No. 32925-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DON ARTHUR MOORE,

Appellant.

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

The Honorable Judge Christopher E. Culp

AMENDED APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Bruce Molony stayed at Don Arthur Moore's property while Mr. Moore was out of town. When Mr. Moore returned, he noticed items missing from his property and he suspected Mr. Molony had taken them. Mr. Moore reported the theft to the police. When several days passed and the police had not yet arrested Mr. Molony, Mr. Moore went to Mr. Molony's property to confront him about the theft. A confrontation ensued, with Mr. Moore receiving a stab wound to his left side and a laceration to his head, and Mr. Molony receiving multiple gunshot wounds and stab wounds. Mr. Molony died as a result of these injuries.

The State charged Mr. Moore with one count of first degree murder. At the jury trial held on the charge, Mr. Moore asserted self-defense. The trial court also gave a first aggressor jury instruction. Defense counsel did not object to this instruction.

Peremptory challenges during voir dire were conducted silently, on paper. The prosecutor made a statement during voir dire that this is not a capital case.

Defense counsel did not request a jury instruction for the lesser-included offense of first degree manslaughter and did not object to testimony of a prior bad act by Mr. Moore.

The jury convicted Mr. Moore as charged, and also found he was armed with two deadly weapons. The trial court sentenced Mr. Moore to a term of confinement that included a deadly weapon sentencing enhancement and a firearm sentencing enhancement. Mr. Moore now appeals.

B. ASSIGNMENTS OF ERROR

1. The exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial.

2. The trial court erred by giving a first aggressor jury instruction.

3. Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the prosecutor's statement during voir dire that this was not a capital case.

4. Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for the lesser-included offense of first degree manslaughter.

5. Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony by Ronald George Skogstad of a prior bad act by Mr. Moore.

6. The trial court erred in imposing a firearm enhancement, where the jury returned a special verdict finding Mr. Moore was armed with two deadly weapons.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial.

Issue 2: Whether the trial court erred by giving a first aggressor jury instruction.

Issue 3: Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel.

a. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the prosecutor's statement during voir dire that this was not a capital case.
b. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for the lesser-included offense of first degree manslaughter.
c. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony by Ronald George Skogstad of a prior bad act by Mr. Moore.

Issue 4: Whether the trial court erred in imposing a firearm enhancement, where the jury returned a special verdict finding Mr. Moore was armed with two deadly weapons.

D. STATEMENT OF THE CASE

Don Arthur Moore owns a property, including a home, near the north edge of Riverside, Washington. (RP[1] 757-758). In 2012, Mr. Moore became ill and went to Ferndale, Washington, to live for the winter months. (RP 759-760). He arranged for an acquaintance, Bruce Molony, to live in his Riverside home while he was gone. (RP 760-762, 812).

Mr. Moore spent approximately three months in Ferndale and returned to his Riverside home towards the end of March 2013. (RP 762-

[1] The Report of Proceedings consists of: (1) a single volume, containing four pre-trial hearings and the sentencing hearing, transcribed by Tina Steinmetz; and (2) five consecutively paginated volumes containing the jury trial, transcribed by Barbara J. Scoville. The single volume is referred to herein as "Steinmetz RP." The five consecutively paginated volumes are referred to herein as "RP."

763, 824). Mr. Molony was at Mr. Moore's home when Mr. Moore arrived and left shortly after. (RP 763).

Mr. Moore began to notice several items missing from his property. (RP 763-764, 802). He estimated he was missing more than $10,000 worth of property. (RP 765, 768, 803). He suspected Mr. Molony was involved. (RP 269, 766, 769).

On April 9, 2013, Mr. Moore filed a theft report with Deputy Dennis Irwin of the Okanogan County Sheriff's Office. (RP 268-275, 765-767). He told Deputy Irwin he knew Mr. Molony was involved. (RP 269, 769).

On April 20, 2013, law enforcement had not arrested Mr. Molony for the theft of Mr. Moore's property. (RP 774). On that afternoon, armed with a .22 pistol, Mr. Moore went to Mr. Molony's property to confront him regarding the theft. (RP 559-560, 774-776, 781, 805, 828-829).

When Mr. Moore arrived, Mr. Molony was sitting outside, on a rock retaining wall. (RP 780). A confrontation ensued between Mr. Molony and Mr. Moore. (RP 781-790). Subsequently, Mr. Moore called 911 to report that he had been stabbed in his left side and needed an ambulance, and that Mr. Molony was dead. (RP 344, 373-379, 795-796, 821-822, 842-843). He told the 911 dispatcher that he killed Mr. Molony with a .22 pistol "and the knife he pulled on me." (RP 374-375, 378). Mr.

Moore also told the dispatcher Mr. Molony threw a rock at him and it cut his head. (RP 375).

Law enforcement officers, including Deputy Irwin, arrived at the scene. (RP 283-284, 344, 383-384, 405, 506). Mr. Moore was squatting down by a low rock wall on the property. (RP 348-349). He was holding his left side and told Deputy Irwin he had been stabbed. (RP 349-350). He also had some lacerations on his head. (RP 349-350).

Mr. Moore told Deputy Irwin "he'd been doing some work on his property and that he had - - he was going to work on a truck and he found a clutch missing and that he was initially still going to let me handle it but then he just lost it." (RP 350-351). Deputy Irwin testified Mr. Moore made the following statements to him at the scene:

> [Deputy Irwin:] [H]e . . . told me that after he discovered the clutch was missing that he drove up to [Mr. Molony's] and that he told him to, "Get in the truck because we're gonna go to town and you're gonna buy -- buy me a new clutch to replace the one you stole."
> . . . .
> And that when he did that, [Mr. Molony] just replied, "What?" And he then came at him with a knife. He said that [Mr. Molony] came at him with a knife so he drew a pistol that he was -- that [Mr.] Moore drew a pistol and emptied it into him and then dropped the pistol. And that about that time, that he said then [Mr. Molony] hit him in the head with a rock, threw a rock and hit him in the head. That's when he picked up the knife and stabbed him until the fight was over.
> [Prosecutor:] So he said he came at him with a knife and he shot him from a gun he was wearing in a holster?
> [Deputy Irwin:] Correct.

