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Court of Appeals
Division I
State of Washington

NO. 69841-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JUSTICE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA L. LINDE, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the trial court properly gave a first aggressor instruction where the evidence clearly showed that Justice fired multiple times at Ed Roy before Roy responded.

2. Whether Justice waived any error as to the wording of the aggressor instruction when he never asked the trial court to include additional language in the instruction.

3. Whether Justice has failed to demonstrate ineffective assistance of counsel where there is no reasonable probability that the jury convicted him based on his words alone.

4. Whether Justice has failed to demonstrate that the prosecutor's argument that he was the aggressor because he shot first was improper given Justice's theory of defense, or that the argument was so flagrant and ill-intentioned that no instruction could have cured any resulting prejudice.

5. Whether the trial court properly exercised its discretion in excluding evidence of Ed Roy's state of mind weeks after the shooting, where this evidence said nothing about whether Roy was the aggressor at the time of the shooting.

6. Whether Justice has failed to show a violation of the right to a public trial where the written form containing peremptory

challenges listed the numbers of the excused jurors and the party that excused each one, and the form was promptly filed in the court record.

7. Whether there is no need to resentence Justice where removal of an Arizona conviction from his offender score will reduce his offender score from 11 to 10, thus not affecting his standard range, and the trial court indicated that the sentence would be the same whether his offender score was 9, 10 or 11.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Michael Justice was charged by Information and Amended Information with three counts of Assault in the First Degree against three separate victims (Edward Roy, Shelly Tonge-Seymour, E.T.S.), and one count of Unlawful Possession of a Firearm in the First Degree; each of the assault charges included a firearm allegation.[1] CP 1-11, 46-48. The State alleged that, at a little before noon on Saturday, July 14, 2012, Justice fired at Roy with a handgun on a crowded street in the Columbia City neighborhood of Seattle. CP 4. Prior felony convictions for

[1] Michael Justice's wife, Shaquina Justice, was charged in the same Amended Information with Rendering Criminal Assistance in the First Degree. CP 47. At a joint trial, the jury found Shaquina Justice not guilty. RP 2121.

Robbery in the Second Degree made Justice's possession of the firearm unlawful. CP 3; RCW 9.41.040(1).

Defense counsel confirmed at the outset that Justice would raise self-defense as to the shooting, and necessity as to the unlawful possession of a firearm. RP 53. In his opening statement, counsel told the jury that the defense would advance two separate theories: that the police conducted an "inadequate and lazy" investigation, and that Michael Justice was "acting to defend himself and his family." RP 381. Counsel reiterated his "inadequate investigation" theory several times during the trial. RP 586, 1314, 1323. In closing argument, counsel told the jury that the State had failed to prove that Justice did not act in self-defense or that Justice acted with the intent to inflict great bodily harm, and he again attacked the quality of the investigation. RP 2065.

The trial court instructed the jury accordingly, giving instructions on the defense of self-defense/defense of another, reasonable force, "no duty to retreat," and "act on appearances." CP 404, 405, 406, 407. The court also gave a "first aggressor" instruction. CP 408. As to unlawful possession of a firearm, the court instructed the jury on the defense of necessity. CP 412.

The jury found Justice guilty of Assault in the First Degree as to Edward Roy, and of the associated firearm allegation, but not guilty of assaulting Shelly Tonge-Seymour or E.T.S. CP 46-48, 186-87, 189-90. The jury also found Justice guilty of Unlawful Possession of a Firearm in the First Degree. CP 188. The trial court imposed a standard range sentence of 325 months. CP 202, 204; RP 2146.[2]

2. SUBSTANTIVE FACTS.

Michael Justice likely did not expect to encounter Ed Roy on a sunny Saturday morning in the Columbia City neighborhood of Seattle. Justice, back home in Seattle for a short time while he and his wife Shaquina job-hunted, had just had breakfast with Shaquina at Geraldine's, a popular Columbia City restaurant. But once Justice realized that Roy had pulled into the parking lot where Justice had parked his own car, Justice wasted no time in arming himself for the showdown that he was determined to have with Roy.

It all began innocently enough. Michael and Shaquina Justice were temporarily back in Seattle after a period of living in Arizona; they were planning to move back home, and both were applying for jobs in the Seattle area. RP 1519-22, 1719. On July

[2] The verbatim report of proceedings consists of 14 consecutively-numbered volumes and will be referred to simply as "RP."

14, 2012, Shaquina[3] and Justice went to Geraldine's, a popular restaurant in the Columbia City neighborhood, for a Saturday morning breakfast. RP 1521-23, 1759.

After finishing their meal, Justice and his wife returned to the parking lot where they had left their rental car, a red Dodge Challenger. RP 1523, 1543-44, 1758-59. As Justice was pulling out of the parking stall, Ed Roy's black SUV pulled into the lot. RP 1084-89, 1524, 1760. Justice got out of his car and approached Roy. RP 1088-90, 1524-25, 1763-64. After a brief verbal confrontation, Roy pulled into a parking stall, left his car, and walked down the street toward Geraldine's to meet his girlfriend, Elissa Rosenberg.[4] RP 1080-85, 1099; Ex. 2.[5]

Many innocent bystanders witnessed the chaos that followed. Several people noticed Ed Roy and Elissa Rosenberg at the corner of Rainier Avenue South and South Ferdinand Street, where Geraldine's is located; the two were involved in some sort of

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[3] Because Michael and Shaquina Justice share a last name, Shaquina Justice will be referred to in this brief as "Shaquina." No disrespect is intended.

[4] Rosenberg had just gotten her hair done at a salon in the neighborhood, and she and Roy had agreed to meet for breakfast at Geraldine's. RP 1007-08, 1013.

[5] Ex. 2 shows the parking lot where Justice and Roy parked their cars. The parking lot is on the south side of South Ferdinand Street. RP 459-60. The four red arrows on this exhibit show the directions of the four surveillance cameras from which video of this incident was ultimately obtained. RP 393-96, 419, 512-13.

conversation with another man who was farther up South Ferdinand.[6] RP 530, 906, 926, 1674-75; Ex. 34, 35.[7] A number of witnesses heard Justice talking loudly toward or shouting profanities at Roy. RP 402, 791-94, 823-28, 909-10, 929, 1673-75.

Shelly Tonge-Seymour had an uncomfortably close view of the action. Shelly and her daughter were returning from a shop on Rainier Avenue to the salon on South Ferdinand Street where Shelly's partner, Jill, was getting her hair cut.[8] RP 521, 523-24, 527-29. As Shelly and her daughter started to head east on South Ferdinand, they saw Roy and Rosenberg standing on the corner, looking up South Ferdinand. RP 530. Roy started slowly up South Ferdinand, but Rosenberg hung back. RP 530.

As Shelly and her daughter walked up South Ferdinand on the south side of the street behind Roy, Shelly heard Roy say, "You are barking too loud." RP 531-33. Shelly did not know at whom

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[6] While most of the witnesses did not know the identities of Ed Roy, Elissa Rosenberg, or Michael Justice, there is no dispute as to the actors' relative positions (east or west on South Ferdinand Street) during the events in question. During his testimony, Justice described what he was doing in the video that captured his part in the shooting. RP 1758-97. For the convenience of the reader, these three will be referred to by name, rather than by the physical descriptions given by the witnesses.

[7] Ex. 34 shows Geraldine's, which is on the northeast corner of Rainier Avenue South and South Ferdinand Street. RP 1675. Ex. 35 looks east down South Ferdinand toward the parking lot where both Justice and Roy had parked their cars. These exhibits are provided to orient the reader to the scene.

