Supreme Court No. 92836-3
(Court of Appeals No. 71518-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

STEVEN KAYSER, Appellant.

ANSWER/CROSS PETITION FOR REVIEW

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210/ADMIN #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 778.5710

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, State of Washington, Respondent, asks this Court to review one of three issues examined by the Court of Appeals, Division One, referred to in section B that resulted in the reversal of Steven Kayser's conviction for assault in the second degree with a deadly weapon. The State additionally requests this Court deny review of the two additional issues Kayser petitioned for further review on March 2nd 2016, for the reasons set forth herein.

B. COURT OF APPEALS DECISION

The State of Washington petitions this Court for review of the Court of Appeals opinion in State v. Kayser, #71518-6-I (unpublished) which was filed December 21st 2016. Specifically, to review whether the Court of Appeals erred reversing Mr. Kayser's conviction based solely on the trial court's discretionary decision to admit a mock up of a 'sign' found taped to the inside of a window in Kayser's business office where Kayser kept his shotgun.

The sign said 'stop', 'this is a very dangerous place' and warned of an 'armed response.' The language on the sign suggests Kayser had a pre-designed plan to deal with perceived trespassers as further corroborated by the shotgun ready for use in Kayser's office and the 'memoranda of

trespassing incident' given to officers by Kayser immediately after his arrest. The language in Kayser's sign was therefore probative in assessing Kayser's 'intent' in the context of the State's allegation that he intentionally assaulted the process server and in rebutting Kayser's contention that he only was compelled in the moment to shoot at the process server in protect himself and his wife. Moreover, the record below reflects this evidence was not presented or argued as impermissible character evidence and played a minimal role at trial. The prosecutor only mentioned it in passing during closing cautioning the jury this evidence was relevant only in evaluating Kayser's intent.

The Court of Appeals substituted its judgment for that of the trial court in concluding the trial court's decision to admit this evidence was unreasonable and that alleged non constitutional error was not harmless. In doing so, the Court of Appeals decision abrogates the principle of affording trial court's discretion in making evidentiary decisions. A copy of the opinion is attached as Appendix A.

Review of the remaining two issues Kayser requests review of in his March 2nd 2016 petition however, should be denied. The Court of Appeals appropriately rejected Kayser's ineffective assistance of counsel argument because the record reflects his attorney reasonably strategically

decided to withdraw a request to have the jury instructed on a defense of property theory, to focus on his remaining self-defense and defense of other theories, after agreeing the trial court should instruct the jury on the definition of malicious as it related to the defense of property theory. Kayser's trial attorney's decision was strategically reasonable because the plain language of the statutory defense of property provides one may lawfully justify the use of force in defense of property *only* if preventing a 'malicious' trespass or interference of property.

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> (3) whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or ***malicious trespass***, or other ***malicious interference with real or persona property*** lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020. (***emphasis added***). "Statutes must be interpreted and construed so that all of the language used is given effect, with no portion rendered meaningless or superfluous." State v. Hirschfelder, 170 Wn.2d 536, 242 P.3d 876 (2010). The term 'malicious' pursuant to RCW 9A.04.110(12) is defined as to have "an evil intent, wish or design to vex, annoy or injure another person." Legislative definitions provided by the

statute is controlling. State v. Sullivan, 143 Wn.2d 162, 19 P.3d 1012 (2001).

Consistent with the analysis contained within the Court of Appeals decision, Kayser's trial attorney reasonably concluded the defense of property requires some evidence to support the jury finding the alleged trespasser trespassed or interfered with the defendant's property, with *malicious intent* based on the objective and subjective standards set forth in the jury instructions. State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997). The Court of Appeals therefore accurately concluded in context to Kayser's ineffective assistance of counsel claim, that "it was a legitimate tactical decision for counsel to decide against pursuing a defense that would require the jury to find that Adams acted with 'malice' in contrast to the 'reasonable belief' standard applicable in the self-defense and defense of others theory. The Court of Appeals discussion of the defense of property in the context of the ineffective assistance of counsel claim is not inaccurate and does not warrant further review.