> [Prosecutor:] And at that point, the knife was apparently dropped? Did he describe -
> [Deputy Irwin:] Yeah, I believe he picked up the knife that he said [Mr. Molony] had came at him with and that's what he used on [Mr. Molony].
> [Prosecutor:] And did -- what did he say he did after that?
> [Deputy Irwin:] Then he said he reported it to the police. . .
> .

(RP 354-355).

Mr. Moore told Deputy Irwin that Mr. Molony struck him in the head with a rock before he stabbed Mr. Molony. (RP 367).

Mr. Molony died at the scene. (RP 351, 385, 407). A knife and a pistol were laying on the ground adjacent to Mr. Molony's body. (RP 267, 288, 290, 387, 507). An autopsy showed he had multiple gunshot wounds and multiple stab wounds, including three stabs wounds to the back. (RP 407-408, 420, 423-424, 461-462). The cause of death was identified as "multiple gunshot and stab wounds to the head and chest." (RP 424).

Mr. Moore was taken to the hospital by ambulance for treatment of his wounds, a head wound and wound on his left side. (RP 356, 389-390, 544-545, 797). He received stitches for the wound on his left side. (RP 810-811).

When he was released from the hospital the next day, Mr. Moore agreed to speak with Deputy Irwin and Detective Timothy Heyen of the Okanogan County Sheriff's Office. (RP 494-495, 556-557, 797-799). In the interview, addressing what occurred at Mr. Molony's property on the

day in question, Mr. Moore stated "[w]hen I got over there, he said, 'What's happening?' Something like that, right. I says, 'Get in your truck. We're going to Schuck's and you're buying a clutch pack for that one you stole.'" (RP 559, 572-573). Mr. Moore stated Mr. Molony acted like he didn't know what he was talking about. (RP 560). Mr. Moore described the confrontation:

> [Mr. Molony] didn't have a knife in his hand when I walked up there. He was sitting on that rock bench that he fell back onto doing some kind of yard work or planting. I don't know what he was doing. He was just sitting there. And he got up, and he didn't have anything in his hand. And then all of a sudden, he came around -- around the house like this. I saw -- I was -- I told you he's -packs a gun. I was watching him to make sure he . . . I didn't see him reach for anything. But all of a sudden, he had -- I saw a flash of metal in his hand behind his back. And I saw metal and I thought it was a gun. And then he just came -- I didn't -- I didn't have my – I didn't have my gun in my hand at that time.
> . . .
> It was in the holster.

(RP 560-561).

Mr. Moore said Mr. Molony swiped at him with a knife, and got him on the head, but he did not feel it anywhere else. (RP 561-562). Mr. Moore said he then shot Mr. Molony once. (RP 562, 590). He said after he shot Mr. Molony once, something hit him on the side of the head. (RP 562, 591). Mr. Moore described what happened next:

> [H]e was still coming so I shot again. . . he dropped the knife and it came out of his hand. And he fell back onto the -- there's a rock wall about this tall.
> . . .
> And I just -- I shot him till the gun wouldn't shoot anymore. And he was still -- he was trying to reach for that knife. I dropped the gun when it quit shooting, and he was trying to reach for the knife. I grabbed -- I picked the knife up and I stabbed him with it. I don't know how many times I stabbed him. Several.

(RP 563-564, 579-581, 585).

Mr. Moore said Mr. Molony was still moving around when he was stabbing him. (RP 582-584). He said Mr. Molony was down on the ground. (RP 588, 593).

Later in his statement, Mr. Moore said when he confronted Mr. Molony he told him he was going to jail, and "[t]hat's when he stood up and came toward me. That's when I took the gun out. I didn't have - - I didn't aim it at him - - I just had it out. It was down here." (RP 575). Mr. Moore further stated:

> I had the gun. He stood up -- he stood up from where -- from where he was seated, like, facing -- I'm like here, and he's sitting looking that way. He stood up. And when he stood up, then I put my hand on the gun and started to take it out. But he was all one motion. He stood up and came around, and I didn't really -- So I saw a flash of silver. I thought it was a gun, but I didn't even know it was a knife at that point in time. When he lunged at me, I faded to my right, and I pulled the gun and I shot.

(RP 596-597, 680, 685).

Mr. Moore said he did not bring the gun out until Mr. Molony swung at him. (RP 679-680).

The State charged Mr. Moore with one count of first degree premeditated murder. (CP 81-83, 121-122, 162-164). The first amended information alleged a deadly weapon and a firearm sentencing enhancement. (CP 81). Mr. Moore gave notice of his intent to use self-defense as a legal defense to the charge. (CP 132). The case proceeded to a jury trial in September 2014. (RP 27-1006).

Voir dire was held in the courtroom, on the record. (RP 27-224). During voir dire, the prosecutor asked potential jurors whether anyone would have difficulty making a decision in the case, regardless of the evidence presented. (RP 157- 166). The prosecutor engaged in the following colloquy with a potential juror:

> [Prosecutor:] I'll go to the next paddle, Number 79, Ms. Edwards.
> [Potential juror:] Yeah. I'm so opposed to the death penalty, so I don't belong on a jury that's deliberating a capital case.
> [Prosecutor:] Okay. And just so you know, this is not a capital case.
> [Potential juror:] Oh. So then that's different.
> [Prosecutor:] Okay. With that knowledge, are - - what you're feeling on if you were asked to reach a decision in this case in the charge of first degree murder, are you - - are you capable of making that decision at the end of the case?
> [Potential juror:] Yes.

(RP 162).

Defense counsel did not object during this colloquy. (RP 162).

Also during voir dire, the attorneys exercised peremptory challenges, silently, on paper. (CP 166-170, 209-221; RP 220, 222-223). As of September 10, 2015, approximately one year after the jury trial, the paper list of peremptory challenges was not filed in the trial court.[2] (CP 179-181, 207-221, 224-235).

On September 17, 2015, Okanogan County Prosecutor Karl Sloan emailed Okanogan County Clerk Charleen Groomes, and an individual named Mary Horner, the following question:

> Are the jury lists that we mark preemptory [sic] challenges on filed [sic] with the court, or made part of the court file? I am specifically interested in State v. Don Moore 13-1-00126-6.

(CP 207).

Ms. Groomes responded:

> Sandy is in the process of scanning those in. She has what I had in my drawer for processing payments. If she doesn't have them, I know we keep them somewhere. I can check more into it.

(CP 207).

