SUPREME COURT NO. 96018-6

NO. 76108-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES COURTNEY,

Petitioner.

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

The Honorable George Bowden, Judge

PETITION FOR REIVEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Charles Courtney requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Courtney, No. 76108-1-I, filed April 23, 2018. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Statements during custodial interrogation are presumed coerced in violation of the Fifth Amendment unless the Miranda[1] warnings are given. Courtney was questioned in a detective's car after being told a witness had identified him as the shooter and there was probable cause to arrest him for murder. Must these pre-Miranda statements be suppressed because Courtney was effectively under arrest?

2. Under Missouri v. Seibert,[2] Miranda warnings may be ineffectual to negate the presumption of coercion when they are deliberately delayed until after the person has already confessed. Must Courtney's subsequent post-Miranda statements to the detective also be suppressed as the product of a deliberate two-step interrogation?

3. The court instructed the jury a person who is attacked may defend himself with force rather than flee; there is no duty to retreat. The

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

court also instructed the jury that "necessary" means no reasonable alternative to the use of force exists. Did the court err in defining "necessary" when that definition conflicts with and is likely to confuse the jury regarding the absence of a duty to retreat?

C. STATEMENT OF THE CASE

a. Courtney learns of a threat to his home.

Courtney confronted Michael Knierim, a guest in his home, about Knierim having sex with another of his guests, a sixteen-year-old runaway. 2RP[3] 678-79, 916-17, 972, 1544-45 Threats ensued on both sides. 2RP 681-83, 740, 753.

The evening of October 5, 2015, Courtney received word that Knierim would attack him on sight, that his house was "hot." 2RP 917, 1571-72; CP 832. Courtney and his significant other, dental hygienist Eileen Marasigan, believed this meant Knierim was coming to shoot up their home. 2RP 975-76; CP 832. Social media images showed photos of Knierim with a gun. 2RP 742-43. Courtney also threatened Knierim, but Knierim testified Courtney often talked nonsense and never followed through. 2RP 740, 1574.

Knierim, by contrast, came to Courtney's apartment complex in the middle of the night. 2RP 686-87, 753-54. He did not come alone. 2RP 686-

[3] There are 20 physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – April 13, 2016, June 2, 2016; 2RP – June 1, Aug. 12, Sept. 8-9, Sept. 12-16, Sept. 19-23, Sept. 26, Nov. 16, 2016; 3RP – Aug. 26, 2016; 4RP – Sept. 6-7, 2016.

87, 712-15. Two carloads of people arrived at the parking lot shared by the Taco Time and Courtney's apartment complex. 2RP 689, 712-15. Lauren Tomita was outside and saw Knierim with the group wearing bandannas over the lower half of their faces. 2RP 879, 1001, 1033, 1038. At least one carried a gun.[4] 2RP 1033-35, 1041.

Knierim's driver, Gabby Nogales, admitted she, Knierim, and the other drug dealers in the area, hated Courtney because he had recently arrived and begun dealing heroin. 2RP 643-44, 653-54. She admitted she keeps baseball bats in the car. 2RP 1753. When she later heard someone had been shot and killed, she assumed Courtney was the victim. 2RP 661, 667. She claimed the group's presence that night was a coincidence. 2RP 613-23.

Anthony Boro was part of the armed group with Knierim and Nogales. 2RP 1889. Social media showed him actively preparing and recruiting others for the trek to Courtney's apartment complex. 2RP 1759-65. The attachment to one message includes a photo of a baseball bat. 2RP 1761-62. On the way, Boro told Sea Land Ly he intended to rob Courtney.[5] 2RP 1890. Once there, Boro got separated from the group, and each car left without him, mistakenly believing he was in the other car. 2RP 624-25, 692.

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[4] Knierim admitted he owned a gun but claimed he did not bring it with him. 2RP 695, 742-44.

[5] Ly claimed he only went there to purchase narcotics from Courtney. 2RP 1889.

b. Courtney responds to the threat.

The mood in the apartment was frantic after Tomita told Courtney about the group. 2RP 955-57, 1041, 1579-80. Marasigan testified Courtney and their friend Jesse Landrum went outside and came back several times, believing Knierim was nearby. 2RP 950-51. Marasigan looked out and saw Nogales' maroon car. 2RP 951-53. Marasigan and the couple's roommates and guests hid in the hallway to stay away from the windows, Marasigan immobilized by fear. 2RP 955-57, 989. Then, Courtney looked through the peephole of the apartment and saw two men standing at the door.[6] 2RP 1299.

During his military service in Iraq, Courtney was trained as a scout. 2RP 1789. He learned to watch for quick movements and people with their faces concealed. 2RP 1790. In recent weeks, he had begun carrying a handgun for protection and had purchased ammunition earlier that day. 2RP 914, 946. A defense expert testified Courtney's traumatic experiences caused post-traumatic stress disorder (PTSD). 2RP 1809. PTSD causes heightened threat awareness and hypervigilance. 2RP 1797-98. It also leads to increased activity in the amygdala, the brain's fear center, and decreased activity in the pre-frontal cortex, responsible for conscious thought. 2RP 1811-12. In the expert's opinion, Courtney's PTSD impaired his ability to think things

[6] Courtney initially said someone jiggled the door handle as if trying to get in, but then agreed that did not happen. 2RP 1300.

through and caused him to view the situation as an immediate threat to himself and his family. 2RP 1814.

The men at the door turned and ran, so Courtney and Landrum gave chase. 2RP 703, 1299-1300. Aware Boro was not alone, Courtney sent Landrum another way and then stopped to wait so he would not be blindsided. 2RP 1299-1300, 1315. Boro ran out from a pathway between two buildings and reached for his waist.[7] CP 819. Courtney's military training and the sense of threat that had accompanied the evening took over. He took a stance, lined up his sights, and fired; he estimated he was about 20 feet away. 2RP 1296, 1308; CP 821. Later, when he showed police where he had been, police estimated the distance as about 80 feet. 2RP 1305.

Given his training, Courtney was fairly certain he had hit his target. CP 820. He returned to the apartment and told Tomita it was his first confirmed kill. 2RP 1051-52. He told Marasigan he got one of them and they would be safe now. 2RP 958. Later, in a phone call from jail, he told Marasigan, "I'm in here for murder 1 . . . because fuckers couldn't respect the fuckin' house." Exs. 31A, 31B.[8] He told her, "Six people came to my fucking house, six people came to my house and I saw one so I shot the fuck

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[7] Marasigan also told detectives Courtney had seen something he believed to be a gun in Boro's pants. 2RP 982, 984-85.

[8] For each phone call, citation is made both to the recording (exhibits 31A, 32A, 33A) and to the unadmitted transcripts for ease of reference (exhibits 31B, 32C, 33B).

out of him." Exs. 32A, 32C. He told her, "I proved through action that I don't fuck around." Exs. 33A, 33B. He told her, "I have a military background, trained to kill. . . . When I shot I knew he was gonna die." Exs. 32A, 32C. He explained he had shot someone who was "trying to break into our house." Exs. 32A, 32C.

