SUPREME COURT NO. 97055-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERRELL WALL,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION ONE

Court of Appeals No. 79070-6-I
Pierce County No. 15-1-03750-3

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, TERRELL WALL, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Wall seeks review of the March 11, 2019, unpublished decision of Division One of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Wall was convicted of two counts of second degree assault. Over defense objection, the attending physician was permitted to testify to statements made by the victims at the hospital, under the medical diagnosis or treatment exception to the hearsay rule. Where the witness testified to statements of blame in addition to statements about the cause of injuries, did this improper admission of hearsay prejudice the defense?

2. Wall was convicted of first degree burglary, which required the State to prove he was armed with a deadly weapon or assaulted a person during the course of the offense. Where the record contained evidence that Wall was acting in self-defense, did the court's refusal to instruct on self-defense as to burglary deny Wall his right to present a defense?

D. STATEMENT OF THE CASE

The Pierce County Prosecuting Attorney charged appellant Terrell Rakai Wall with first degree burglary and first degree assault of James Heim and Danae Lizotte based on an incident at Lizotte's apartment. CP 1-3, 40-42; RCW 9A.52.020(1)(a), (b); RCW 9A.36.011(1)(a), (c). The State alleged that Wall was armed with a deadly weapon during each offense. CP 40-42; RCW 9.94A.530; RCW 9.94A.533.

Following the incident Wall called 911 and reported that he had been in a fight with two friends during which he cut his friend's ear with a box cutter and punched his friend in the face, and his hand was injured. Exhibit 1. He said he threw the box cutter away after he ran off, and he was calling from a park several blocks away. *Id*. The fire department picked Wall up at the park and transported him to the hospital. 8RP[1] 123.

While he was at the hospital, Wall spoke to his friend Nicholas Caratachea. 9RP 160. Wall told him that Lizotte had been cheating on Heim, and he was upset about it. 9RP 161. Wall had found some messages on Lizotte's phone, and he was going to show Heim, but he got mad and broke the phone. Then things escalated, he shoved Lizotte, Heim jumped in, and Wall shoved Heim. Wall said something about acting in defense. 9RP 162-63. When he realized how far it had gotten, he ran off.

[1] The Verbatim Report of Proceedings is contained in thirteen volumes, designated as follows: 1RP—12-16-16; 2RP—1-12-17; 3RP—3-29-17; 4RP—4-27-17; 5RP—5-19-17; 6RP—6-1-17; 7RP—6-5-17; 8RP—6-6-17; 9RP—6-7-17; 10RP—6-8-17; 11RP—6-12-17; 12RP—6-13-17; 13RP—7-7-17.

9RP 163. Wall told Caratachea he was pretty sure Heim had cut him with a knife. 9RP 164, 168.

Wall waited at the hospital a few hours for his injury to be treated and for police to arrive. 8RP 146-47. When Wall was contacted by police, he indicated he knew why they were there, and he was taken into custody. 8RP 143.

At trial Lizotte and Heim gave their descriptions of what happened. Heim testified he and Wall met in high school and they have been friends for about ten years. His girlfriend Lizotte was part of their group of friends, as was Caratachea, and they saw each other often. 9RP 230-31, 313. The evening before the incident, they were all at Caratachea's house. 9RP 232. At some point Wall was rude to Lizotte, and she and Heim left. 9RP 281, 315. They spent the night at Lizotte's apartment. 9RP 233, 318.

In the morning, Wall sent Lizotte a Facebook message apologizing for the night before. 9RP 323. He then texted that he was coming over, and when he arrived he knocked on the window. 9RP 282, 325. Lizotte went to the door to let him in. 9RP 242-43, 326. Heim said that Wall looked startled to see him, and Wall asked Lizotte to step outside. 9RP 245.

Lizotte testified that Wall took her phone and accused her of cheating on Heim. 9RP 327. He cornered her against a wall and refused to move when she told him to. 10RP 368. Wall smashed her phone and pushed her, and when she screamed Heim came outside. 10RP 369.

