

67248-7

67248-7

NO. 67248-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
VALENTE ALVAREZ-GUERRERO,
Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Evidence proffered to establish the defendant was a drug dealer was not relevant pursuant to ER 401 and therefore inadmissible. Evidence proffered to establish the defendant was a drug dealer was more prejudicial than probative and therefore inadmissible pursuant to ER 403. Did the trial court properly exercise its discretion in excluding the defendant's personal claim the victim was a drug dealer, a potential witness' belief the victim was a drug dealer based on foot traffic into the victim and defendant's apartment, and a suspected crack cocaine pipe found in the victim's bedroom closet?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On May 29, 2009, the appellant Valente Alvarez-Guerrero was charged by Information with the crime of Murder in the Second Degree with a deadly weapon allegation. CP 1. On April 30, 2010, the charges against the appellant were amended to one count of intentional murder in the second degree with a deadly weapon allegation and one count of felony murder in the second degree

with a deadly weapon allegation. CP 5-6. A jury trial was held before the Honorable Julie Spector from February 7 to February 22, 2011. 1 RP 1; 5 RP 183¹.

The defense sought to admit evidence at trial that the victim, Arturo Guillen-Ramirez, was a drug dealer². 1RP 44-46; CP 12-14. The defense sought to admit the testimony from the appellant that the victim was a drug dealer, evidence that a suspected crack pipe had been found in the victim's bedroom closet, observations by a neighbor Sandra Ramirez that there had been significant foot trafficking into and out of the appellant's/victim's apartment, and Sandra Ramirez's knowledge of the victim's reputation for being a drug dealer. Id. The parties agreed that no illegal drugs had been found in the apartment save for the potential crack pipe, which had been discarded before any testing. 1RP 47, 52. The parties further agreed that toxicological testing found no drugs in the body of the victim. 1 RP 47, 64. The trial court, observing that evidence the victim was a drug dealer was prohibited ER 404(b) evidence,

¹ The respondent adopts the same method of reference for the verbatim report of proceedings as used by the appellant: 1RP - 2/7/11; 2RP - 2/8/11, 2/9/11, 2/10/11; 3RP - 2/14/11; 4RP - 2/15/11, 2/16/11; 5RP - 2/17/11, 2/22/11, 2/23/11; 6 RP - 5/20/11.

² The defense also sought to introduce that the victim frequented prostitutes. 1RP 44-45.

suggested the defense have Ms. Ramirez testify pretrial as to her knowledge of any acts of violence by the victim or her knowledge of the victim's reputation for violence/dangerousness. 1RP 53-57. The court observed that the crack pipe did not appear to be relevant since toxicological testing established the victim had no drugs in his system at the time of the crime. 1RP 63-66.

Prior to her testimony, the defense attempted to make a proffer as to the content of Ms. Ramirez's testimony.³ 1RP 111-12. The court summarized the proffer as that Ms. Ramirez heard the victim on one occasion arguing with his girlfriend and Ms. Ramirez believed there was physical fighting because she heard thumping. 1RP 115-16. The court ruled at this time that any testimony concerning alleged drug dealing by the victim would be excluded⁴ because there was no physical evidence of dealing and drug dealing does not equal violence. 1RP 116-18. Further the court found the evidence of alleged drug dealing was a backdoor attempt

³ The defense initially stated Ms. Ramirez would say that she regularly heard what she believed was Mr. Guillen-Ramirez beating up his girlfriend in the apartment, that he would be kicking at his apartment door, coming down the hallway intoxicated and behaving aggressively, and, on one instance, beat up his girlfriend. 1RP 111-12.

⁴ Evidence of prostitutes was excluded on the same grounds. 1RP 116.

to "trash" the victim. 1RP 118. The court found the appellant could testify to acts of violence on the part of the victim observed by the defendant. 1RP 116. The court allowed the defense to call Ms. Ramirez to determine if she knew the victim's reputation for violence. 1RP 118.

When Ms Ramirez did appear to testify pretrial and prior to testifying, defense counsel informed the court that Ms. Ramirez did not see a physical altercation between the victim and his girlfriend; she only saw an extremely angry and vociferous oral argument with thumping sounds. 2 RP 71. Ms. Ramirez testified pretrial and stated one day she had seen the victim arguing with his girlfriend. 2RP 75. During the fight the victim was angry, looked mad, was red in the face, had hair in his face, and made motions with his hands. Id. Ms. Ramirez, however, said it was only an argument and she had not heard anything that could possibly have been a physical fight. Id. The defense asked no questions whether Ms. Ramirez was aware of the victim's reputation for violence or dangerousness in the community. Id. at 73-76. After Ms. Ramirez's testimony, the defense affirmatively elected not to call

Ms. Ramirez as a witness for trial⁵. 2RP 111-112. The court finalized its exclusion of the crack pipe as not relevant and reiterated that assumptions the victim was dealing drugs were also excluded. 2RP 113, 118-122.