Police found Boro deceased from a gunshot wound to the back, with a bandanna pulled snugly around his mouth and a baseball bat nearby. 2RP 507, 527, 1083, 1085-87. No one else witnessed the shooting. Several neighbors, however, had heard running footsteps, a gunshot, and exclamations such as, "Dude, you shot him," or, "I'll kill all you motherfuckers." 2RP 454-55, 458, 743-44, 811, 844-46.

Andrew Muilenburg claimed to have picked up Courtney that evening and brought him to his dealer, where Courtney purchased a quantity of heroin. 2RP 1395-99. Courtney also told Muilenburg he had shot someone in self-defense. 2RP 1414-15, 1430-31.

c. Police question Courtney.

The morning after the shooting, a deputy waiting outside his apartment building asked Courtney if he had seen or heard anything. 2RP 1150. Courtney told him he had heard something and agreed to speak with Detectives Brad Pince and Dave Bilyeu. 2RP 1150-51, 1203-04. Their conversation began outside Pince's car while Courtney had a cigarette. 2RP

55. Courtney agreed to record a statement inside the car, where it would be quieter. 2RP 59-60. Bilyeu left to attend to other matters. 1RP 25. At that time, Courtney was not a suspect. 2RP 61.

Pince told Courtney, "You understand that you're here on your own free will and you're free to go at any time? You don't have to give me a statement? Do you understand that?" CP 783. Courtney responded, "I didn't know that. No, sir." CP 783. Pince told Courtney the door was unlocked and he could leave at any time. CP 784. Courtney told Pince he heard a gunshot shortly before Landrum came running back up to the apartment. 2RP 1203-04, 1207.

While Courtney and Pince were talking, Bilyeu learned another detective had developed probable cause to arrest Courtney for murder based on a witness who identified him as the shooter. 1RP 27; 2RP 1259. Bilyeu quickly returned to Pince's car. 1RP 27. He got in the car behind Courtney (who was in the front passenger seat), tried (unsuccessfully) to silently tell Pince what he had learned, and sat with his gun in his lap pointed at Courtney through the back of the seat. 1RP 28-29, 31.

Bilyeu told Courtney a witness had identified him as the shooter. CP 808-09. Courtney said, "No." CP 808-09. Bilyeu responded, "Why would I believe you when you lied to me earlier?" CP 809. Courtney told him he was scared someone would hurt him. CP 809. Bilyeu asked, "Where's the gun?"

CP 809. Courtney answered, "What? I don't have a gun, sir." CP 809. Bilyeu retorted, "I didn't ask you if you have a gun. I asked you, where is the gun?" CP 809. Courtney said he did not know. CP 810.

Bilyeu then told Courtney there was probable cause to arrest him for murder. 1RP 30; CP 810. He did so with the goal of eliciting additional statements from Courtney. 1RP 30. Courtney first protested, "You said I could leave in ten minutes," but then when Pince tried to end the interview, Courtney admitted being the shooter. CP 810. He explained there had been a threat to kill him, someone tried to get into his home, and he did not want the person to get away and do it again. CP 810-11.

Pince continued to question Courtney about the shooting. CP 810-14; 2RP 73-75. Courtney asked for a cigarette because "I know I'm gonna get cuffed." CP 811. He also asked to talk to Marasigan. CP 813. Pince told Courtney he could either talk or not talk, but he could not have a cigarette break or talk to Marasigan. CP 811-13. Courtney became so distressed that he twice threatened to kill himself, the second time mentioning a pill in his hand. CP 813-15. This prompted a struggle during which Courtney told the detectives about the gun in his waistband and the knife in his pocket and was disarmed. CP 815-16; 1RP 32-33; 2RP 68-69.

Bilyeu placed Courtney in handcuffs, told him he was under arrest, and advised him of his Miranda rights. 1RP 33. A search of Courtney's

person revealed small bags of heroin, several more rounds of ammunition and just over $100 in cash. 2RP 1324-28, 1337-42; Ex. 157. When Courtney continued speaking, Bilyeu started recording again and re-advised him of his rights. 1RP 34. Then, Bilyeu questioned Courtney again. CP 818-30.

This second recording began with Bilyeu declaring Courtney was placed in handcuffs after admitting to the shooting. CP 818. Bilyeu then summarized Courtney's description of the events and asked Courtney to confirm. CP 818. Bilyeu then said, "tell me the whole story." CP 819. Courtney repeated his account, explaining he had shot Boro after seeing him reach for something at his side. CP 819. Bilyeu then questioned Courtney about the gun and the shell casing. CP 820-22. Courtney said he used the gun the detectives had just taken from him and gave the casing to Marasigan. CP 820-22. Bilyeu asked if Boro had anything in his hands, why Boro had tried to open Courtney's door, where Boro was hit, and whether he had said anything. CP 822-30. Courtney answered Boro had been holding his waistband, had tried the door because of Knierim, was hit in the back, and had said nothing. CP 822-30. Courtney then agreed to walk through the scene and show detectives how events had unfolded. 2RP 1289.

At a pre-trial hearing, the court determined Courtney's statements to Pince and Bilyeu, both before and after the Miranda warnings, were

voluntary and admissible because he was not in custody.[9] CP 736-37. In closing argument, the State specifically relied on Courtney's statements that he took his stance, lined up his sights, and fired. RP 1944-45.

d. Courtney seeks review.

The Court of Appeals affirmed Courtney's convictions for first-degree murder and possession of heroin with intent to distribute. App. at 1. The court held Courtney was not in custody when Bilyeu told him there was probable cause to arrest him for murder. App. at 14. The court further determined Bilyeu did not engage in an impermissible two-step interrogation with mid-stream Miranda warnings as prohibited by Missouri v. Siebert. App. at 20. The Court also found any error in admitting Courtney's statements was harmless. App. at 21. Finally, the court found harmless the erroneous jury instruction defining "necessary" to mean that no reasonably effective alternative to the use of force appeared to exist. App. at 24-25. Courtney asks this Court to grant review and reverse.

[9] Courtney's subsequent statements, such as inquiring about the official cause of Boro's death, were also admitted, with the exception of one statement which was excluded because it was in response to a query by the booking officer after Courtney had requested an attorney. 2RP 1451, 1454; CP 737-38.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

1. COURTNEY WAS EFFECTIVELY IN CUSTODY AFTER BEING INFORMED THERE WAS PROBABLE CAUSE TO ARREST HIM FOR MURDER.

Courtney asks this Court to grant review under RAP 13.4(b)(3) and (4) because this case presents significant constitutional issues and issues of public interest. Courtney was interrogated in a police car by two officers. Although he was initially there voluntarily, that situation changed when Bilyeu returned and told Courtney he had probable cause, based on a witness who knew Courtney, to believe Courtney was the shooter and arrest him for murder. Courtney's statements after this announcement and before he was advised of his Miranda rights should have been suppressed.