According to Heim, he heard Lizotte tell Wall to stop hitting her and give her back her phone, so he went out to the front porch. 9RP 248. Heim's clothes were in the bedroom right next to the front door, including his belt with his knife on it, but he did not get dressed before going outside. 9RP 283. When Heim got to the porch, Lizotte and Wall both looked angry, and Heim saw Wall throw Lizotte's phone to the ground. 9RP 248-49. Heim stood between Wall and Lizotte and told Lizotte they should go back inside. 9RP 250. He walked through the front door and Lizotte followed. 9RP 251; 10RP 369.

Once the door was shut, it was flung open again and Wall entered the apartment. 9RP 255; 10RP 370. Heim testified that Lizotte told Wall to leave, there was a pause, and then Wall shoved Lizotte down the hall. 9RP 255. Lizotte testified that Wall shoved her as soon as he walked in the door. 10RP 370. According to Heim, Wall was standing there staring at Lizotte on the floor, when Heim threw a punch at Wall and landed a blow to his left temple. 9RP 257-58. Heim testified that a brawl broke out between the three of them. 9RP 258-59. Lizotte saw Wall and Heim

punching each other, and she tried to get Wall to leave. 10RP 371. Wall hit her multiple times across her head and chest. 10RP 373. After the fighting went on for a few moments, Heim felt a sharp sting on his right ear. 9RP 259. Heim said he never had anything in his hand during the confrontation, and he never threatened Wall. 9RP 276. Neither Lizotte nor Heim ever saw Wall with a weapon either. 9RP 296; 10RP 373.

Wall left, and Heim ran outside. He was bleeding, and he asked Lizotte to call 911. 9RP 260-61. He realized he had injuries to his back as well as his ear. 9RP 266; 10RP 375-76. Lizotte had gashes across her collarbone and chest. 10RP 378. Heim and Lizotte were taken to the hospital in an ambulance, and their wounds were treated. 9RP 268; 10RP 377.

a. Admission of hearsay over defense objection

Dr. Benjamin Constance was the attending physician at Tacoma General Hospital who treated Heim and Lizotte. 9RP 176, 178-79. Constance testified that Heim had penetrating trauma injury to his neck, with a laceration crossing the base of his skull. 9RP 180, 182. Bleeding was able to be controlled, and a CT scan showed no damage to major blood vessels. 9RP 186, 189. A cut through the cartilage of his ear required surgical repair and would likely result in permanent scarring.

9RP 190-91. Heim also sustained stab wounds to his back which required multi-layer suture repair. 9RP 193-94.

Constance testified that medical professionals rely on medical records in the course of treatment, including annotations of information provided by patients regarding the nature or mechanism of injury. 9RP 196. He testified that Heim's records contained annotations of what Heim said about how his injury occurred. 9RP 197. When the prosecutor asked what Heim said, defense counsel objected that Heim's statements were hearsay. The court overruled the objection on the basis of medical diagnosis or treatment. *Id*. Constance then testified that Heim "alleged that he was defending a female and was stabbed by what he believed to be a box knife." *Id*.

Constance testified that Lizotte had penetrating wounds and lacerations to her neck, and two distinct lacerations to her chest. 9RP 199-200. Over defense hearsay objection Constance was permitted to repeat statements Lizotte made about how she sustained her injuries. 9RP 206. Constance testified that Lizotte alleged she and Heim were involved in an altercation with another friend, her laceration was caused by a razor, and she was also punched in the face. 9RP 208-09.

b. Refusal to instruct on self-defense as to burglary

At the close of evidence the defense requested self-defense instructions as to all three charges. 11RP 431; CP 95-97. Counsel argued that testimony that the cut on Wall's hand was possibly a defensive injury, that Wall told Caratachea he was acting in defense and he thought Heim had cut him with a knife, and that Heim had his knife that day meets the criteria for presenting self-defense to the jury. 11RP 432. The court agreed that there was sufficient evidence of self-defense to instruct the jury on that issue, but it expressed doubt that the defense applied to burglary. 11RP 431, 433, 444. Defense counsel argued that one of the elements of first degree burglary as charged was that Wall committed an assault or was armed with a deadly weapon, and self-defense would negate that element. 11RP 433. The court disagreed and instructed the jury on self-defense as to the assault charges but not as to the burglary charge. 11RP 450-51; CP 169.