Additionally, the Court of Appeals appropriately denied Kayser's pro-se request to review an additional ground pertaining to his sentence. On direct appeal, Kayser argued in a statement of additional grounds of review, the trial court should have had discretion to impose a shorter

sentence in consideration of his age, *citing* Miller v. Alabama, ___U.S.__, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The Court of Appeals determined Miller was applicable to juveniles and therefore, not applicable to Kayser because he is not a juvenile offender. Now, Kayser requests review *not* of this issue, but on a related issue asserting the trial court should have had discretion to impose an exceptional sentence below the mandatory 36 month firearm enhancement predicated on the constitutional analysis set forth in Miller. See, COA Opinion at 12, as compared to Kayser Pet. for Review at 8. Consideration of an issue, not argued in the Court of Appeals should be denied.

Even if reviewable, Miller is not applicable to Kayser's sentence. Moreover, Kayser cannot demonstrate imposition of the mandatory firearm enhancement, as authorized by the legislature and the jury special verdict violates the Eight Amendment. See, State v. Houston-Sconiers, __Wn.App. ___, 365 P.3d 177 (2015). Review of this alleged sentencing error, not litigated in the Court of Appeals, should be denied.

C. ISSUE PRESENTED FOR REVIEW

This Court has a substantial interest in ensuring multiple trials are not required at public expense. Should review be granted where the record reflects the trial court reasonably exercised its discretion to admit relevant evidence for the limited purpose of assessing

Kayser's intent and where reversal is not appropriate under a non-constitutional standard of review because the admitted evidence was not inherently prejudicial, was not presented or argued impermissibly and played a minor role at trial?

D. STATEMENT OF THE CASE

Steven Kayser is an educated man not unfamiliar with civil litigation. He has, according to trial testimony, worked as a forensic accountant in criminal fraud matters, has a history of involvement in both civil and criminal litigation and is, along with his wife, Gloria Young, the registered agent of multiple companies.

On February 10th, 2010 at 4 p.m., however, when a process server went to Kayser's property and served him and his wife, Gloria Young with legal papers, Kayser angrily told the process server he had 5 seconds to get off his property or "I'll shoot you." RP 265-66, 268, 343. At the time Kayser, his wife and the process server, Adams, were standing in a large gravel parking area that ran alongside a long pole building where Kayser ran his business. While counting to five, Kayser quickly retrieved a loaded shotgun from his business office in the pole building, returned to the gravel parking lot and fired a live round of ammunition toward the process server, who was then trying to get back to his vehicle to leave. RP 268-69.

As the process server tried to get in his car and get his keys in the ignition, Kayser leveled the shotgun at him and the car. RP 272, 348. Adams ducked under the front dash board as Kayser fired a second time. RP 273, see also, RP 350 (Adams contends Kayser's defense investigator mischaracterized his defense interview), 351, 994. The process server thought he was dead. RP 278. At trial, the process server explained after the first shot, Kayser leveled the shotgun at him and his car prior to firing his shotgun and Adams was surprised the car did not appear to be hit. RP 273, 267. As the process server squealed away in his car, Kayser continued counting and fired a third shot over but near the process server's vehicle. A neighbor, Dawneeeta Demmer corroborated the process server's account, testifying she saw Adams car pull into Kayser's property through an open gate and subsequently heard loud counting, gunshots and his car squealing out of Kayser's gravel driveway. RP 36, 373, 371.

Kayser believed he had the right to use his shotgun in response to an illegal trespasser on his private property notwithstanding the open gate and the fact that Kayser conducted business at the property and received deliveries in the gravel parking area that ran along the pole building where Kayser's business office was located. Kayser even typed up a 'memoranda of trespassing incident' that he gave when law enforcement that stated:

