainants' prior sexual history as "loose" women).

Nonetheless, Beckmeyer acknowledges the jury heard his testimony and statement to police that he feared McDonald and acted to save his life. Thus, exclusion of the evidence did not eliminate his entire claim that the force was justified. But, as this Court has made clear, a defendant need not show that an adverse ruling eliminated their "entire" defense. Jennings, 199 Wn.2d at 63-674. Here, the jury primarily heard statements expressing fear made after the incident. Beckmeyer was entitled to present, and the jury was entitled to learn, that Beckmeyer's fear of McDonald was longstanding—not a recent fabrication.

Constitutional error is harmless if the State can assure the appellate court beyond a reasonable doubt that the jury would

have reached the same verdict without the error. State v. Romero-Ochoa, 193 Wn.2d 341, 347, 440 P.3d 994 (2019). The State cannot demonstrate this error was harmless beyond a reasonable doubt.

The State bore the burden of disproving beyond a reasonable doubt that Beckmeyer's use of force was lawful. Jordan, 158 Wn. App. at 301. The State could defeat a self-defense claim by disproving that Beckmeyer subjectively feared imminent harm. E.g., Werner, 170 Wn.2d at 337. The jury heard McDonald was armed with a long gun and Beckmeyer was cornered in the bedroom of his thin walled trailer. The State argued that despite Beckmeyer's statements the night of the incident, he wasn't truly afraid of McDonald. But Beckmeyer could not present provider testimony demonstrating his expressed fear of McDonald was not a post hoc attempt to save his own skin. Rather, it was longstanding. Such evidence was necessary for the jury to stand "as nearly as practicable in [Beckmeyer's] shoes." Wanrow, 88 Wn.2d at 235; see also

Allery, 101 Wn.2d at 595 (dynamics of household members' prior relationship was relevant to defendant's subjective fear). The State cannot demonstrate beyond a reasonable doubt that the error was harmless.

For the reasons stated, the Court of Appeals is at odds with prior decisions of this Court. This Court should grant review, reverse counts 1 through 3, and remand for a new trial.

3. **This Court should remand for the trial court to strike the $500 VPA and $100 DNA fee from Beckmeyer's judgment and sentence.**

Even if this Court does not grant review on the primary issue, Beckmeyer respectfully requests that this Court remand for the $500 VPA and $100 DNA fee to be stricken from his amended judgment and sentence, along with the supervision fees the Court of Appeals has already ordered stricken.

Beckmeyer is indigent under RCW 10.101.010(3)(a) and (c) because he is not employed and, prior to incarceration, received disability benefits. CP 432. The sentencing court intended to waive all non-mandatory fees. See App. at 20. The

trial court imposed only the then-mandatory $500 VPA and $100 DNA fee—plus a domestic violence fee that was not waivable under the circumstances—and restitution, which was likewise mandatory. RP 2204; see CP 415, 443.

At the time of Beckmeyer's sentencing, in late 2021, RCW 7.68.035(1)(a) mandated a $500 penalty assessment "[w]hen any person [was] found guilty in any superior court of having committed a crime," except for some motor vehicle crimes. RCW 43.43.7541 similarly mandated a $100 DNA collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." Both fees were mandatory regardless of the defendant's indigency or inability to pay. State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016); State v. Mathers, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016).

In April of 2023, however, the legislature passed Engrossed Substitute House Bill 1169, amending RCW 7.68.035. The amendment provides, "The court shall not impose the penalty assessment under this section if the court finds that

the defendant, at the time of sentencing, is indigent" as defined in RCW 10.101.010(3). Laws of 2023, ch. 449, § 1. The new legislation also eliminates the $100 DNA collection fee for all defendants. Laws of 2023, ch. 449, § 4. These amendments took effect on July 1, 2023. Laws of 2023, ch. 449, § 27.

But, under this Court's decision in State v. Ramirez, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018), and the Court of Appeals' decisions in State v. Wemhoff, 24 Wn. App. 2d 198, 201-02, 519 P.3d 297 (2022) and State v. Ellis, ___ Wn. App. ___, 530 P.3d 1048, 1057 (2023), certain legal financial obligations are not final until appeal is final. Amendments to related statutes therefore apply prospectively to cases like Beckmeyer's that are still pending on appeal. Wemhoff, 24 Wn. App. 2d at 201-02. Because the $500 VPA and $100 DNA fee are not final until the termination of Beckmeyer's appeal, he is entitled to the benefit of the legislative amendments.

The amendments were signed into law May 15, 2023, two months after the Court of Appeals considered this case without

oral argument. See Laws of 2023, ch. 449. The Court of Appeals rejected Beckmeyer's motion[2] to order these fees stricken, intimating that it was too late to address the matter in the Court of Appeals in any format because a written decision was forthcoming.

