71531-3

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NO. 71531-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

AUSTIN STEIN,

Appellant.

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the court permitted law enforcement officers to express improper opinions on his guilt.

2. The trial court erred, and denied appellant his right to present a defense, when it excluded relevant evidence concerning the alleged victim.

3. Defense counsel was ineffective for failing to ensure jurors were fully and properly instructed on self-defense.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Witnesses must never offer an opinion, even by inference, as to a defendant's guilt. Appellant claimed that he was the victim and had responded in lawful self-defense. Two members of law enforcement were permitted to testify that they had significant experience dealing with actual victims and appellant was not acting like one during and following his arrest. Did this deny appellant his constitutional right to a fair and impartial trial?

2. Appellant is black; the alleged victim was white. At trial, the defense sought to prove that the alleged victim attacked appellant and that appellant merely fought back in self-defense. To

help establish these events, the defense sought to use evidence that the alleged victim – who used a racial epithet against appellant – also had two swastika tattoos, which were relevant to establishing his intent, his racial motive to attack appellant, and that he was the first aggressor. Did the trial court's exclusion of this evidence deny appellant his constitutional right to present a defense?

3. During closing argument, defense counsel argued that appellant was legally justified in using deadly force to repel the attack against him. Counsel failed, however, to ensure jurors received an instruction that supported this argument, thereby making it appear – consistent with the State's theory – that appellant had used excessive force. Did counsel's error deny appellant his constitutional rights to effective representation and a fair trial?

4. Assuming none of these errors, alone, warrant a new trial, does their combined effect warrant that result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Austin Stein with Murder in the Second Degree in connection with the November 4, 2012 death of Bill Smith. CP 1-6. Stein claimed self-defense. CP 136-139. A jury rejected that defense, however, and found him

guilty. CP 143. The Honorable Bruce Heller imposed a standard range sentence of 196 months, and Stein timely filed his Notice of Appeal. CP 173, 187-194.

2. Substantive Facts

Thomas Cummings lives in a home, in Covington, with his fiancée, Jackie Mead. 10RP[1] 53-54; exhibit 3A. Two to three months before Smith's death, Cummings allowed Smith – whom he had known for a couple of years – to park his trailer in Cummings' back yard and live there while Smith "was getting his act together." 10RP 58-59; exhibit 3E. Smith was an alcoholic. 10RP 21.

Another Covington resident, Anthony Hedin, also knew Smith and spent time with him in the trailer watching movies and drinking. 10RP 15-17. Hedin knew Austin Stein through a temporary work agency both men used and he introduced Stein to Smith. 10RP 20; 14RP 118-119. Thereafter, Smith, Hedin, and Stein occasionally socialized together at Smith's trailer. 10RP 20-21; 14RP 119-124.

On the late afternoon or early evening of November 3, 2012,

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 10/21/13; 2RP – 10/30/13; 3RP – 10/31/13; 4RP – 11/4/13; 5RP – 11/4/13 (voir dire); 6RP – 11/5/13; 7RP – 11/6/13; 8RP – 11/6/13 (voir dire); 9RP – 11/7/13; 10RP – 11/10/13; 11RP – 11/13/13; 12RP – 11/14/13; 13RP – 11/18/13; 14RP – 11/19/13; 15RP – 11/20/13; 16RP – 11/21/13; 17RP – 2/7/14.

Hedin and Stein stopped by Smith's trailer. 10RP 21; 14RP 122. Smith was not alone. Katarina Krogness, whom Smith considered his girlfriend, also was present. 10RP 21; 13RP 23-24; 14RP 122-123. During the visit, Smith drank more than the others and was drunk. 10RP 21-22; 13RP 29; 14RP 123-124.

At some point, Stein told Krogness she was cute, which Smith overheard. 13RP 27, 30, 47; 14RP 126. Although Stein merely intended to pay Krogness a compliment, Smith was irate and accused Stein of "trying to get at" his girl. 10RP 22-23, 39; 13RP 27, 31; 14RP 126. Smith began screaming at Stein, repeatedly called him a nigger, and told him to "get the fuck out of here." 10RP 23, 41-42; 13RP 31; 14RP 126-128. Irrational behavior was not uncommon for Smith. When he was drunk, he would get angry and he would often break things. 13RP 25.