The jury returned a guilty verdict on the burglary charge and found Wall guilty of the lesser included offenses of second degree assault. CP 183-87. It also returned affirmative special verdicts on the deadly weapon allegations. CP 188-90. The Court of Appeals affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER THE IMPROPER ADMISSION OF HEARSAY WHICH UNFAIRLY PREJUDICED THE DEFENSE CONSTITUTES HARMLESS ERROR IS AN

ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THIS COURT SHOULD REVIEW. RAP 13.4(b)(4).

The trial court admitted statements made by Heim and Lizotte to medical personnel under the medical diagnosis or treatment exception to the hearsay rule. ER 803(a)(4); 9RP 197, 206. To be admissible under this rule, the declarant's motive in making the statement must be to promote treatment, and the medical professional must have reasonably relied on the statement for the purpose of treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012), *review denied*, 177 Wn.2d 1009 (2013); *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). Thus, statements as to causation ("I was hit by a car") would normally be admissible, but statements as to fault ("…which ran a red light") would not. *Butler*, 53 Wn. App. at 217 (quoting 5A K. Tegland, Wash.Prac. § 367 at 224 (2d ed. 1982)).

There are some instances where it is necessary to delete the inadmissible portion of a statement and admit the rest. *Butler*, 53 Wn. App. at 217 (citing Tegland). For example, in *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003), the Court held that the trial court abused its discretion when it failed to redact from the victim's medical records statements attributing fault, where the redaction could have been made

while preserving the portions relevant to diagnosis or treatment. *Redmond*, 150 Wn.2d at 497.

In this case, statements of blame as well as causation were presented to the jury. The attending physician testified that medical professionals rely on statements from patients regarding the nature and mechanism of injury in making a diagnosis and anticipating potential injury. 9RP 196-97. His testimony was not limited to statements from Heim and Lizotte regarding the nature and mechanism of their injuries, however. He testified not only that Heim said he was cut with a box cutter, but that the injury occurred while he was defending Lizotte. 9RP 197. And he testified that Lizotte said not only that her laceration was caused by a razor but that she and Heim were involved in an altercation with another friend. 9RP 208-09. As the Court of Appeals held, the trial court abused its discretion in admitting these attributions of fault under the medical diagnosis exception to the hearsay rule. Opinion, at 7.

The Court of Appeals concluded, however, that the trial court's error was harmless. Opinion, at 7-8. While there was no question that Wall was the third person involved in the incident or that he used the box cutter, the circumstances under which he did so were disputed. It was the defense position that Wall was acting in self-defense during the encounter. Where the record contains evidence which supports this defense theory,

improperly allowing the jury to consider the hearsay statements of blame cannot be deemed harmless error.

2. WHETHER THE COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE, WHICH DENIED WALL HIS RIGHT TO PRESENT A DEFENSE, CONSTITUTES HARMLESS ERROR PRESENTS A CONSTITUTIONAL QUESTION THIS COURT SHOULD REVIEW. RAP 13.4(b)(3).

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Jury instructions are constitutionally sufficient only if they permit each party to argue its theory and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The trial court's refusal to instruct the jury on self-defense as to the burglary charge rendered the instructions in this case inadequate, because the instructions did not fully inform the jury regarding the lawful use of force or the State's burden of proof. Failure to give the proposed instructions denied Wall his right to present a defense.

The parameters of self-defense are set out in RCW 9A.16.020(3). Under that statute, the use of force is lawful "[w]henever used by a party about to be injured...in preventing or attempting to prevent an offense against his or her person…in case the force is not more than is necessary."