But, although the amendments allow for individuals to make a motion in the trial court, Beckmeyer would have to do so without counsel. Because the Court of Appeals already ordered supervision fees to be stricken, App. A, at 19-20, the most efficient resolution would be for this Court to order the trial court to also strike the $500 VPA and $100 DNA fee from Beckmeyer's judgment and sentence. He therefore respectfully requests that this Court do so.

[2] The issue was raised in motion format because it appeared time was of the essence.

4. **For similar reasons, this Court should remand for the trial court to consider whether to impose interest on restitution.**

This Court should also remand for the trial court to consider whether to impose interest on restitution. The trial court imposed interest on a $4,493.46 restitution award. CP 443-44.

In 2022, the legislature added a subsection to RCW 10.82.090, effective January 1, 2023. Laws of 2022, ch. 260, § 12 states that "[t]he court may elect not to impose interest on any restitution the court orders. [T]he court shall inquire into and consider," among other factors, whether the offender is indigent under RCW 10.101.010(3). RCW 10.82.090(2); see also Laws of 2023, ch. 449, § 13 (eff. July 1, 2023).

Even though the amendment took effect after sentencing, remand is still appropriate because it took effect when the case was not yet final. Ellis, 530 P.3d at 1057 (citing Ramirez, 191 Wn.2d at 748-49). Beckmeyer asks that this Court remand for the trial court to consider the RCW 10.82.090(2) factors in determining whether to impose interest.

E. CONCLUSION

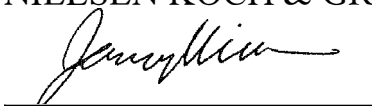
This Court should accept review under RAP 13.4(b)(1) and reverse three of Beckmeyer's convictions. In any event, this Court should remand for the $500 VPA and $100 DNA fee to be stricken and for the trial court to consider whether interest on restitution is appropriate considering Beckmeyer's indigency.

I certify this document was prepared in 14-point font and contains 4,995 words excluding those portions exempt under RAP 18.17.

DATED this 19th day of September, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX

Filed
Washington State
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August 22, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN PAUL BECKMEYER, Appellant.	No. 56139-5-II UNPUBLISHED OPINION

CHE, J. — Beckmeyer appeals the trial court's ruling excluding his prior statements made to medical providers as an abuse of discretion and violation of his right to present a defense. Beckmeyer also appeals the trial court's imposition of community custody supervision fees. In August 2020 after an argument, John Beckmeyer shot multiple rounds from his trailer window, killing James McDonald. At trial, Beckmeyer raised a self-defense claim. Beckmeyer sought to introduce out-of-court statements he made to medical providers several weeks prior to demonstrate his longstanding, subjective fear of McDonald. The trial court excluded the statements as inadmissible hearsay. Following a jury trial, Beckmeyer was found guilty of one count of second degree murder, two counts of second degree assault, and one count of fourth degree assault. Beckmeyer's judgment and sentence requires that he pay community custody supervision fees.

We hold that (1) the trial court did not abuse its discretion in excluding statements to medical providers, and even if the trial court erred in excluding the evidence, any such abuse was not prejudicial, (2) the trial court did not violate Beckmeyer's right to present a defense, and (3) the trial court erred in imposing the community custody supervision fees. We affirm Beckmeyer's convictions, reverse the imposition of community custody supervision fees, and remand for the trial court to strike the community custody supervision fees from Beckmeyer's judgment and sentence.

FACTS

John Beckmeyer and his girlfriend, Danielle Boucher, lived together in a fifth wheel trailer on a two-acre property owned by Beckmeyer's sister. James McDonald and Randi Benson, who had been in a romantic relationship for eight years, also lived on the property. Beckmeyer's sister was married to Benson's grandfather. Initially, McDonald and Benson lived in a motorhome on the property across from Beckmeyer and Boucher's fifth wheel trailer. A grassy area, used for barbequing, separated the motorhome and fifth wheel trailer. McDonald and Benson later moved into the main house on the property.

On August 26, 2020, Beckmeyer and Boucher were barbequing in the grassy area between the fifth wheel trailer and the motorhome. McDonald and Benson joined Beckmeyer and Boucher outside. The group was drinking alcohol and Boucher was playing music on a Bluetooth speaker. Beckmeyer asked Boucher to turn the music down. When Boucher did not turn the music down, Beckmeyer hit Boucher on the side of her head. McDonald confronted Beckmeyer about hitting Boucher and the two men began yelling at each other. While Benson consoled Boucher, Beckmeyer got up from the barbeque and returned to the fifth wheel trailer.

Although Benson heard Beckmeyer "say he was going to go get his .45," Boucher "didn't hear [Beckmeyer] say anything" before he returned to the fifth wheel trailer. 3 Rep. of Proc. (RP) at 1100, 1188.