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[2] Mr. Moore filed his original opening brief on September 10, 2015. On this same day, Mr. Moore filed a Motion to Accept Additional Evidence under RAP 9.11, followed by a Supplemental Motion to Accept Additional Evidence on September 30, 2015. A Commissioner of this Court granted Mr. Moore's motions, and also permitted the State to supplement the record with additional materials. (CP 236-239). Clerk's Papers pages 166-239 contain the additional evidence accepted pursuant to this Commissioner's Ruling.

On September 28, 2015, Okanogan County Jury Management Coordinator Sandy Ervin sent Mr. Sloan the following message, via email:

> I found this in Charleen's box separated from the other case documents. I hope this is what you are looking for.

(CP 208).

Attached to Ms. Ervin's email were the struck juror sheets. (CP 209-214).

On September 30, 2015, the undersigned counsel emailed Okanogan County Clerk's Office Deputy Clerk Loretta Houston the following question:

> I assume the struck juror sheet and/or a list of jurors in [sic] not part of the trial court docket? If it is can you please send me that docket number?

(CP 179).

Ms. Houston responded "[t]he jurors is not imputed into the trial court docketing. So there isn't anything to send you."

(CP 179-180).

As of December 15, 2015, the jury panel and strike sheets were filed in the trial court, as trial docket number 140.1. (CP 199, 215-221).[3]

[3] The struck juror sheets attached to Ms. Ervin's email (CP 209-214) are not the same as the "jury panel and strike sheets" filed as trial docket number 140.1 (CP 215-221).

At the trial, Edward McIntyre testified he previously told Detective Heyen that he heard Mr. Moore talking about someone stealing from him, and that he heard Mr. Moore say "I'll kill the son of a bitch." (RP 306).

Ronald Skogstad testified he heard Mr. Moore talking about coming back from the coast and stating that some items were missing from his property. (RP 314). He testified Mr. Moore stated, on the day of the incident, "I'm gonna murder that motherfucker." (RP 315-316, 325, 327). Mr. Skogstad testified he did not think that Mr. Moore was serious. (RP 316, 325, 327-329).

On re-direct, the prosecutor questioned Mr. Skogstad as follows:

> [Prosecutor:] Did the defendant have somewhat of a temper?
> [Mr. Skogstad:] Not that I saw.
> [Prosecutor:] Was there a prior time where he grabbed ahold of your throat one time?
> [Prosecutor:] Yeah, but that was -- we'd been out on a road trip. We went and looked at a car and somethin' like that, him and I. He didn't have wheels, so we took my pickup. And -- and I don't know what happened. It just -- out of the clear blue, he reached out and grabbed my throat with his right hand, and I knocked it off with my right hand and told him he better not do that again. But that was the end of that.
> [Prosecutor:] That was not expected?
> [Mr. Skogstad:] No. I have no idea where it even came from.

(RP 329).

Defense counsel did not object to this questioning. (RP 329).

Deputy Irwin testified consistent with the facts stated above. (RP 267-279, 343-369, 492-503, 858-861). He further testified a note was found in the pocket of a shirt Mr. Moore was wearing when he spoke with him at the scene. (RP 358-360). Deputy Irwin read the contents of the note:

> I, [Mr.] Molony, hereby assign any and all interests I hold on the acreage I occupy. This conveyance satisfies all value of items stolen from [Mr.] Moore while I was housesitting from the 1st January, '13, to 3-16-13. I further agree to leave Okanogan County. X [Mr.] Molony" and "X" and a signature line.

(RP 360).

Mr. Moore took the stand in his own defense. (RP 757-857). He testified he went to Mr. Molony's property on the day in question to arrest him, because the police were not. (RP 774-775, 781-782, 804). He testified that if Mr. Molony would not sign the note he wrote, he was going to arrest him. (RP 360, 826-828). Mr. Moore stated he was armed with a .22 pistol "[b]ecause I had reason to believe that Mr. Molony was armed and I was concerned for my own health and literal survival." (RP 776). He testified Mr. Molony did not invite him to his property that day. (RP 838).

Mr. Moore testified that after he spoke to Mr. Molony, Mr. Molony jumped up and attacked him. (RP 780-781). He stated "[Mr. Molony] just jumped up and rapidly came towards me swinging an arm

which I - - bringing an arm up which I saw silver in and I assumed to be a gun . . . ." (RP 783, 805-806, 827). Mr. Moore testified he then pulled his pistol out, and shot Mr. Molony. (RP 786-787). He stated "I felt scared and threatened and I felt like I was about to be killed." (RP 787, 843).

Mr. Moore testified the events all occurred simultaneously: he testified he was pulling his gun "[o]nce [Mr. Molony] got up and started charging me, yes, I was, the point that he began his charge and I saw a glint of what I didn't know what at the time. It was something in his hand." (RP 841-842, 847). He testified "I pulled the gun out when [Mr. Molony] started to come at me . . . I pulled it out and it went to my side and then it came up as he was continued [sic] to come at me." (RP 850).

Mr. Moore testified after the first shot, something hit him in the head. (RP 789-790). He testified Mr. Molony was flailing with both arms, and he shot him again. (RP 788-789, 806, 818-819). Mr. Moore testified Mr. Molony went down on the ground after he shot him a second time, but "[h]e was scrambling attempting to come back at me." (RP 818-819, 855).

Mr. Moore testified after he fired all his available shots at Mr. Molony, Mr. Molony was laying on the ground and tried to reach for the knife. (RP 819). Mr. Moore stated he picked up the knife. (RP 819). He testified he did not remember stabbing Mr. Molony, but "I read it in the

reports, and I would concur that that is accurate at the time I did know [sic]." (RP 790, 819). He did testify he stabbed Mr. Molony because he was still mobile. (RP 820).

Mr. Moore also testified he does not remember making the statements in his interview with Deputy Irwin and Detective Heyen. (RP 798-799). He testified "I lost it after the first gunshot." (RP 837).

Mr. Moore denied making the statements regarding killing Mr. Molony to Mr. McIntyre and Mr. Skogstad. (RP 851-852). He testified he told them "'If [Mr. Molony] pulls a weapon on me, I will shoot him,' as he had pulled a weapon already on a friend of mine." (RP 851-852). Mr. Moore also made this statement in phone call he made to Mr. Skogstad from jail following the incident. (RP 319-324). Mr. Moore stated "I told you I was gonna do it if he pulled a gun on me." (RP 322).