[8] Because Shelly and Jill Tonge-Seymour share a last name, they will be referred to by first name in this brief. No disrespect is intended.

that remark was directed. RP 533. Just as she and her daughter reached the steps up to the salon, with Roy still in front of them, Shelly heard a loud "bang." RP 536-37. When she looked in the direction of the noise, she saw that Roy and Justice each had a gun in his hand. RP 538.

Jill Tonge-Seymour also had a good view of some of the action. While getting her hair cut, she heard shouting out on the street. RP 565. When she looked out, she saw Ed Roy on the sidewalk directly in front of the window, facing to the east. RP 566-67. After hearing gunshots, Jill saw Roy pull out a gun and start shooting. RP 566, 568-70. She could not see at whom he was shooting. RP 570. Jill believed that she heard two shots before she saw Roy pull out his gun. RP 569.

Peter Lamb saw the altercation from the other end of the street. Lamb owns and manages the parking lot where both Justice and Roy had parked their cars. RP 392. Located at his office building across the street from the parking lot are four surveillance cameras mounted at angles that provide views of the parking lot,

South Ferdinand Street, and a smaller lot next to the building.[9] RP 392.

Lamb was in his office on that Saturday morning. RP 400. When he walked across the street to check the payment box at the parking lot, he saw Justice on the sidewalk next to Lamb's building, shouting loudly toward Rainier Avenue to the west, saying things like, "Hey, so and so, get up here right now." RP 401-03; Ex. 2.

As Lamb started across the street to the south side, where the parking lot was located, Justice started to cross the street in the same direction. RP 404. Just then, a red Dodge came up the street from the east, with a woman driving.[10] RP 404. Justice leaned down and spoke to the woman through the window. RP 405. The Dodge pulled into the alley to the west of Lamb's building. RP 406, 433-34; Ex. 3.

Justice, who by now was standing next to the driveway that led into the parking lot, continued to yell down the street, getting louder. RP 406-07; Ex. 2. Lamb did not hear anyone yelling back. RP 406-07. Justice turned around and glanced at Lamb, then

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[9] Lamb provided footage from these cameras to police. RP 419, 512. The footage is contained in Ex. 1. RP 419-21.

[10] This was Shaquina Justice in the red Dodge Challenger. RP 1539-40.

turned back toward Rainier, pulled out a gun, and started shooting. RP 407.

Lamb looked down the street and finally saw Roy, about 70 feet away on the sidewalk. RP 408; Ex. 2. Roy had his hands by his sides. RP 413. Lamb had both men in his line of sight when the shooting began; he saw Justice fire first. RP 442-44.

Other witnesses who observed the altercation also testified that Justice was the first to shoot. Elizabeth Scott works at the salon on South Ferdinand Street where Jill Tonge-Seymour was getting her hair cut. RP 656, 661. Hearing loud shouting, Scott looked outside and saw Justice shouting down the street. RP 662-63. When Scott looked down the street, she saw Shelly Tonge-Seymour and the Tonge-Seymours' daughter walking up the sidewalk behind Ed Roy and Elissa Rosenberg. RP 665-68. Roy was walking slowly and deliberately, with a kind of swagger – he was "making an impression." RP 668.

Scott saw Justice walk to the middle of the street, pull out a gun and start shooting. RP 669-70. Right after that, Roy pulled out a gun and fired at Justice. RP 670-71. Scott heard one or two shots from Justice before Roy pulled out his own gun. RP 671.

Martinez saw Justice jump into the back seat of the red car that Shaquina was driving. RP 976-80. The car sped off. RP 981. Martinez noted the license plate number, and passed it on to the police along with a description of the car.[12] RP 978, 982-83.

Meanwhile, when Roy got up to the parking lot, he fired toward the north, in the direction that Justice had run. RP 413-14. At this point, the two were shooting at each other.[13] RP 414. Roy then jumped into his black SUV and left, driving east on South Ferdinand. RP 415-16. Lamb was able to give police a partial license plate number for Roy's car. RP 416-17.

Justice testified on his own behalf. For the most part, he did not dispute his part in the shooting. He testified that, when he walked up to Roy's car in the parking lot after breakfast at Geraldine's, his only intent was to patch up a quarrel with Roy. RP 1760, 1764. Justice claimed that Roy pulled out a gun and

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[12] Justice and Shaquina went straight to the rental car agency at SeaTac Airport and exchanged the red Dodge Challenger for a different car. RP 861, 864-65, 1569, 1801.

[13] This is corroborated by the location of the shell casings. RP 478-83 (locations of shell casings circled in blue on Ex. 12); Ex. 12.

threatened to kill him.[14] RP 1764-65. Justice said that when Roy got out of his car and continued to threaten him, Justice backed away toward his own car, reached in the driver's side window, and grabbed Shaquina's gun (a 9mm semi-automatic Ruger P95), telling Shaquina to leave the area.[15] RP 1530, 1766-73. Justice insisted that his only reason for grabbing the gun was to protect himself and his wife. RP 1773.

Justice then determined to walk down to Geraldine's to talk to Roy and "beg for my life again." RP 1779. While insisting that his only desire was "to be cool with Ed," Justice admitted that he began to shout and gesture at Roy, giving him "the finger," telling him to "come here," and calling him a "bitch ass nigger" and a "sucker."[16] RP 1784-85.

At this point, Shaquina came back around the block and told Justice to get in the car. RP 1786-87. He refused, not wanting "to

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[14] Justice claimed to be afraid for his life based on an ongoing disagreement with Roy in the course of which Roy had allegedly threatened to kill Justice. RP 1725-29. Doug Wrenn, a mutual acquaintance of both Justice and Roy, backed Justice's version of the quarrel. RP 1478-88. Roy denied that he was angry at Justice. RP 1091.

[15] Shaquina appears to have purchased the handgun legally. RP 1529-30. Justice, as a convicted felon, was not allowed to possess a firearm. RP 1798-99; CP 1-3, 201, 207. Shaquina claimed that she did not see Justice grab her gun. RP 1568, 1585-86.

[16] These admissions were prompted at least in part by video from surveillance cameras, which had recorded Justice's actions. Segments of the video were played by Justice's attorney to allow Justice an opportunity to explain his actions. RP 1784-85; Ex. 1.

look like a coward." RP 1787. Roy was just staring at Justice, not gesturing or speaking. RP 1788. Roy then started to walk up the street toward the parking lot. RP 1788.

Justice claimed that Roy patted his side as he walked, and said, "Better get in that car, boy." RP 1794. Justice responded, "Don't go there." RP 1796. According to Justice, Roy then said, "Too late now," and lifted his shirt as if to get a gun. RP 1796. Justice said that at that point, "my body took over." RP 1796.

Justice admitted that, when Roy told him to get in the car, Justice already had his own gun in his hand:

> Q: And what he said to you was, "Get in the car."
> A: Yes.
> Q: And you had the gun in your hand at that point, right, as you're standing there?
> A: Yes.
> Q: In your right hand?
> A: Yes, ma'am.
> Q: And you did not see a gun in Mr. Roy's hand.
> A: Not at that point.

RP 1891.

Justice also admitted that he fired the first shot.[17] RP 1790, 1925. He admitted that he did not see anything in Roy's hands, but claimed to know that Roy was armed. RP 1790-91. Justice denied

[17] Again, this admission was forced by the video (Q: "And we're going to see you shoot first, aren't we?" A: "Yes." Q: "Before – before Mr. Roy discharges." A: "Yes."). RP 1790.

any intent to hit Roy, however, claiming to have deliberately fired at the ground ("I put the bullet in the only place that I thought was safe to put it . . . In the grass."). RP 1797-98. Justice insisted that he fired only once.[18] RP 1797.

After the shooting, Justice jumped into the red Dodge Challenger that Shaquina had waiting, and left the scene. RP 976-78, 1543, 1800-01. They went straight to the rental car agency to return the car. RP 864-65, 1801; Ex. 44.