McDonald left the barbeque area to retrieve a "double-barrel" shotgun from the main house. 3 RP at 1188. Boucher saw McDonald return "to the barbecue area . . . [and] point the shotgun towards [the window where Beckmeyer was] in his trailer." 3 RP at 1132. Benson saw McDonald returning with the shotgun "broken open,"[1] but did not see McDonald load or point the shotgun. Benson alleges that McDonald "said that he was going to defend himself." 3 RP at 1215.

After McDonald returned to the barbecue area, Benson saw "a black thing come out the window of the fifth wheel [trailer]." 3 RP at 1188. Beckmeyer, who was laying on his bed inside the fifth wheel trailer, stuck his gun outside the window and fired several shots. Benson and Boucher ducked to the ground. Bullets struck McDonald, piercing his lungs. McDonald died at the scene.

The State charged Beckmeyer with one count of first degree murder, or in the alternative one count of second degree murder, two counts of first degree assault, and one count of fourth degree assault.

I. WITNESS TESTIMONY

At trial, witnesses testified as described above. Beckmeyer asserted that he had acted in self-defense. Beckmeyer felt threatened by McDonald based on "[t]hings that happened in the

[1] When "broken open," a shotgun's chambers are exposed for loading and unloading ammunition. 3 RP at 1156.

past." 4 RP at 1461. Evidence of McDonald's propensity for violence was introduced through Boucher, Benson, and Beckmeyer's testimony.

Boucher testified that in 2019, following an accident concerning Beckmeyer's dog, McDonald pointed a BB gun at Beckmeyer's head. Boucher described another incident six weeks prior to the shooting when Boucher and McDonald got into an argument. Boucher could not recall what the argument was about but remembered that at some point McDonald "picked [Boucher] up and threw [her] on the ground." 3 RP at 1079. Although Beckmeyer was not present for the altercation, Boucher told Beckmeyer about what happened. Following that incident, Boucher and Beckmeyer went to the hospital for Boucher's injury. Boucher told the medical provider about her living situation.

Benson recalled the 2019 incident with Beckmeyer's dog. Benson did not remember McDonald pointing a BB gun at Beckmeyer, but did remember that Beckmeyer "threatened to hurt [McDonald]." 3 RP at 1184. In describing Boucher's altercation with McDonald, Benson explained that Boucher "just kept getting in [McDonald's] face and [that] he pushed [Boucher] over." 3 RP at 1185. Benson attributed Boucher's injury to her having "tripped and [fallen] over [a] stool" after McDonald pushed her. 3 RP at 1185. Benson characterized Beckmeyer and McDonald's relationship as sometimes "good and [that] other times it was like cats and dogs." 3 RP at 1183.

Following the shooting, detectives interviewed Beckmeyer. The recorded interview was played for the jury. During the interview Beckmeyer explained that McDonald "gets really violent" and "crazy sometimes." 4 RP at 1343, 1348. Beckmeyer told detectives that "about two months ago [McDonald] sent [Boucher] to the hospital" after having thrown her to the ground.

4 RP at 1342. Beckmeyer described having "had troubles in the past with [McDonald]," commenting that McDonald had "attacked [Beckmeyer] a couple times." 4 RP at 1346. At several points during the interview, Beckmeyer told detectives that McDonald had also attacked Boucher and Benson. Beckmeyer explained that McDonald previously "pulled a [BB] gun on [Beckmeyer]." 4 RP at 1372. In explaining why Beckmeyer shot McDonald, Beckmeyer expressed being afraid for his and Boucher's lives.

Beckmeyer's testimony during trial echoed his statements to the detectives. When asked about what was going through his head prior to the shooting, Beckmeyer focused his testimony on two prior incidents with McDonald. Beckmeyer first described his thoughts as "Oh, Jeez. [McDonald has] pointed a gun at me before, and . . . this time [McDonald has] a real firearm." 4 RP at 1461. Beckmeyer described the BB gun incident and the way McDonald "exploded," going from "calm and collective [sic] to . . . extremely mad and . . . yelling, screaming, tearing his shirt off, throwing his glasses on the ground." 4 RP at 1462. Beckmeyer described McDonald's behavior as "very threatening," causing Beckmeyer to question whether McDonald "was going to start throwing punches." 4 RP at 1464. Beckmeyer further testified that five weeks before the shooting, there had been a confrontation between Boucher and McDonald.