> Today at approximately 4 p.m. Gloria called me from the house to tell me she was very concerned that someone was snooping around our buildings and wanted to know if I had an appointment with someone. I was in my office in the warehouse. I walked outside by the corner of the garage and Gloria looked afraid and was standing several feet away from a very large man with long flowing hair. I walked up within several feet of the man and asked what he wanted and told him he was trespassing. He did not speak his name and did not provide his name. The man asked if I was Steven Kayser and I answered I was and again told him he was trespassing. He moved toward me and handed me something. I backed away without looking at what he handed me. At that point I again told him he was trespassing and told him he had five seconds to get on my property and away from my wife. He did not leave but instead asked me to sign something he had and started opening a clipboard type of metal container and started reaching for something. At that point I again told him to get off my property and counted to five. I then told him I was going to my office for my shotgun and turned away from him and walked quickly to get my shotgun as I was concerned that he was standing too close to Gloria. I got my shotgun and quickly walked back to the corner of the garage where he was standing and he had not left but was still standing too close, about five feet from Gloria. I again told him he had the count of five to get of my property. He still did not move. I counted to five and fired one warning shot in the air. At that point the man started walking slowly back to his car, which he had parked about 30 feet from the yellow entrance gate, a clear indication that he had read the not trespassing sign. He halted at his car, I fired another warning shot in the air. He got into his car and made a gesture at me with something in his hand. I fired a third warning shot while on my property, he then accelerated out of the driveway and squealed his tires backing onto the road and left.

RP 400-422, CP __Plaintiff's exhibit 105. Nothing in Kayser's typed out memoranda or comments to law enforcement stated Kayser or his wife thought the process server had a weapon, that they feared for their lives or

that Adams was doing anything other than allegedly refusing to leave Kayser's property. RP 459. In contrast to Kayser's version of the trespassing incident, Adams explained that when Kayser walked up to him, he appeared angry and then after being served, Kayser looked at the papers and then got really mad and told him he had five seconds to get off his property. RP 267.

Inside Kayser's office, where Kayser was when Adams arrived where Kayser retrieved his shotgun from, investigators found a mock up of a warning sign that stated "stop" "do not" "this with permission from owner" "and appt" "this is a very dangerous place" RP 457, see also Supp CP ___ (exhibit 90-91). On the bottom of the mocked up sign, another sticky attached to it said "armed response." RP 457-459. In light of Kayser's claim that he was entitled to eject Adams as a trespasser investigators seized this sign. This sign was later introduced at trial, read into evidence and mentioned briefly once in closing argument as relevant only to assessing Kayser's intent. Steven Kayser was subsequently charged with assault in the second degree with a deadly weapon. RCW 9A.36.021(1)(c). CP 3-4.

At trial, Kayser claimed he lawfully fired his shotgun at the process server because he and his wife were afraid the process server had a gun,

they felt threatened and feared for their persons and their property. RP 875. This claim was in stark contrast to the calm demeanor Gloria Young appeared to have to investigators immediately following the shooting. RP 455, 585. Neither Kayser nor Young called the police or 911 while the process server, Adams was on their property or after Adams fled. RP 459.

Prior to trial, the state agreed not present any testimony or argue that Kayser's conduct was consistent with the no trespass sign seized from Kayser's business office. 1RP 30. Consistent with the trial court's ruling, the state presented the sign but did not offer any testimony beyond reciting to the jury what the sign said. No further questions or testimony was presented relating to the no trespassing office sign. In closing argument, the prosecutor made one statement in passing, asserting the sign was relevant solely for the limited of assessing of Kayser's intentions during the incident. RP 1071. Despite the limited role this singular piece of evidence played at trial, the Court of Appeals concluded not only that the trial court abused its discretion admitting this evidence; characterizing it as impermissible character evidence pursuant to ER 404(b), but also that its admission was not harmless and warranted reversal of the jury's verdict. The Court of Appeals decision is inconsistent with the record and

impermissibly substitutes its own judgment for that of the trial court. Further review is therefore warranted.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

Review is warranted because the public has a substantial interest in ensuring trials aren't reversed based on reasonable discretionary decisions of the trial court; particularly where the admitted evidence is relevant, did not play a significant role at trial and the evidence was not presented or argued as impermissible character evidence pursuant to ER 404(b). RAP 13.4(b)(4). As such, the Court of Appeals decision abrogates the standard of review in reviewing trial court decisions admitting evidence and conflicts with State v. Foxhoven, 161 Wn.2d 168, 174-5, 163 P.3d 786 (2007).