Ed Roy's version of events differed from Justice's on several points. Roy testified that, as he arrived at the parking lot in his black 2007 Yukon Denali, he met briefly with his girlfriend, Elissa Rosenberg; Rosenberg had just had her hair done nearby and the two had planned to have breakfast at Geraldine's. RP 1080-85. Roy told Rosenberg to go down the street to Geraldine's and get a table while he parked. RP 1085. As Roy entered the lot, he noticed a red car; he didn't see who was in the car at that point. RP 1087. As Roy was about to pull into a parking space, he stopped because he saw Michael Justice approaching his car. RP 1088-89.

[18] Presumably, Justice was referring to the number of shots he fired from his initial position at the driveway into the parking lot, on the south side of the street. Once Justice ran down the alley to the north, he and Roy were exchanging shots. RP 413-14, 1906; Ex. 12.

According to Roy, Justice had an "attitude," and asked Roy why he was "still talking about this." RP 1090-91. Roy asked Justice what the problem was, but Justice simply looked Roy "up and down," as if to see whether Roy was armed. RP 1092.

As it happens, Roy *was* armed. Unlike Justice, Roy had a concealed weapons permit. RP 1093. He had a handgun on his hip, inside his baggy sweat pants. RP 1093-94. While Roy did not mention the gun or show it to Justice, it could have been visible as Roy sat in his car. RP 1094.

Roy asked Justice what the problem was, but Justice did not respond. RP 1094-95. Feeling uncomfortable with Justice standing over him, Roy got out of his car. RP 1094-95, 1099. When Roy was still unable to find out what the problem was, he got back into his car and backed into a parking spot. RP 1099-1100. Roy saw Justice go over to his own car, reach in on the driver's side, and grab something. RP 1101.

Roy left the parking lot, crossed the street, and headed toward Geraldine's. RP 1103-06. When he looked over his shoulder, he saw Justice gesturing at him ("throwing some type of hand signs up"). RP 1105.

When Roy got to Geraldine's, he met up with Rosenberg and discovered that there was a lengthy wait for a table. RP 1108. Rosenberg had noticed Justice, and she was getting nervous. RP 1108. Deciding to drive to a nearby breakfast spot, the two crossed to the south side of the street and headed back up the street toward their cars.[19] RP 1109-11. Roy could see that Justice was still gesturing toward him. RP 1110-11. It appeared to Roy that Justice was "trying to signal for me to come down that way."[20] RP 1110-11.

Roy kept an eye on Justice as Roy walked up the street. RP 1111. When Roy got to the last tree, somewhere near the beauty shop, Justice, who was standing near the entrance to the parking lot, pulled out a gun and fired at him. RP 1111-12; Ex. 46.[21] Justice got off one or two shots before Roy managed to get his gun out. RP 1115. Roy fired two or three shots from his original position, and then Roy and Justice exchanged shots

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[19] Rosenberg had parked her car on the street adjacent to the parking lot where Roy had left his car. RP 1008-09.

[20] This impression is corroborated by Peter Lamb's testimony that he heard Justice shouting something like, "Hey, so and so, get up here right now." RP 402.

[21] Roy referred to Ex. 46 as he testified about where he was when Justice first fired at him. RP 1112. While Roy did not place a mark on Ex. 46, Peter Lamb placed an "x" on the last tree (south side of South Ferdinand, west of parking lot) when describing where Roy was when Justice started shooting. RP 408, 411; Ex. 2.

when Justice ran into the alley on the north side of the street. RP 1115-16.

The red car reappeared "out of nowhere." RP 1116. Thinking he was going to be shot at again, Roy fired at the car. RP 1117. Roy then got into his own car, and left the area.[22] RP 1117.

By the time Detective Waters figured out that the shooter to the west was Ed Roy, the detective had already viewed the surveillance video. RP 1262-63. He did not show any of the video to Roy before asking Roy for his version of events.[23] RP 1130, 1271. Roy's statement matched the video "almost exactly." RP 1271.

Justice, by contrast, had seen all parts of the surveillance video, and had discussed it extensively with his attorney, before testifying. RP 1758. Nevertheless, the video conclusively refutes Justice's claim that he fired only once from his initial location, as well as his claim that he put the bullet "in the grass." The video clearly shows Justice firing twice in quick succession from his location by the driveway into the parking lot; neither shot is aimed

[22] Rosenberg, who had been behind Roy when the shooting started, had run into the hair salon and taken shelter in the back with others. RP 1029-30, 1113-14.

[23] Nor did Roy see the video before testifying at trial. RP 1130.

at the ground. *Compare* RP 1797 *with* RP 1286; Ex. 1 (Files 13 & 16 at 10:41:33 – 10:41:37).[24]

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION. JUSTICE HAS SHOWN NEITHER INEFFECTIVE ASSISTANCE OF COUNSEL NOR PROSECUTORIAL MISCONDUCT.

Justice raises several challenges relating to the first aggressor instruction. He first contends that the evidence did not support this instruction, and that it should not have been given. He further argues that the instruction was incomplete because it did not inform the jury that words alone are not sufficient provocation to defeat a self-defense claim.

Justice then maintains that his attorney was ineffective in not proposing the "words alone" language when his objection to the aggressor instruction was rejected. Finally, Justice claims that the prosecutor in closing argument improperly relied on the assault

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[24] Ex. 1 is a DVD containing surveillance video of this incident from Peter Lamb's four cameras. RP 419-21. The video footage includes a date and time stamp. The time stamp is one hour behind the actual time, presumably due to a failure to adjust for daylight savings time; the date is incorrect (video shows July 15 instead of July 14) because of a "leap year" issue. RP 1210.

The DVD contains a file designated "20120802094011." Clicking on this file opens a list of 21 numbered files ("00000000.dat" to "00000020.dat"). The first 6 files appear to contain no footage. Of the remaining 15, only file numbers 9, 12, 13 and 16 will be referenced in this brief; the remaining files appear to contain footage that is outside the timeframe of these events, or to duplicate footage that is contained within the four files that will be referenced.

itself as the provocation justifying the first aggressor instruction, and that this was prejudicial misconduct.

All of these claims fail. Justice claimed at trial that, while he admittedly fired the first shot, he aimed it at the ground and had no intention of injuring Ed Roy. This was inarguably a provocative act and, under Justice's theory of defense, it was not the assault itself. And Justice failed to preserve any claim that the aggressor instruction did not contain additional language about "words alone."

Nor can Justice show the prejudice necessary for his claim of ineffective assistance of counsel. Testimony from several witnesses established that Justice fired multiple times before Roy ever fired back, and the surveillance video unequivocally shows Justice firing twice in quick succession at the beginning of the altercation. Given these facts, there is no reasonable probability that the jury relied on Justice's words alone for the aggressive act.

Finally, the prosecutor did not misstate the relevant law in arguing that Justice became the aggressor when he decided to fire his gun. Under Justice's theory, his initial shot was not the assault itself – yet it was clearly a provocative act. Under these circumstances, Justice cannot show that the prosecutor's remarks

were so flagrant and ill-intentioned that no instruction could have cured any resulting prejudice.

a. Relevant Facts.

The State proposed a "first aggressor" jury instruction. RP 1646. While Justice took exception to the proposed instruction, he made no substantive argument as to why it was not appropriate under the facts of his case. RP 1918.

The trial court found that the instruction was "appropriate under the different set of facts that we've got and the testimony in this case." RP 1646. The court accordingly gave the following instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 408 (Instruction No. 20); WPIC 16.04.

b. The Instruction Was Supported By The Evidence.