To protect against the coerced self-incrimination prohibited by the Fifth Amendment,[10] Miranda requires that, before being subjected to custodial interrogation, a person must be advised of the constitutional rights to silence and counsel. 384 U.S. at 478-79. Statements made without this protection are generally inadmissible at trial.[11] Id. at 479.

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[10] The Fifth Amendment provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." The protections of the Fifth Amendment apply to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Article I, section 9 of Washington's constitution likewise states: "[n]o person shall be compelled in any criminal case to give evidence against himself." The state and federal provisions are interpreted as providing the same protection. State v. Earls, 116 Wn.2d 364, 375-75, 805 P.2d 211 (1991)

Here, it was undisputed Courtney was interrogated. Interrogation includes statements or conduct designed to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Bilyeu's announcement of probable cause was interrogation because his goal was to elicit information and any information Courtney gave would be incriminating. 1RP 30; see Miranda at 476-77 (noting that virtually anything a suspect says can be used against him or her at trial). Confronting Courtney with probable cause was interrogation because it was both designed to and reasonably likely to elicit an incriminating response. Id. at 301-02.

The primary issue below was whether Courtney was in custody. 2RP 110-11, 117-18, 128-31. The answer is, "Yes," because a reasonable person would have believed himself to be effectively under arrest after learning the police had probable cause to arrest him for murder.

In the context of Miranda, custody is a term of art delineating circumstances that present a serious danger of coercion. Howes v. Fields, 565 U.S. 499, 508-09, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012). The test is objective, whether a reasonable person would have felt his or her freedom

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[11] The warnings are a pre-requisite for the admissibility of statements made during custodial interrogation unless another, equally protective, process is implemented, Miranda, 384 U.S. at 490. Voluntary statements made without Miranda warnings may, nonetheless, be used for impeachment purposes only. Harris v. New York, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

was restricted to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983); State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986). The Ninth Circuit described the inquiry as "whether a reasonable person in the circumstances would have believed he could freely walk away from the interrogators." United States v. Barnes, 713 F.3d 1200, 1204 (9th Cir. 2013) (citing United States v. Kim, 292 F.3d 969, 973-74 (9th Cir. 2002)). Appellate review is de novo. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

A reasonable person in Courtney's shoes would feel similarly to the defendant in United States v. DiGiacomo, 579 F.2d 1211 (10th Cir. 1978). There, the officers told DiGiacomo he could choose between immediate arrest and "voluntary" appearance at the Secret Service office the following morning. Id. at 1213. The court held this was the functional equivalent of custody and required Miranda warnings. Id. at 1214. Washington's Court of Appeals has similarly held that a person was in custody for purposes of Miranda when "any attempt to leave would probably result in immediate physical restraint or custody." State v. Dennis, 16 Wn. App. 417, 422, 558 P.2d 297 (1976).

Here, police had probable cause to arrest Courtney for murder. A reasonable person would believe he was in custody because he would be immediately arrested if he tried to leave. His only two options were to

"voluntarily" answer questions or be formally arrested. Courtney was subject to custodial interrogation beginning when Bilyeu informed him there was probable cause to arrest him for murder. DiGiacomo, 579 F.2d at 1213-14; Dennis, 16 Wn. App. at 422. His subsequent statements made without benefit of Miranda warnings should have been suppressed.

2. OFFICERS TOLD COURTNEY THERE WAS PROBABLE CAUSE TO ARREST HIM FOR MURDER BUT DID NOT ADMINISTER MIRANDA WARNINGS UNTIL AFTER HE HAD CONFESSED.

Courtney's post-Miranda statements to Bilyeu should also be suppressed due to the deliberate two-step interrogation technique. When a person has already confessed without benefit of Miranda warnings, subsequent warnings may be ineffective to protect the free exercise of the person's constitutional rights. United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006) (citing Seibert, 542 U.S. at 604-06). Post-Miranda statements must be suppressed when objective evidence shows (1) a deliberate two-step interrogation and (2) the Miranda warnings did not effectively apprise the suspect of a genuine choice whether to follow up on prior admissions. State v. Rhoden, 189 Wn. App. 193, 200-01, 356 P.3d 242 (2015) (citing Williams, 435 F.3d at 1158-61).

Courts inquire whether the objective circumstances, in addition to subjective evidence such as the officer's testimony, support an inference that

the two-stage process was used to subvert the protections of Miranda. Id. Objective evidence of deliberateness includes the timing and setting of each part of the interrogation, the completeness of the pre-Miranda interrogation, continuity of the pre- and post-Miranda law enforcement personnel, and overlapping content of the pre- and post-Miranda statements. Id.

The Ninth Circuit has explained that, once an officer has detained and interrogated a subject, "there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed." Williams, 435 F.3d at 1159. On the contrary, "the most plausible reason for the delay is an illegitimate one. . . the interrogator's desire to weaken the warning's effectiveness." Id.

Detective Bilyeu made a deliberate choice to engage in a two-part interrogation. He knew there was probable cause but chose to question Courtney instead of arresting him. 1RP 29. After arrest, Bilyeu turned on the recording and continued questioning Courtney. 1RP 34. The State may argue Bilyeu continued the questioning only because Courtney continued to talk. 1RP 34. But even so, Bilyeu did not simply let Courtney speak; he deliberately questioned Courtney to confirm and elaborate on Courtney's earlier unwarned statements. 1RP 34. Each step of this two-part interrogation involved a deliberate act by Bilyeu. 1RP 29, 34.

Justice Kennedy's concurrence[12] in Seibert concludes a two-step interrogation is more likely deliberate when the post-warning session resembles a cross-examination about unwarned statements. Seibert, 542 U.S. at 621. Here, Bilyeu began the second part of the interrogation by summarizing Courtney's earlier statement, then pressed him on details such as what gun he used, the location of the shell casing, what part of Boro's body was hit, and whether Boro said anything. CP 818-30. This cross-examination-like interrogation undermined the Miranda warnings because it conveyed the impression that, since Courtney had already confessed, all police needed to do was nail down the details.

When officers deliberately elicit statements in a two-step interrogation with a mid-stream Miranda warning, courts consider whether steps were taken to cure the effect of the delayed warnings. Rhoden, 189 Wn. App. at 199, 201 (citing Williams, 435 F.3d at 1160). These steps may entail a separation in time and location between the pre- and post-Miranda questioning or additional advice that the pre-warning statements are likely

[12] Justice Kennedy's concurrence is the holding of the Court because Seibert is a plurality opinion. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859 (1976)).

not admissible at trial. Seibert, 542 U.S. at 621; Rhoden, 189 Wn. App. at 201 (citing Williams, 435 F.3d at 1160-61).