Efforts by everyone to calm Smith were not successful. 14RP 127-128. As Hedin and Stein stepped out of the trailer, Smith came after them with a large hammer in his hand, told the men to "get the fuck off my property," and held the hammer over his head as if he might strike them. 10RP 23-24, 40-41; 13RP 32-33; 14RP 128-129. Both men left the area and spent the night at Hedin's home, where they attributed the incident to Smith's level of intoxication and tried to

put it out of their minds. Stein was not angry. 10RP 25-27, 42-43; 14RP 130-132.

The next morning, November 4, Krogness told Smith that he had acted crazy the night before and that he should call and apologize to Hedin and Stein. 13RP 35-36. Smith then called Hedin, said he had been drunk, and apologized for his behavior. 10RP 27-28, 43, 47; 13RP 37. Smith also invited the men over for another drink. 10RP 28. Hedin told Stein about the call. 10RP 47; 14RP 133.

Stein left Hedin's home that afternoon intending to catch the bus to visit his father in West Seattle. 14RP 133-134. Because he had time before the next bus, however, he walked to Smith's trailer to tell him there were no hard feelings. 14RP 134. Smith, who had been drinking again, invited Stein inside. 14RP 135. The two were getting along fine and discussed the Seahawks and their common interest in painting and construction work. 14RP 137. Smith was drinking what appeared to be whiskey, and Stein had beer. 14RP 138.

At some point that afternoon, Krogness called Smith and said she no longer wished to talk to him because of his behavior the night before. 13RP 38, 45. Smith's behavior was deteriorating and his

drinking had increased. 13RP 38. The phone call ended with Krogness hanging up on Smith. 13RP 38.

According to Stein, while at the trailer, Smith was involved with more than one phone call and stepped outside to talk on the phone. 14RP 139-140, 185-187. After one such call, Smith reentered the trailer and mumbled something about someone not believing him. 14RP 141. When Stein asked Smith if he was alright, Smith responded, "you don't fuckin' talk to me like that" and approached in an aggressive fashion. 14RP 142-143. As Stein stood up, Smith hit him in the head, causing him to fall. 14RP 143.

According to Stein, Smith attempted to hit him some more while Stein tried to push him away. 14RP 143. Smith then shouted, "I am going to blow your fucking head off, nigger," and started heading for the front of the trailer. 14RP 144. Believing he was about to be shot, Stein grabbed Smith from behind and pulled him back toward the middle of the trailer and onto the floor. 14RP 144-147. Stein was scared, angry, and confused about what was happening. 14RP 149. The two fought, with both men yelling and cursing, temporarily getting to their feet, and then going to the floor again. Both men were throwing punches, and Stein continued to strike Smith until he noticed blood. 14RP 147-150.

Everything was foggy thereafter. 14RP 150. Stein was not sure whether Smith was still alive, although he had not intended to kill him. 14RP 151. He saw Smith's cell phone on the counter and grabbed it to call for help, but he never did. 14RP 151-152. Instead, he exited the trailer and knocked on a rear window on Cummings's house. 14RP 152.

Cummings heard the banging and brought Stein inside. 10RP 61-62. Stein was mumbling, panicky, talking in circles, and not making sense, although Cummings discerned that he was saying something about alcohol and a fight. 10RP 62, 81-82. When Cummings went to tell his fiancée, Jackie Mead, that Stein was in the house, Stein attempted to leave, but ended up inside their garage. 10RP 63-64, 105. Mead got him out of the garage, but then Stein started walking down a hall toward the bedrooms. 10RP 64, 106. Cummings took Stein out to the front of the house, where the two sat in the front yard. 10RP 64-65.

Stein's bizarre behavior continued. He went from talking about events the night before involving Smith to challenging Cummings to a fight to indicating he would protect Cummings if anyone tried to harm him. 10RP 65-66. He seemed anxious and like he did not know where he was. 10RP 66. Cummings noticed

blood on Stein's shirt and asked him about it. 10RP 66-67. Cummings said he had been in a fight with Smith in the woods, had done something stupid, and would never see his daughter again. He also handed Cummings his driver license. 10RP 67.