RCW 9A.16.020(3). "A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim." *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). A defendant is entitled to instructions on self-defense when the record contains some evidence, from whatever source, which tends to prove the defendant acted in self-defense. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Roberts*, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977).

The defense's threshold burden of production is low. The defendant is not even required to present evidence which would be sufficient to create a reasonable doubt; rather, any evidence that the defendant acted out of fear of injury will suffice. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *McCullum*, 98 Wn.2d at 488; *State v. Adams*, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). Once the defendant produces some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 199, 156 P.3d 309 (2007).

Here, although the court determined there was sufficient evidence to present the issue of self-defense to the jury, it did not believe the defense applied to a charge of burglary. 11RP 431, 433, 444. Where the trial court refuses to give a self-defense instruction based on a ruling of

law, review is de novo. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

To convict Wall of first degree burglary as charged in this case, the State had to prove that during the course of the burglary Wall was armed with a deadly weapon or assaulted a person. CP 162; RCW 9A.52.020(1)[2]. There was evidence that Wall used a box cutter at the end of the fight, although neither Heim nor Lizotte saw it, and it was not offered in evidence. 9RP 296; 10RP 400. Whether the box cutter constituted a deadly weapon was an issue for the jury. *See* CP 165. There was also evidence that Wall used the box cutter in his job at Costco, and he had come to Lizotte's apartment from work. 9RP 158-59, 252. The jury could infer that he was carrying a work tool, which he used to defend himself, rather than that he was armed with a deadly weapon.

As for the assault element of first degree burglary, the law recognizes that lawful use of force may negate an assault. *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997); *State v. Graves*, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999). The jury should have been

[2] (1) "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1).

instructed that if it found Wall's use of force was lawful, it could not rely on the alleged assault to convict Wall of first degree burglary.

The Court of Appeals held that the trial court erred in refusing to instruct the jury on self-defense as to the assault predicate of the burglary charge. Opinion, at 10. It concluded, however, that the error was harmless, because the jury was not persuaded by the self-defense argument as to the separate assault charges. *Id*.

"Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of fact.'" *Adams*, 31 Wn. App. at 396-97 (quoting *Allen v. Hart*, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)). "The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." *McCullum*, 98 Wn.2d at 488. Because the record contains some evidence that Wall acted in self-defense which would have negated an element of first degree burglary, he was entitled to have the jury instructed on that defense to the charge. *See Walden*, 131 Wn.2d at 473-74. The court's failure to so instruct the jury denied Wall his right to present a defense and relieved the State of its burden of proof.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Wall's convictions and remand for a new trial.

DATED this 9th day of April, 2019.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Terrell Wall,* Court of Appeals Cause No. 79070-6-I, as follows:

Terrell Wall/DOC#400607
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

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

Catherine E. Glinski
Done in Manchester, WA
April 9, 2019

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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March 11, 2019

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CASE #: 79070-6-I
State of Washington, Respondent v. Terrell Wall, Appellant

Pierce County, Cause No. 15-1-03750-3

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Frank Cuthbertson
Terrell Wall

FILED
3/11/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERRELL RAKAI WALL, Appellant.	)	No. 79070-6-I DIVISION ONE UNPUBLISHED OPINION FILED: March 11, 2019

MANN, A.C.J. — Terrell Wall appeals his conviction for first degree burglary and two counts of second degree assault. Wall contends that the trial court erred by admitting hearsay evidence and not instructing the jury on self-defense for the burglary charge. We affirm.

I.

The State charged Wall with two counts of first degree assault and first degree burglary, stemming from an incident on September 17, 2015, when Wall unlawfully entered Danae Lizotte's apartment and stabbed Lizotte and her boyfriend James Heim.

The evening before the incident, Wall, Lizotte, and Heim were socializing at the home of a mutual friend, Nick Caratachea. At some point during the evening, Lizotte

rejected an advance by Wall. Lizotte and Heim left together and spent the night at Lizotte's apartment in Tacoma.