In rebuttal testimony following Mr. Moore's testimony, Deputy Irwin and Detective Heyen testified Mr. Moore had not previously stated Mr. Molony was flailing at him with both arms. (RP 859-862). Detective Heyen also testified that Mr. Moore stated in his interview that as he was approaching and speaking with Mr. Molony, "he had brought the pistol out and had it at what I would call a 'low ready' down at his waistline." (RP 862-863).

Defense counsel requested self-defense jury instructions. (RP 876-880). The trial court granted defense counsel's request and instructed the jury on self-defense. (CP 55-58; RP 882-885, 891-892, 904-906).

The State requested a first aggressor jury instruction. (CP 91; RP 874-875, 882). Defense counsel did not object to the first aggressor jury instruction, stating "[w]e would agree with the State, however, that 16.04 would be appropriate as well based on their theory of the case. (RP 876, 891-892, 894). The trial court gave the following jury instruction:

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

(CP 58; RP 905-906).

The State also requested jury instructions on the lesser included offense of second degree murder. (CP 96-98; RP 875). Defense counsel did not object to this jury instruction, and the trial court gave the instructions. (CP 52-54; RP 873-886, 891-892, 894, 902-904). Defense counsel did not propose jury instructions on the lesser included offense of first degree manslaughter. (RP 873-886, 891, 894).

The trial court also gave deadly weapon special verdict jury instructions. (CP 23, 61-62; RP 909-910). The jury was instructed as follows:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime. A knife having a blade longer than three inches is a deadly weapon. A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(CP 62; RP 909-910).

The jury was given the following deadly weapon special verdict form:

> We, the jury, return a special verdict by answering as follows:
>
> QUESTION 1: Was the defendant armed with a deadly weapon that was knife [sic] having a blade longer than three inches, at the time of the commission of the crime?
>
> ANSWER:_____ (Write "yes" or "no")
>
> QUESTION 2: Was the defendant armed with a deadly weapon that was a pistol, revolver, or any other firearm, at the time of the commission of the crime?
>
> ANSWER:_____ (Write "yes" or "no")
>
> . . . .

(CP 23; RP 910).

On September 15, 2014, the jury found Mr. Moore guilty as charged. (CP 24; RP 1005). The jury also answered "yes" to both questions on the deadly weapon special verdict form. (CP 23; RP 1005-1006).

At sentencing, the trial court imposed 84 months confinement for sentencing enhancements, comprised of 60 months for a firearm enhancement and 24 months for a deadly weapon enhancement. (CP 10-14; Steinmetz RP 63).

Mr. Moore timely appealed. (CP 3).

E. ARGUMENT

Issue 1: Whether the exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial.

Both the federal and Washington State constitutions provide that a defendant has a right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (*citing* Wash. Const. art. I, § 22; U.S. Const. amend VI). "In *Bone-Club*, [our Supreme Court] enumerated five criteria that a trial court must consider on the record in order to close trial proceedings to the public." *Id*. at 10 (citing *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.3d 325 (1995)). "A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public." *Id*. at 12 (emphasis in original); *see also State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

A defendant may raise the constitutional right to a public trial issue for the first time on appeal. *State v. Koss*, 181 Wn.2d 493, 498, 334 P.3d 1042 (2014) (citing *Wise*, 176 Wn.2d at 9; *State v. Brightman*, 155 Wn.2d

506, 517-18, 122 P.3d 150 (2005)). Whether a defendant's constitutional public trial right has been violated is reviewed de novo. *Id*. at 499 (citing *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

"A violation of the public trial right is structural, meaning prejudice is per se presumed to inhere in the violation." *State v. Njonge*, 181 Wn.2d 546, 554, 334 P.3d 1068 (2014) (citing *Wise*, 176 Wn.2d at 13-14; *Paumier*, 176 Wn.2d at 35; *Easterling*, 157 Wn.2d at 181). "The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181. Washington has not adopted a *de minimis* standard in the context of the public trial right. *See id.* at 180-81; *see also State v. Frawley*, 181 Wn.2d 452, 465-66, 334 P.3d 1022 (2014) (plurality opinion declining to take a de minimis approach); *State v. Shearer*, 181 Wn.2d 564, 572-75, 334 P.3d 1078 (2014) (plurality opinion rejecting the State's argument that courtroom closures were de minimis, because structural error standard "forecloses the possibility of de minimis violations.").

A three-step framework is used to analyze public trial right cases. *See State v. Smith*, 181 Wn.2d 508, 513-14, 521, 334 P.3d 1049 (2014). "The steps of this public trial right framework are: (1) Does the proceeding at issue implicate the public trial right? (2) If so, was the

proceeding closed? And (3) If so, was the closure justified?" *Id*. at 521. "The appellant carries the burden on the first two steps; the proponent of the closure carries the third." *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015)[4].

Here, the exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial. (RP 220, 222-223).

Turning to the first question of the three-step analysis, our Supreme Court recently reaffirmed that the pubic trial right "attaches to jury selection, including for cause and peremptory challenges." *Love*, 183 Wn.2d at 605.

The second questions asks whether there was a closure of the courtroom. *See Smith*, 181 Wn.2d at 521. As stated above, Mr. Moore bears the burden of showing that a closure occurred. *See Love*, 183 Wn.2d at 605-606; *see also Njonge*, 181 Wn.2d at 556.

In *Love*, counsel exercised peremptory challenges silently in the courtroom by exchanging a written lists of jurors. *Love*, 183 Wn.2d at 602. Counsel took turns striking one name from the list (referred to as the struck juror sheet), indicating they had exercised a peremptory challenge.

[4] A petition for certiorari to the United States Supreme Court was docketed in this case on February 8, 2016.

Id. at 602-03. The struck juror sheet was filed in the court record and is available to the public. *Id*. at 603. The courtroom remained open to the public while counsel exercised their peremptory challenges in writing. *Id*.

On appeal, the defendant argued, in relevant part, that "peremptory challenges on the struck juror sheet effectively 'closed' the courtroom, though it was unlocked and open, because the public was not privy to the challenges in real time." *Id*. at 604. He further argued "the possibility that spectators at his trial could not . . . see the struck juror sheet used for peremptory challenges rendered this portion of his trial inaccessible to the public." *Id*. at 606.