II. EXCLUDED TESTIMONY

Prior to the start of trial, Beckmeyer sought to admit McDonald's prior bad acts "that relate to Mr. Beckmeyer's reasonable apprehension of danger." Clerk's Papers (CP) at 82. Beckmeyer argued that "[e]vidence of McDonald's prior bad acts [would] be introduced through testimony of Danielle Boucher, Dr. Wulff, ARNP Doyle, the law enforcement interview of Danielle Boucher, the law enforcement interrogation of Mr. Beckmeyer, and the testimony of

Mr. Beckmeyer." CP at 83. Beckmeyer explained that the "reasonableness of [his] fear that he was going to get shot and his reaction are informed by what he knew about McDonald's specific acts of a violent and volatile nature." CP at 77. Beckmeyer further argued that statements "to medical providers are independently admissible under ER 803(a)(3) & (4)." CP at 78. Beckmeyer asserted that evidence of McDonald's propensity for violence is "offered to establish that [Beckmeyer] reasonably feared McDonald because of what [Beckmeyer] knew at the time." CP at 78.

The trial court ruled that certain prior bad acts would be admissible. Although McDonald's assault of Boucher, attempted assault of Beckmeyer, and assault of Beckmeyer with a BB gun were admissible bad acts, the trial court declined "to try to describe . . . what evidence [would] be admissible to show those acts." 1 RP at 265.

During trial, Beckmeyer sought to introduce statements made to third parties and medical providers. Specifically, Beckmeyer sought to introduce his and Boucher's statements about their relationship with McDonald to nurse Christine Doyle and doctor Laura Wulff. Doyle co-managed Boucher's care and primarily focused on Boucher's "struggles with alcohol abuse." 4 RP at 1602. On July 14, 2020, Boucher, accompanied by Beckmeyer, sought treatment from Doyle. In her progress notes, Doyle noted that

> [Boucher] presents with tailbone pain x5 days.
> She states she got into a fight with her roommate [McDonald] and was body slammed into the ground.
>
> About 5 days ago [Boucher] got into a physical altercation with her roommate. Not feeling safe at home. [Boucher] has been distancing herself from housemate. Her partner, [Beckmeyer], states he has also experienced violence from his step-nieces boyfriend ([McDonald]). Both [Beckmeyer and Boucher] have been living in a motel for two days. [Beckmeyer's] sister passed from cancer and they were living in her house without issue until [McDonald] started living there. They don't

> want to get a retraining (sic) order or contact the police. They are just going to stay away. [Boucher] is waiting to get into a detox program in NJ - Wednesday she will hear if she can get in. The[n] she plans to travel to NJ to be with her aunt.

CP at 132.

Next, Beckmeyer sought to introduce testimony through Wulff, Beckmeyer's primary care provider. Although Wulff saw Beckmeyer for his "blood pressure, some psych concerns, [and] depression," Wulff primarily treated Beckmeyer's chronic pain following his neck and back surgeries. 4 RP at 1591. On July 16, 2020, Beckmeyer met with Wulff "for a follow up chronic pain visit." CP at 133. In her progress notes, Wulff noted

> Patient states that his pain overall is unchanged on his current regimen of Tramadol . . . . Functional goal he is working on: walking. Niece's boyfriend [McDonald] has a temper and has been abusive to other people living on the property (such as [Boucher]); [Beckmeyer and Boucher] have been staying in a motel.

CP at 133. Wulff made notes concerning Beckmeyer's medication regimen and post-surgery recovery progress. CP at 133. Wulff's report also captured Beckmeyer's statements concerning his living condition, noting that

> [Beckmeyer] continues to report poor social situation and chaotic home life. Lives in a run-down 5th wheel w/o running water on sister's land; sister has died so house now occupied by [Benson/McDonald]. . . .
> Tries to care for [Boucher] (alcoholic).

CP at 133.

In seeking to introduce these statements made to Doyle and Wulff, Beckmeyer argued that the statements "are non-hearsay, or alternatively, admissible under exceptions to the hearsay rule." CP at 233. The State argued that "a doctor coming in to testify about some out-of-court statement is hearsay in this context." 3 RP at 1261. The State further argued that exclusion of the statements did not "prevent the defendant from presenting a defense in terms of his state of

mind as to self-defense because the jury's actually heard the evidence that's relevant on the issue of self-defense." 3 RP at 1261-62.

The trial court concluded that Beckmeyer's statements to medical providers were "not related to medical diagnosis or anything." 3 RP at 1265. The trial court explained that although the underlying incidents "could be relevant to reasonable fear, . . . the proper evidence of that coming in . . . is a different issue." 3 RP at 1266.

III. VERDICT AND SENTENCING

Following a jury trial, Beckmeyer was found guilty of one count of second degree murder of McDonald, two counts of second degree assault of Boucher and Benson, and one count of fourth degree assault of Boucher. The jury returned special verdicts finding that Beckmeyer's assault against Boucher involved domestic violence against an intimate partner. The jury also returned special verdicts finding that Beckmeyer used a firearm in the commission of the second degree murder and in both counts of second degree assault. The trial court sentenced Beckmeyer to 347 months of confinement, 36 months of community custody, and ordered Beckmeyer to pay legal financial obligations (LFOs) comprised of mandatory fees, community custody supervision fees, and restitution.