Cummings's neighbor, Landon Huffman, came over and suggested that they check on Smith. 10RP 68. Cummings, Mead, and Huffman walked back to the trailer and discovered Smith's body inside. 10RP 68-72, 109-110, 135-137; exhibit 8. Based on the wounds to Smith's head, it looked like he had been shot. 10RP 137. Landon, who was armed with a pistol, made sure Stein did not leave. 10RP 72-74, 135-136. Cummings called 911. 10RP 73.

Stein's bizarre behavior continued. At one point, he walked off the property, crossed the street, and was removing the metal plate to a water meter. 10RP 74-75. Cummings told Stein to come back in his yard or he would kick his ass. In response, Stein walked toward Cummings and hit him in the temple. 10RP 75-76, 86-87. Stein then sat down and began using Smith's cell phone. 10RP 77. A some point Hedin called the phone – hoping to speak with Smith – but Stein answered. 10RP 29-30; 11RP 49. Stein was not making sense; he threatened Hedin and engaged in a rant, so Hedin hung up on him. 10RP 30, 48-50. Mead asked Stein if the phone he was

using belonged to Smith. Stein said it might and stuck it in a nearby planter. 10RP 77, 111-112. Stein then decided to go stand in the street and wait. 10RP 79.

Police arrived in response to what had been reported as a shooting and, with assault rifles in hand, yelled commands for everyone to get on the ground. 10RP 79, 153, 167, 202, 206. Stein did not comply initially and paced back and forth with his hands in his pockets before finally getting on the ground and following orders. 10RP 156-158, 192-193. Stein was not cooperative when questioned, and he continued to ramble and make nonsensical statements as if he were confused; for example, he told officers he had called his mother and she was on her way to the scene and he asked if "Big Rich" was okay. 10RP 171-173, 177, 184-185. He also urinated on himself. 11RP 59.

Stein said police had the wrong person. 10RP 194, 203. He also said he knew he had "fucked up." 10RP 176. He eventually explained about the incident the night before – when Smith had chased him with a hammer – and how he had come by Smith's trailer that day to make sure things were good between the two of them. 11RP 77-78, 97-99, 169-172; 12RP 7-9. Stein was jumping from topic to topic and not staying on point, but he denied a fight and

told police that Smith was upright and uninjured when he left Smith's trailer. 11RP 79-80, 171; 12RP 17. He also challenged the notion he had blood on him. 11RP 81-83, 172. Stein was resistant to the taking of DNA swabs of his hands (clenching his fist before eventually complying) and resistant to photographs (looking away from the camera). 10RP 174; 11RP 63-64, 73, 165-166; exhibit 20; at 1:19:15-1:20:06, at 1:23:25-1:26:24.

Police did not find any weapons or drugs on Stein, and – despite a slight odor of alcohol – officers did not conclude he was intoxicated. 10RP 166, 181, 187, 205; 11RP 69; 12RP 10-13; exhibit 20, at 1:51:31-1:52:22. He had no obvious injuries. 10RP 170.

An autopsy revealed that Smith had bruising and abrasions on various parts of his body, including his hands, arms, torso, neck, and face. 12RP 107-113, 118-119, 127. He also had broken ribs, with corresponding bruises on his lungs, and multiple lacerations on the face and scalp. 12RP 114-116, 125-127, 134-135. Smith suffered a skull fracture of the type usually associated with a blow to the side of the head that would have required significant force. 12RP 136-137. He also had bruising to the brain. 12RP 137-138. The mechanism of death was blunt force injury to the head. 12RP 142-143, 146. The medical examiner could not say whether the

injuries to Smith's arms were defensive; nor could he assign blame for Smith's death. 12RP 151-152, 155. Smith's blood alcohol level was .43. 12RP 144. A chronic long-term drinker can function at this level. 12RP 157.

Testing confirmed that bloodstains found on Stein's hand and his shirt came from Smith. 11RP 145-154. Spatter analysis inside the trailer proved difficult because it was conducted after the trailer had been moved from the site, causing items to shift and fall on top of the stains. 11RP 175-176; 12RP 34, 41. The analyst concluded that "the blood letting event occurred towards the rear of the trailer and it was due to impact." 12RP 78. Although the analyst could conclude Smith was near the ground at some point during the incident and that it was a "dynamic scene" with a lot of commotion, she could not say who started the fight or how long it lasted. 12RP 81-85. And, although the State speculated that a broken wooden chair inside the trailer was used as a weapon, the analyst could not agree based on the spatter and, during a pretrial interview, conceded the spatter on the chair would have looked different had it been used as a weapon. 12RP 90-94.