Our Supreme Court disagreed with the defendant and found that on the facts presented, no closure occurred. *Id*. at 606-07. The Court reasoned "observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges . . . on paper, and ultimately evaluate the empaneled jury." *Id*. at 607. The Court further reasoned "[t]he transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available." *Id*.

The Court found that written peremptory challenges "do not amount to a courtroom closure because they are made in open court, on the record, and subject to public scrutiny." *Id*. The Court further found

that "written peremptory challenges are consistent with the public trial right *so long as they are filed in the public record.*" *Id.* (emphasis added).

Here, in contrast, Mr. Moore can show a courtroom closure occurred. (RP 220, 222-223). Although voir dire was held in the courtroom, on the record, the peremptory challenges were done silently, on paper. (RP 27-224). And, as of September 30, 2015, the paper list of peremptory challenges (the struck juror sheet) was not filed in the trial court. (CP 179-181, 207-221, 224-235). For more than one year after the jury trial, September 2014 to, at a minimum, September 30, 2015, the paper list of peremptory challenges was not filed in the public record, and therefore, it was not publically available or subject to public scrutiny. (CP 179-181, 207-221, 224-235; RP 27-1006); *cf. Love*, 183 Wn.2d at 607.

It was only after Mr. Moore filed his original opening brief in this appeal, and raised this public trial argument, that the paper list of peremptory challenges was filed in the trial court. (CP 179-181, 199, 207-221, 224-235). The version of the paper list of peremptory challenges eventually filed in the trial court was different from the documents that jury management coordinator Ms. Ervin found in the Clerk's box after the jury lists were requested by Mr. Sloan. (CP 207-221).

Because the paper list of peremptory challenges was not filed in the trial court for an extended period of time, the written peremptory

challenges done here are not consistent with the public trial right. *Cf. Love*, 183 Wn.2d at 607. Unlike the procedures used at the defendant's trial in *Love*, the procedure used in Mr. Moore's case do not comport with the minimum guarantees of the public trial right, and a courtroom closure occurred. *See id*. The paper list of peremptory challenges in Mr. Moore's case was not publicly available for at least the period of time from September 2014 to September 30, 2015; this record shows that the jury panel and strike sheets were not filed in the trial court until December 15, 2015. (CP 179-181, 199, 207-221, 224-235). Therefore, for this significant time frame following Mr. Moore's trial, the public could not scrutinize the selection of his jury from start to finish. *Cf. Love*, 183 Wn.2d at 607.

Finally, under the third question, the closure here was not justified, because the trial court did not conduct a *Bone-Club* analysis to justify the closure. *See Smith*, 181 Wn.2d at 514 n.5; *see also Wise*, 176 Wn.2d at 12 (the trial court must consider the *Bone-Club* factors before closing the courtroom). "It remains true that the trial court, not the defendant, is responsible for making a record that the proper procedures were followed before closing a court proceeding to which the right to an open trial attaches." *Koss*, 181 Wn.2d at 503 (citing *Bone-Club*, 128 Wn.2d at 258-59).

The exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial. The trial court did not consider the *Bone-Club* factors before closing the trial to the public in this manner. *See Bone-Club*, 128 Wn.2d at 258-59. The case should be reversed and remanded for a new trial. *See Wise*, 176 Wn.2d at 19 (setting forth this remedy for a public trial right violation during voir dire).

Issue 2: Whether the trial court erred by giving a first aggressor jury instruction.

Although Mr. Moore did not object to the first aggressor jury instruction below, review of the issue for the first time on appeal is proper under RAP 2.5(a)(3). (RP 876, 891-892, 894).

A party may challenge a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). To meet this test, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). "[T]he appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Id*. (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)).

In order for an error to be "manifest" under RAP 2.5(a)(3), a showing of actual prejudice is required. *Id*. at 99 (quoting *Kirkman*, 159 Wn.2d at 935). "To demonstrate actual prejudice, there must be a

plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id*. (internal quotation marks omitted) (alteration in original) (quoting *Kirkman*, 159 Wn.2d at 935). Claims of error involving self-defense instructions raised for the first time on appeal are analyzed "on a case-by-case basis to assess whether the claimed error is manifest constitutional error." *Id*. at 104.

Once a claim of self-defense is asserted, the absence of self-defense becomes an element of the crime that the State has the burden to disprove beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 493–94, 656 P.2d 1064 (1983). Here, however, the jury was instructed that if it determined Mr. Moore was the first aggressor then he could not claim self-defense. (CP 58; RP 905-906). This first aggressor jury instruction prevents the jury from considering whether the State has proved beyond a reasonable doubt that Mr. Moore did not act in self-defense. (CP 58; RP 905-906). Therefore, the first aggressor instruction, if erroneous, implicates a defendant's constitutional rights. *See State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) ("The failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude."); *O'Hara*, 167 Wn.2d at 105 (stating the constitution requires the jury to be instructed as to each element charged,

and "[t]he requirement also applies to a self-defense jury instruction . . . .").

Because Mr. Moore's constitutional rights are implicated, the next question is whether he can show the error in giving the first aggressor jury instruction had practical and identifiable consequences on the trial. *See O'Hara*, 167 Wn.2d at 99 (defining manifest error) (quoting *Kirkman*, 159 Wn.2d at 935).

"Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate." *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). However, because a first aggressor instruction affects a defendant's claim of self-defense, which the State must disprove beyond a reasonable doubt, "courts should use care in giving an aggressor instruction." *Id*. at 910 n.2. "[F]ew situations exists necessitating an aggressor instruction." *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010) (citing *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

A first aggressor jury instruction is appropriate under the following circumstances:

> [W]here (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.

Id. at 959.

"[W]ords alone do not constitute sufficient provocation." *Riley*, 137 Wn.2d at 911.

The evidence presented at trial showed Mr. Moore was not the first aggressor. (RP 315-316, 325, 327, 354-355, 367, 559-562, 572-573, 575, 590, 596-597, 680, 685, 781-790, 805-806, 827, 850-852, 862-863); *see also Stark*, 158 Wn. App. at 959. The evidence showed Mr. Moore did not provoke the fight. He confronted Mr. Molony with words alone, and Mr. Molony came towards him. (RP 354-355, 559, 572-573, 575, 780-781). Confronting Mr. Molony with words was not sufficient provocation to warrant a first aggressor jury instruction. *See Riley*, 137 Wn.2d at 911.