Beckmeyer appeals.

ANALYSIS

I. STANDARD OF REVIEW

A trial court determines "whether evidence is relevant and admissible." *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). This court reviews "the trial court's rulings for abuse of discretion." *Jennings*, 199 Wn.2d at 59. A trial court abuses its discretion where

"'no reasonable person would take the view adopted by the trial court.'" *Jennings*, 199 Wn.2d at 59 (quoting *State v. Atesbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

In determining whether a trial court erred in excluding evidence in violation of a defendant's Sixth Amendment right to present a defense, this court engages in a "two-step review process." *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). This court first reviews "the trial court's individual evidentiary rulings for an abuse of discretion." *Id.* Where a "'trial court abused its discretion in making an evidentiary ruling, and the ruling was prejudicial to the defendant,'" our inquiry ends. *Jennings*, 199 Wn.2d at 59 (quoting affirmingly *State v. Jennings*, 14 Wn. App. 2d 779, 800-01, 474 P.3d 599 (2020)) (Melnick, J., concurring)). However, where "'the abuse of discretion constituted harmless error'" or where a court's evidentiary rulings do not constitute abuse of discretion, this court next "consider[s] de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense." *Jennings*, 199 Wn.2d at 58-59 (quoting *Jennings*, 14 Wn. App. 2d at 800-01 (2020)).

II. REVIEW OF EVIDENTIARY RULINGS FOR ABUSE OF DISCRETION

A. *Hearsay*

Hearsay evidence is not admissible except as provided by the rules of evidence, other court rules, or by statute. ER 802. Under ER 801(c), "hearsay" is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Determining whether "an out-of-court statement is hearsay depends on the purpose for which the statement is offered." *State v. Duarte Vela*, 200 Wn. App. 306, 319, 402 P.3d 281 (2017).

1. *ER 803(a)(4)—Statements for Purposes of Medical Diagnosis or Treatment*

Beckmeyer argues that the "trial court erred when it excluded testimony regarding [his prior] statements to medical providers" because the statements "were pertinent to treatment" and admissible under ER 803(a)(4). Br. of Appellant at 21, 33. We disagree.

ER 803(a)(4) provides an exception to the hearsay rule for statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." A statement is reasonably pertinent to diagnosis or treatment where "(1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment." *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

However, statements made for the purpose of a medical diagnosis or treatment that identify the perpetrator of a crime are not admissible under ER 803(a)(4). *State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993). But in domestic violence situations, "a declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." *Williams*, 137 Wn. App. at 746.

Here, the trial court properly excluded Beckmeyer's statements to medical providers, Doyle and Wulff, on the basis that the statements were "not related to medical diagnosis." 3 RP at 1265. First, Beckmeyer's statement to Doyle during Boucher's appointment that Beckmeyer had experienced violence from McDonald did not promote or relate to Boucher's injury and Doyle's treatment or diagnosis of Boucher. Beckmeyer was not Doyle's patient, nor was he

seeking treatment from Doyle. Doyle, was treating Boucher for a tailbone injury. Boucher had already explained to Doyle how Boucher sustained the injury in an altercation with McDonald. Beckmeyer's statement did not describe Boucher's "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). Beckmeyer's statement that he also experienced violence from McDonald provided no information that Doyle could reasonably rely on in diagnosing or treating Boucher's tailbone injury.

Next, although Beckmeyer was seeking treatment from Wulff, his statements about McDonald were not pertinent to his treatment or diagnosis. Wulff, Beckmeyer's primary care provider, met with Beckmeyer "for a follow up chronic pain visit" following his neck and back surgeries. CP at 133. Wulff's report notes that Beckmeyer stated McDonald "has a temper and has been abusive to other people living on the property (such as [Boucher]); [Beckmeyer and Boucher] have been staying in a motel." CP at 133. Wulff's progress report also notes that Beckmeyer "continues to report poor social situation and chaotic home life." CP at 133.

Beckmeyer does not explain how these statements to Wulff concern Beckmeyer's medical history, a past or present symptom, pain, or sensation relevant to Wullf's treatment of Beckmeyer's chronic pain following his neck and back surgeries. Whether McDonald had a temper is unrelated to Beckmeyer's treatment or diagnosis. Beckmeyer's statement that McDonald has been abusive *to others* on the property does not implicate Beckmeyer's treatment or diagnosis. In the absence of a relevant link between Beckmeyer's chronic pain and Beckmeyer's statement about McDonald's temper towards other people, Beckmeyer's statement

to Wulff was unrelated to his diagnosis and treatment. Also, Beckmeyer does not explain how or if Wulff relied on Beckmeyer's statements in providing treatment.