Dr. Megan McNeal, a clinical and forensic psychologist, examined Stein, conducted tests on him, and reviewed discovery in

the case to assess his behavior immediately after the fray. 14RP 5-14. She concluded that Stein had suffered an acute stress response. These responses are reactions to traumatic events, a consequence of a fight or flight reaction, result in a state of shock, and are related to PTSD. 14RP 14-15. An individual in this state could not be expected to have an articulate, complete, and rational conversation. Moreover, memory impairment is typical. 14RP 32-34. Stein's condition at the time could explain why he did not mention being attacked by Smith or his efforts to ward off the attack. 14RP 54. Dr. McNeal also noted that Stein does not like the police and has a history of non-cooperation, including an earlier case in which he was an uncooperative victim, which may have influenced his interactions with police at the scene. 14RP 54-55, 90.

During closing argument, the State noted the main issue for jurors was whether self-defense had been disproved beyond a reasonable doubt. 15RP 13. The State theorized that Stein still had hard feelings about being called a nigger the night before, he and Smith got into an argument again the next day, and Stein attacked and killed Smith – perhaps with a piece of the broken chair. 15RP 30-32. The State also argued that even if Smith threatened to shoot Stein, Stein's use of force in response was not reasonable or

necessary. 15RP 10, 33-35, 72-73.

The defense argued that Smith was drunk when Stein stopped by his trailer, still upset with Stein from events the night before, and blamed Stein for the fact Krogness had just called and broken off their relationship. 15RP 40-42. Counsel asked jurors to conclude that, in light of Smith's physical attack on Stein and his threat to shoot Stein, Stein acted reasonably in defending himself. 15RP 36-37, 42-50, 67-70.

C. ARGUMENT

1. OFFICERS WERE PERMITTED TO EXPRESS OPINIONS ON APPELLANT'S GUILT, THEREBY DENYING HIM A FAIR TRIAL.

Prior to trial, the State sought permission to have law enforcement officers testify to Stein's demeanor following his arrest, including testimony from officers "that the defendant's behavior was unlike any they have seen in a traumatized victim." Supp. CP ___ (sub no. 51, State's Trial Memorandum, at 11); 2RP 48.

Defense counsel objected to officers testifying beyond their factual observations of Stein – and specifically to their opinions that Stein was acting inconsistently with a trauma victim – based on foundation, speculation, and relevance. 2RP 48-49, 56-57.

Judge Heller rejected the defense arguments, but gave

counsel a standing objection. 3RP 11-12. Judge Heller ruled that, so long as the State laid a sufficient foundation demonstrating officers had significant experience dealing with trauma victims, they could testify on the subject. 3RP 11.

At trial, the State offered the opinions of two officers that are the subject of this challenge on appeal. The first is King County Sheriff's Deputy Eric Gagnon, who participated in Stein's arrest. 10RP 190-193. On direct examination, the following exchange occurred between the prosecutor and Deputy Gagnon:

> Q: Now Deputy, have you dealt with, not just in the context of being a Sheriff's Deputy but in your background as well, with people who have been – who have suffered trauma immediately after they've encountered that trauma?
>
> A: Yes, I have.
>
> Q: In what context?
>
> A: When I was in the Coast Guard I spent, excuse me. I spent 60 days at Ground Zero.
>
> Q: And have you dealt with people who have been the targets of crime – violent crimes?
>
> A: Yes, I have.
>
> Q: And do you – when you arrive at the scene, are you one of the first people to deal with them?
>
> A: Yes.

Q: And can you tell us, please, what has been your experience with them? Is there a standard response that they all have? Are they all different? Is there a – a – a – common thread that you see among these people?

A: Normally when – normally when somebody, excuse me while I compose myself for a second.

Q: Sure.

A: Normally when somebody is – has just been involved in a trauma, let's say a family member has passed away or they have been a victim of a horrendous crime, they're looking for help. They want – and just because of our societ – our cultural and our society, they look –

Defense: I'm going to object.

Witness: -- people –

Court: Overruled.

A: They look for people who represent help. Nurses, police officers, fire fighters and so on and so forth. They normally have a difficult time making decisions that help them in the immediate sense, meaning they're kind of -- they're in a -- they are in a state where they are, you know, almost locked and that's why they're looking for somebody to help them through that immediate circumstance.