Moreover, the evidence does not conflict as the whether Mr. Moore provoked the fight. *See Stark*, 158 Wn. App. at 959. The evidence of the fight came from Mr. Moore, by his statements to law enforcement and his trial testimony, and according to him, he did not take action until Mr. Molony came at him. (RP 354-355, 575, 596-597, 679-680, 685, 850, 862-863).

In addition, Mr. Moore did not make the first move by drawing a weapon. *See Stark*, 158 Wn. App. at 959. Mr. Moore only removed his gun when Mr. Molony came at him. (RP 354-355, 575, 596-597, 679-680,

685, 850, 862-863); *see also State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) (holding that a first aggressor jury instruction was inappropriate where the defendant's only act toward the victim was brandishing a previously concealed firearm after the victim approached him). According to Mr. Moore, the actions of Mr. Molony happened in a continuous sequence, from him coming towards Mr. Moore to presenting and using a weapon on him. (RP 596-597, 680, 685, 841-842, 847).

Also, Mr. Moore took his gun out after Mr. Molony came at him, but it was not yet aimed at Mr. Molony. (RP 354-355, 575, 596-597, 679-680, 685, 850, 862-863). Mr. Moore only aimed the gun at Mr. Molony after he saw Mr. Molony with what he thought was a gun, and Mr. Molony came at him with it. (RP 354-355, 562, 590, 596-597, 680, 685, 786-787, 841-842, 847). These are not the actions of a first aggressor.

The giving of a first aggressor jury instruction here was manifest error affecting a constitutional right. Mr. Moore was not the first aggressor and the State was not entitled to a first aggressor jury instruction. *See Stark*, 158 Wn. App. at 959 (stating the circumstances under which a first aggressor jury instruction is proper). By giving the first aggressor jury instruction, the trial court precluded the jury from considering Mr. Moore's self-defense claim. Mr. Moore's conviction

should be reversed and remanded for a new trial before a properly instructed jury.

Issue 3: Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable.'" *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

a. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the prosecutor's statement during voir dire that this was not a capital case.

When questioning a potential juror during voir dire, the prosecutor stated "[a]nd just so you know, this is not a capital case." (RP 162).

As acknowledged above, in order for Mr. Moore to establish defense counsel was ineffective for failing to object to this comment, Mr. Moore must show defense counsel's representation was deficient, and that this deficient representation was prejudicial. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

"[N]o mention may be made of sentencing in noncapital cases." *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001). "This strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations." *Id*. at 846.

Trial counsel's failure to object to an instruction to the jury that the death penalty is not involved falls below prevailing professional norms.

Id. at 847. In addition, such failure to object is not tactical because there is no possible advantage to not objecting, and "such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner." *Id*.

Here, defense counsel's failure to object to the prosecutor's statement during voir dire that this was not a capital case was deficient performance. *See Townsend*, 142 Wn.2d at 847; *see also Hicks*, 163 Wn.2d at 488 (reaching the same conclusion). Such failure to object was not tactical. *See Townsend*, 142 Wn.2d at 847; *see also Hicks*, 163 Wn.2d at 487-88.

In order to establish prejudice, Mr. Moore must show that without the error, the result of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Mr. Moore can also establish prejudice by showing that defense counsel's error deprived him of a fair trial. *See Hicks*, 163 Wn.2d at 477 (quoting *Strickland*, 466 U.S at 687).

Without the prosecutor's comment, the result of the trial would have been different. Knowing that the death penalty was not at stake could have persuaded the jury to reject Mr. Moore's self-defense claim. For this same reason, defense counsel's error also deprived Mr. Moore of a fair trial with a reliable result.

Mr. Moore has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to the prosecutor's statement during voir dire that this was not a capital case constituted deficient performance and Mr. Moore was prejudiced by that deficient performance. His conviction should be reversed.

b. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for the lesser-included offense of first degree manslaughter.

"A person is guilty of murder in the first degree when . . . [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person . . . ." RCW 9A.32.030(1)(a). "A person is guilty of manslaughter in the first degree when . . . [h]e . . . recklessly causes the death of another person." RCW 9A.32.060(1)(a).

A defendant is entitled to a lesser-included offense jury instruction if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382, 385 (1978). "First, each of the elements of the lesser offense must be a necessary element of the offense charged." *Id*. "Second, the evidence in the case must support an inference that the lesser crime was committed." *Id*. at 448.

First degree manslaughter is a lesser-included offense of first degree murder. *See State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708

(1997). "In other words, the first prong of the *Workman* test is satisfied." *Id*.; *see also Workman*, 90 Wn. 2d at 447.

Under the second prong of the *Workman* test, "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." *Id*.; *see also Workman*, 90 Wn. 2d at 448.

"[A] defendant who reasonably believes he is in imminent danger and needs to act in self-defense, 'but recklessly or negligently used more force than was necessary to repel the attack,' is entitled to an instruction on manslaughter." *State v. Schaffer*, 135 Wn.2d 355, 358, 957 P.2d 214, 215 (1998) (quoting *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)).

In *Schaffer*, our Supreme Court found the trial court erred by not instructing the jury on manslaughter as a lesser-included offense to first degree murder. *Schaeffer*, 125 Wn.2d at 358-59. The Court first found, based on a concession made by the State, that "there was sufficient evidence to permit the jury to find [the defendant] acted in the reasonable belief he was in imminent danger." *Id*. at 358. The Court then found "[t]he additional evidence-that [the defendant] shot the victim five times including twice in the back - was sufficient to support a finding that he recklessly or negligently used excessive force to repel the danger he

perceived." *Id*. The case was reversed and remanded for a new trial. *Id*. at 359.

Here, there was sufficient evidence to permit the jury to find Mr. Moore acted in reasonable belief that he was in imminent danger. The evidence showed Mr. Molony came towards Mr. Moore and that Mr. Molony brandished a weapon. (RP 354-355, 560-562, 575, 596-597, 680, 685, 783, 803-806, 827, 841-842, 847, 850). Mr. Moore testified that when he shot Mr. Molony "I felt scared and threatened and I felt like I was about to be killed." (RP 787, 843). Further, the additional evidence – that Mr. Moore shot and stabbed Mr. Molony multiple times, including three stab wounds to the back – was sufficient to support a finding that Mr. Moore recklessly used excessive force to repeal the danger he perceived. *See Schaeffer*, 125 Wn.2d at 358; *see also* (RP 407-408, 420, 423-424, 461-462).