On February 23, 2011, the jury returned verdicts of guilty as charged as to count II, felony murder in the second degree, and as to the lesser included offense as to count I, manslaughter in the first degree. CP 18-19. The jury also returned a deadly weapon verdict. CP 20. Sentencing was held on May 20, 2011. CP 73. Count I was vacated. CP 70. The appellant was sentenced to a total period of confinement of 194 months. CP 72. This appeal timely followed. CP 98.

2. SUBSTANTIVE FACTS.

On May 28, 2009 at approximately 7:00 a.m., Seattle Police responded to a possible homicide reported by the Seattle Fire

⁵ Later, the defense sought to introduce Ms. Ramirez's observations of foot traffic into the apartment as corroborative evidence of the appellant's suspected testimony concerning visitors to the apartment. 2RP 119. The court denied this request on the grounds Ms Ramirez had not testified to these observations and, assuming she would testify to foot traffic, that evidence remained inadmissible propensity evidence. 2RP 119-122.

Department at an apartment building located at 7429 Rainier Ave S., Seattle, King County, Washington. 3RP 7-8. At that location, Arturo Guillen-Ramirez was found face down partially in the hallway, partially inside the doorway of Apartment #301. 3RP 8-9, 94. Guillen-Ramirez had significant stabbing wounds to his body. 3RP 47-50, 94. A large pool of blood surrounded his head. 3RP 10, 27, 93. The victim was fully clothed and two large bags with clothing and other personal items were near the doorway and the body. 3RP 25-31. Guillen-Ramirez was found unarmed. 3RP 31-32.

Seattle Police had responded to apartment #301 hours earlier at 11:52 p.m. on May 27, 2009. 4RP 7-8; Exhibit #22 at 6-7. The responding officers, Adley Shepherd and Nathan Patterson, found the appellant, Valente Alvarez-Guerrero, and victim, Arturo Guillen-Ramirez, in the apartment. 4RP 9-10; Exhibit #22 at 8-9. Guillen-Ramirez had a bloody mouth and nose and scratches on his neck. 4RP 11; Exhibit #22 at 9. The appellant looked like he had been in a fight. Exhibit #22 at 9. The officers spoke with both men. 4RP 11; Exhibit #22 at 10. The appellant told the officers that he had woke up angry because Guillen-Ramirez and a female friend had turned on the light and made a lot of noise. 4RP 12;

Exhibit #22 at 10. The appellant said he confronted Guillen-Ramirez. Exhibit #22 at 10. He said they argued and Guillen-Ramirez began to choke him. 4RP 12; Exhibit #22 at 11-12. The appellant said he freed himself from the chokehold by punching Guillen-Ramirez several times in the face. 4RP 12-13; Exhibit #22 at 12-13. The punches knocked Guillen-Ramirez to the ground. 4RP 13; Exhibit #22 at 13.

The officers determined the appellant was the aggressor, arrested him and took him to the South Precinct. 4RP 13-14; Exhibit #22 at 13-14. The officers saw the appellant had a pre-existing injury to his hand. 4RP 14; Exhibit #22 at 14. The appellant told the officers that he was scheduled for surgery later that same morning at Harborview Medical Center. 4RP 15; Exhibit #22 14-15. Realizing that the King County Jail would not book the appellant with his type of injury, the arresting officers decided to release the appellant so he could attend his surgery. 4RP 21-22; Exhibit #22 at 14. Officer Shepherd specifically told the appellant twice not to return to the apartment. 4RP 22. The defendant was released from the South Precinct at approximately 0105 hours. Id.

The victim's sister, Alondra Vasquez, received a call from the appellant at 5:47 a.m. stating that he (the appellant) had got into an argument with her brother (Guillen-Ramirez) and had shot him (Guillen-Ramirez). 4 RP 17. Ms. Vasquez lived in California. 3RP 13. The appellant asked Ms. Vasquez if she knew if Guillen-Ramirez was dead or alive. 3RP 17. She attempted to call her brother, but did not receive an answer from him. 3RP 18-19.