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and properly inform

the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Each side is entitled to have the jury instructed on its theory of the case where there is evidence to support that theory. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

When determining whether evidence introduced at trial was sufficient to support the giving of an instruction, the appellate court views the supporting evidence in the light most favorable to the party that requested the instruction. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, *rev. denied*, 173 Wn.2d 1003 (2011); State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005) (citing State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). The State need only produce "some evidence" that the defendant was the aggressor to meet its burden of production. Bea, 162 Wn. App. at 577. Whether the State produced sufficient evidence to justify a first aggressor instruction is a question of law that is reviewed *de novo*. Id.

The provoking act must be intentional, and one that a jury could reasonably assume would elicit a belligerent response by the victim. Id. While the provoking act must be *related* to the eventual assault as to which self-defense is claimed, it cannot be the *actual*

assault. Id.; State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, *rev. denied*, 115 Wn.2d 1010 (1990). Words alone do not constitute sufficient provocation to support a first aggressor instruction; however, a combination of words and aggressive conduct can suffice. Riley, 137 Wn.2d at 909, 911.

A trial court properly gives a first aggressor instruction where: 1) the jury can reasonably determine from the evidence that the defendant provoked the fight; 2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or 3) the evidence shows that the defendant made the first move by drawing a weapon. State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008) (citing Riley, 137 Wn.2d at 909-10).

All three bases exist here. The jury could certainly determine from watching the video that Justice provoked the fight – the video shows Justice shouting and gesturing at Roy (Ex. 1 (File 13 at 10:40:09 – 10:40:13)), and then shooting twice before Roy shoots back (Ex. 1 (Files 13 & 16 at 10:41:33 – 10:41:37)). This evidence, and the evidence from numerous witnesses who testified that Justice was the first to fire his gun, conflicted with Justice's claim that he acted in self-defense. And the evidence is

clear, including from Justice's own testimony, that he made the first move by drawing his weapon. RP 1891.

Justice argues that the only aggressive act was "the assault itself." Amended Brief of Appellant at 29. He claims that he was "merely standing on the street" when the shooting started. Id. But the testimony and the video belie these claims. Roy said that Justice was gesturing at him ("throwing some type of hand signs up") while Roy was still walking toward Geraldine's. RP 1105. When Roy headed back up the street toward his car, Justice was still gesturing, as if "trying to signal for me to come down that way." RP 1110-11.

And there was more than Roy's testimony. Naomi Ishisaka said that she was scared when Justice "reached toward his waistband, like he was trying to like show that he was armed." RP 829. Significantly, the video confirms that Justice was gesticulating wildly at someone up the street, arms raised high in the air, culminating in Justice lifting up his shirt. Ex. 1 (File 13 at 10:40:09 – 10:40:13).

The aggressive and threatening gestures portrayed in the video and described in the testimony could, in combination with Justice's loudly delivered and "highly offensive" epithets (RP 794),

support giving a first aggressor instruction to the jury. *See* Riley, 137 Wn.2d at 909 (aggressor instruction proper when based not on words alone, but on aggressive conduct as well).

But here there was an additional, even more compelling basis for the first aggressor instruction. Justice was forced by witness testimony and the video to admit that he fired the first shot. He rested his self-defense claim on his story that he fired that first shot at the ground, fearful that Roy might draw a gun and with no intent to harm Roy (i.e., not an assault), and that his subsequent shots were fired in self-defense only after Roy had fired at him.

The State was entitled to counter this defense by arguing that the first shot, even if fired into the ground (and thus not the actual assault), was nevertheless an intentional act reasonably likely to provoke a belligerent response, thus creating the necessity for Justice to act in self-defense by firing back at Roy. Under this scenario, Justice was the first aggressor, and was not entitled to claim self-defense. CP 408 (WPIC 16.04).

While the aggressor instruction is to be given only "sparingly and carefully," it is proper "where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction." Bea, 162 Wn. App. at 576. Given Justice's theory of

self-defense, the aggressor instruction was needed to argue that Justice's initial shot, even if fired into the ground, was sufficiently provocative to negate his claim of self-defense. *See* Id. at 578 ("The first aggressor instruction was needed for the State to argue that these acts could negate Mr. Bea's theory of self-defense.").

c. Justice Waived Any Challenge To The Wording Of The Instruction.

Justice additionally argues that the trial court erred by not adding additional language to WPIC 16.04, the first aggressor instruction, specifically to inform the jurors that words alone could not constitute sufficient provocation to defeat a self-defense claim. This argument fails.

First of all, Justice voiced only a general exception to the first aggressor instruction. Once the court determined to give it, Justice never asked the trial court to add this additional language to the standard instruction. Under RAP 2.5(a), an appellate court may refuse to hear a claim of error that was not raised in the trial court. State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). "The underlying policy of the rule is to 'encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the

opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" Id. at 98 (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

A party must make his dissatisfaction with jury instructions given or refused clear to the trial court to preserve any error for appeal. "Exceptions to the failure of the trial court to give an instruction must clearly apprise the trial judge of the points of law involved. Where the exception and the discussion of it does not do so, points of law or issues involved will not be considered on appeal." Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). "If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it." Goodman v. Boeing Co., 75 Wn. App. 60, 75, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). *See* Christensen v. Munsen, 123 Wn.2d 234, 247, 867 P.2d 626 (1994) ("[S]ince plaintiff did not raise this issue in excepting to the instruction before the trial court, it need not be considered here.").

Having failed to preserve his claim that the aggressor instruction should have included a caution that words alone are not sufficient provocation, Justice can gain review only if he can show manifest constitutional error. RAP 2.5(a)(3). This requires a

showing of "actual prejudice," i.e., a "plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case." O'Hara, 167 Wn.2d at 91 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

Justice cannot make this showing under the facts of this case. Both witness testimony and the video showed that the provocation consisted of much more than words – Justice made provocative gestures, and he fired the first shots. Moreover, the State never argued that Justice's words alone could justify a finding that he was the aggressor.

Justice, citing to RP 2038, claims that the State "highlighted this evidence" (i.e., Justice's words) in its closing argument. Amended Brief of Appellant at 30-31. This is not completely accurate. The State highlighted the *combination* of Justice's words and actions:

> Michael Justice paces, gestures, and he yells in Ed Roy's direction. Watch the defendant's body language, and you tell me if he looks angry or scared. He's angry. And watch his body language through the entire video.
>
> . . .
>
> He literally stalks Ed Roy back to the south side of the street. He's screaming down the street at Ed Roy. "Come back here." All sorts of profanities.
>
> . . .

> And where does he stand? Right between Ed Roy and Ed Roy's car. He knows where Ed Roy's car is parked and he knows Ed Roy is going to have to get in this car if he wants to leave. So where does the defendant position himself? Right in between them. Is that something that someone that's scared does or someone that's angry does?

RP 2038-39.

Justice also cites to RP 2049 in support of this argument. There, in arguing that Justice was not afraid of Roy, the State pointed out that "Michael Justice stood at the end of this street trying to bait [Ed Roy] back into engaging with him." RP 2049. Justice apparently interprets "bait" as referring to words alone. But the testimony does not support this. Naomi Ishisaka said that Justice reached toward his waistband "like he was trying to like show that he was armed." RP 829. Roy testified that Justice was "still gesturing" as he crossed the street, as if "trying to signal for me to come down that way." RP 1110-11. As the evidence before the jury indicated that "baiting" included gestures as well as words, the State's argument cannot be said to focus on words alone.

Given this evidence and the relevant argument, Justice cannot show that, had the jury been instructed that words alone were insufficient to support the first aggressor instruction, they would have accepted his claim of self-defense. The alleged error

had no practical and identifiable consequences in this case, and Justice cannot raise this claim for the first time on appeal.

d. Counsel Was Not Ineffective In Failing To Ask For An Additional Admonition Concerning "Words Alone."