Furthermore, although Beckmeyer, Boucher, Benson, and McDonald lived on the same property, Beckmeyer did not share a residence with McDonald. Beckmeyer was not in any intimate relationship with McDonald nor was he related to McDonald. Therefore, the trial court's decision to exclude Beckmeyer's statements to Doyle and Wulff under ER 803(a)(4) is not an abuse of discretion.

2. *ER 803(a)(3)—Then Existing Mental, Emotional, or Physical Condition*

Beckmeyer argues that his statements to Wulff, that McDonald had a temper and has been abusive to others living on the property, were also admissible under ER 803(a)(3) as "'statements of the declarant's then existing state of mind.'" Br. of Appellant at 35 (quoting ER 803(a)(3)). Beckmeyer posits that the statements were relevant to a jury's full understanding of Beckmeyer's state of mind regarding Beckmeyer's ongoing fear of McDonald. We disagree that the statements were admissible under ER 803(a)(3).

Under ER 803(a)(3), a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . , but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will," is not excluded by the hearsay rule. The use of "'then' in the term 'then-existing' refers to the time the statement was made, not the earlier time the statement describes." *State v. Sanchez-Guillen*, 135 Wn. App. 636, 646, 145 P.3d 406 (2006). A statement "discussing the conduct of another person that may have created the declarant's state of mind [is]

inadmissible under ER 803(a)(3)." *State v. Sublett*, 156 Wn. App. 160, 199, 231 P.3d 231 (2010).

Here, Beckmeyer's statement to Wulff that McDonald "has a temper and has been abusive to other people living on the property" is not a statement of Beckmeyer's then existing state of mind. CP at 133. Beckmeyer's statement describes McDonald's past conduct. Furthermore, Beckmeyer's statement does not pertain to his *own* state of mind but rather describes McDonald's past interactions with others. Accordingly, Beckmeyer's statement to Wulff is not a statement of his then existing state of mind.

Thus, the trial court did not abuse its discretion in excluding Beckmeyer's statement to Wulff under ER 803(a)(3).

B. *Self-Defense—State of Mind Evidence*

Alternatively, Beckmeyer argues that his statements to Doyle and Wulff were not hearsay, i.e., offered for the truth of the matter asserted, but were instead offered to show Beckmeyer's state of mind and longstanding fear of McDonald. We disagree because even if the statements were relevant to Beckmeyer's state of mind, there is no prejudice as the statements were cumulative.

Under RCW 9A.16.050, homicide is justifiable when it is committed in "the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain to . . . do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished." A successful self-defense claim requires "'evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater

force than was reasonably necessary.'" *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (quoting *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997)).

In evaluating a self-defense claim, the "vital question is the reasonableness of the defendant's apprehension of danger, and his good faith in acting upon such apprehension." *State v. Ellis*, 30 Wash. 369, 373, 70 Pac. 963 (1902). Accordingly, the "jury are entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act." *Id.* Evidence demonstrating "a victim's propensity toward violence that is known by the defendant is relevant to a claim of self-defense 'because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at that time, had reason to fear bodily harm.'" *Duarte Vela*, 200 Wn. App. at 319 (quoting *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972)). Evidence "that the defendant was aware of specific acts of violence committed by the victim" is "admissible as justifying forceful acts of the defendant in self-defense." *State v. Walker*, 13 Wn. App. 545, 549, 536 P.2d 657 (1975).

Although relevant evidence is generally admissible, 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." ER 402, 403.

Here, Beckmeyer attempted to introduce his statements to Doyle and Wulff for the purpose of demonstrating the reasonableness of his fear concerning McDonald. Even assuming without deciding that the statements were relevant to Beckmeyer's state of mind and fear of McDonald, the trial court's ruling excluding the statements was not prejudicial because the evidence was cumulative. *See Jennings*, 199 Wn.2d at 59-60.

Evidence that Beckmeyer was familiar with McDonald's temper and violent behavior along with the fact Beckmeyer and Boucher were staying in a motel was introduced through several other witnesses, including Beckmeyer himself. First, Boucher testified that McDonald had previously "barge[d] into the [couple's] fifth wheel in a rage," "screaming at [Beckmeyer]" while pointing a BB gun at Beckmeyer's head. 3 RP at 1125. Boucher further testified that McDonald had picked her up and thrown her to the ground during an argument and that she had told Beckmeyer about the incident. Benson's testimony explained that Beckmeyer and McDonald's relationship was good sometimes, "and [that] other times it was like cats and dogs." 3 RP at 1183.