At 1017 a.m. on May 28, 2009, Associate King County Medical Examiner Dr. Brian Mazrim arrived at apartment #301 and began to process the body. 3RP 85-86, 92-93. Dr. Mazrim preliminarily determined that Guillen-Ramirez had suffered several sharp force injuries. 3RP 94. Sharp force injuries are either a stab or a cut caused by a knife or some other sharp object. Id. Mazrim opined that Guillen-Ramirez had died sometime between midnight and 4 a.m. that morning. 3RP 95.

The medical examiner's office took custody of the victim's body and performed an autopsy the next day, May 29, 2009. 3RP 98. Dr. Mazrim found that the victim had been stabbed in the left chest, the right back, and the head. 3RP 102-104, 110-111, 112. He also had defensive wounds to his right hand across his right 3rd,

4th, and 5th fingers consist with grabbing a knife blade. 3RP 113.

The stab wound to the victim's head entered his mid right eye brow and went through the victim's right eye, the left optic nerve and cut the pituitary gland, the pons, the left temporal and frontal lobes of the brain and the left cerebellum. 3RP 106. This wound was 4 and ½ inches deep. 3RP 108. Dr. Mazrim opined that it was this stab wound to the head that killed Arturo Guillen-Ramirez. 3RP 109.

Additionally, this stab wound, because it severed portions of the victim's brain, rendered Guillen-Ramirez immediately unconscious. 3RP 109. Had Guillen-Ramirez's body been upright when this wound was inflicted, he would have immediately collapsed. Id.

Mazrim testified that after Guillen-Ramirez collapsed into immediate unconsciousness, he would not have been able to regain mobility. 3RP 110.

At 6:15 p.m. on the day of the murder, May 28, 2009, detectives were informed the appellant had been stopped and arrested outside of Fresno, California. 4RP 42-43. He was taken into custody and his vehicle was impounded for processing. 4 RP 42-43, 50. Case detectives Jason Kasner and Cloyd Steiger flew to Fresno the next day, May 29th, to interview the appellant. 4 RP 43-44. The detectives began their interview of the appellant at 1:00

p.m. on May 29, 2009. 4RP 44. This interview was recorded and transcribed. 4RP 45, 49; Exhibit #27. The appellant admitted although he had been told not to return to the apartment, he decided to return to get his truck and leave. Exhibit #27 at 10. He said when he returned to the apartment building, he decided to get all of his stuff. When he entered the apartment, he encountered Guillen-Ramirez. Id. at 11. When Guillen-Ramirez attempted to call the police, the appellant admitted he took Guillen-Ramirez's cell phone from his hand. Id. The appellant said Guillen-Ramirez then grabbed a bag of clothes the appellant was carrying and would not let the appellant leave. Id. at 12. He said they were fighting in the kitchen when Guillen-Ramirez began screaming he had blood on his hand. Id. The appellant claimed he did not know the cause or source of the blood, but he decided to run from the apartment and drive to California. Id. at 12-13. He said he did not go to his scheduled surgery because they would be watching for him there. Id. at 13. The appellant said it was only a fist fight, no big deal. Id. at 15-16. When pressed by the detectives, the appellant said maybe he scratched Guillen-Ramirez's face. Id. at 19. When they confronted him and asked if he knew about the murder or the stab

wounds to Guillen-Ramirez's, the appellant said he did not. Id. at 22. When asked how many times he stabbed the victim, the appellant said he didn't think he stabbed the victim, asserting that he only scratched him. Id. at 23. Eventually, the appellant admitted that during the fight in the kitchen, he grabbed a six to seven inch knife and may have stabbed the victim. Id. at 24, 27-29. The appellant said that at one point during the fight, the victim said, "Oh, shit," and the appellant saw the victim's hand was bloody. Id. at 28. He said he knew he had screwed up and started to run. Id. Although physiologically impossible, the appellant claimed that the victim ran after the appellant into the hallway. 3RP 109-110; Exhibit #27 at 29. The appellant admitted that he had been very mad and this had been the worst he had ever lost his temper. Exhibit #27 at 30. He did not know what happened to the knife. Id. at 32.