Q: And can you tell us what your experience was of the defendant and his demeanor that night?

A: When we were contacting the defendant, he – his actions came across as I want to get away from me {sic}. I want to get away from you

particularly, the police –

Defense: I'm going to object to that.

Witness: -- and --

Court: Sustained.

Q: What did you observe of the defendant?

A: I watched him walk towards two fully uniformed police officers with patrol rifles. Not following any of the commands that were given immediately. Act in a manner that when he pulled his hands out almost to instigate some – some type of response from the police officers.

Gives me kind of part of what I – part compliance when I tell him to get down on the ground, face down. He does that by kneeling. And then he finally lays down on the ground. And when we take him back and when I put him behind the -- the fire truck, he immediately makes this, you know – and I read him the rights, he immediately makes a statement you've got the wrong guy. Like he's trying to throw me off –

Defense: Objection.

Court: Sustained.

Defense: Move to strike.

Court: Stricken.

10RP 197-199. The prosecutor finished her direct examination of Deputy Gagnon with the following:

Q: Was there anything about your interactions with

him that reminded you of your interactions with people who have been victims of traumatic crime?

A: They're – they're not consistent with each other. He was acting opposite of what I have experience in from trauma victims.

10RP 200.

The second opinion at issue came from King County Sheriff's Detective Jeanne Walford. Detective Walford was unavailable for trial, and her testimony was presented to jurors via recorded video deposition. Exhibit 20;[2] 11RP 157-161. In one segment of the deposition, the deputy prosecutor asks Detective Walford – much like she asked Deputy Gagnon – about her experiences dealing with "victims of violent crime." Exhibit 20, at 1:44:10-1:44:26. After detailing her significant experience (17 years and thousands of violent crime victims), Detective Walford discusses typical responses to such trauma. Exhibit 20, at 1:44:28-1:47:04. The prosecutor then asks how Stein acted when she dealt with him at the police station shortly after his arrest, and Walford describes him as direct, obstinate, and controlling. Exhibit 20, at 1:47:05-1:48:04.

The prosecutor continues:

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[2] A transcript of the deposition was filed in the trial court. See Supp. CP ___ (sub no. 65, Video Deposition).

Q: In your experience, was there anything about what he was doing that was consistent with what you've seen from others who have been victims or witnesses of violent or traumatic crimes?

A: Well, he didn't act like a victim.

Q: How so?

A: He wasn't – he was just more upset with the process. He wasn't acting like apologetic or anything or even really curious about – he just wanted, you know – all right. He wanted to read the warrant word for word, which isn't typical actually. I've not had that happen a lot. And, to be honest, I thought maybe once we were done reading it, that there would be more stalling, but he was okay after that.

Exhibit 20, at 1:48:04:1:48:58.

Initially, Judge Heller had excluded Detective Walford's testimony that Stein was not "acting like a victim" for lack of foundation. 4RP 31. Later, however, he reversed himself and – over defense objection – permitted the evidence, which jurors saw and heard. 6RP 14-17; exhibit 20, at 1:48:04-1:48:58.

During closing argument, the prosecutor reminded jurors that Stein had not acted like a victim: "To a person, the police who have dealt with victims of trauma say this was unlike any traumatized person they've ever seen before." 15RP 16.

This Court should find that Deputy Gagnon and Detective

Walford provided improper opinions on Stein's guilt, thereby denying him a fair trial.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. State v. Quaale, ___ Wn.2d ___, 340 P.3d 213, 217 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In determining whether testimony is impermissible, trial courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759).

Here, the witnesses were law enforcement officers, meaning their testimony carried an "aura of reliability" with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). The nature of the testimony was that Deputy Gagnon and Detective Walford knew how an actual crime victim acted and Stein had not acted like a victim. These improper opinions were critical because the State had no witness who actually saw what occurred inside the trailer and could speak to whether Stein had acted in self-defense. The improper opinions went to the core issue in the case – the identity of the true victim – and were used to convince jurors that Stein was the attacker rather than a victim who had defended himself.