The next morning, Lizotte received Facebook messages from Wall saying "[h]ey, I really didn't mean anything I said to you last night. Okay. I'll understand if you want to end our friendship." Lizotte did not respond. An hour later, Wall appeared at Lizotte's bedroom window. Both Heim and Lizotte were still in bed. Lizotte told Heim that she thought Wall was there to apologize.

Lizotte invited Wall inside the apartment to talk. From the hallway, Wall could see that Heim was lying in Lizotte's bed. Wall appeared startled that Heim was there, and asked Lizotte if they could talk outside. Once outside on the porch, Wall grabbed Lizotte's phone and accused her of cheating on Heim. Wall pushed Lizotte against the wall and smashed her phone.

Heim heard Lizotte yelling "stop hitting me," "give me my phone back" and heard the phone hit the ground. Heim, wearing only his undershirt and boxers, went outside to investigate. Heim positioned himself between Wall and Lizotte. Wall told Heim that Lizotte had cheated on him and the proof was on her phone.

Heim told Lizotte that they should go inside. As Lizotte followed Heim inside, she tried to close and lock the door behind her but Wall pushed his way inside the apartment. Wall then shoved Lizotte, causing her to fall against a dresser. Lizotte blacked out from the fall.

Heim, after witnessing Wall shove Lizotte, tried to punch Wall in the left temple. Heim indicated that his punch had no effect. Lizotte regained consciousness and saw Wall attacking Heim. Lizotte tried to punch Wall in the stomach, which also had no

effect. Lizotte attempted to get Wall off of Heim, but Wall shoved her against the wall and she blacked out for a second time. Heim felt a sharp sting on his right ear, reached over and recalled he could feel his skull bone. When Lizotte regained consciousness, she saw Heim's "ear hanging off of his face." Heim shouted at Wall, "oh my god, you punched my ear off" and told Lizotte to call an ambulance. Wall fled the scene. Lizotte called 911 on Heim's phone. Lizotte noticed that Heim had two long stab wounds on his back, was very pale, and that his lips were turning white.

Lizotte's disabled parents were home during the incident. Before the ambulance arrived, Lizotte's mother pointed out that Lizotte also had two long slashes across her chest. Lizotte and Heim were taken to Tacoma General for treatment.

Shortly after Lizotte called 911, 911 dispatchers received a call from Wall. Wall told the dispatcher: "I got in a fight with my friend, I took my razor blade and I cut one of my friend's ear, my hand is injured, and I punched my friend in the face." Wall stated that he threw the weapon when he ran off and identified the weapon as a box cutter. When asked if Wall was injured, he indicated he had a cut on his hand from a box cutter. Wall also stated he was "turning himself in." The dispatcher realized that Wall was associated with the incident that authorities were currently responding to at Lizotte's apartment.

Wall went to St. Joseph's Hospital. While at the hospital, Wall called his friend Caratachea to tell him about the incident. Caratachea testified at trial that Wall believed he was cut by Heim's knife, but that Wall did not say he saw Heim holding a knife. Caratachea also testified that Heim was known to carry knives.

During trial, the State called treating physician, Dr. Benjamin Constance, Chief of Emergency Medicine at Tacoma General to testify about Heim's and Lizotte's injuries. Dr. Constance described Heim's injuries as life threatening lacerations across the base of his skull. Dr. Constance described Lizotte as a "very, very high acuity emergency patient" because "[s]he had penetrating wounds and lacerations" to her neck and chest area, which put her at a high risk for injury to her lungs and the blood vessels of the neck and arms.

Both Lizotte and Heim testified at trial. Neither remembers seeing Wall holding the box cutter. The box cutter was never recovered. On the day of the attack, Wall was wearing his Costco uniform, which included a box cutter.

Wall rested without presenting evidence. During closing arguments, the defense argued that Wall was acting in self-defense when he assaulted Lizotte and Heim, and that the State did not prove beyond a reasonable doubt that Wall had the requisite intent to find him guilty of burglary. The jury convicted Wall of first degree burglary and two counts of second degree assault. The jury also returned a special verdict form that Wall was armed with a deadly weapon during the commission of the burglary and assaults. Wall appeals.