The appellant testified at trial. 4RP 81-165; 5 RP 3-72. He testified after Guillen-Ramirez had gone to bed, that he, the appellant, had initiated the first fight by turning on Guillen-Ramirez's bedroom light and saying, "Now you know how it feels." 4RP 97-98. He said that after he had pushed Guillen-Ramirez's off of him,

Guillen-Ramirez said, "You just got beat up." The appellant testified that he responded, "Not yet, we are just getting started." 4RP 102; 5RP 11. The appellant said that he, the appellant, said, "Wrestling is for women, men fight with their fists." 4RP 103; 5RP 11-12. He further told the victim, "Get up, I don't want to beat you up on the ground." 4RP 103. He also said to the victim, "Don't be afraid, don't worry, I'm not going to kick you while you're on the ground." 5 RP 13. After Guillen-Ramirez got up, the appellant said he told Guillen-Ramirez to get his hands up, that he wasn't going to hit him like this. 4 RP 103-104; 5RP 13. Guillen-Ramirez responded that he was going to call the police. 4RP 104; 5 RP 13. The appellant admitted he did not flee the apartment in fear of Guillen-Ramirez. 5RP 15. He claimed that he never told responding officers that during the first fight he punched Guillen-Ramirez. 5RP 16. The appellant admitted that he had been told not to go back to the apartment until the next day. 5RP 17.

As he had told detectives, the appellant testified that when he returned to apartment, Guillen-Ramirez stated that he was going to call the police. 4RP 119-120; 5RP 21-22. The appellant admitted that he grabbed the victim's phone and refused to return it. 4RP 120; 5RP 21-23. When the victim grabbed the bag the

appellant was holding, the appellant now claimed that the victim hit the appellant in the mouth and the appellant had fallen backward. 4RP 121; 5RP 25-26. The appellant, with clarity he did not exhibit with the detectives, now stated that he opened a kitchen drawer and pulled out a 6 inch knife and threatened the unarmed victim with it. 4RP 121-122; 5RP 26-27. The appellant claimed that as he was backing out of the apartment, the victim grabbed the knife and attempted to turn the knife on the appellant. 4RP 125-126. The appellant admitted that the knife remained in his hand the entire time he was in the apartment. 5RP 30. He admitted that he had not seen a knife in the victim's hand during this incident. Id. at 30-31.

The appellant testified that as he neared the apartment door, he fell on his back, still gripping the knife, and the victim straddled him, striking him with a fist and struggling over the knife. 4RP at 126-130. At one point during the struggle, the appellant testified that the victim raised upright on his knees. 4RP 130; 5RP 44. The victim then looked down at his right hand. 5RP 44. The victim had a circle of something that appeared to be blood on his right hand. 4RP 130-131; 5RP 44, 46. Looking at his right hand, the victim

touched his right hand with his left and made a circular motion on his right hand. 5RP 44-45. Then the victim looked at his left hand and touched it in a similar fashion with his right. 5RP 45. The victim then softly said, "Oh, shit." 4RP 130; 5RP 46. The victim then said, "Now you're going to see." 5RP 46. Still holding the knife in his hand, the appellant said that he pulled his legs and feet from under the straddling victim, and ran from the apartment. 4RP 130; 5RP 45-47.

Although the knife never left his hand, the appellant claimed he never felt it enter the victim's skull. 5RP 46-47. Contrary to what he had told detectives, during his trial testimony, the appellant said he did not know if the victim followed him toward and into the hallway. 5RP 47. Even though the appellant maintained that he never knew he had stabbed the victim, he conceded that if a person stabbed another 4 inches deep in the back, 2 and ½ inches deep in the chest, and 4 and ½ inches deep in the head, the stabber would know they stabbed someone. 5RP 53. Maintaining he did not know he had seriously injured the victim, the appellant admitted that he did not attend his scheduled surgery, he did not collect tools in his locker, nor did he take the bags filled with his clothes. 5RP 54-55.

C. **ARGUMENT**

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE CRACK PIPE AND EVIDENCE THAT THE VICTIM WAS AN ALLEGED DRUG DEALER.

The appellant claimed he acted in self-defense when he inflicted injury to Guillen-Ramirez. In support of that claim, the defense sought to introduce evidence of Guillen-Ramirez's alleged drug dealing. Although no affirmative evidence of drug dealing such as drugs, scales, packaging, or client lists were found at the murder scene, the defense sought admission of a.) the appellant's claim the victim was a drug dealer, b.) the observations of a neighbor that there was considerable foot traffic in and out of the appellant/victim's apartment, c.) the neighbor's knowledge of the victim's reputation for being a drug dealer, and d.) the recovery of a suspected crack pipe in the victim's closet. The State opposed the admission of this evidence. After testimony and thorough argument, the trial court excluded the above mentioned evidence on the grounds it was inadmissible character evidence under ER 404(a) and 405, irrelevant under ER 401, and/or more prejudicial than probative under ER 403.