Neither step was taken here. The second part of the interrogation occurred immediately after the arrest that interrupted the first part and in the same location. 1RP 30-41. Bilyeu advised Courtney of his Miranda rights but did not tell him the statements he had already made were likely inadmissible. 1RP 35-36.

In fact, the structure of the two-part interrogation suggested the opposite and was misleading. Bilyeu began by summarizing and asking Courtney to confirm his earlier confession, saying "Okay. So the dude comes to your door. He tries to get in. You open the apartment door, the guy's startled and he runs off and you yell, hey Jesse. . . . Jesse comes with you. So what happens?" CP 818. He then said, "Tell me the whole story." CP 819. As Justice Kennedy noted, "Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false." Seibert, 542 U.S. at 621.

Without any break or additional warnings regarding his pre-Miranda statements, the mid-stream warnings were ineffective to afford Courtney an intelligent and genuine choice about exercising his constitutional rights. The two-step interrogation subverted the legitimate interests the Miranda

warnings are designed to protect. Seibert, 542 U.S. at 618-19. Courtney's post-Miranda statements to Bilyeu should have been suppressed.

Admission of Courtney's statements in violation of Miranda and Seibert is constitutional error that requires reversal. See State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Constitutional error is presumed prejudicial unless the court can say that, beyond a reasonable doubt, the error did not contribute to the verdict. Rhoden, 189 Wn. App. at 202-03 (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). When the inadmissible evidence is a confession, this is almost never the case. Barnes, 713 F.3d at 1207 (quoting Williams, 435 F.3d at 1162).

Courtney's post-arrest statements were particularly damaging to his self-defense claim because they included details such as taking a stance, lining up his sights, and firing while Boro was running away. 2RP 1296, 1308; CP 821. The State relied on these details to argue for premeditation and against self-defense. 2RP 1930, 1945. Admission of these statements likely contributed to the verdict. Courtney's conviction should be reversed.

3. THE ERRONEOUS JURY INSTRUCTIONS IMPLIED COURTNEY HAD A DUTY TO RETREAT.

In instruction 23, the court correctly informed the jury that a person may defend himself when attacked; the law does not impose a duty to retreat.

CP 122. But instruction 26, defining "necessary," CP 125, likely confused the jury on this point.

The jury was also instructed that necessary means, "no reasonably effective alternative to the use of force appeared to exist." CP 125. Under this instruction, self-defense would appear unavailable if any reasonable alternative, including retreat, existed. When self-defense instructions are confusing or misleading, reversal is required. State v. O'Hara, 167 Wn.2d 91, 108, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010) (discussing State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996)).

In this case, a juror could view retreat as a reasonable alternative to the use of force. 2RP 1296, 1304. The instructions, in turn, would permit a juror to then conclude self-defense was not available. CP 125. Therefore, the instructions relieved the State of its burden to disprove self-defense. "It is constitutional error to relieve the State of its burden of proving the absence of self-defense." State v. L.B., 132 Wn. App. 948, 952, 135 P.3d 508 (2006) (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

In finding this error harmless, the Court of Appeals failed to appreciate several facts that could lead to reasonable doubt as to whether Courtney acted in self-defense. Boro could have, and likely did appear closer to Courtney at the time, given Courtney's initial estimate that Boro was only 20 feet away. CP 821. A person acting in self-defense is entitled to act on

appearances, and the jury was so instructed. CP 123; L.B., 132 Wn. App. at 952. Courtney had been threatened, and Boro was reaching for an item in his waistband. CP 819, 832. Running away does not prevent a quick turn to fire a gun. Moreover, the trial judge believed there was sufficient evidence for a reasonable juror to find Courtney acted in self-defense, or he would not have instructed the jury on that affirmative defense. 2RP 1917.

A reasonable juror could have found Courtney was in imminent fear for his life. Reversal is necessary because the misleading jury instructions likely contributed to the verdict. Walden, 131 Wn.2d at 478. Courtney asks this Court to grant review of this constitutional issue under RAP 13.4(b)(3).

E. CONCLUSION

Because this case raises significant constitutional issues and issues of substantial public interest, Courtney requests this Court grant review under RAP 13.4 (b)(3) and (4).

DATED this 27th day of June, 2018.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. CHARLES JEROME COURTNEY, Appellant.	No. 76108-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2018

APPELWICK, J. — Courtney was convicted of first degree murder and possession of heroin with intent to distribute. He argues that police elicited statements from him in violation of Miranda,[1] and that the trial court erred in its jury instructions. We affirm.

FACTS

The State charged Charles Courtney with the murder of Anthony Boro, and possession of heroin with intent to manufacture or deliver. The charges arose out of events occurring on October 5 and 6, 2015. On the evening of October 5, Boro, along with friends, went to Courtney's apartment complex. According to Courtney, that night an unknown person tried to open the door to his apartment, and Courtney and Jesse Landrum ran after him into the parking lot.

Courtney told police that the person, later identified as Boro, was running away from him. While Boro was running away in the parking lot, Courtney stopped,

[1] Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

pulled out his gun, and fired once. According to Courtney, Boro was about 20 feet away when he shot him in the back. After being shot in the back, Boro fell to the ground and died. Police determined, after doing a walkthrough of the apartment complex, that Courtney was about 80 feet away from Boro.when he shot him.

In the preceding weeks, various people, including runaway teenagers, had been staying at Courtney's apartment. One of the people staying with Courtney was Lauren Tomita. Michael Knierim also spent one night at the apartment. Knierim got into an argument with Courtney over Knierim's interaction with Tomita. Courtney and Knierim threatened each other in text messages and over the phone.

On October 5, 2015, Knierim was spending time with Boro, Isadora Nogales, and Sea-Land Ly, driving around in Nogales's car. That evening, they ended up at the park at Martha Lake. Across the street from the park was the apartment complex where Courtney lived. Ly testified that he and Knierim went to the apartments to purchase drugs from Courtney. Ly also testified that Boro said he wanted to rob Courtney. Ly, Knierim, and Boro were walking toward the apartments, but decided to leave when they saw Tomita, and whom they thought was Courtney or another one of his friends, outside.

Ly got into Nogales's car and they left the area. Another car picked up Knierim, and the two cars met at apartments on Casino Road. They realized that Boro was not in either car.

Police responded to a 911 call shortly before 1:00 AM on October 6. The responding officers arrived at the Altia Apartments and found Boro deceased, laying in the parking lot. Deputy Christopher Veentjer arrived at the apartments

just after 6:00 AM to do scene security, which included asking residents in the area if they had seen or heard anything. At one point, Deputy Veentjer asked detectives on the scene to speak to two people who said that they had heard something regarding the incident.

Detective Brad Pince spoke with one of the individuals, who identified himself as Courtney. Detective Pince asked Courtney if he would mind walking with him to his vehicle so they could talk privately, and Courtney agreed. Initially while they talked, Detective Pince and Courtney stood in front of Pince's truck. They talked for approximately 30 minutes outside of Pince's truck. Detective Dave Bilyeu was also there for most of the conversation. Courtney told Pince some information that Pince thought was relevant to the investigation, so Pince asked Courtney if he could record a statement. Courtney agreed. Pince asked Courtney to get into his truck to make it easier to hear the conversation on the recorder. Pince testified that Courtney did so voluntarily.