Therefore, Mr. Moore was entitled to a jury instruction on the lesser-included offense of first degree manslaughter. *See Schaeffer*, 125 Wn.2d at 358-59. The evidence would permit a jury to rationally find Mr. Moore guilty of first degree manslaughter and acquit him of first degree murder. *See Warden*, 133 Wn.2d at 563; *see also Workman*, 90 Wn. 2d at 448.

However, "a defendant who is entitled to lesser included instructions may choose to forgo such instructions nevertheless." *Grier*, 171 Wn.2d at 42. When the failure to instruct the jury on a lesser-include offense is raised as an ineffective assistance of counsel claim, "[t]he salient question . . . is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions." *Id*. The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *Id*. *at* 43; *see also State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

In *Grier*, our Supreme Court found the withdrawal of lesser-included jury instructions was not ineffective assistance of counsel. *Id*. at 42-45. The Court reasoned "[the defendant] and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal." *Id*. at 43.

Here, defense counsel could not reasonably have believed an all or nothing strategy was the best approach to achieve an acquittal. *See Grier*, 171 Wn.2d at 43. Given the evidence that Mr. Moore shot and stabbed Mr. Molony multiple times, including three stab wounds to the back, and Mr. Moore's statements that "he lost it," there was a high likelihood the

jury would reject Mr. Moore's self-defense claim. *See State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) ("[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant."); *see also* (CP 41-62; RP 350-351, 407-408, 420, 423-424, 461-462, 837). Further, defense counsel did not follow an all or nothing strategy: the jury was instructed on the lesser included offense of second degree murder and defense counsel did not object to this jury instruction. (CP 52-54; RP 873-886, 891-892, 894, 902-904).

Defense counsel's decision to forgo a lesser-included jury instruction for first degree manslaughter, where there was a high likelihood the jury would reject Mr. Moore's self-defense claim based upon the use of excessive force, was not part of a legitimate trial strategy to obtain an acquittal. *See Grier*, 171 Wn.2d at 43; *see also Hassan*, 151 Wn. App. at 218.

Mr. Moore was entitled to a jury instruction on the lesser-included offense of first degree manslaughter, and defense counsel was ineffective for failing to request such an instruction. Mr. Moore's conviction should be reversed.

c. Whether Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony by Ronald George Skogstad of a prior bad act by Mr. Moore.

The prosecutor questioned Mr. Skogstad regarding a prior bad act by Mr. Moore, where he grabbed ahold of Mr. Skogstad's throat. (RP 329). Mr. Skogstad testified "[i]t just -- out of the clear blue, he reached out and grabbed my throat with his right hand, and I knocked it off with my right hand and told him he better not do that again." (RP 329). Defense counsel did not object to this testimony.

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

"The burden of demonstrating a proper purpose for admitting evidence of a person's prior bad acts is on the proponent of the evidence." *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). In order to admit evidence under ER 404(b), the trial court must follow four steps: "'(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an

element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Id*. at 175 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

"Evidence of prior bad acts is presumptively inadmissible." *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). "In doubtful cases, the evidence should be excluded." *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). "[S]trategy must be based on reasoned decision-making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, defense counsel's failure to object to the prior bad act testimony by Mr. Skogstad fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the testimony under ER

404(b) would have been sustained. The only purpose for this evidence was to show Mr. Moore's propensity for violence, to show he acted in conformity with a violent character on the day of the incident. *See* ER 404(b).

In addition, the prior bad act testimony by Mr. Skogstad was more prejudicial than probative. *See Foxhoven*, 161 Wn.2d at 174 (quoting *Thang*, 145 Wn.2d at 642) (ER 404(b) analysis requires the trial court to "'weigh the probative value against the prejudicial effect.'"). The jury was instructed that if it determined Mr. Moore was the first aggressor then he could not claim self-defense. (CP 58; RP 905-906). The prior bad act testimony by Mr. Skogstad addresses a prior act of aggression by Mr. Moore. Mr. Moore's prior act of aggression was more prejudicial than probative to his assertion of self-defense.

Mr. Moore's failure to object was not tactical. The prior bad act testimony by Mr. Skogstad shows Mr. Moore's propensity for violence, and the key issue in this case was whether Mr. Moore acted in self-defense or whether he was the first aggressor.

Had defense counsel objected to the prior bad act testimony by Mr. Skogstad, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. This prior bad act testimony showed Mr. Moore's

propensity for violence and could have swayed the jury to determine that Mr. Moore was the first aggressor.

Mr. Moore has proven that the failure to object to the testimony of by Ronald George Skogstad of a prior bad act by Mr. Moore constituted ineffective assistance of counsel. *Sexsmith*, 138 Wn. App. at 509. His conviction should be reversed.

Issue 4: Whether the trial court erred in imposing a firearm enhancement, where the jury returned a special verdict finding Mr. Moore was armed with two deadly weapons.

"[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citations omitted). Mr. Moore argues, for the first time on appeal, that the trial court erred in sentencing him with a firearm sentencing enhancement that was not found by the jury.

A sentencing court may not exceed the authority issued to the court by the jury's determination, such as by imposing a sentence in violation of the defendant's Sixth Amendment right to have a jury decide a sentencing enhancement. *State v. Bainard*, 148 Wn. App. 93, 101, 199 P.3d 460 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). This is a constitutional challenge

subject to de novo review. *Id*. (citing *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005)).

In *State v. Recuenco*, the defendant was charged with and convicted of second degree assault with a deadly weapon, identified as a handgun. *State v. Recuenco*, 163 Wn.2d 428, 431-32, 180 P.3d 1276, 1282 (2008) (*Recuenco III)*. The jury also returned a special verdict finding the defendant was armed with a deadly weapon. *Id*. at 432. The charging document did not allege a firearm sentencing enhancement, and the jury did not return a special verdict finding the defendant was armed with a firearm. *Id*. At sentencing, the trial court imposed a firearm sentencing enhancement. *Id*.

Our Supreme Court first reversed the defendant's firearm sentencing enhancement on the basis that imposing a firearm sentencing enhancement without a firearm finding by the jury violated the defendant's Sixth Amendment rights under *Blakely*. *Id*. at 433 (citing *State v. Recuenco,* 154 Wn.2d 156, 110 P.3d 188 (2006) *(Recuenco I)*); *see also Blakely*, 542 U.S. at 303.