- a. The Trial Court Acted Within Its Discretion When The Court Excluded Evidence Alleging That The Victim Was A Drug Dealer And A Suspected Crack Pipe Had Been Recovered In The Victim's Closet.

In order to be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence". ER 401. Even if relevant, however, evidence may still be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403. We review a trial court's evaluation *707 of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403 with a great deal of deference, using a "manifest abuse of discretion" standard of review. State v. Russell, 125 Wash.2d 24, 78, 882 P.2d 747 (1994).

State v. Luvane, 127 Wn. 2d 690, 706-07, 903 P.2d 960(1995).

"Evidence of a person's character is generally not admissible to show action in conformity therewith on a particular occasion."

State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998), citing ER 404 (a). When a defendant asserts self-defense, "a defendant may introduce evidence of the victim's violent disposition to prove the victim acted in a violent manner at the time of the crime." Hutchinson, id., citing State v. Alexander, 52 Wn. App. 897, 900, 765 P. 2d 321 (1988). This evidence would be relevant to issue of first aggressor. State v. Alexander, id. "In this situation,

Rule 404(a)(2) allows the defendant to show the victim's quarrelsome or violent disposition." Teglund, Washington Practice, Evidence Law and Practice, (2011), section 404.6, citing State v. Adamo, 120 Wash. 268, 207 P. 7 (1922). "The victim's character need not have been known to the defendant to be admissible on the issue of who was the first aggressor." Id. As to the issue of whether the defendant had a reasonable apprehension of danger, the victim's reputation for violence or the victim's commission of violent acts are admissible if known to the defendant at the time of the incident. Teglund, Washington Practice, Evidence Law and Practice, (2011), section 404.6; State v. Negrin, 37 Wn. App. 516, 526, 681 P.2d 1287 (1984); State v. Walker, 13 Wn. App. 545, 549-550, 536 P.2d 657 (1975). Just as is true for decisions based on ER 401 and 403, trial court decisions on the admission of evidence under ER 404(a) are reviewed for abuse of discretion. State v. Perez-Valdez, 172 Wn. 2d 808, 814, 265 P.3d 853, 856 (2011).

- i. Appellant's knowledge of victim's alleged drug dealing.

The appellant's knowledge that the victim dealt drugs out of their apartment, if true, is not relevant to the issue of self-defense.

Specific acts of violent conduct on the part of the victim, if known by the defendant, are admissible to gauge the defendant's reasonable apprehension of fear. Evidence of dealing drugs without some additional evidence does not speak to the victim's violent tendencies. The defense proffer no evidence that the victim used or possessed weapons to further his drug dealing, that the victim injured or violently threatened any of his customers while drug dealing, or promised violent retaliation against the appellant if he interfered with the victim's alleged drug dealing. The defense was unable to "point to any particular instance of "violence." 1RP 56. The appellant's own admitted behavior in regards to the victim on May 27-28, 2009 revealed the victim's drug dealing held little or no threat in the appellant's eyes. The appellant instigated the first fight by turning on the victim's bedroom light. The appellant taunted and insulted the victim after the first fight concluded. The appellant returned to the apartment that morning. The defense proffered no evidence that this victim's drug dealing equated to a violent disposition or specific acts of violence that would be relevant to self-defense. The trial court was clearly within its discretion when it excluded such irrelevant testimony.

None of the appellant's cited authority stands for the proposition that a victim's status as a drug dealer or a victim's prior acts of dealing drugs is relevant evidence when a claim of self-defense is asserted. RCW 9.73.200 spoke of drug dealing and violence as justification for interception and recording of conversations without warrant. State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992), addressed whether a rational basis existed for the school bus stop zone sentencing enhancement.

The appellant claims drug dealing is admissible in a self-defense case by bootstrapping a victim's alleged drug dealing to a victim's possession and/or use of deadly weapons. Appellant's Brief at 18-19. None of the appellant's authorities, however, find evidence of drug dealing admissible in a self-defense context. United States v. Rivera, 844 F.2d 916 (2nd Cir. 1988) addressed whether sufficient evidence had been produced to establish constructive possession of a firearm. United States v. Simon, 767 F.2d 524 (8th Cir. 1985) considered whether evidence of drug dealing was admissible evidence as to possession of a firearm. United States v. Crespo, 834 F.2d 267 (2d Cir. 1987) considered whether federal agents lawfully entered the defendant's apartment