While in the truck, Pince sat in the driver's seat and Courtney sat in the front passenger seat.[2] Pince and Courtney were the only ones in the truck. The doors were closed and unlocked. After asking Courtney information about his identity, Detective Pince asked Courtney:

> Det. Pince: [Y]ou understand that, that you're here on your own free will and you're free to go any time? You don't have to give me a statement? Do you understand that?

[2] In the transcript of Pince's recorded conversation with Courtney, Pince states to Courtney, "[Y]ou're sitting on the driver's side." In his testimony, Pince clarified that it was a misstatement during the recording, and Courtney was on the passenger side.

Mr. Courtney: I didn't know that. No, sir.

Det. Pince: 'kay. . . . are you willing to give me a statement freely and voluntarily at this point?

Mr. Courtney: Yes, sir.

Det. Pince: N'kay. That . . . and we're sittin' in a vehicle but, but you're sitting on the driver's side and the door's unlocked and you can get out and go any time you want to. Is that accurate?

Mr. Courtney: Yes, sir.

(Boldface omitted.)

About 30 minutes into the recording, Detective Bilyeu returned to Pince's truck. In Pince's four door truck, Bilyeu sat in the back seat on the passenger side, directly behind Courtney. Bilyeu told Courtney that one of the teenagers staying with him said Courtney was the shooter. Courtney told the detectives that he was not the shooter. Then there was the following exchange:

Det. Bilyeu: Where's the gun?

Mr. Courtney: What? I don't have a gun, sir.

Det. Bilyeu: I didn't ask you if you have a gun. I asked you, where is the gun?

Mr. Courtney: I don't know where the gun is, what like, the pistol that he would have would be on him, most likely. And he left earlier. He left right before I left.

Det. Bilyeu: Well, Lead Detective Conley has probably [sic] cause for your arrest for murder.

Mr. Courtney: Well, I . . . you said I could leave in ten minutes and I'm coming back to the apartments anyways.

(Alteration in original.)

At this point, Detective Pince attempted to wrap up the interview:

Det. Pince: 'kay. Step out. Let's stop this ah, recording for a second here. . . .

Mr. Courtney: But he said that I could leave in ten minutes. You lied to me.

Det. Pince: The time is now 0835

Mr. Courtney: No.

Det. Pince: . . . hours . . .

Mr. Courtney: That's not fair. Okay. Okay. Wait though, wait then, wait, wait, wait, wait, wait, please. Wait, fine. Fine. I heard someone was tryin' to . . . hurt me and my family . . . me and the people inside the place. This guy, 2-0-6, that Payton knows.

Det. Bilyeu: Maybe we should turn the recording back on.

Det. Pince: The recording's still going.

Det. Bilyeu: Alright.

Mr. Courtney: Payton's uncle, a guy named 2-0-6, was trying to kill me. He was trying to rob me. That's what they were [telling] me. And it's what people were saying. So I went to get a pistol because I didn't want to get, I didn't want to get killed. . . . And then all this happened and then that guy was trying to get into my house. He was the . . . door was jiggling so I called Jesse. . . . And then when I opened the door he started running away. So I went after him. I had Jesse loop around the back and I shot him because I didn't want him to get away and I didn't want him, I didn't want it to happen ever again.

(Some alterations in original.)

The officers asked Courtney for more details. Courtney answered that the man he shot was trying to break into his house. Then, Courtney stated that he

wanted to get cigarettes because he said he knew he was going to "get cuffed." Pince replied that they were not going to have cigarettes yet, and that he wanted to clarify what happened. Courtney stated, "You lied before. I'd like it now before I go further." Pince asked him, "[A]re you telling me you don't want to talk anymore?" Courtney said he wanted to talk, and answered a few more questions. Courtney stated more than once that he wanted a cigarette, and then stated that he wanted to talk to his girlfriend, Eileen. Pince replied, "That's not gonna happen. You either talk to us now or you don't." Courtney said he was going to kill himself, but then continued to answer Pince's questions. After Pince began asking about the gun again, Courtney stated, "I can kill myself with the pill I have in my hand." At that point, Pince testified,

> I grabbed his arm. And then there was a little bit of a struggle and I took a gun off him, so there was some physical contact at that point. He was then moved from my vehicle and placed in handcuff [sic].

The officers arrested Courtney, and Bilyeu read him the Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Courtney voluntarily waived them. The officers resumed the recording and Courtney gave the officers more details about the shooting.

At the pretrial hearing under CrR 3.5, the court determined that Courtney's statements to Pince and Bilyeu, both before and after the Miranda warnings, were knowing, voluntary, and admissible.

Courtney was charged with one count of first degree murder and one count of possession of heroin with intent to manufacture or deliver. The jury found

Courtney guilty on both charges. The court imposed a standard range sentence with firearm enhancements for both counts. Courtney appeals.

DISCUSSION

Courtney makes four arguments. First, he argues that the court should have suppressed the statements he made before the police advised him of his Miranda rights, because he was in custody. Second, he argues that the court should have suppressed his statements after the Detective gave the Miranda warnings, because they violate the two-step interrogation test of Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). Third, he argues that the court's error in admitting his statements was not harmless, and that the error requires this court to reverse his conviction. Fourth, he argues that the jury instructions were ambiguous regarding self-defense and the duty to retreat, also requiring reversal.

I. *Miranda* Rights

Courtney argues the trial court erred when it admitted statements he made to police in a custodial interrogation before the police advised him of his rights under Miranda.

The United States Supreme Court has held that when the authorities take an individual into custody or otherwise deprive him of his freedom, it jeopardizes the privilege against self-incrimination. Miranda, 384 U.S. at 478. Under Miranda, before questioning a person, authorities must warn him that he has the right to remain silent, that anything he says can be used against him in a court of law, that

he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him if he so desires. Id. at 479.

If police conduct a custodial interrogation without Miranda warnings, statements made by the suspect during the interrogation must be suppressed. Id. To determine if a person was in custody, the court uses an objective test: whether a reasonable person in the individual's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). The defendant must show some objective facts indicating his or her freedom of movement was restricted or curtailed. State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004). This court reviews a trial court's custodial determination de novo. Id. at 36.

A. Custodial Interrogation

Here, Courtney argues that his encounter with detectives became a custodial interrogation when he was sitting in Detective Pince's vehicle and Detective Bilyeu told him that there was probable cause to arrest him for murder. Distinguishing this case from Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d. 317 (1984), he argues that he was in a police dominated atmosphere. And, he contends that a reasonable person would have believed himself to be under arrest after learning the police had probable cause to arrest him.