Justice argues in the alternative that his trial counsel was ineffective in failing to request that the first aggressor instruction state that words alone could not support a conclusion that he was the aggressor. For many of the reasons argued in subsection c., *supra*, this claim fails.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different had the allegedly deficient conduct not occurred. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either part of this test has not been met, it need not address the

other part. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, *rev. denied*, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential; every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, a defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some *conceivable* effect on the outcome of the proceeding. Strickland, 466

U.S. at 693. Rather, the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

The failure to request a jury instruction may be a legitimate tactical decision. *See* State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009) (decision not to request limiting instruction as to gang-related evidence was legitimate trial strategy not to reemphasize damaging evidence). Counsel here could reasonably have decided that calling the jury's attention once more to Justice's profanity-laced tirade directed at Roy would be counter-productive. Justice has not established deficient performance.

Nor can Justice establish prejudice. The State never argued that words alone could make Justice the aggressor, or deprive him of his self-defense claim. Moreover, the video showed much more than "mere words" – it depicted Justice's aggressive gestures, and showed him firing the first shots. Given these facts, there is no reasonable probability that the outcome of the trial would have been different had Justice's counsel proposed that language directed to "words alone" be added to the first aggressor instruction. He has failed to demonstrate ineffective assistance of counsel.

e. The Prosecutor Did Not Misstate The Relevant Law In Closing Argument.

Justice contends that the prosecutor committed misconduct in her closing argument relating to the first aggressor instruction. This claim ignores the context of the argument, the issues in the case, the evidence, and Justice's theory of defense.

To support a claim of prosecutorial misconduct, the defendant bears the burden of establishing both the impropriety of the comments and their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Allegedly improper arguments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Russell, 125 Wn.2d at 85-86; *see* State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012) ("In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.").

A defendant who did not object at trial is deemed to have waived any claim of prosecutorial misconduct, unless the remarks were "so flagrant and ill intentioned that an instruction could not

have cured the resulting prejudice."[25] "Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 761 (internal quotation marks omitted).

Justice points to the following language in the prosecutor's closing argument: "If he provoked the incident, then it's not self-defense. And that's what we have here. Mr. Justice cannot claim self-defense here because he is the one who created the situation that everyone on that street was subjected to when he decided to fire his gun." RP 2015. He did not object to this argument at trial.

Justice now finds fault with this language, arguing that it contravenes the principle that the provoking act must be separate from the conduct that constitutes the assault. *See* Bea, 162 Wn.

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[25] This Court should reject Justice's attempt to avoid this higher standard required by his failure to object. He analogizes to State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), relying on *dicta* in footnote 7 at pages 736-37. Amended Brief of Appellant at 39-40. In Walker, the appellate court found four separate instances of prosecutorial misconduct in closing argument. Id. at 730-36. As to the claim that Justice relies on here (misstating the law of defense of others), Walker *did* object. Id. at 735. The court's conclusion that prejudice existed even under the more demanding standard (fn.7) was colored by its observation that "the *cumulative effect of repetitive prejudicial prosecutorial misconduct* may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Id. at 737 (italics added). Justice makes only one claim of prosecutorial misconduct, and he did not object.

App. at 577 (provoking act cannot be the actual assault); Kidd, 57 Wn. App. at 100 (same). This argument ignores his own theory of defense. While the incontrovertible evidence from the video forced Justice to admit that he fired the first shot, he denied any intent to hit Roy with that shot. RP 1797-98. Justice instead claimed that he "put the bullet in the only place that I thought was safe to put it . . . In the grass." RP 1797.

The prosecutor was permitted to counter this argument by pointing out that, even under this scenario, Justice could not claim self-defense. By deciding to fire that first shot, Justice provoked the gunfight that ensued. And under Justice's version of events – that the first shot was not fired at Roy and was not intended to hit him – that first shot did not constitute an assault. The argument was thus a proper response to Justice's theory of defense.

Moreover, Justice did not object to the argument that he now challenges. He cannot show – indeed, he does not even argue – that any prejudice from the prosecutor's argument could not have been obviated by a curative instruction, had one been requested. He cannot meet his burden here. He has waived any error.

f. The Instruction Did Not Affect The Necessity Defense.

Justice argues that any error in giving the first aggressor instruction requires reversal of his conviction for unlawful possession of a firearm as well. This argument relies on a misunderstanding of the necessity defense.

The trial court instructed the jury on the affirmative defense of necessity:

> Necessity is a defense to a charge of Unlawful Possession of a Firearm if
>
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
> (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
> (3) the threatened harm was not brought about by the defendant; and
> (4) no reasonable legal alternative existed.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 412 (Instruction No. 24); WPIC 18.02. In finding Justice guilty of Unlawful Possession of a Firearm in the First Degree, the jury necessarily rejected this defense. CP 188.

The validity of Justice's self-defense claim as to his shootout with Roy has no impact on his necessity defense to the firearm possession charge. As a convicted felon, Justice was guilty of unlawful possession of a firearm the minute he took possession of his wife's gun from the front seat of their rental car. Justice did not return to the car after his initial confrontation with Roy until Roy was already back in his own car and starting to back into a parking space. Ex. 1 (File #12 at 10:36:28 – 10:36:44). After exiting his own car, Roy left the parking lot, crossed the street, and headed toward Rainier Avenue and Geraldine's. Ex. 1 (File #12 at 10:37:13 – 10:38:03). Any immediate danger was gone, yet Justice continued to possess the handgun.

This is exactly the argument that the State made in closing:

> And when the danger is gone, the necessity is gone. That means when Ed Roy walked down the street away from the defendant down to Geraldine's to meet Elissa Rosenberg and the defendant still stood there by Mr. Lamb's house on that camera holding the gun,

> no argument can be made at that point that there was still a necessity for Mr. Justice to have that gun.

RP 2022.[26]

Under these circumstances, a jury would likely conclude that Justice had failed to meet his burden to establish a necessity defense. There was no evidence that, with Roy turning his back on Justice and heading away down South Ferdinand, Justice's continued possession of the gun was "necessary to avoid or minimize a harm." Nor can Justice show that "no reasonable legal alternative existed" – calling the police or simply leaving the area come to mind as reasonable legal alternatives. *See* State v. Jeffrey, 77 Wn. App. 222, 227, 889 P.2d 956 (1995) (where no evidence of immediate threat of imminent serious bodily injury or death, phone call to police was adequate alternative to unlawful possession of a firearm).

And even if the issue of who provoked the shootout were relevant, Justice could not prevail on his necessity defense no matter how that issue was resolved. Given the numerous citizens put at risk by Justice's decision to obtain and fire a gun on a

[26] Justice's claim as to the State's argument about the necessity defense is apparently in error. He cites to "RP 2201." Amended Brief of Appellant at 33. But the VRP ends at RP 2149. If Justice means to cite to RP 2101, he is still in error, as that page contains the *defense* argument concerning the necessity defense.

crowded sidewalk on a busy Saturday morning in an urban neighborhood, Justice could not show that "the harm sought to be avoided was greater than the harm resulting from a violation of the law." *See* State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994) (jury instruction on necessity defense properly refused where defendant failed to show that possible harm to his friend was greater than the danger in which he placed other drivers by his reckless driving). The jury properly rejected the necessity defense to the firearm charge.

2. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF EDWARD ROY'S AFTER-THE-FACT STATEMENT.