The abuse of discretion standard applicable when examining the admissibility of evidence reversal requires a determination that the trial court decision was manifestly unreasonable was exercised on untenable grounds or was made for untenable reasons. The record in this case reflects no such abuse of discretion occurred in this case. The trial court appropriately admitted a mock up of a 'sign' found taped to the inside of a window in Kayser's business office, on his property, that warned 'stop' without 'permission from owner' this was a 'very dangerous place' and of

an 'armed response.' The state argued this evidence was logically relevant and therefore admissible to a material issue before the jury, in assessing Kayser intentions when he retrieved and fired his shotgun at a process server in response to being served a civil summons and complaint.

ER 404(b) precludes admission of evidence of crimes, acts or any evidence offered to "show the character of a person to prove that the person acted in conformity with that character" but permits trial courts, acting within their discretion, to admit evidence that is relevant other permissible purposes such as demonstrating motive, plan or intent. State v. Foxhoven, 161 Wn.2d 168, 174-5, 163 P.3d 786 (2007).

Typically, ER 404(b) evidence is admissible within the discretion of the trial court if the evidence is logically relevant to a material issue before the jury; relevant and necessary to prove an essential ingredient of the crime charged. State v. Saltarellli, 98 Wn.2d 358, 655 P.2d 697 (1982). Secondly, the probative value of this evidence must outweigh any potential for prejudice. Id. Relevant evidence is evidence that 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 than it would be without the evidence. ER 401. The threshold to admit relevant evidence is low. Even marginally relevant evidence is admissible. State v. Darden, 145 Wn.2d

612, 41 P.3d 1189 (2002). "Evidence is relevant if a logical nexus exists between the evidence and the fact to be established." State v. Burkins, 94 Wn.App 677, 692, 973 P.2d 15(1999). Appellate courts generally defer to the assessment of the trial judge who is in the best position to determine the prejudicial effect of evidence. State v.Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007).

Here, the Court of Appeals concluded that the sign in Kayser's office was not logically connected to Kayser's intent when he fired the shots at Adams because "there was no evidence that Kayser himself made the sketch, what its purpose was, or how long it had been hanging in Kayser's office. COA Opinon at 7. The court concluded the office sign was impermissible propensity evidence because the only commonality between the sign and the charged act was the defendant. Id. The appellate court's analysis misconstrues the record and the logical connection between the language contained within the sign, Kayser's perception that the process server was an 'illegal trespasser' on his property and the shooting.

The sign was located in Kayser's business office. The office, as described by officers, was a private business office occupied and used by Kayser. And, contrary to the Court of Appeals decision, it wasn't the

presence of the sign in Kayser's office, but the language contained within the sign that logically connected this evidence to evaluating Kayser intentions in shooting at Adams. The language suggests Kayser had a plan to deal with illegal trespassers with an armed response; an intention that was entirely consistent with the 'memoranda of trespassing incident' statement Kayser initially provided to authorities after this incident and the fact that he kept a loaded shotgun in his business office. The language of the sign was additionally relevant because it was entirely ***inconsistent*** with Kayser's new theory at trial, that Kayser acted in the moment in self-defense and defense of his wife. Thus, this evidence, while not playing a significant role at trial, was logically relevant to the jury's assessment in determining whether Kayser intended to assault the process server or only lawfully acted out of self-defense.

While the Court of Appeals is correct that admission of Kayser's sign *could* have permitted the state to suggest Kayser was a "dangerous individual inclined to resort to firearms without legitimate reason," the record reflects no such impermissible argument or suggestion was made. See, COA Slip Op. at 8, RP 1071-1072. Instead, the prosecutor appropriately mentioned once during closing that the sign found in Kayser's office was "presented to you to show the defendant's intent." RP

1072. Prior threats are admissible even if they are not directed toward a particular person pursuant to ER 404(b). State v. Gates, 28 Wash. 689 (1902). Here, the sign warned of an 'armed response' to those without an appointment and that this 'was a very dangerous place.' This evidence was probative of Kayser's intentions in determining whether Kayser unlawfully threatened Adams because he wrongfully believed he was justified in shooting at trespassers or reasonably only acted in the moment because he lawfully feared for his and his wife's safety.