In Berkemer, the Supreme Court held that the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than that surrounding the kinds of interrogation discussed in Miranda. 468 U.S. at 438-39. Courtney contends that the scene of a homicide investigation is a more police dominated

atmosphere than a traffic stop. In State v. Ferguson, this court declined to find a custodial interrogation in the investigation of a vehicular homicide. 76 Wn. App. 560, 567-68, 886 P.2d 1164 (1995). There, this court noted that the seriousness of the potential traffic charge did not alter the analysis. Id. at 567. The mere fact that the police were investigating a homicide when questioning Courtney does not require this court to find that he was in custody.

Then, Courtney contends that he was in custody after Bilyeu told him a witness had identified him as the shooter and there was probable cause to arrest him for murder. He cites to non-Washington cases to support his argument that when police inform the person there is probable cause to arrest, this weighs heavily in favor of finding the person was in custody.

First, he relies on State v. Pitts, 936 So.2d 1111 (Fla. Dist. Ct. App. 2006). There, the court stated that "if a reasonable person in the suspect's position would understand that the police have probable cause to arrest the suspect for a serious crime such as murder or kidnapping, that circumstance militates strongly toward the conclusion that the suspect is in custody." Pitts, 936 So.2d at 1128 (footnote omitted). But, the court found that because police confronted Pitts with only a bare uncorroborated accusation that he had killed the victims—without any details concerning how, when, or where the crime was committed—it was not readily apparent that the detectives considered him the prime suspect. Id. And, even if a reasonable person in Pitts's position would have understood from what the officers said that he was a prime suspect, that would not be, in itself, dispositive of the custody issue. Id.

The uncorroborated accusation in Pitts resembles what police told Courtney here. In Pitts, during an interview with the suspect, police wrote down on a notepad, " 'TJ says Sammy killed these guys,' " (a false accusation against Pitts, the suspect). 936 So.2d at 1119. The officer intentionally left the notepad for Pitts to see it. Id. Here, the police told Courtney that a teenage witness, someone Courtney had known for about a week, said that he was the shooter. As in Pitts, this was an uncorroborated accusation that lacked details, and one that would not lead a reasonable person in Courtney's circumstances to understand that he was in custody.

Second, Courtney relies on State v. Schwerbel, 233 Or. App. 391, 226 P.3d 100 (2010). Article I, section 12 of the Oregon State Constitution requires that police give a suspect Miranda warnings when police interrogation occurs under " 'compelling' " circumstances or when that suspect is in full custody. Schwerbel, 233 Or. App. at 395 (quoting State v. Shaff, 343 Or. 639, 645, 175 P.3d 454 (2007)). A suspect is placed in compelling circumstances when a reasonable person in the suspect's position would have felt compelled to answer a police officer's questions. Id. In Schwerbel, the court's Miranda analysis centered on whether the police interrogation of the suspect occurred under "compelling circumstances." Id.

Conversely, the protection provided by article 1, section 9 of the Washington State Constitution is coextensive with that provided by the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Washington courts consistently hold that Miranda warnings are required when a reasonable person would believe

he was in police custody to a degree associated with formal arrest—not when a person would have felt compelled to answer a police officer's questions. See Lorenz, 152 Wn.2d at 36-37. Thus, the analysis in Schwerbel is not persuasive here.

Third, Courtney cites to United States v. Lee, 699 F.2d 466 (9th Cir. 1982). In Lee, two agents interrogated the defendant in a closed FBI car for well over an hour, as investigators were in and around his house. Id. at 468. The court affirmed the district court's finding that the defendant was in custody, because a reasonable innocent person in that circumstance could conclude that he was not free to leave. Id. Notably, the court sustained the suppression under the clearly erroneous standard, finding that the district court held a reasonable view of the evidence. Id.

This case differs factually from Lee because, here, police were not searching Courtney's apartment at the time of the questioning. Moreover, in a later decision, the 10th circuit found that Lee was decided under an outmoded standard of review. United States v. Jones, 523 F.3d 1235, 1242 n.2 (10th Cir. 2008). The Jones court noted that under Berkemer the question is not whether a reasonable person would believe he was not free to leave, which was the question the Lee court asked. Id. Instead, the proper inquiry is whether such a person would believe he was in police custody of the degree associated with formal arrest.[3] Id.

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[3] Believing one was free to leave might be dispositive of the question of whether the person believed he or she was in custody. But, the converse, believing that one was not free to leave, would not necessarily establish that the person was in custody to the degree associated with formal arrest. See generally 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.6(c) (4th ed. 2017) (noting that the Supreme Court has adopted an objective standard; determining whether the

Courtney argues that he was in custody when the detectives confronted him with probable cause to arrest him for murder. The only relevant inquiry is how a reasonable person in the suspect's position would have understood his situation. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997). Thus, it is irrelevant whether the police had probable cause to arrest the defendant, whether the defendant was a focus of the police investigation, whether the officer subjectively believed the suspect was or was not in custody, or even whether the defendant was or was not psychologically intimidated. Id.

This case is similar to Jones. There, after intercepting an iodine package addressed to Jones, agents approached Jones in a parking lot and asked to speak with her. Jones, 523 F.3d at 1237. She agreed to speak in the agent's car. Id. at 1238. Inside the car, an agent told Jones that she was not under arrest, did not have to talk to him, and was free to leave. Id. He told her the door was unlocked. Id. At one point, as in this case, an agent told Jones that he could arrest her based on the iodine package. Id. The encounter lasted about 45 minutes to an hour. Id. The court affirmed the district court's finding that Jones was not in custody when she spoke with the agent in his car. Id. at 1240. The court focused on key factors including: the agent told Jones she was free to leave; it was a less coercive environment; and the lack of police domination in the encounter. See id. at 1240-42.

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situation was "custodial" for Miranda purposes will often require a careful examination of all the circumstances of the particular case).

Applying these cases and Miranda's objective standard to these facts, the trial court did not err. Similar to the suspect in Jones, Courtney was not ordered into Detective Pince's truck. Instead, Pince asked to speak with Courtney inside the truck, to facilitate the recording, and Courtney agreed. As in Jones, the detective told Courtney the doors were unlocked, and that he could get out and go at any at time. The conversation in Pince's truck was about 45 minutes long, and the police did not attempt to block or restrain Courtney from leaving until he threatened to kill himself with a pill. At that point, the police had physical contact with Courtney and placed him in handcuffs. Pince also reminded Courtney more than once that he could choose to talk or not.

When Bilyeu joined them in the truck and sat behind Courtney, Bilyeu took his gun out of holster and held it on his leg, but Courtney could not see it. Bilyeu testified that the atmosphere did not change when he joined the truck, and that Courtney's demeanor did not change at all. While Bilyeu told Courtney that there was probable cause for his arrest, neither Pince nor Bilyeu told Courtney that he was going to be arrested. Bilyeu testified that after he told Courtney that there was probable cause for his arrest, Courtney's demeanor did not change, and he continued to answer questions, but was a "little more animated in his innocence." Pince testified, "We asked him questions and got the same answer. We weren't getting him to change his mind, so I was just getting ready to wrap up the interview." Pince tried to end the interview, and have Courtney step out of the vehicle. But, because Courtney said 'no,' told them to wait, and kept talking, Pince

did not end the interview. Then, Courtney stated that he had shot an individual. The decision to continue the interview was Courtney's.