The circumstances at Stein's trial are reminiscent of what occurred in State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Haga was convicted of murdering his wife and infant daughter. Id. at 482. During trial, an ambulance driver testified that Haga had not displayed any grief and that he (the driver) had significant experience dealing with individuals experiencing grief over the death of a loved one. Id. at 490. The prosecutor then asked the witness whether Haga's response to the death of his wife was unusual, to which the witness responded that

the defendant had been unusually "calm and cool." Id. On appeal, this Court reversed, concluding that the driver's testimony improperly implied his opinion that the defendant was guilty and could not be deemed harmless. Id. at 492.

As a constitutional error, the State bears the burden of demonstrating that the improper admission of the opinions on Stein's guilt – presumed prejudicial – was harmless beyond a reasonable doubt. Quaale, 340 P.3d at 218; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). In a case where law enforcement officers told jurors (to quote Deputy Gagnon) that Stein "was acting opposite of what I have experience in from trauma victims" and (to quote Detective Walford) that Stein "didn't act like a victim," and the State expressly used these opinions to its advantage during closing argument, the evidence and argument cannot be dismissed as harmless.

2. THE TRIAL COURT ERRED, AND DENIED STEIN HIS RIGHT TO PRESENT A DEFENSE, WHEN IT PRECLUDED EVIDENCE OF SMITH'S SWASTIKA TATTOOS.

At trial, the prosecution moved to preclude evidence that Smith had a swastika tattoo on his ankle, arguing it was irrelevant

and too prejudicial and noting that he apparently got it when he was a teenager. 2RP 21-22; 3RP 19, 28.

The defense sought to introduce evidence that Smith had two such tattoos – the one on his ankle and another one on his arm. 2RP 24; 3RP 26. The defense pointed out that Smith had injected race into the case when he called Stein a nigger. That Smith had swastika tattoos was relevant to his intent, his motive to attack Stein unprovoked (in addition to blaming Stein for his breakup with Krogness), and to establish that he was the aggressor in the fray. 2RP 24-25; 3RP 19, 27. Moreover, *when* Smith got one of his tattoos was less important than the fact that he still had two of them, which established his current state of mind. 3RP 26. Defense counsel also pointed out that any improper prejudice could be handled with a limiting instruction. 3RP 26.

Judge Heller excluded the evidence, finding its relevance too attenuated in light of the apparent age of the ankle tattoo and its prejudice extreme because it suggested that Smith was a Nazi who got what he deserved. 3RP 25-26. Judge Heller said he would reconsider if something more directly connected the tattoos to what happened, but short of such a connection, it was excluded. 3RP 26, 28. This was error. There was already a sufficient connection.

Criminal defendants have a constitutional right to present relevant evidence in their own defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Relevant evidence may only be excluded if the State shows that the evidence is "'so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" Id. (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Moreover, where evidence is highly probative, "'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.'" Id. (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). A claimed violation of the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Stein's defense at trial was that Smith attacked him, unprovoked, and then threatened to kill him, thereby necessitating the lawful use of force in self-defense. As defense counsel pointed out below, Smith's racism – revealed by his use of the slur "nigger" and by his two swastika tattoos – was relevant to demonstrate his intent, his motive to attack Stein, and that he was

the attacker during the incident. Such evidence was consistent with self-defense and inconsistent with a conviction for murder.

In State v. Nelson, 152 Wn. App. 755, 759-762, 219 P.3d 100 (2009), review denied, 168 Wn.2d 1028, 230 P.3d 1060 (2010), Nelson was one of three defendants charged with multiple offenses – including animal fighting – in connection with an illegal dog fighting operation. Nelson had multiple tattoos on his body depicting dogs, including one on his back depicting two pit bulls fighting. Id. at 763. An expert was permitted to testify that such tattoos can serve as "a lead for detectives." Id. In affirming the admission of evidence of the tattoos, Division Three found the evidence relevant because the tattoo depicting a dog fight made it more likely Nelson was engaged in an animal fighting operation. Moreover, Nelson was free to offer evidence of benign reasons for his tattoos for the jury's consideration. Id. at 772.

If the prosecution can use relevant tattoo evidence to establish a defendant's guilt, surely a defendant has the right to use such evidence to establish his innocence. Just as Nelson's tattoo made it more likely he engaged in illegal behavior, Smith's Nazi tattoos, which revealed his intolerance for racial minorities, made it more likely he harbored ill will toward Stein and attacked Stein.