Given the burden of proof and the requirement the state prove beyond a reasonable doubt that Kayser wasn't lawfully acting in self-defense or defense of his wife, the trial court did not abuse its considerable discretion admitting this relevant evidence. ER 404(b). State v. Ciskie, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988), State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). ER 404(b) should not be applied in a manner to deprive the state of relevant evidence. Particularly where the state is careful to ensure the evidence is argued appropriately and in a limited way. Reversal of the Court of Appeals decision is warranted.

Even if the trial court's discretionary decision could be construed as a manifest abuse of discretion, Kayser is not entitled to reversal of his conviction because this evidence was not inherently prejudicial, was not

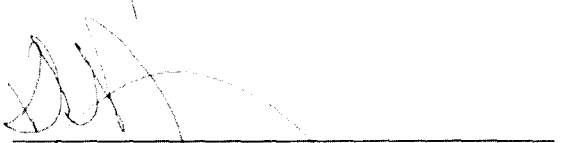
presented or used impermissibly, was only mentioned during closing arguments in passing, and the remaining evidence overwhelmingly supported the jury's verdict. The Evidentiary error as alleged here only requires reversal if the error within reasonable probability, the outcome of the trial would have been materially affected by the alleged error. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

This Court has previously stated "we should avoid multiple trials and attendant uneconomic use of judicial resources when the new trial will inevitably arrive at the same result. State v. Tharp, 96 Wn.2d 592, 637 P.2d 961 (1981). Had the 'mock sign' not been admitted, the jury would have still reached the same conclusion. The sign, while relevant, played an insignificant role at trial and was neither presented nor argued as impermissible character evidence. The trial court's discretionary decision admitting this evidence should be upheld and Kayser's conviction for assault in the second degree with a deadly weapon be affirmed.

F. CONCLUSION

For the reasons set forth above, Petitioner, State of Washington, respectfully requests that this Court accept discretionary review of the trial court decision to admit relevant ER 404(b) evidence and to deny Kayser's request to further review his ineffective assistance of counsel and sentencing claims.

Respectfully submitted this 21 day of March, 2016.



KIMBERLY THULIN, WSBA No. 21210
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, Lenell Nussbaum, addressed as follows:

2125 Western Avenue, Suite 330
Seattle WA 98121
lenell@nussbaumdefense.com

TDAStarck
LEGAL ASSISTANT

3/29/16
DATE

APPENDIX

A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN LEO KAYSER, Appellant.	)	No. 71518-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 21, 2015

BECKER, J. — Steven Kayser appeals his conviction for assaulting a process server. An erroneous ruling admitting character evidence was sufficiently prejudicial to require a new trial.

FACTS

Steven Kayser, a man in his late sixties at the time of the incident in question, became an inventor after working much of his life as an accountant. Kayser protects his inventions as trade secrets. He has occasionally been involved in litigation concerning them.

Kayser moved to rural Whatcom County in 2006. A driveway marked by a large "no trespassing" sign leads into his property. The first building encountered is a long warehouse where Kayser maintains his office and stores documents. Kayser keeps the windows of this building covered. Kayser's residence is at the end of the driveway.

In February 2010, process server Mark Adams arrived at the Kayser property with a civil summons and complaint to serve on Kayser and his wife. It was about 4:00 p.m. Adams parked his car and walked up to the warehouse. He knocked on one of the doors and tried to look through a window. A phone in Adams' car rang, so he returned to the car momentarily. He then went back to the warehouse and started knocking on a different door.

Kayser's wife, Gloria Young, saw Adams from a window and thought he was "snooping." Young telephoned Kayser in the warehouse to alert him. She then went outside and was approached by Adams. In response to questions, Young told Adams that she lived there and that she was Kayser's wife. Adams handed her some papers from a metal box. Kayser came out of the warehouse and said, "Can I help you?" Adams responded by asking him if he was Steven Kayser. Kayser answered "yes." Adams did not identify himself. He handed documents to Kayser and asked if he would sign for them.