Courtney was not in custody before his confession for Miranda purposes. A reasonable person in his position would not feel his liberty was restricted to a degree associated with formal arrest. The trial court did not err in denying Courtney's motion to suppress his statements before the Miranda warnings.

B. Post-*Miranda* Statements

Courtney first confessed before the police gave him Miranda warnings. After the police read him the Miranda warnings, he confessed again. Courtney argues that his post-Miranda statements must be suppressed as the result of a deliberate interrogation strategy that the Supreme Court declared unconstitutional in Seibert.

In Seibert, the police deliberately refrained from providing Miranda warnings as part of a "question first" strategy. See 542 U.S. at 605-06. Police took Seibert into custody and deliberately withheld the Miranda warnings:

> In arresting her, Officer Kevin Clinton followed instructions from . . . Officer Richard Harahan that he refrain from giving Miranda warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her without Miranda warnings for 30 to 40 minutes.

Seibert, 542 U.S. at 604-05. After Seibert confessed, police advised her of her rights, reminded her of her prior confession, and then went over the same information a second time during a recorded interview, all under the safe harbor of the Miranda warning. Id. at 605. Washington courts have held that the controlling constitutional rule of Seibert is that of Justice Kennedy's concurrence. State v.

Hickman, 157 Wn. App. 767, 774-75, 238 P.3d 1240 (2010). In Hickman, this court recognized that a trial court must suppress post-warning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning did not effectively apprise the suspect of his rights. Id.

1. Preserved Error

Courtney did not cite Seibert in the proceeding below, but he contends that the issue was preserved for appeal because, in his CrR 3.6 motion to suppress, citing State v. Erho, 77 Wn.2d 553, 463 P.2d (1970), he argued that the post-Miranda statements were inadmissible.[4] Alternatively, Courtney contends that if the issue was not preserved for appeal, the court should still address the admissibility of the post-Miranda statements, because it is manifest constitutional error that warrants review under RAP 2.5(a)(3).

In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). While Courtney did not argue the correct legal standard under Seibert, he did raise the substantive issue that the post-Miranda statements were inadmissible.

To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is of

[4] Courtney also briefly raised the issue at trial, arguing to the court that "the explicit purpose of not stopping that conversation, arresting him, and informing him of his right to remain silent is the fact that they want to continue eliciting incriminating responses."

constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To show the error is manifest the defendant must show actual prejudice. Id. at 99. Prejudice is shown when it is plausible that the claimed error had practical and identifiable consequences in the trial. Id. If the facts necessary to adjudicate the claimed error are not in the record, no actual prejudice has been shown, and the error is not manifest. Id.

The admissibility of a defendant's statements postarrest implicates the Fifth Amendment. See Hickman, 157 Wn. App. at 772-73. Courtney's post-Miranda statements were used at trial. The State, in closing, said,

> He intended to do the very act. What evidence do we have? These are from Mr. Courtney's own mouth, his own words to law enforcement, his own words to Detective Bilyeu, both during a recorded statement and a walk-through that he stopped -- he stopped right by that path, and he waited.
>
> And why did he wait? Because he knew Jesse Landrum was at the other end. He had told Jesse Landrum to go the opposite direction. So why not? You stand and you wait because you know if the other guy is coming the other way, he's coming back to you.
>
> He takes a shooting stance. . . This isn't some instantaneous act; he's waiting for a clear shot. He's watching as he runs away from him.
>
> He pulls his gun out of his holster. Yes, this is quick. Pulling it out, but he even says that he's getting a sight picture, lining him up. And he pulls the trigger as Anthony continues to run away from him.
>
> His statement to law enforcement . . . I knew I was going to hit him. What better statement of your intent when you pull the trigger, knowing that you're going to hit someone?

These comments closely mirror Courtney's post-Miranda statements:

> Mr. Courtney: I stopped at the . . . there's like a pathway . . . where the cars park on one side, . . . he runs down there. I'm like, Jesse go right side. So Jesse goes through

> and I wait. And when he comes out that side he has his hand out and I don't know what he's grabbing. I pulled out my pistol from the holster that I have and then I shoot so that I wouldn't like, I didn't want to get shot, too. . . .
>
> . . . .
>
> Det. Bilyeu: So this guy, was he running away from you?
>
> Mr. Courtney: Yes, [because] he, he knew I had a, a pistol. . . .
>
> . . . .
>
> Det. Bilyeu: Was he running or walking?
>
> Mr. Courtney: Running. And he was bolting. He was running and I was, I stopped. I'm prior service so my shot . . . I knew I was gonna hit him.

The State used Courtney's statements to argue intent and premeditation. It is plausible that these statements had practical and identifiable consequences at trial. We analyze the issue as manifest constitutional error, and address the substantive issue of whether the admission of the post-Miranda statements violated Seibert.

2. Deliberate Two-Step Interrogation

Courtney argues that Detective Bilyeu made a deliberate choice to engage in a two-part interrogation. Seibert requires a trial court to consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the interrogator deliberately employed a two-step interrogation technique to undermine Miranda. Hickman, 157 Wn. App. at 775. The objective evidence includes the timing, setting, and completeness of the

pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements. Id.

Detective Pince did not know who had shot Boro when he began the interview with Courtney. He could not have deliberately employed a two-step interrogation before he knew that Courtney was the shooter.

Interrogation refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that they should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Courtney stated that he had been told he could leave in ten minutes when the interview started, so Pince began to make a record that the interview was ending when Courtney objected and volunteered that he had shot the victim. There is no objective evidence that shows why Pince's attempt to end the interview would elicit an incriminating statement from Courtney. Courtney's confession to shooting the victim was a voluntary statement. After Courtney volunteered that he had shot someone, Pince gave him the choice to keep talking. Pince asked, "[A]re you telling me you don't want to talk anymore?" Courtney replied, "I want to talk. I just want . . . to get stuff." After Courtney was arrested and Bilyeu read the Miranda warnings, Courtney voluntarily waived them.

Courtney relies on State v. Rhoden, 189 Wn. App. 193, 356 P.3d 242 (2015). In Rhoden, police questioned the defendant while he was restrained with handcuffs in his home, before advising him of his Miranda rights. Id. at 196. Police then took him to another area of the home, advised him of his Miranda rights, and

questioned him a second time in the same vein. Id. The parties agreed that Rhoden was subject to custodial interrogation both before and after the Miranda warnings, and the court held that the trial court erred in failing to suppress Rhoden's post-Miranda statements. Id. at 199, 202.