Evidence of membership in a particular group may be relevant to motive and intent. See State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964, review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998); State v. Campbell, 78 Wn. App. 813, 821-822, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995). Associating with Nazis was relevant here. Moreover, as in Nelson, the State was free to offer benign reasons for the tattoos (for example, they were old and may not have represented Smith's current views despite the fact he maintained them on his body).

Because evidence of Smith's tattoos was relevant, Stein had a constitutional right to present the evidence unless the State can show it was so improperly prejudicial that it would have disrupted the fairness of the fact-finding process. Jones, 168 Wn.2d at 720. The State cannot make that showing. As defense counsel noted, any improper prejudice – for example, under ER 404(b)[3] – could have been handled with a limiting instruction specifically identifying the purposes for which the evidence could be used and telling jurors they could not use the evidence simply to conclude Smith was a bad

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[3] ER 404(b) indicates, "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" but permits such evidence for other purposes, including evidence of motive and intent.

person and acted in conformity with that character on the day in question. Jurors are presumed to follow such instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Nor can the State show the exclusion of this evidence was harmless beyond a reasonable doubt, meaning "any juror would have reached the same result without the error." Jones, 168 Wn.2d at 724 (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Without evidence of Smith's long-held racist views, it was far easier for jurors to excuse his use of a racial slur the night before his death as an isolated drunken incident for which he was sincerely sorry and that played no role in events the next day. In reality, Smith's racism and continuing association with Nazis provided an additional motive to attack Stein and threaten to shoot him, made it more likely Smith was the aggressor in the trailer, made it more likely Stein's version of events was credible, and made it more likely Stein acted defensively. Reversal is required.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE JURORS WERE FULLY INSTRUCTED ON SELF-DEFENSE.

The State charged Stein with Murder in the Second Degree under two theories: (1) felony murder for killing Smith during an Assault in the Second Degree and (2) intentional murder. CP 1.

Ultimately, however, the State abandoned its attempt to prove intentional murder. 12RP 165-166.

The "to convict" instruction at Stein's trial required the State to prove that Stein killed Smith in the course of an Assault in the Second Degree, defined as an intentional assault that recklessly inflicted substantial bodily harm. CP 129-130. The relevant self-defense standard where the predicate felony is Assault in the Second Degree based on the reckless infliction of substantial bodily harm is reasonable fear of "injury" rather than the more demanding standard of "great personal injury" applicable in most homicide cases. State v. McCreven, 170 Wn. App. 444, 461-467, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015, 297 P.3d 708 (2013).

Based on McCreven, defense counsel ensured Stein's jury was instructed – based on WPIC 17.02 and RCW 9A.16.020(3) – that Stein was entitled to use reasonable defensive force if he reasonably believed he was about to be injured in Smith's trailer. CP 136. Although defense counsel also initially proposed justifiable homicide instructions – based on WPIC 16.02 and RCW 9A.16.050 – counsel did not ultimately ensure these instructions were included in the packet provided jurors. CP 15-17, 88-91;

14RP 206-212; 15RP 3-9.

During closing argument, however, defense counsel did not limit his arguments to convincing jurors that Stein had acted lawfully under WPIC 17.02 because he reasonably feared injury. He also argued, consistent with WPIC 16.02, that Stein had been legally authorized to use deadly force against Smith:

> Defense: Now, Austin, as he told you, believed that Bill Smith was going to get a gun and shoot him. Bill Smith was threatening to kill him. What that means is that Austin was entitled to use deadly force. If Austin had a gun he could have shot him. If Austin had a knife he could have stabbed him.
>
> State: Your Honor, I'm going to object. That is a misstatement of the law.
>
> Court: Overruled.
>
> Defense: He was entitled to use deadly force, and he didn't have a gun or a knife and he did what he had to do in the moment.

15RP 47. Later, defense counsel returned to the issue of deadly force:

> Nothing tells you that you have to wait – in order to use self-defense you need to wait until you're injured before you're allowed to act. He acted before and he succeeded in defending himself. He landed those blows to protect himself. And if he thought that he was getting a gun, he was entitled to use deadly force.

15RP 50.

