

NO. 46239-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DARRELL NEWTON NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 13-1-01034-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that there was a closure of the courtroom during jury selection when all jury selection proceedings occurred in an open courtroom?
2. Has defendant further failed to show the trial court's decision to admit evidence of defendant's conduct leading up to the assault was based on untenable grounds where such evidence fell within the res gestae of the offense and also would have satisfied the requirements of the 404(b) balancing test as it did not unduly prejudice defendant?
3. Did the trial court properly decline to hear defendant's writ of habeas corpus where such a writ was not properly before the court?

B. STATEMENT OF THE CASE.

1. Procedure

On March 12, 2013, the Pierce County Prosecuting Attorney (State) charged Darrell Nelson (hereinafter "defendant") with one count of second degree assault with a deadly weapon for threatening his teenage son with a knife. CP 1-2.

The case proceeded to a jury trial before the Honorable Ronald E. Culpepper. 1RP 4, 38.¹ Defendant requested a mistrial based on the need for further discovery after the jury had been impaneled but before opening statements were given. 1RP 93-94. The court granted defendant's motion, explicitly noting that double jeopardy was not implicated as the request for mistrial was made by defendant. 1RP 127-28.

Defendant's second trial began on February 26, 2014. 2RP 55. The State sought to admit evidence of a prior domestic violence incident between defendant and the victim that had occurred five days before the charged assault. 3RP 212, 214. The State argued that this evidence should be admitted to allow the jury to evaluate the victim's credibility with full knowledge of the dynamics of the relationship between the victim and defendant. 3RP 215. The State did not seek to introduce evidence of defendant's prior suicidal tendencies or paranoia at that time. 3RP 216. The court subsequently denied the State's motion, and ruled that the evidence of a prior assault was inadmissible. 3RP 222. On March 10, 2014, the court declared a mistrial after the jury had deliberated for several days and were unable to reach a verdict. 4RP 801-02.

¹ The State will refer to the verbatim report of proceedings as follows: 1RP: 11/14-25/13; 2RP: 2/26/14; 3RP: 2/27/14; 4RP: 3/10/14; 5RP: 4/15/14; 6RP: 4/16/14; 7RP: 4/24/14; 8RP 4/25/14; 9RP: 5/9/14; 10RP: 4/23/14; 11RP: 4/17/14; 12RP 4/21/14; 13RP 4/22/14. All remaining proceedings will be referred to by the date of the proceeding followed by the page number.

Jury selection for defendant's third trial began on April 15, 2014. 5RP 153. Both parties exercised their preemptory challenges at a sidebar conference while the jury venire was in the courtroom. 6RP 292. The sidebar was not transcribed into the record, however both parties' preemptory challenges were recorded and filed with the court. 6RP 292; CP Supp 242.

Defendant appeared pro se with the assistance of standby counsel at his third trial. RP(4/14/14) 4-5. During motions in limine, defendant sought to preclude the State from "offering any 404(b) evidence." 5RP 133. The court asked defendant what he intended with this motion, and defendant replied that he did not believe the holes he punched in the ceiling of his home were relevant to the commission of the assault. 5RP 135-36. The court concluded that specific instances of defendant's conduct leading up to the incident were admissible as res gestae to illustrate the children's fear of defendant. 5RP 136-38.

Defendant did not testify at trial. 7RP 791, 797. The jury subsequently found defendant guilty of second degree assault. 7RP 2; CP 168. The jury also found defendant committed the assault with a deadly weapon and that the crime was an aggravated domestic violence offense. 7RP 2-3; CP 169-71. At sentencing, defendant brought forth a writ of habeas corpus. 9RP 6-7. The court declined to hear defendant's writ. 9RP

23. The court imposed a high end, standard range sentence of twenty-one months confinement. 9RP 16; CP 227. Defendant subsequently filed a timely notice of appeal. CP 237.

2. Facts

On March 11, 2013, R.J.N.,² defendant's then fifteen year old son, went to defendant's residence after school. 12RP 460. R.J.N had lived with defendant and his three younger siblings until he was kicked out of the house three days prior because defendant began to suspect R.J.N of conspiring to steal defendant's marijuana. 12RP 447, 451-52, 456. As R.J.N. approached the house, his two younger siblings came out and told him to stay away because defendant was in a bad mood. 12RP 460. R.J.N. needed to use the restroom and proceeded inside the house. 12RP 461. R.J.N encountered defendant by the side door of the house. 12RP 461-62. Defendant attempted to grab R.J.N around his neck but R.J.N moved and defendant scratched him in the process. 12RP 462. R.J.N went inside the house and defendant followed. 12RP 463-64. Defendant ran at R.J.N. and pushed him into the stove. 12RP 464. Defendant began punching R.J.N with closed fists. 12RP 465. R.J.N sustained several bruises on his arms as a result. 12RP 466-69.