Kayser testified that he perceived Adams as a trespasser. He felt Adams, a large man with long hair, was frightening Young, who is some years older than Kayser, small and a little frail. Kayser also said that when he saw Adams reaching into the metal box, he feared it might contain a gun. In an angry voice, Kayser told Adams he had five seconds to get off the property. Kayser threatened to get a gun.

Adams testified that he immediately began to walk back to his car. Kayser, on the other hand, testified that Adams stayed where he was. Kayser hurried back to his office, came out with a shotgun, and fired a shot. Kayser kept

counting to five and fired two more shots—one after Adams reached his car and one as Adams backed out of the driveway.

Three years later, Kayser was tried and convicted of assault in the second degree while armed with a deadly weapon. The jury answered "yes" to the allegation that the assault occurred with a firearm. Kayser was sentenced to three months for the assault and three years for the firearm enhancement. Kayser appeals.

SUFFICIENCY OF THE EVIDENCE

Kayser first challenges the sufficiency of the evidence to prove the crime charged. When a conviction must be reversed for insufficiency of the evidence, the case must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). We therefore address this issue first.

In considering the sufficiency of the evidence, this court reviews the record in the light most favorable to the State to determine whether a rational jury could have found the essential elements of the charge beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At trial, Adams testified that all the shots were fired into the air, although the second shot was at a lower angle than the others. Kayser argues that Adams' trial testimony supports, at most, the misdemeanor charge of unlawful display of a firearm.

In a statement to police officers right after the incident, Adams said he thought the second shot was fired toward him and he was surprised it did not hit him or his car. The jury could have believed that what Adams told police at the

time of the incident was more credible than his memory three years later. And in any event, the State was not required to prove that Kayser shot directly at Adams. The question presented to the jury was whether Kayser used unlawful force with the intent of putting Adams in imminent fear of bodily injury. The element of intent for the felony as charged is in the definition of assault, stated as follows in instruction 7:

INSTRUCTION NO. 7

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict harm.

Adams testified that Kayser threatened to shoot him if he was not off the property by the count of five. He recalled that after the first shot, he ran to his car and ducked under the dashboard while fumbling with his keys. He was surprised that the second shot did not hit either him or his car. This evidence was sufficient to prove that Kayser intended his shots to create in Adams apprehension and fear of bodily injury and that Adams did in fact have a reasonable apprehension and imminent fear of bodily injury.

Kayser defended on the basis that the force he used was lawful because he was acting in defense of himself and his wife. Where self-defense or defense of another is claimed, the absence of self-defense becomes another element the State must prove beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983). Kayser contends the State did not present sufficient evidence to show the absence of self-defense.

Adams testified that he handed papers to Kayser to sign and asked Kayser for his signature. According to Adams, Kayser responded by proclaiming that Adams would be shot if he were not off the property in five seconds. Adams testified that he immediately began to walk back towards his car. A reasonable jury could conclude from this testimony that Adams posed no threat to Kayser or Young. This was sufficient evidence to carry the State's burden to prove absence of self-defense.

We reject Kayser's challenge to the sufficiency of the evidence.

ER 404(b) – EVIDENCE OF INTENT

We next address the alleged error in admitting evidence under ER 404(b).

During a search of Kayser's office, the police photographed a pencil sketch of what looked like a stop sign. The sketch was found taped to an interior window shutter, facing inward. Below the stop sign diagram were handwritten sentences indicating entry was forbidden without the owner's permission. "This is a very dangerous place" was clearly written on the bottom. On a sticky note attached to the sketch, the phrase "Armed Response" was penciled in.

The State offered the photograph as an exhibit. Kayser objected on ER 404(b) grounds.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of a prior act may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Such evidence must be relevant to

a material issue, and its probative value must outweigh its prejudicial effect. State v. Everybodytalksabout, 145 Wn.2d 456, 465-66, 39 P.3d 294 (2002).