In rebuttal, the prosecutor told jurors that defense counsel was incorrect and Stein had not been entitled to use deadly force:

> There's just a couple quick things I want to deal with, and the first and most important is, these instructions are what guide you. These are what the judge read to you. Not what Mr. Dubow decides the law is. These instructions do not say you're allowed to use deadly force to respond to an assault. These instructions say that the use of force is lawful, and I'm talking about instruction 14, when force is no more than necessary. When is death a necessary response to an assault? That is a misstatement of the law.
>
> Defense: Objection, Your Honor.
>
> Court: Overruled.

15RP 71. The prosecutor then continued to argue that Stein's use of force was excessive and not reasonable. 15RP 71-72.

Following closing arguments, and after jurors had been excused to begin deliberations, defense counsel moved to have jurors instructed using WPIC 16.02 that Stein was entitled to use deadly force if he reasonably feared death, great personal injury, or commission of a felony against him. Counsel pointed out that, given the prosecutor's closing argument, it would be prejudicial not to provide jurors with that correct statement of the law. 15RP 77-

81. The State objected, arguing WPIC 16.02 was incorrect in light of the charge and would require another round of closing arguments. 15RP 79-80. The defense motion was denied. 15RP 82-83.

Defense counsel's argument that Stein was entitled to use deadly force in self-defense without ensuring jurors were provided an instruction supporting that argument constitutes ineffective assistance of counsel and denied Stein a fair trial.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'"

State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Counsel's representation may be deficient for failing to offer an instruction that would have aided the defense. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where defendant charged with felony flight and defense was intoxication). This includes proposing instructions that ease the State's burden to disprove self-defense. See State v. Kyllo, 166 Wn.2d 856, 862-871, 215 P.3d 177 (2009); State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004).

Here, defense counsel argued during closing that Stein had the right to use even deadly force under the circumstances because he reasonably feared he was going to be shot. Unfortunately, he failed to provide jurors with a proper instruction on this issue. As a result, the prosecutor was permitted to argue that Stein was not permitted to use deadly force under any circumstances – even if Smith did threaten to kill him and appeared to be in the process of carrying out that threat. This was deficient performance.

While defense counsel properly ensured jurors received WPIC 17.02, in order to argue deadly force he also had to request WPIC 16.02. Because WPIC 16.02 was a correct statement of the law, i.e., Stein could indeed use deadly force if he reasonably believed Smith intended to kill him, inflict great personal injury, or commit a felony against him, Judge Heller would have been obligated to give it. Judge Heller was not obligated to do so, however, after closing arguments and once jurors had begun their deliberations. See State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990) (although courts may provide supplemental instructions once deliberations have begun, they may not go beyond matters that were or could have been argued to jurors).

Stein was prejudiced as a result of his attorney's failure to timely request the instruction. To show prejudice, a defendant need only show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). Counsel's failure permitted the prosecutor to argue that, under no circumstances could Stein use deadly force in self-defense. He was not entitled to use such force

as a matter of law. And since the State's theme at trial was that Stein had used more force than necessary against Smith, and Stein clearly *had* used deadly force, this made conviction far more likely based on a jury finding of excessive force. On this alternative ground, this Court should order a new trial.

4. CUMULATIVE ERROR DENIED STEIN A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes that neither the improper opinions that Stein was not a victim, nor the exclusion of Smith's racial motive to attack Stein, nor counsel's mistake concerning the self-defense instructions, by itself, warrants reversal of Stein's conviction, the combined effect of these errors certainly warrants that result. In combination, these errors eased significantly the State's ability to convince jurors it had proved Stein's guilt while simultaneously impeding Stein's ability to establish reasonable doubt. In combination, they denied Stein his constitutional right to a fair trial.

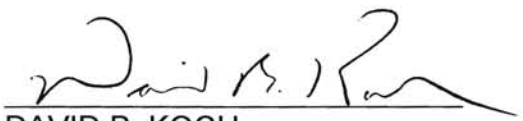
D. CONCLUSION

A detective and a police deputy were permitted to comment on Stein's guilt. Stein was denied his constitutional right to present relevant evidence in his defense. And, Stein's attorney was ineffective in his handling of jury instructions and closing argument. Alone and together these errors denied Stein a fair trial and require reversal.

DATED this ___ day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71531-3-I
	)	
AUSTIN STEIN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AUSTIN STEIN
DOC NO. 374314
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 9934

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JANUARY 2015.

X Patrick Mayovsky