Here, Courtney argues that Bilyeu made a similar choice in questioning Courtney when he had probable cause to arrest him, continued to question Courtney after his confession, and then gave him his Miranda warnings. But, in fact, Pince tried to end the interview after Bilyeu told Courtney that there was probable cause for his arrest, but Courtney stopped the detective and voluntarily stated that he had shot someone.

Courtney also cites United States v. Barnes, 713 F.3d 1200 (9th Cir. 2013). In Barnes, the defendant's parole officer summoned him to a meeting where FBI agents confronted him with evidence of his drug distribution and questioned him before advising him of his Miranda rights. See id. at 1203. The court found that Barnes was in custody during the interrogation. Id. at 1205. One of the agents testified that he believed that Barnes would think that he was not free to leave the meeting, and intended to question Barnes about his involvement in a crime. Id. at 1205. The court held that the agents made a deliberate decision to engage in a two-step tactic to contravene Miranda warnings. Id. at 1206.

Courtney argues that the officers here made a similar decision to delay Miranda warnings. But, Courtney was not in a position in which a reasonable person would have felt that his freedom was curtailed to the degree associated with a formal arrest. Thus, he was not in custody when Bilyeu told him there was

probable cause for his arrest, and Pince even attempted to end the interview after Courtney responded to Bilyeu's statement. The detectives did not deliberately employ a two-step interrogation to undermine Miranda.

The trial court did not err in admitting the post-Miranda statements.

3. Harmless Error

Courtney next argues that the admission of his statements in violation of Miranda and Seibert is a constitutional error that requires this court to reverse his conviction. He argues that the jury would have been far more likely to believe Courtney's self-defense claim without his statements to police. Since we conclude there was no error, we need not address this argument to reach our decision. But, for the sake of completeness we will address it.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If the untainted evidence at trial was so overwhelming that it necessarily led to a finding of guilt, reversal is not required, because there is no reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict. Id. at 426. The State bears the burden of proving a constitutional error harmless beyond a reasonable doubt. Id. at 425.

Here, the evidence clearly established that Courtney was the shooter. At trial, the State admitted into evidence the gun that the officers recovered from Courtney when they arrested him. An officer also testified about the shell casing recovered from Courtney's girlfriend, about four hours after the shooting, that the

officers believed came from Courtney's gun. And, other witnesses testified that Courtney admitted he shot someone. Eileen Marasigan, Courtney's fiancée, testified that she heard one gunshot and when Courtney returned to the apartment he said that he "got one of them." Tomita also testified that after Courtney returned to the apartment he said he "might have got my first one," which she clarified meant one "kill" or that he "killed somebody." Andrew Muilenburg testified that Courtney said he shot Boro in the back. Stanley Adams, a medical examiner who examined the victim, testified that the victim was shot in the back, and that the manner of death was homicide. Patrick Guanzon, a resident of the Altia Apartments, testified that he heard a gunshot and saw a man with a gun. Guanzon recognized the man as someone who lived in the apartment across from him. Guanzon testified that he heard the man with a gun say, "I'm going to kill all of you [expletive]." While Courtney's statements to police were a more detailed description of his actions, any reasonable jury would have reached the same verdict with the untainted evidence.

II. Jury Instructions

Finally, Courtney contends that this court should reverse his conviction because the jury instructions failed to make it clear that there is no duty to retreat when acting in self-defense. He argues that instruction 23 and instruction 26 were contradictory and likely confused the jury. He asserts that instruction 26 indicated that that there must be no reasonable alternative to the use of force, while instruction 23 indicated that the use of force is lawful even if retreat is a reasonable alternative.

The jury is to presume each instruction has meaning. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). Jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. O'Hara, 167 Wn.2d at 105. A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The 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. Id. at 474. When instructions are inconsistent, it is the duty of the reviewing court to determine whether the jury was misled as to its function and responsibilities under the law by that inconsistency. Id. at 478.

In instruction 21 (shown in part), the trial court instructed the jury that the homicide was justified if Courtney was acting in self-defense or defense of another:

> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

In instruction 23, the court gave the no duty to retreat instruction:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.08, at 263-64 (4th ed. 2016) (WPIC).

In number 25, the court also gave the aggressor—defense of self 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 kill 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.

WPIC 16.04.

And, in instruction 26, the court gave the jury WPIC 16.05, definition of necessary:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

Courtney likens this case to Walden. In Walden, the trial court's jury instructions on great bodily injury could have impermissibly restricted the jury from considering the defendant's subjective beliefs about the possible consequence of an assault by others. 131 Wn.2d at 473. Our Supreme Court held that the instructions were internally inconsistent, and that the definition of great bodily injury in one instruction was a misstatement of the law, requiring reversal. Id. at 478-79.

Here, the State argues that instruction 26 defining "necessary" was given in connection with instruction number 25, the first aggressor instruction. It asserts that the definition of "necessary" defined "necessity" in that instruction. It argues there was no inconsistency and that the instructions properly advised the jury of the law. We disagree.

WPIC 16.05 says to use the "necessary" definition "when the word 'necessary' is used in instructions relating to defenses in WPIC Chapters 16 and 17." WPIC 16.05, note on use at 259. The word "necessary" does not appear in the instructions given in this case. WPIC 16.04.01, Aggressor—Defense of Others, does use the word "necessary" and the note indicates to use WPIC 16.05 (Necessary—Definition) with this instruction. WPIC 16.04.01, note on use at 258. But, this instruction was not given in this case. The court gave WPIC 16.04, Aggressor—Defense of Self, which uses the word "necessity," but the note does not suggest the use of WPIC 16.05 with this instruction. WPIC 16.04, note on use at 256. Therefore, the trial court erred in giving the instruction defining "necessary" from WPIC 16.05.

Courtney asserts that the instruction error is constitutional error that requires reversal. Since the error infringed upon Courtney's constitutional rights, the error is presumed prejudicial, and the State has the burden of proving that the error was harmless. State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). The constitutional error cannot be declared harmless unless it was harmless beyond a reasonable doubt. Id. An error in instructions is harmless only if it in no way affected the final outcome of the case. Id.

Courtney contends that there was evidence from which a reasonable jury could have found that the State failed to disprove self-defense beyond a reasonable doubt. First, that he had been informed of a threat that an armed group of men had arrived at his apartment complex. And second, that he told police that he saw Boro reach for his waistband.

But, the overwhelming evidence at trial was that Courtney shot Boro in the back while Boro was running away from him, approximately 70 to 80 feet away. And, according to Courtney, he had chased Boro from his apartment, down stairs, and through the parking lot. No reasonable jury could conclude on these facts that Courtney shot Boro in self-defense. It could not have reached the conflict in the jury instructions. We conclude that, on this record, beyond all reasonable doubt the instructional error was harmless.

We affirm.

Appelwick, J.

WE CONCUR:

Spearman, J.

Leach, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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