To determine whether evidence is admissible under ER 404(b), trial courts must engage in a three-part analysis. First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the jury. In doubtful cases, the scale should be tipped in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

The trial court admitted the exhibit as probative of Kayser's intent and found that it was not unduly prejudicial. After a deputy testified and described the sketch, Kayser moved for a mistrial. The motion was denied.

On appeal, Kayser argues the admission of the evidence violated ER 404(b). This court reviews decisions under ER 404(b) for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

The State initially suggests that ER 404(b) does not apply because the challenged exhibit "does not constitute misconduct or a bad act." The idea that the rule applies only to prior bad acts or misconduct is a misconception. Everybodytalksabout, 145 Wn.2d at 466. The rule prohibits the use of any kind of "other" act as propensity evidence.

"If the State offers evidence of a prior act to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior act

connects to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334. Here, to convict Kayser of the charged offense, the State had to prove that he fired the shots with the intent to create in Adams apprehension and fear of bodily injury. The State theorizes that the presence of the sketch inside Kayser's office "was an indication from Kayser that he intended to deal with uninvited trespassers with an armed response." This theory does not logically connect the sketch with Kayser's intent when he fired the shots on the day in question. There was no evidence that Kayser himself made the sketch, what its purpose was, or how long it had been hanging in his office.

"Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a nonpropensity based theory, there must be some similarity among the facts of the acts themselves." Wade, 98 Wn. App. at 335. The State did not identify for the trial court any similarity between Kayser's act of firing shots outside the office and his "other" act of keeping the sketch inside the office. When the issue first arose, the prosecutor said, "I think the jury can make of it what they will." What the jury was then allowed to "make of it" was that Kayser had a propensity to use arms to scare off strangers. We conclude the trial court abused its discretion by admitting the sketch.

Errors under ER 404(b) require reversal only if the error, within reasonable probability, materially affected the outcome. The error is harmless "if the evidence is of minor significance compared to the overall evidence as a whole." Everybodytalksabout, 145 Wn.2d at 468-69.

The State argued that Kayser fired the shots because he was angry about being served papers. Kayser argued that he fired the shots with justification because he perceived Adams to be a trespasser who was menacing his wife and did not leave when asked. The exhibit enabled the State to argue that an "Armed Response" was Kayser's preplanned response to unwelcome visitors in general. Thus, the exhibit cast doubt on Kayser's claim that his use of force in this incident was lawful.

The trial court reasoned that the note was not "all that prejudicial" to Kayser because it simply reflected that he was a careful and private man, concerned about the confidentiality of his trade secrets and the safety of himself and his wife. The sketch was more than that. It included the statement "This is a very dangerous place" and the note "Armed Response." This material was prejudicial. It suggested that Kayser was a dangerous individual inclined to resort to firearms without legitimate reason.

Because Kayser's defense depended on the reasonableness of his claim of self-defense and defense of another, we cannot say with confidence that the challenged evidence had no material effect on the outcome of the trial. Kayser is entitled to a new trial.

We next address other issues raised by Kayser that may arise again on retrial.

DEFENSE OF PROPERTY

Defense counsel initially proposed an instruction on lawful force that included use of force to defend one's property. Just before the case went to the

jury, counsel withdrew that portion of the instruction. Kayser contends counsel's withdrawing the instruction on defense of property was deficient performance.

To establish ineffective assistance of counsel, Kayser must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Claims of ineffective assistance of counsel are reviewed on appeal de novo. Sutherby, 165 Wn.2d at 883.

Kayser contends there was no legitimate reason for trial counsel to abandon the defense of property instruction. He argues that if instructed on the defense of property, the jurors might have reasonably believed that he, a man in his late sixties and of small build, used reasonable force to eject a large stranger who he believed to be a trespasser.

Kayser correctly argues that a person who uses force to expel a trespasser will not necessarily incur criminal liability so long as the use of force is reasonable. RCW 9A.16.020. It is not necessary for the defendant in such a case to show that he feared for his own personal safety. State v. Bland, 128 Wn. App. 511, 516, 116 P.3d 428 (2005). "Although the use of deadly force is not justified to expel a mere nonviolent trespasser, under certain circumstances necessary force may include putting a trespasser in fear of physical harm."