Additionally, the jury listened to Beckmeyer's interview with detectives following the shooting. During the interview, Beckmeyer explained that two months prior to the shooting, McDonald had "beaten up" Boucher and "sent her to the hospital." 4 RP at 1342. Beckmeyer described McDonald as "really violent" and capable of getting "really crazy sometimes." 4 RP at 1343, 1348. Beckmeyer explained that he has "had troubles in the past with [McDonald]," and that McDonald had "attacked [Beckmeyer] a couple times." 4 RP at 1346. Beckmeyer reiterated his allegation, stating McDonald has "already beat on me once. And he's beat up on his girlfriend. And he's already beat my girlfriend." 4 RP at 1354. Beckmeyer also told detectives that McDonald had previously gone "crazy" and "pulled [a] BB gun on [Beckmeyer]." 4 RP at 1372. After learning about McDonald's death, Beckmeyer acknowledged that McDonald was a "good guy" but that "he used to have big anger problems." 4 RP 1412. Beckmeyer explained that he "was afraid because . . . [McDonald] attacked [Beckmeyer's] girlfriend, bruised her tail bone bad," and left "a huge bruise" on her arm. 4 RP at 1412.

Finally, Beckmeyer's own testimony, provides evidence of his state of mind. Counsel specifically asked what was going through Beckmeyer's mind when he saw McDonald approaching with a shotgun. Beckmeyer explained that he thought "Oh, Jeez. [McDonald has] pointed a gun at me before, and then I go this time [McDonald has] a real firearm." 4 RP at 1461. Beckmeyer explained that McDonald had pointed a BB gun at him "a year or so prior." 4 RP at 1462. When asked whether "there [had] been other instances in which [McDonald] ha[d] been threatening to [Beckmeyer] or [Boucher]," Beckmeyer explained that he was aware of the incident between Boucher and McDonald. 4 RP at 1464.

Even if Beckmeyer's statements to Doyle and Wulff may have been relevant to show his state of mind, such evidence was cumulative. The substance of the excluded evidence contained in Beckmeyer's statements to Doyle and Wulff was admitted through Boucher, Benson, and Beckmeyer's testimony. Accordingly, even if Beckmeyer's statements to Doyle and Wulff were relevant to show Beckmeyer's state of mind, the trial court did not abuse its discretion in excluding those statements because the statements were cumulative evidence.

Under *Jennings*, when "'the trial court abused its discretion in making an evidentiary ruling, and the ruling was prejudicial to the defendant, we would avoid the constitutional issue altogether.'" 199 Wn.2d at 59 (quoting *Jennings*, 14 Wn. App. 2d at 800-01 (Melnick, J., concurring)). However, where, the trial court's abuse of discretion is harmless or where, the trial court does not abuse its discretion, then we proceed to consider the constitutional issue. *Jennings*, 199 Wn.2d at 59. Here, even if the excluded statements were relevant to Beckmeyer's state of mind, the trial court's exclusion of the statements was not prejudicial because the

excluded statements were cumulative; therefore, we now turn to Beckmeyer's Sixth Amendment argument.

III. SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

Beckmeyer argues that "the trial court's exclusion of the evidence deprived [him] of his right to present a complete defense, and [that] the error was not harmless beyond a reasonable doubt." Br. of Appellant at 38. Beckmeyer contends that the evidence was relevant and that "the State cannot demonstrate the evidence was 'so prejudicial as to disrupt the fairness of the fact-finding process.'" Br. of Appellant at 39. The State argues that Beckmeyer "was not denied his right to present a complete defense and any such denial was harmless beyond a reasonable doubt because the evidence was cumulative to other admissible evidence." Br. of Resp't at 28. We agree with the State.

A criminal defendant has a constitutional right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. However, this right is not absolute and may "'in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process' . . . including the exclusion of evidence considered irrelevant or otherwise inadmissible." *State v. Giles*, 196 Wn. App. 745, 756-57, 385 P.3d 204 (2016) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038. 35 L. Ed. 2d 297 (1973). Under the Constitution, judges may "'exclude evidence that is repetitive . . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Jennings*, 199 Wn.2d at 63 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d. 503 (2006)).

Where "evidence is relevant, the reviewing court must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that

evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Jennings*, 199 Wn.2d at 63. Evidence demonstrating "a victim's violent actions may be admissible to show the defendant's state of mind at the time of the crime and to indicate whether he had reason to fear bodily harm." *State v. Burnam*, 4 Wn. App. 2d 368, 376, 421 P.3d 977 (2018). There is "a distinction between evidence that merely bolsters credibility and evidence that is necessary to present a defense." *Jennings*, 199 Wn.2d at 66-67.