without a warrant. United States v. Torres-Rosario, 658 F.3d 110 (1st Cir. 2011) reviewed whether serious drug offenses were appropriate prior felonies to justify a prohibition on his possession of firearms. Both United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1993) and United States v. Brown, 188 F.3d 860 (7th Cir. 1999) considered whether federal agents had reasonable suspicion to stop and search a suspect. United States v. Brockington, 849 F.2d 872 (4th Cir. 1988) weighed the sufficiency of the evidence that the defendant's weapons were connected to his drug dealing. Although these cases, in general terms, mention the connection between drug dealing, violence, and weapons, none conclude that drug dealing is always violent, and thus, without any affirmative evidence of violence on the part of the victim, would be per se admissible in a self-defense case. No case so concludes because such a bald overgeneralization about the sale and delivery of drugs cannot legitimately be made.

In addition to not being relevant to self-defense under ER 401, specific acts of or a reputation for drug dealing alone is properly excluded under ER 403 because such evidence is far more prejudicial than probative. Otherwise, relevant evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. Here the evidence of drug dealing was clearly prejudicial and misleading⁶. On the facts here, any knowledge the appellant had of the victim's drug dealing did nothing to deter the appellant from engaging the victim, both verbally and physically, on multiple occasions. Rather than fairly weighing whether the defendant acted in legitimate self-defense, the jury would have been prejudiced against an alleged cocaine-selling victim. The proffer of this evidence was nothing more than an attempt to smear the victim and persuade the jury that the victim, being a bad drug dealing person, got what he deserved. Even if relevant, which it is not, the probative value of the evidence of drug dealing is overwhelmed by its prejudicial effect and was properly excluded by the trial court.

The appellant incorrectly claims that all evidence a defendant knows about a victim is admissible in a self-defense case. Appellant's brief at 15- 17. The appellant's own authorities provide examples of where inadmissible evidence known by the

⁶ Introduction of evidence of drug dealing alone is misleading because it requires the jury to assume facts not in evidence. The appellant did not assert the victim possessed a weapon or employed violence in his drug dealings. Accordingly, the jury would be left to speculate and employ a wide range of personal stereotypes about how drug dealers act.

defendant about the victim was properly excluded. State v. Despenza, 38 Wn. App. 645, 689 P.2d 87 (1984) (Suppression of reference to victim's membership in the Nazi party was found to be a proper exercise of the trial court's discretion); State v. Bell, 60 Wn. App. 561, 805 P.2d 815 (1991) (trial court did not abuse discretion in excluding evidence of the victim's homosexuality). Other cases have also properly excluded defense proffered evidence when self-defense was at issue. State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998) (victim's rude and intimidating behavior excluded because it was not evidence of a violent disposition).

- ii. Ms. Ramirez's observations and knowledge of victim's reputation for being a drug dealer.

Without considering the proof problems with Ms. Ramirez's testimony, her observations of high foot traffic into the appellant's/victim's apartment and her knowledge of the victim's reputation for being a drug dealer was properly excluded under ER 401 and ER 403 for the reasons argued above. Evidence of drug dealing alone is not relevant in a self-defense, and, if at all relevant,

evidence of drug dealing alone is inadmissible because it is far more prejudicial than probative.

Ms. Ramirez's proffered evidence of specific acts of drug dealing is extremely tenuous, and thus, even less relevant than the defendant's claims. Ms. Ramirez's observations of specific acts of drug dealing was nothing more than an assumption of drug dealing based on heavy foot traffic in and out of the appellant's/victim's apartment. This was never coupled with observations by Ms. Ramirez of actual drugs, drug paraphernalia, exchange of money, or verbalized request for drugs. Belief that this constituted drug dealing is speculation at best. Submitting this to the jury would be asking the jury to inappropriately speculate. This evidence is clearly not relevant under ER 401 because of its speculative nature.

Further, the specific acts observed by Ms. Ramirez of people coming to and going from Apartment #301 are not admissible under ER 405 (a). Evidence of a victim's violent disposition must be in the form of reputation evidence, not evidence of specific acts. State v. Hutchinson, id. at 886-887. "Specific acts may be used to prove character only where the pertinent character trait is an essential element of a claim or defense." Hutchinson, id., citing ER 405(b). "Specific act character evidence relating to a victim's alleged

propensity for violence is not an essential element of self-defense." Hutchinson, id.; State v. LeFaber, 77 Wn. App. 766, 769, 893 P.2d 1140 (1995); State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988); State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984).