On remand of the case from the United States Supreme Court, our Supreme Court next found that harmless error does not apply:

> We recognize here that the harmless error doctrine simply does not apply because no error occurred in the jury's determination of guilt.
> . . . .

> The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Id. at 441-42.

The Court then vacated the firearm sentencing enhancement. *Id*. at 442.

In *State v. Williams*, the charging document alleged three firearm sentencing enhancements. *State v. Williams*, 147 Wn. App. 479, 482, 195 P.3d 578 (2008). At trial, the jury was only given, and only returned, special verdict forms for three deadly weapon sentencing enhancements. *Id*. At sentencing, the court imposed three firearm sentencing enhancements. *Id*.

On appeal, this Court vacated the firearm sentencing enhancements and remanded the case for resentencing using the deadly weapon sentencing enhancements. *Id*. at 485. This Court reasoned that our Supreme Court's decision in *Recuenco III* that harmless error does not apply is binding. *Id*. at 484. This Court found "[a] sentencing court may impose a firearm sentence enhancement only when the information alleges the firearm enhancement, the State produces evidence supporting the firearm enhancement, *and the fact finder returns a firearm enhancement special verdict*." *Id*. (emphasis added) (citing *Recuenco*, 163 Wn.2d at 434). This Court further found "the finder of fact here did not make the

factual determinations necessary to impose firearm enhancements." *Id.* at 485 (citing *Recuenco*, 163 Wn.2d at 442).

Here, Mr. Moore was charged with both a deadly weapon and a firearm enhancement. (CP 81). However, the jury was instructed on two deadly weapon enhancements, and returned special verdicts finding Mr. Moore was armed with two deadly weapons. (CP 23, 61-62; RP 909-910, 1005-1006). The trial court imposed both a deadly weapon sentencing enhancement and a firearm sentencing enhancement. (CP 10-14; Steinmetz RP 63).

The trial court erred in imposed the firearm sentencing enhancement, because the jury did not make the necessary factual determinations to impose a firearm sentencing enhancement. *See Williams*, 147 Wn. App. at 485 (citing *Recuenco*, 163 Wn.2d at 442). The imposition of a firearm sentencing enhancement without a firearm finding by the jury violated Mr. Moore's Sixth Amendment rights under *Blakely*. *See Recuenco*, 163 Wn.2d at 433 (citing *Recuenco*, 154 Wn.2d at 156); *see also Blakely*, 542 U.S. at 303.

This error was not harmless. *See Recuenco*, 163 Wn.2d at 441-42; *see also Williams*, 147 Wn. App. 484; *Bainard*, 148 Wn. App. at 100-105, 111 (finding the trial court erred in sentencing the defendant with an enhancement that was not charged by the State nor found by the jury).

The firearm sentencing enhancement should be vacated and the case should be remanded for resentencing on the two deadly weapon sentencing enhancements found by the jury. *See Williams*, 147 Wn. App. at 485 (setting forth this remedy).

F. CONCLUSION

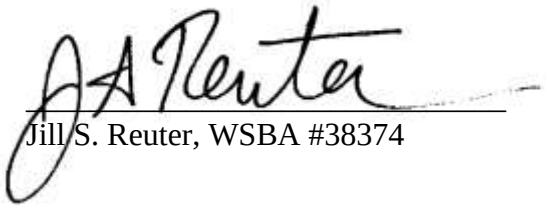
The exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial. The case should be reversed and remanded for a new trial.

The case should also be reversed and remanded for a new trial because the trial court erred by giving a first aggressor jury instruction.

A new trial is also warranted because Mr. Moore was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel: failed to object to the prosecutor's statement during voir dire that this is not a capital case; failed to request a jury instruction for the lesser-included offense of first degree manslaughter; and failed to object to testimony of a prior bad act by Mr. Moore.

At a minimum, the firearm sentencing enhancement should be vacated and the case should be remanded for resentencing on two deadly weapon sentencing enhancements.

Respectfully submitted this 10th day of February, 2016.



Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. DON ARTHUR MOORE Defendant/Appellant	)	COA No. 32925-9-III PROOF OF SERVICE

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 10, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Don Arthur Moore, DOC #960633
Washington State Penitentiary
1313 North 13th Ave
Walla Walla, WA 99362

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at ksloan@co.okanogan.wa.us and sfieldlarson@co.okanogan.wa.us using Division III's e-service feature.

Dated this 10th day of February, 2016.

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

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 32925-9-III
vs.	)	
	)	
DON ARTHUR MOORE	)	STATEMENT OF ADDITIONAL
	)	AUTHORITIES
Defendant/Appellant	)	
	)	

Pursuant to RAP 10.8, Appellant Don Arthur Moore respectfully offers the following additional authority for the issue of whether the exercise of peremptory challenges silently by writing violated Mr. Moore's constitutional right to a public trial:

> *State v. Marks*, No. 91148-7, slip op. at 1-2 (Wash. Feb. 25, 2016) (Holding that no closure of the courtroom in violation of the right to a public trial occurred, where peremptory challenges were exercised in a sidebar conference, because the courtroom was open to the public during the challenges, the trial court announced the selected members of the jury panel in open court immediately following the challenges, and the list of challenged jurors "was then made part of the public record of the trial.").

Dated this 25th day of February, 2016.

/s/ Jill S. Reuter
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Spokane, WA 99219
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Wa.Appeals@gmail.com

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 32925-9-III
vs.	)	
	)	
DON ARTHUR MOORE	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 25, 2016, having obtained prior permission, I served a true and correct copy of the attached Statement of Additional Authorities by email on the Okanogan County Prosecutor's Office at ksloan@co.okanogan.wa.us and sfieldlarson@co.okanogan.wa.us.

Dated this 25th day of February, 2016.

/s/ Jill S. Reuter
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NICHOLS LAW FIRM PLLC

February 25, 2016 - 11:01 AM

Transmittal Letter

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Case Name:	State of Washington v. Don Arthur Moore
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Party Respresented:	Don Arthur Moore
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	Trial Court County: Okanogan - Superior Court # 13-1-00126-6

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- ☑ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to ksloan@co.okanogan.wa.us, sfieldlarson@co.okanogan.wa.us, and wa.appeals@gmail.com.

Sender Name: Jill S Reuter - Email: jillreuterlaw@gmail.com