II.

Wall first contends that the trial court wrongfully admitted statements made by Heim and Lizotte to medical personnel under the hearsay exception to medical diagnosis. We disagree.

We review admission of evidence under ER 803(a)(4), the hearsay exception for statements made for purposes of medical diagnosis or treatment, under an abuse of

discretion standard. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001) overruled on other grounds by State v. Schierman, ___ Wn.2d ___, 415 P.3d 106 (2018). Since trial courts are granted broad discretion when making evidentiary rulings, such rulings will be reversed only if based on manifestly unreasonable or untenable grounds. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

ER 803(a)(4) provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the rule against hearsay. "The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment." Woods, 142 Wn.2d at 602 (citation omitted). Statements as to the causation of the injury are admissible, while statements attributing fault are excluded. Woods, 142 Wn.2d at 602 (citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE § 367, at 224 (2d ed. 1982)). A statement is "reasonably pertinent when (1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment." State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

Wall objects to two statements, one by Heim and one by Lizotte, as attributing fault to Wall and not being reasonably pertinent to diagnosis or treatment. During direct examination, Dr. Constance described the importance of a patient's "subjective history" in accurately treating the patient. Dr. Constance stated "[i]n the history of present illness, the patient's subjective history and the history that is provided by the patient is summarized as it pertains to the nature of the illness and it helps us in making a

diagnosis and anticipating the potential injury." The State then inquired into the nature of Heim's injuries and how they occurred. Dr. Constance responded that "the patient alleged that he was defending a female and was stabbed by what he believed to be a box knife."

Dr. Constance also testified to Lizotte's description of how she sustained her injuries stating "the patient alleges that she was involved in an altercation . . . her gentleman friend also involved in this altercation, having been occurred with somebody that was a known entity as well, and I believe she referred to him as a friend. I do not recall any recollection specific to what was used in the altercation." The State contends that neither of these statements identify a responsible party, and thus are not statements attributing fault to Wall.

Dr. Constance's testimony about Heim stating that he was stabbed with a "box knife" was properly admitted as reasonably pertinent to medical treatment. Heim's motive in making the statement was so doctors could adequately assess the necessary course of treatment. Dr. Constance indicated that he reasonably relied on the "nature or mechanism of injury" in course of treating the injury. Thus, the statement was properly admitted under ER 803(a)(4).

However, Dr. Constance's testimony that Lizotte identified her assailant as a "friend" and Heim indicated he was injured while "defending a female," are more problematic as they attribute fault. State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) is illustrative. In Redmond, our Supreme Court held that the trial court abused its discretion by admitting two unredacted portions of medical records that attributed fault to the defendant. The Court concluded that the statements "[Johnson] . . . was leaving

school yesterday and while on school grounds apparently an ex-student accosted and dragged Mr. Johnson from his auto" was inappropriate because referring to an "ex-student" attributed fault. Redmond, 150 Wn.2d at 497. Similarly, the statement "[Johnson] . . . was leaving school yesterday and was accosted in the parking lot by another male" was inappropriate. Redmond, 150 Wn.2d at 497.

The inadmissible statements in Redmond and Dr. Constance's testimony that identified the assailant as a "friend" are similar. While describing an assailant as a "friend" or "student" does not specifically identify the assailant, it does attribute fault to limited category of possible persons, including Wall. "Defending a female" also implies that Wall caused Heim's injuries, and thus attributes fault. Neither of these statements are reasonably pertinent to diagnosis or treatment. Thus, we conclude the trial court abused its discretion in failing to exclude this portion of Dr. Constance's testimony.