Ms. Ramirez's proffered knowledge of the victim's reputation for drug dealing was also fraught with proof problems. Even prior to the multiple different representations by defense counsel as to what Ms. Ramirez would testify, the State requested a hearing be conducted to determine what precisely Ms. Ramirez knew. CP 103. When such a hearing was conducted, no attempts were made by the defense to establish Ms. Ramirez was aware of the victim's reputation for violence or for drug dealing. When questioned, it was discovered that Ms. Ramirez never saw the victim acting violent and had only heard him arguing with his girlfriend on one occasion. What Ms. Ramirez knew and did not know was unclear at best. Besides being properly excluded under ER 401 and ER 403, any reputation evidence was appropriately excluded because of a failed offer of proof.

iii. The crack pipe.

Evidence of the suspected crack pipe⁷ was properly excluded for the reasons cited above. The crack pipe was not relevant to the appellant's claim of self-defense. The pipe was more prejudicial than probative. Under State v. Hutchinson, Id., specific acts, such as possession of a crack pipe, are not admissible to prove violent disposition. Additionally, the crack pipe was irrelevant in regards to the victim's physical condition at the time of the incident. The toxicological examination of the victim's blood and urine from at the time of his death revealed no drugs in his system.

Like the proffered evidence of Ms. Ramirez, the asserted significance of the crack pipe was tenuous and speculative. The appellant asserted that the pipe was used by the prostitutes and drug buyers that came to the victim's room. It was never clarified how the appellant knew this nor how the presence of a suspected crack pipe in a closet would be evidence of the victim's violent

⁷ Only photos of the suspected pipe existed. The suspected pipe found in the victim's closet was not retained by police, and thus, was not available for drug analysis.

disposition. Like the other evidence proffered by the defense as to the victim's alleged drug dealing, the crack pipe was properly suppressed.

- b. The Defendant's Constitutional Right To Present A Defense Was Not Violated When The Court Excluded Evidence Alleging That The Victim Was A Drug Dealer And A Suspected Crack Pipe Had Been Recovered In The Victim's Closet.

The appellant claims that the court's suppression of evidence that the victim was a drug dealer and had a crack pipe in his closet denied the defendant his constitutional right to present his defense. Appellant's Brief at 14-15. Nothing could be further from the truth. The appellant was allowed to present a complete defense of self-defense to the jury. The defendant was allowed to testify as to how his actions were in self-defense. Thorough cross-examination of the officers who responded to the first incident, the case detective, and the medical examiner in support of the defendant's self-defense claim was conducted. The defendant's doctor was called to explain his preexisting injuries. Jury instructions on not only justifiable homicide but excusable homicide

were given. CP 44-50. Just because some of the defendant's proffered evidence is excluded, the appellant's right to present a defense was not violated.

The Sixth amendment to the United States Constitution and Const. art. 1, § 22 grant criminal defendants the right to present testimony in one's defense, Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514, 522 (1983). A criminal defendant has no constitutional right, however, to have irrelevant or inadmissible evidence admitted in his or her defense. Washington v. Texas, *Id.* 388 U.S. at 16; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (irrelevant evidence); State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (inadmissible evidence); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has a right to present a defense " 'consisting of relevant evidence that is not otherwise inadmissible' " (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992))). Only when the defendant's evidence is both relevant and admissible, does it become the State's burden to demonstrate that "the evidence is so

prejudicial as to disrupt the fairness of the fact-finding process at trial.” State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

As argued above, the excluded evidence was irrelevant and more prejudicial than probative. Suppression of irrelevant and/or inadmissible evidence does not elevate review of the trial court's decision to suppress evidence to one of constitutional magnitude. It does not change the scope of review from abuse of discretion to de novo. Here, the trial court's suppression rulings did not eviscerate the appellant's defense, but excluded only a small portion of the evidence the appellant sought to present to the jury. The appellant's self-defense claim was thoroughly presented to the jury minus irrelevant and inadmissible evidence.

The instant case is very similar to State v. Hutchinson, 135 Wn.2d. 863, 886-87, 959 P.2d 1061 (1998). In Hutchinson, the Washington Supreme Court upheld the trial court's suppression of proffered victim character evidence in a self-defense case. Hutchinson sought to admit evidence that one of the murdered police officers was intimidating and rude and had a history of verbally abusing people he confronted professionally and physically abusing suspects he stopped from driving while under the influence. Hutchinson had been stopped for driving while under the

influence. No violation of the constitutional right to present a defense was found in the Hutchinson case nor asserted.