² Defendant's children were minors at the time. For purposes of anonymity, the State will refer to them by their initials.

Defendant grabbed R.J.N's backpack which R.J.N had brought into the house and set on the ground. 12RP 469-71. He proceeded to go through R.J.N's belongings despite R.J.N repeatedly telling him to stop. 12RP 470-71. Defendant began to read a note that R.J.N's friend had written to him. 12RP 471. R.J.N. grabbed the backpack and attempted to move it away from defendant. 12RP 471. Defendant then reached into the kitchen sink and grabbed a butcher knife. 12RP 472. The knife was approximately six to seven inches long with a sharp blade. 12RP 472-73. Defendant stood approximately a foot and a half away from R.J.N and pointed the knife toward his face. 10RP 695; 12RP 473.

R.J.N's then seven year old brother and nine year old sister, R.E.N., observed the incident. 10RP 675, 696. R.E.N. recalled how defendant told R.J.N. "I'm not afraid to hurt you with this" as he was holding the knife toward R.J.N. 10RP 696. R.J.N. proceeded to back away from defendant as defendant continued holding the knife for approximately forty seconds. 10RP 696. R.J.N. ran to a neighbor's house and called 911. 12RP 474-75.

Tacoma Police Officer Leslie Belford responded to the scene. 11RP 333, 340. He contacted R.J.N. at the neighbor's house and observed scratches on his neck and upper chest. 11RP 341-42. R.J.N. appeared shaken and nervous, and told the officers defendant had held a knife to his throat. 11RP 341, 354.

Upon entering defendant's residence the officers noted an overwhelming smell of marijuana. 11RP 358. They observed multiple marijuana plants and remnants of plants throughout the house, as well as multiple holes in the ceiling. 11RP 358-59. One of the younger children subsequently directed Officer Belford to the knife defendant had used in assaulting R.J.N. 11RP 360.

Officers contacted defendant at the residence and placed him under arrest. 11RP 380. Defendant informed the officers as he was transported to jail that he had already "kicked out" his eldest teenage sons because he believed they were conspiring with R.J.N to steal his marijuana. 11RP 386.

Two months prior to the assault, defendant began growing large amounts of marijuana in his home, which he shared with his six children. 10RP 676-79; 11RP 422-25. Defendant subsequently became very paranoid, and suspected that his children were stealing the marijuana from him. 11RP 426. In the following months, defendant's demeanor changed toward his children; he was quick to anger and acted very aggressive toward them. 11RP 426. In February of 2013, defendant expelled his two eldest children from the residence, believing that they were stealing marijuana from him. 11RP 424, 426-27. Defendant also began poking holes in the ceiling of his home in an attempt to catch anyone trying to steal his marijuana. 11RP 427. Defendant would also spray pepper spray

into the crawlspace area of his home to prevent anyone from taking his marijuana. 11RP 428.

Defendant subsequently enlisted R.J.N. to help him grow and tend the marijuana plants. 11RP 421, 425. Shortly after expelling his two eldest children from the residence, defendant began to suspect R.J.N of also trying to steal his marijuana. 12RP 447, 451-52. Defendant subsequently confiscated R.J.N's cell phone because he believed R.J.N. was using it to contact people when defendant was not around and scheme to steal the marijuana. 12RP 451-52.

Sometime in early March of 2013, defendant threatened to kill himself in front of his children. 12RP 452. Defendant attempted to leave the residence, and R.J.N. tried to prevent defendant from doing so. 13RP 593-94. Defendant became angry and punched R.J.N, causing him to sustain a black eye and bruise on his arm. 13RP 394-95. R.J.N. then ran to a neighbor's house and called 911. 12RP 454. Defendant proceeded to cut down several of the marijuana plants when he realized the police were on their way because he was over the allotted legal limit and did not want to "get in trouble." 12RP 455. Defendant told R.J.N. he could no longer live at the residence shortly thereafter. 12RP 456.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM WHERE JURY SELECTION OCCURRED IN AN OPEN COURTROOM.
 - a. RAP 2.5(a)(3) should be applied to right to public trial cases, as it is to other constitutional rights.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court “deprives the trial court of [its] opportunity to prevent or cure the error” thereby undermining the primacy of the trial court. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)(the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Id.* at 926-27. A defendant can demonstrate actual prejudice on appeal by making a “plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* at 935.

Prior to the adoption of RAP 2.5, the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. *State v. Marsh*, 126 Wash. 142, 145-46, 217 P. 705 (1923).