However, a nonconstitutional error is "harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial." State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257 (1992) (citation omitted). Since Wall had the opportunity to cross-examine both Lizotte and Heim, Wall's Sixth Amendment confrontation right was not implicated. U.S. Const. amend VI; see also Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). When the confrontation clause is not implicated, erroneous admission of evidence is analyzed under the nonconstitutional harmless error standard. State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). The admission of Dr. Constance's statement attributing fault to a "friend" is harmless error because other overwhelming evidence attributed fault to Wall. Wall admitted on the 911 call that he had been in a

fight with his friends and sliced one of his friend's ear with a box cutter. Wall's statements were admissible as statements against interest. ER 804(b)(3). Thus, while it was error to admit Dr. Constance's testimony attributing fault to Wall, the error was harmless.

III.

Wall next contends that the trial court erred by refusing to instruct the jury on self-defense as to the burglary charge, denying Wall the right to present a defense and relieved the State of its burden of proof. We disagree.

The standard of review for a trial court's refusal to grant the jury instructions depends on whether the refusal was based on a matter of law or fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A defendant is entitled to an instruction on self-defense when he presents some evidence of both his subjective good faith belief that he was in imminent danger of great bodily harm, and objectively, whether his belief was reasonable considering the defendant's situation. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002) (citation omitted). When a trial court denies a self-defense instruction because no reasonable person in the defendant's position would have acted as the defendant did, the standard of review is de novo. Read, 147 Wn.2d at 243. When a trial court denies a self-defense instruction because there is a lack of evidence supporting the subjective prong, the standard of review is abuse of discretion. Read, 147 Wn.2d at 243. Here, the trial court rejected the defendant's proposed instruction as a matter of law, thus the standard of review is de novo.

The trial court instructed the jury on self-defense as to the two assault charges and included a first aggressor instruction. The trial court refused to instruct the jury on

self-defense as to the burglary charge. Under RCW 9A.52.020(1), "[a] person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." Wall argued his theory of self-defense could negate either the element of being armed with a deadly weapon or assaulting any person.

Wall relies on the following testimony from Caratachea to argue Wall was acting in self-defense:

> I know that [Wall] told me he did something and like in defense of what had happened. . . . I guess he attacked them, and, um, at some point he realized where, like how far it had gotten, and I guess he stopped at that point and then he just ran off he said. . . . I know that apparently he had used his box cutter, but I don't remember if it was him telling me that or whatever. I don't remember exactly what, how he had described it. . . . [Heim] had just gotten in the way, and he understood why [Heim] had pushed him or hit him or whatever he had done because, you know, he had seen him push [Lizotte] and it was apparently a pretty hard push like a huge shove, and I guess she went flying into a wall or something like that, so it wasn't like delicate, and then that's when [Heim] jumped in. So he said he felt bad about what happened to [Heim], but I guess he just kind of got in the way.[1]

Additionally, Wall relied on evidence that Heim often carried a knife and had one in his pants pocket in Lizotte's bedroom, to support his self-defense claim.

Self-defense can be a defense to the assault predicate of burglary. Here, the trial court concluded that Wall was entitled to a self-defense instruction for the assault charges, but concluded as a matter of law, that the same evidence did not warrant a self-defense instruction for the assault predicate of burglary. Wall relied on identical

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[1] (Emphasis added.)

evidence to argue both theories of self-defense. Once the trial court gave the self-defense instruction for assault, it was an error not to extend the instruction to the assault predicate of burglary.

The trial court's error, however, was harmless. "An error affecting a defendant's self-defense claim is constitutional in nature." State v. Arth, 121 Wn. App. 205, 213, 87 P.3d 1206 (2004). Under the constitutional error analysis, an error in jury instructions is harmless if within the entire context of the record, it is harmless beyond a reasonable doubt. State v. Grimes, 165 Wn. App. 172, 187, P.3d 454 (2011). The trial court instructed the jury on self-defense as applied to the assault charges, and the jury found that the State proved beyond a reasonable doubt that Wall was not acting in self-defense. Wall relied on the same evidence for both theories of self-defense. Therefore, even if the trial court had instructed the jury on self-defense as to the burglary charge, Wall cannot establish the jury verdict would have been any different.

We affirm.

Mann, A.C.J.

WE CONCUR:

Andrus, J.

GLINSKI LAW FIRM PLLC

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