A violation of an individual's right to present a defense is "subject to constitutional harmless error review." *State v. Orn*, 197 Wn.2d 343, 359, 482 P.3d 913 (2021). An error is harmless where the State proves "'beyond a reasonable doubt that the jury would have reached the same verdict without the error.'" *Id.* (quoting *Romero-Ochoa*, 193 Wn.2d 341, 347, 440 P.3d 994 (2019)).

As discussed above, testimony concerning Beckmeyer's knowledge of McDonald's history of violence was introduced through Boucher, Benson, and Beckmeyer's testimony, as well as Beckmeyer's recorded statements to detectives. Beckmeyer testified that he had knowledge of Boucher's interaction with McDonald and of her resulting injury. Beckmeyer explained to the jury that the couple stayed in a hotel after Benson's injury. Beckmeyer further testified that a year prior to the shooting, McDonald had pointed a BB gun at Beckmeyer. Furthermore, Beckmeyer testified that in the moments before the shooting, his thoughts focused on McDonald's prior violent acts. The jury also heard Beckmeyer's recorded statements to detectives that included Beckmeyer reciting these incidents multiple times during the interview. Moreover, Boucher and Benson's testimony confirmed these incidents between Beckmeyer and

McDonald. Accordingly, Beckmeyer had the opportunity to present his theory of the case and present evidence relating to his longstanding subjective fear of McDonald.

Statements made by Beckmeyer to Doyle and Wulff are cumulative as they were introduced numerous times through Boucher, Benson, and Beckmeyer's testimony, as well as Beckmeyer's recorded statement to detectives. Rather than provide new evidence for the jury's consideration, Doyle and Wulff's testimony would only serve to bolster Beckmeyer's credibility concerning his longstanding fear of McDonald. Given the cumulative nature of the evidence, Beckmeyer's ability to testify and present his theory of the case, the trial court did not err in excluding Beckmeyer's statements made to Doyle and Wulff.

Furthermore, even if the trial court erred in excluding statements made to Doyle and Wulff, we are assured beyond a reasonable doubt that the jury would have reached the same verdict without the error. The general statements that Beckmeyer made to Doyle and Wulff were introduced through witnesses who gave detailed accounts of the incidents between McDonald and Beckmeyer. Thus, the jury would not have reached a different verdict had they been able to consider the excluded evidence.

Accordingly, we conclude that the trial court did not deny Beckmeyer his right to present a complete defense and even if it did, any such denial was harmless beyond a reasonable doubt.

IV. COMMUNITY CUSTODY SUPERVISION FEES

Beckmeyer argues that his "community custody supervision fee should be stricken [from his judgment and sentence] because it is a discretionary legal financial obligation, which the trial court intended to waive." Br. of Appellant at 43. Beckmeyer further argues that "[i]n the alternative, defense counsel was ineffective for failing to alert the court that . . . the written

judgment and sentence did not waive the fee[s]." Br. of Appellant at 48. The State concedes that this "court should strike the Community Custody Supervision fee." Br. of Resp't at 35. We agree.

Under former RCW 9.94A.703(2)(d) (2018), a trial court could waive community custody supervision fees. In 2022, the legislature amended RCW 9.94A.703(2) and removed subsection (d). *See* SECOND SUBSTITUTE H.B. 1818, 67th Leg., Reg., Sess. (Wash. 2022). The amended statute does not provide for the imposition of community custody supervision fees. RCW 9.94A.703. Costs imposed under former RCW 9.94A.703(2)(d) were not final until the termination of all appeals. *State v. Wemhoff*, 24 Wn. App. 2d 198, 202, 519 P.3d 297 (2022). The cost statute "in effect at the conclusion of a defendant's appeal appl[ies] to a defendant's case." *Id.*

Here, the trial court imposed community custody supervision fees after expressing an intent to only impose mandatory LFOs. In its oral sentencing, the trial court ordered that the LFOs be "basically just the mandatory minimum." 6 RP at 2204. However, Beckmeyer's judgment and sentence requires that he "pay supervision fees as determined by DOC." CP at 442. In light of amended RCW 9.94A.703(2) and the record's suggestion that the trial court intended to waive discretionary LFOs under former RCW 9.94A.703(2)(d), we reverse the imposition of the community custody supervision fee and remand to the trial court to strike the community custody supervision fees from Beckmeyer's judgment and sentence.

CONCLUSION

We hold that the trial court did not err in excluding statements by Beckmeyer to Doyle and Wulff because the statements were inadmissible hearsay and cumulative. We further hold

that the trial court did not violate Beckmeyer's right to present a defense, but the trial court improperly imposed the community custody supervision fee. Consequently, we affirm Beckmeyer's convictions, reverse the imposition of community custody supervision fees, and remand for the trial court to strike the community custody supervision fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

Che, J.

We concur:

Worswick, P.J.

Worswick, P.J.

Price, J.

Price, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

September 19, 2023 - 10:35 AM

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