Justice contends that the trial court improperly excluded exculpatory testimony, thereby violating his right to present a defense. But the testimony at issue – that weeks after the shooting Roy told a friend of Justice's that Roy had "almost killed your boy" – said nothing about Roy's attitude toward Justice *before* Justice shot at him multiple times. The trial court acted well within its discretion in finding that the confusing and unfairly prejudicial nature of this proposed testimony outweighed any probative value.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution grant a

criminal defendant the right to present testimony in his own defense. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed.2d 1019 (1967)). The right to present defense witnesses is not absolute, however; a criminal defendant has no constitutional right to have irrelevant evidence admitted. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

Relevant evidence is defined as "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. "A trial court's decision to exclude evidence will be reversed only where the trial court has abused its discretion." Lord, 161 Wn.2d at 294. The court abuses its discretion if its exercise of that discretion is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Justice planned to call DeShawn Milliken to testify on his behalf. CP 94. Following an interview with Milliken, the State moved to exclude a portion of his proposed testimony, arguing that it was irrelevant because it related to an incident that occurred

weeks *after* the shooting and thus said nothing about Roy's state of mind on the date in question:

> Mr. Milliken also recounts an incident that occurred a few weeks after this shooting, wherein he approached Mr. Roy at a little league ball game to talk about the incident. He indicated that Mr. Roy responded angrily and made threats to Mr. Milliken if Mr. Milliken did not leave him alone. This incident is not relevant in any way to the events of July 14th, 2012 and should be excluded under ER 401.

Supp. CP ___ (sub #49, Motion to Exclude and/or Limit Testimony of Defense Witnesses, at 5); *see also* CP 1411-12. The defense claimed that Roy told Milliken, approximately two weeks after the shooting, "Don't make me do you like I almost killed your boy," and argued that this comment tended to show that Roy, not Justice, was the aggressor on July 14, 2012. CP 1412-13.

The trial court granted the motion to exclude Milliken's testimony relating to this comment, finding it irrelevant and likely to be confusing and unfairly prejudicial:

> I'm going to grant the motion to exclude this. It is after the incident. And the situation – I don't think it adds anything to what was likely happening on July 14th. The way it's described is sometime within weeks or possibly months after the shooting incident where shots were fired, an individual approaches – Mr. Miliken [sic] approaches Mr. Roy. And as it's described here, at least by Ms. Kline, to talk about the incident.

> The – even if – even if Mr. Roy responded angrily and made threats, the Court's view is that it does – it makes no showing, doesn't tend to make anything more or less likely as to who did what and why on the 14th. Because at that point, things have changed dramatically in that shots have been fired. And how someone would react when being asked to talk about that and approached on behalf, perhaps someone associated with Mr. Justice, I think it is likely to be confusing, unfairly prejudicial, and not offered – not tend to make anything at issue in the case more likely than not. So I'm going to exclude that.

RP 1413-14.

This ruling shows the court's careful and thoughtful exercise of its discretion.[27] Regardless of how Roy felt about Justice before Justice fired at him, it would not be surprising if Roy was shooting to kill once Justice began his potentially deadly assault. In any event, Roy's reaction weeks after the shooting, when approached by someone who may have wanted to intercede on Justice's behalf, has little to say about who was the aggressor at the time of the shooting. The trial court properly concluded as much. The court acted well within its discretion in excluding this comment, and this ruling should not be disturbed on appeal.

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[27] The court ruled that Milliken *would* be allowed to testify as to whether Roy had a reputation for violence. RP 1414-17. However, the defense did not call Milliken, likely because Milliken had earlier told Detective Waters that Roy was *not* known to be violent. RP 1414-15, 1416.

3. THE METHOD OF EXERCISING PEREMPTORY CHALLENGES DID NOT VIOLATE JUSTICE'S RIGHT TO A PUBLIC TRIAL.

Justice argues that his right to a public trial was violated when the trial court took peremptory challenges in writing, rather than orally. Justice is wrong. The prospective jurors who had been challenged were excused in open court. The numbers of the challenged jurors were listed on a form, along with which party challenged which juror and the order of the challenges. The form was filed for the record on the same day, and was available to any member of the public. This procedure comports with the constitutional commands that defendants receive a public trial and that justice be administered openly.

a. Relevant Facts.

Following the conclusion of questioning of the prospective jurors, the trial court informed the venire in open court that "the next step of these proceeding[s] is for the selection of the final 14 jurors." RP 348. The court announced that "right now the attorneys are making their decisions." RP 348-49. At the conclusion of this process, the judge announced, again in open court, which jurors were being excused. RP 357-58.

On the same day, a form listing the excusals was filed in the court record. CP 423. The list specified the numbers of the excused jurors, which party challenged which juror, and the order in which the challenges were exercised. CP 423.

b. There Was No Violation Of The Public Trial Right.

The right to a public trial is guaranteed by article I, sections 10 and 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution. State v. Slert, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014); State v. Njonge, 181 Wn.2d 546, 553, 334 P.3d 1068 (2014). This right extends in general to voir dire. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed.2d 675 (2010).

Alleged violations of the public trial right may be raised for the first time on appeal. Slert, 181 Wn.2d at 603; Njonge, 181 Wn.2d at 554. Whether the right to a public trial has been violated is a question of law that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Washington courts have established a three-step framework for determining whether the public trial right has been violated. State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014).

The reviewing court will first determine whether the proceeding at issue implicates the public trial right. Id. at 514. This determination is made by applying the "experience and logic" test. Id. (citing Sublett, 176 Wn.2d at 73). Under the experience prong of this test, the court asks whether the place and the process have historically been open to the press and the public. Id. Under the logic prong, the court asks whether public access plays a significant positive role in the functioning of the particular process at issue. Id. Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. Sublett, 176 Wn.2d at 71.

If the court determines that experience and logic do not support a conclusion that the public trial right is implicated, it need not reach the second step – whether a closure occurred. Smith, 181 Wn.2d at 520. A closure occurs when the courtroom is completely and purposefully closed to the public so that no one may enter or leave.[28] State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). A defendant asserting a violation of the right to a public trial must show that a closure actually occurred. Njonge, 181 Wn.2d at 556. In the absence of an express closure on the record,

[28] The court noted that this definition was likely underinclusive, and might be expanded upon in later cases with different facts. Lormor, 172 Wn.2d at 93.

the "experience and logic" test informs the determination of whether a closure occurred. Smith, 181 Wn.2d at 520. Where no closure is demonstrated, the case will be analyzed as a matter of courtroom operations, where the trial court has broad discretion. Njonge, 181 Wn.2d at 558; Smith, 181 Wn.2d at 508.

If the court reaches the third step, it must determine whether the closure was justified. A closure that is unaccompanied by a Bone-Club[29] analysis on the record will almost never be found to be justified. Smith, 181 Wn.2d at 520.

All three divisions of the Court of Appeals have held that identical or analogous procedures for peremptory challenges do not implicate the public trial right. State v. Filitaula, 184 Wn. App. 819, 823, 339 P.3d 221 (2014) (Div. I) (exercise of peremptory challenges in writing, rather than orally, does not implicate the public trial right where a record is kept showing which jurors were challenged and by whom); State v. Marks, 184 Wn. App. 782, 786-89, 339 P.3d 196 (2014) (Div. II) (exercise of peremptory challenges in writing at sidebar conference does not implicate the public trial right under the "experience and logic" test); State v. Webb, 183 Wn. App. 242, 246-47, 333 P.3d 470 (2014) (Div. II)

[29] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

(exercise of peremptory challenges on paper did not violate public trial right), *rev. denied*, 182 Wn.2d 1005 (2015); State v. Dunn, 180 Wn. App. 570, 574-75, 321 P.3d 1283 (2014) (Div. II) (exercise of peremptory challenges at clerk's station does not implicate the public trial right under the "experience and logic" test), *rev. denied*, 181 Wn.2d 1030 (2015); State v. Love, 176 Wn. App. 911, 917-20, 309 P.3d 1209 (2013) (Div. III) (exercise of for-cause and peremptory challenges at sidebar does not implicate the public trial right under the "experience and logic" test), *review granted in part*, 181 Wn.2d 1029 (2015)[30].