Bland, 128 Wn. App. at 517. But defense of property is available to justify the use of force only if the trespass is "malicious":

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, *or a malicious trespass*, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020 (emphasis added).

Defense counsel withdrew the defense of property instruction when it became clear that an instruction would also be needed to define the word "malicious." The State proposed an instruction, modeled after RCW 9A.04.110(12), defining "malicious" in terms of "an evil intent, wish, or design to vex, annoy, or injure another person." It was a legitimate tactical decision for counsel to decide against pursuing a defense that would require the jury to find that Adams acted with malice. There was little or no evidence that Adams came on Kayser's property with a wish to annoy or injure anyone. Cf. Bland, 128 Wn. App. at 516 (trespasser was cursing and acting vexatiously).

Instead, counsel argued self-defense and defense of another. That defense theory did not depend on Adams' actual intent, but instead focused on what Kayser reasonably believed. It was more consistent with Kayser's testimony that Adams' conduct made him afraid for himself and more particularly for his wife.

We conclude Kayser has not shown that defense counsel's performance was deficient.

ADEQUACY OF JURY INSTRUCTIONS

Because the jury has the right to regard the to-convict instruction as a complete statement of the law, it should state all elements the State is required to prove. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Kayser contends that under this rule, the State's burden to prove the absence of self-defense belongs in the to-convict instruction.

A trial court does not commit reversible error when a to-convict instruction does not refer to the State's burden to prove the absence of self-defense, so long as that burden is made clear through a separate instruction. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991); State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984). That is what happened here. Instruction 5, the to-convict instruction, did not include the absence of self-defense as an element, but the State's burden to prove it was stated in instruction 13.

Kayser also contends the to-convict instruction should have instructed the jury to find that Kayser "intentionally" assaulted another "with the objective or purpose to accomplish a result that constitutes a crime." This language was set forth verbatim in a separate instruction, instruction 11. Kayser does not persuasively explain why it was constitutionally necessary to include the same language in the to-convict instruction, nor does he cite authority that would support such a holding.

DETECTIVE AT COUNSEL TABLE

At trial, the prosecutor sat at counsel table with Detective John Allgire. Allgire was expected to testify. Kayser moved to exclude Allgire from the

courtroom until the time of his testimony. The court denied the motion. Kayser assigns error to this ruling. The relevant rule of evidence is ER 615. The rule expressly permits a party such as the State, which is "not a natural person," to designate a representative to sit in the courtroom and hear the testimony of other witnesses:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615. The trial court properly applied the rule.

STATEMENT OF ADDITIONAL GROUNDS

Kayser filed a statement of additional grounds for review under RAP 10.10(a).

Because Kayser had no criminal history, the standard range for his offense was three to nine months. By statute, a mandatory three-year term must be added when there has been a conviction for assault with a firearm. RCW 9.94A.533(3)(b). The trial court imposed a base sentence of three months and then added three years for the enhancement. Kayser contends a court has discretion to impose a shorter sentence in consideration of a person's age. He relies on Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). But the holding of Miller pertains to juveniles. Kayser is not a juvenile. This argument does not provide an additional ground for review.

Instruction 5 informed the jury that it had a "duty" to convict Kayser if it believed the State had proved all elements of second degree assault. This court has previously rejected the argument that such an instruction is erroneous. State v. Meggyesy, 90 Wn. App. 693, 697-705, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 162 n.1, 110 P.3d 188 (2005). We see no basis for reviewing it again.

Reversed.

Becker, J.

WE CONCUR:

Leach, J.

Cox, J.

OFFICE RECEPTIONIST, CLERK

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Cc: lenell@nussbaumdefense.com
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Tara Adrian-Stavik
Paralegal, Civil & Appellate Divisions
Whatcom County Prosecuting Attorney
311 Grand Ave Suite 201
Bellingham, WA 98225
360.778.5755
tadrian@co.whatcom.wa.us

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