- c. Even If It Was Error To Exclude The Crack Pipe And Evidence Of Alleged Drug Dealing, It Was Harmless Error.

Even if the trial court abused its discretion when it suppressed evidence of the victim's drug dealing and the crack pipe, the error was harmless. An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270, 280-81 (1993); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

There is no reasonable possibility that testimony about the victim's drug dealing, whether it be the appellant's or Ramirez's observations, the victim's reputation, or a crack pipe, would have enhanced the defendant's claim of self-defense to a degree that it would have changed the outcome of the trial. Had the evidence been deemed admissible, a limiting instruction would have been given. The evidence of drug dealing would only have been used by the jury to assess the reasonableness of the appellant's apprehension of fear and whether the victim was the likely first

aggressor⁸. Based on the appellant's own testimony, the victim's drug dealing did little to deter the appellant from engaging, taunting, and insulting the victim. Although the appellant claimed to know that his longtime roommate dealt drugs, the appellant continued to live with the victim. Although the victim was a drug dealer and had beat the appellant the evening before, the appellant returned to the apartment where he was likely to encounter the victim and maybe his drug customers. The appellant did not assert the victim possessed a weapon or employed violence in his drug dealings. The absence of weapons and lack of violent behavior in the victim's alleged drug dealing would have been emphasized during cross-examination rendering its significance to self-defense minimal. The fact, if true, that the victim dealt drugs, without something more, would have had little impact on the jury's conclusions.

Additionally, the credibility of the appellant's self-defense claim must be considered in light of the credibility of his testimony. Repeatedly, the appellant's credibility was put into question by his own claims and testimony. The appellant told police that the victim

⁸ In evaluating whether suppression was harmless error, the court cannot employ the prejudicial effect of this evidence that justified its exclusion under ER 403 in assessing whether the trial's outcome would have been different.

ran after the appellant after the victim was stabbed. He told the jury that the victim carefully examined blood on his hands and several comments after being stabbed. The medical examiner, however, testified that the victim would have, upon being stabbed in the head, immediately collapsed into unconsciousness. The appellant claimed that he had no idea that he had stabbed the victim even though he missed a necessary surgery, left his possessions, fled the city and the state, and called the victim's sister to see if the victim was alive. The appellant's description of the fight that killed the victim offers no explanation as to how the victim suffered three stab wounds including one to the back. The appellant's testimony concerning his lack of physical ability in his injured hand differed significantly with his own doctor. The appellant's recorded interview with case detectives presents more like a man attempting to avoid responsibility rather than a man who had to kill his best friend in self-defense. The appellant's suspect credibility must be taken into account when assessing whether the admission of evidence of the victim's alleged drug dealing would have made the appellant's claim of self-defense believable. Looking at the totality of the evidence, it would not. There is no reasonable possibility that testimony that the victim was a drug dealer or had a potential crack pipe in his

closet would have changed the outcome of the trial. If error to suppress this evidence, it was harmless error.

D. CONCLUSION

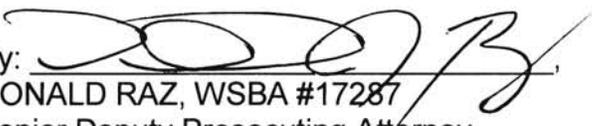
Criminal activity without a clear violent component is not violent activity, is not relevant, and is not admissible on the issue of self-defense. The trial court properly excluded the proffered evidence of the victim's drug dealing because it was not relevant and was more prejudicial than probative. Excluding but a small inadmissible portion of the appellant's case was not a constitutional violation of the appellant's right to present a defense. Even if exclusion of this evidence was error, any error was harmless.

The appellant's conviction and sentence for Murder in the Second Degree should be affirmed.

DATED this 17th day of May, 2012.

Respectfully submitted,

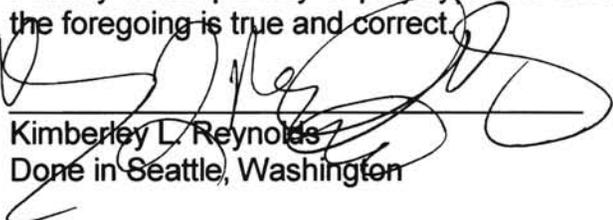
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. VALENTE ALVAREZ-GUERRERO, Cause No. 67248-7-I, in the Court of Appeals, Division I, for the State of Washington.

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



Kimberley L. Reynolds
Done in Seattle, Washington

5/17/12
Date