The procedure used here leads to the conclusion that, even if the excusal of jurors is a part of voir dire under CrR 6.4,[31] the trial court properly exercised its discretion by ensuring that the public had access to the information. The judge announced in open court which prospective jurors had been excused by the attorneys. RP 348-49, 357-58. A written form listing the numbers of the excused jurors, and which party had excused which jurors, was filed for the

[30] The Washington Supreme Court heard oral argument in Love on March 10, 2015. The court's website lists the issue as follows: "When the trial court heard for-cause juror challenges at a sidebar, did this violate the defendant's right to a public trial?"

[31] The court in Marks held that the exercise of peremptory challenges is *not* a part of voir dire. 184 Wn. App. at 786-88 ("No Supreme Court case has held that the public trial right applies to the dismissal of jurors after the questioning is over.").

record on the same day that the challenges were made, and was thus timely made available to the public. CP 423; RP 135. This fulfills the public trial right. *See* Filitaula, 184 Wn. App. at 823 (no violation of public trial right where written form listing prospective jurors removed by peremptory challenge and identifying party who made the challenge was filed in the court record at the end of the case); Love, 176 Wn. App. at 919-20 (written record of for-cause challenges made at sidebar satisfies public's interest in the case and ensures that all activities were conducted aboveboard).

4. ONE OF JUSTICE'S ARIZONA CONVICTIONS SHOULD BE REMOVED FROM HIS OFFENDER SCORE, BUT RESENTENCING IS NOT REQUIRED.

Justice challenges the inclusion of an Arizona conviction for criminal possession of a forgery device in his offender score for the current crimes. He urges this Court to remand his case for resentencing under a corrected offender score.

The State concedes that the Arizona conviction is broader than its Washington counterpart, and that there are no facts to show that the Arizona crime would have violated the Washington statute. Nevertheless, the change in Justice's offender score from 11 to 10 does not affect his standard range, and does not require

resentencing where the trial court made clear that his sentence would be the same whether his score were 9, 10 or 11.

a. Relevant Facts.

At sentencing, the State maintained that Justice's offender score was 11. RP 2133. This total included two out-of-state convictions that Justice was challenging: a theft conviction from Colorado, and a conviction for criminal possession of a forgery device from Arizona. RP 2133; CP 195-98, 207. Justice's standard range for Assault in the First Degree, the more serious of his two convictions, was thus 300-378 months (including the 60-month firearm enhancement).[32] RP 2135; CP 201-02; *see* RCW 9.94A.510, 9.94A.515, 9.94A.533(3)(a), 9A.36.011(2). The State recommended a sentence of 348 months. RP 2136, 2138.

Justice argued that his Colorado theft conviction and his Arizona conviction for possession of a forgery device were not comparable to Washington felonies, and thus should not be counted in his offender score. CP 195-98. He nevertheless agreed that the State's calculation of his standard range – 300 to 378

[32] Justice's sentence of 116 months for unlawful possession of a firearm was ordered to run concurrently, and thus does not affect his overall sentence. CP 204.

months – was correct, as his offender score was in any event nine. CP 192 (fn. 1).

The trial court summarily rejected Justice's challenge to his Colorado theft conviction, finding that it was properly included and that his offender score was thus "at least a ten." RP 2133. Justice has not renewed this challenge on appeal. Amended Brief of Appellant at 55 (fn. 21).

The court agreed to hear "brief argument" on the Arizona conviction for possession of a forgery device, but added: "I don't want to spend a lot of time on this, given that the score doesn't change the range . . . ." RP 2133-34. The State addressed the argument very briefly, while the defense did not mention the issue in its own presentation.[33] RP 2134-35, 2138-41. The court agreed with the State that Justice's offender score was 11:

> I will say I don't think it's tremendously important to anyone here, given that it doesn't change the amount of time that you're going to serve, I do think the correct offender score based on my review of the certified copy and comparison of the statute is an eleven here as opposed to a nine or a ten.

RP 2147.

[33] Both parties had submitted written argument to the sentencing court. CP 195-98; Supp. CP ___ (sub #73, State's Response to Defense Presentence Report Regarding the Defendant's Offender Score).

Justice asked the court to impose an exceptional sentence below the standard range, arguing that Roy was "an initiator, willing participant, aggressor, or provoker of the incident."[34] RP 2139; CP 194; *see* RCW 9.94A.535(1)(a).

The trial court declined to impose a sentence outside the standard range:

> There may be other individuals whose conduct was problematic and not something to be commended. The Court does not find, however, that there was an initiator or first aggressor such that – such that it's deserving of what's called an exceptional sentence under the law. I think the standard range here is the appropriate guideline.

RP 2146. The court imposed a standard range sentence of 325 months. RP 2146.

b. The State Concedes That The Arizona Conviction Is Not Comparable To A Washington Felony.

Washington law employs a two-part test to determine whether an out-of-state conviction is comparable to a conviction in Washington, such that it may be counted in the offender score for purposes of sentencing in Washington. State v. Thiefault, 160

[34] In his written submission, Justice also argued that he "committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his . . . conduct." CP 193-94; *see* RCW 9.94A.535(1)(c). In addition, he argued that the multiple offense policy supported a sentence below the standard range. CP 193, 195; *see* RCW 9.94A.535(1)(g).

Wn.2d 409, 415, 158 P.3d 580 (2007); State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). The court first determines legal comparability, i.e., whether the elements of the foreign offense are substantially similar to the Washington offense. Thiefault, 160 Wn.2d at 415. If the elements of the foreign offense are broader than its Washington counterpart, the court must determine factual comparability, i.e., whether the *conduct* underlying the foreign offense would have violated the Washington statute. Id. The court may rely on only those facts in the record that were admitted, stipulated to, or proved beyond a reasonable doubt. Id.

Lacking such facts in the record of Justice's Arizona guilty plea to possession of a forgery device, the State must rely on the legal prong of the comparability test. Review of this issue is *de novo*. Id. at 414.

The State concedes that the Arizona statute is broader than its Washington counterpart, and thus is not comparable. Under the Arizona statute, a person commits criminal possession of a forgery device if he makes or possesses, with knowledge and intent, any of a number of devices designed, adapted for, or adaptable for use in forging "written instruments." A.R.S. 13-2003 (attached hereto in Appendix A). "Written instrument" includes "[a]ny paper, document

or other instrument that contains written or printed matter or its equivalent," as well as "[a]ny token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification." A.R.S. 13-2001 (attached in Appendix A).

The analogous Washington statute criminalizes unlawful possession of a personal identification device. RCW 9A.56.320(3) (attached hereto in Appendix B). "Personal identification device" includes a machine or instrument whose purpose is to manufacture or print a driver's license or government-issued identification card, an employee identification issue by a public or private employer, or a credit or debit card. RCW 9A.56.320(3). The statute further criminalizes unlawful possession of instruments of financial fraud, which includes possession of a check-making machine to be used for fraudulent purposes. RCW 9A.56.320(5) (attached in Appendix B).

Arizona's statute, with its virtually limitless definition of "written instrument," is broader than Washington's, which contains a specific list of products of forgery. Arizona's statute is thus not legally comparable to the Washington statute, and Justice's conviction under that Arizona statute should not have contributed to

his offender score. His offender score for the first-degree assault conviction, which determined his standard range for purposes of his sentence, should thus be 10.

c. There Is No Need To Remand For Resentencing.

In spite of the error in the offender score calculation, remand for resentencing is not required. "A trial court may determine that nine convictions exist and then stop calculating, so long as the court is not considering the imposition of an exceptional sentence based on reasons related to the offender score." State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007), *rev. denied*, 163 Wn.2d 1047 (2008), *disapproved on other grounds in* State v. Mendoza, 165 Wn.2d 913, 929 n.8, 205 P.3d 113 (2009). Where the offender score is in no case less than nine, any error in calculating the score is harmless. State v. Bobenhouse, 143 Wn. App. 315, 330, 177 P.3d 209 (2008), *aff'd*, 166 Wn.2d 881, 214 P.3d 907 (2009); Fleming, 140 Wn. App. at 138. Where the court imposes a standard range sentence based on an offender score of nine, the appellate court will not remand to calculate the exact score absent a showing of prejudice. State v. Lillard, 122 Wn. App. 422, 433, 93 P.3d 969 (2004), *rev. denied*, 154 Wn.2d 1002 (2005).

Justice nevertheless argues that remand is required because "it is impossible to conclude that Judge Linde would necessarily have imposed the same sentence with the reduced offender score." Amended Brief of Appellant at 63. Not only is it possible to so conclude, Judge Linde made it clear on the record that the offender score points in dispute were irrelevant to Justice's sentence: "I will say I don't think it's tremendously important to anyone here, *given that it doesn't change the amount of time that you're going to serve*, I do think the correct offender score based on my review of the certified copy and comparison of the statute is an eleven here as opposed to a nine or a ten." RP 2147 (italics added).

Where, as here, the standard range would remain the same whether Justice's offender score is 10 or 11, any error in calculating the offender score was harmless. *See* State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). This Court should decline to remand for resentencing.[35]

[35] The State does not oppose remand solely for the purpose of correcting the error in calculating the offender score.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Justice's judgment and sentence.

DATED this 5th day of June, 2015.

Respectfully submitted,

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King County Prosecuting Attorney

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APPENDIX A

13-2003. Criminal possession of a forgery device; classification

A. A person commits criminal possession of a forgery device if the person either:

1. Makes or possesses with knowledge of its character and with intent to commit fraud any plate, die, or other device, apparatus, equipment, software, access device, article, material, good, property or supply specifically designed or adapted for use in forging written instruments.

2. Makes or possesses any device, apparatus, equipment, software, access device, article, material, good, property or supply adaptable for use in forging written instruments with intent to use it or to aid or permit another to use it for purposes of forgery.

B. Subsection A, paragraph 1 does not apply to peace officers or prosecutors in the performance of their duties.

C. A violation of subsection A, paragraph 1 is a class 6 felony. A violation of subsection A, paragraph 2 is a class 5 felony.

13-2001. Definitions

In this chapter, unless the context otherwise requires:

1. "Access device" means any card, token, code, account number, electronic serial number, mobile or personal identification number, password, encryption key, biometric identifier or other means of account access, including a canceled or revoked access device, that can be used alone or in conjunction with another access device to obtain money, goods, services, computer or network access or any other thing of value or that can be used to initiate a transfer of any thing of value.
2. "Coin machine" means a coin box, turnstile, vending machine or other mechanical, electrical or electronic device or receptacle that is designed to receive a coin or bill of a certain denomination or a token made for such purpose and that, in return for the insertion or deposit of the coin, bill or token, automatically offers, provides, assists in providing or permits the acquisition or use of some property or service.
3. "Complete written instrument" means a written instrument that purports to be genuine and fully drawn with respect to every essential feature.
4. "Entity identifying information" includes, if the entity is a person other than a human being, any written document or electronic data that does or purports to provide information concerning the entity's name, address, telephone number, employer identification number, account number or electronic serial number, the identifying number of the entity's depository account or any other information or data that is unique to, assigned to or belongs to the entity and that is intended to be used to access services, funds or benefits of any kind that the entity owns or to which the entity is entitled.
5. "Falsely alters a written instrument" means to change a complete or incomplete written instrument, without the permission of anyone entitled to grant it, by means of counterfeiting, washing, erasure, obliteration, deletion, insertion of new matter, connecting together different parts of the whole of more than one genuine instrument or transposition of matter or in any other manner, so that the altered instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.
6. "Falsely completes a written instrument" means to transform an incomplete written instrument into a complete one by adding, inserting or changing matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.
7. "Falsely makes a written instrument" means to make or draw a complete or incomplete written instrument that purports to be an authentic creation of its ostensible maker but that is not either because the ostensible maker is fictitious, or because, if real, the ostensible maker did not authorize the making or drawing of the written instrument.
8. "Forged instrument" means a written instrument that has been falsely made, completed or altered.
9. "Incomplete written instrument" means a written instrument that contains some matter by way of content or authentication but that requires additional matter to render it a complete written instrument.
10. "Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.

11. "Slug" means an object, article or device that by virtue of its size, its shape or any other quality is capable of being inserted, deposited or otherwise used in a coin machine as a fraudulent substitute for a genuine token, lawful coin or bill of the United States.
12. "Written instrument" means either:
(a) Any paper, document or other instrument that contains written or printed matter or its equivalent.
(b) Any token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification.

APPENDIX B

Inside the Legislature
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- OFM Fiscal Note Website

Access Washington®
Official State Government Website

RCWs > Title 9A > Chapter 9A.56 > Section 9A.56.320

9A.56.310 << 9A.56.320 >> 9A.56.330

RCW 9A.56.320
Financial fraud — Unlawful possession, production of instruments of.

(1) A person is guilty of unlawful production of payment instruments if he or she prints or produces a check or other payment instrument in the name of a person or entity, or with the routing number or account number of a person or entity, without the permission of the person or entity to manufacture or reproduce such payment instrument with such name, routing number, or account number.

(2)(a) A person is guilty of unlawful possession of payment instruments if he or she possesses two or more checks or other payment instruments, alone or in combination:

(i) In the name of a person or entity, or with the routing number or account number of a person or entity, without the permission of the person or entity to possess such payment instrument, and with intent either to deprive the person of possession of such payment instrument or to commit theft, forgery, or identity theft; or

(ii) In the name of a fictitious person or entity, or with a fictitious routing number or account number of a person or entity, with intent to use the payment instruments to commit theft, forgery, or identity theft.

(b) (a)(i) of this subsection does not apply to:

(i) A person or financial institution that has lawful possession of a check, which is endorsed to that person or financial institution; and

(ii) A person or financial institution that processes checks for a lawful business purpose.

(3) A person is guilty of unlawful possession of a personal identification device if the person possesses a personal identification device with intent to use such device to commit theft, forgery, or identity theft. "Personal identification device" includes any machine or instrument whose purpose is to manufacture or print any driver's license or identification card issued by any state or the federal government, or any employee identification issued by any employer, public or private, including but not limited to badges and identification cards, or any credit or debit card.

(4) A person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit theft, forgery,

or identity theft, when the possession does not amount to a violation of RCW 9.35.020.

(5) A person is guilty of unlawful possession of instruments of financial fraud if the person possesses a check-making machine, equipment, or software, with intent to use or distribute checks for purposes of defrauding an account holder, business, financial institution, or any other person or organization.

(6) This section does not apply to:

(a) A person, business, or other entity, that has lawful possession of a check, which is endorsed to that person, business, or other entity;

(b) A financial institution or other entity that processes checks for a lawful business purpose;

(c) A person engaged in a lawful business who obtains another person's personal identification in the ordinary course of that lawful business;

(d) A person who obtains another person's personal identification for the sole purpose of misrepresenting his or her age; and

(e) A law enforcement agency that produces or displays counterfeit credit or debit cards, checks or other payment instruments, or personal identification devices for investigative or educational purposes.

(7) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(8) A violation of this section is a class C felony.

[2003 c 119 § 1.]

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Dana M. Nelson** at nelsond@nwattorney.net containing a copy of the **Brief of Respondent**, in **STATE V. MICHAEL JUSTICE,** Cause No. **69841-9-I**, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

06-05-15

Name Date

Done in Seattle, Washington