At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999)(internal citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate Procedure, and specifically RAP 2.5(a). *Id.* at 601. As noted in a recent opinion, *see State v. Beskurt*, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013)(Madsen, J. concurring), when the Supreme Court decided *State v. Bone-Club* in 1995, it cited to the rule in *Marsh* without taking into consideration the impact of RAP 2.5(a)(3). *See State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g., State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules

of Appellate Procedure and subverts the intent of RAP 2.5(a). *State v. Beskurt*, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013)(Madsen, J. concurring). The Court in *Bone-Club* did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: (1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; (2) it allows a defendant to participate in the procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and (3) as the *Marsh* rule does not require a defendant to show a manifest error or any actual prejudice before obtaining a new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their preemptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to

this procedure. 6RP 290-91; CP Supp 242. Defendant exercised all of his peremptory challenges thereby eliminating venire persons he did not want on his jury. CP Supp 242. Had defendant objected to these procedures and argued that they constituted a violation of his right to an open courtroom, the trial court might have opted for different procedures just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate his peremptory challenges. His failure to object to what he now claims was a courtroom closure within the scope of the right to a public trial and his inability to establish resulting actual prejudice should preclude appellate review. Despite the fact that he cannot show any actual prejudice from the procedures used, defendant nevertheless argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3), and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such, this Court should refuse to review his claim.

- b. The courtroom was open throughout voir dire proceedings.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). In general, this right requires that certain proceedings be held in open court unless application of the five-factor test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), supports closure of the courtroom. Whether a courtroom closure violated a defendant's right to a public trial is a question of law reviewed de novo. *State v. Wise*, 176 Wn.2d at 9.

The threshold determination when addressing an alleged violation of the public right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). “[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public.” *Id.* at 71. To make this determination, our Supreme Court in *Sublett* adopted an “experience and logic” test. *Id.* at 73.

To address whether there was a court closure implicating the public trial right, appellate courts employ a two-step process. *State v. Wilson*, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). First, appellate courts consider whether the particular proceeding at issue “falls within a category of proceedings that our Supreme Court has already

acknowledged implicates a defendant's public trial right." *Id.* at 337.

Second, if the proceeding at issue does not fall within a specific protected category, appellate courts determine whether the proceeding implicates the public trial right using the *Sublett* "experience and logic" test. *Id.* at 335.

"...[T]he exercise of peremptory challenges does not fall within the category of proceedings that automatically implicates a defendant's public trial right." *State v. Marks*, 184 Wn. App. 782, 788, 339 P.3d 196 (2014). In *State v. Wilson*, this Court held that only the voir dire aspect of jury selection automatically implicates the public trial right. *Id.* at 338-40. This Court used the term "voir dire" as synonymous with the actual questioning of jurors, referring to the "'voir dire' of prospective jurors who form the venire." *Id.* at 338. The plurality opinion of our Supreme Court in *State v. Slert* quoted this statement with approval. 181 Wn.2d 598, 611, 334 P.3d 1088 (2014). Therefore, as this Court concluded in *State v. Marks*, "this usage is not consistent with including the exercise of peremptory juror challenges in the meaning of 'voir dire.'" 184 Wn. App. at 787.

Furthermore, "the exercise of peremptory challenges does not satisfy the experience and logic test" set forth by our Supreme Court. *Id.* at 788. The experience and logic test requires the appellate court to consider: (1) whether the process and place of a proceeding historically have been open to the press and general public (experience prong); and (2)

whether access to the public plays a significant positive role in the functioning of the proceeding (logic prong). *State v. Sublett*, 176 Wn.2d at 72-73. If the answer to both prongs is yes, then the defendant's public trial right attaches and the trial court must apply the *Bone-Club* factors before closing the proceeding to the public. *Id.*

The issue of whether peremptory challenges made during a sidebar conference implicate the public trial right under the experience and logic test is controlled by this Court's decision in *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014). In *Dunn*, this Court held that the exercise of peremptory challenges did not satisfy either prong of the test. *Id.* at 575.

In deciding this issue, this Court adopted the reasoning used by Division Three of this court in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). The court in *Love* noted the absence of any authority suggesting that historical practices required that peremptory challenges be exercised in public. *Id.* at 918-19. The court cited *State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), in which the court suggested that peremptory challenges could be made in private. 176 Wn. App. at 918. The court in *Love* also stated that there is no need for public oversight of peremptory challenges, and that the written record of juror challenges satisfied the public interest. *State v. Love*, 176 Wn. App. at 919-20. This Court agreed with the Division Three's analysis in *Love*, and held that under *Dunn* and *Love*, exercising peremptory challenges does not

implicate a defendant's public trial right under the experience and logic test. *State v. Marks*, 184 Wn. App at 789.

Most recently, in *State v. Smith*, our Supreme Court held that sidebar conferences, even if held outside the courtroom, do not constitute a courtroom closure under the experience and logic test. 181 Wn.2d 508, 516-19, 334 P.3d 1049 (2014). The court noted that under the experience prong, sidebar conferences do not aid the public in assessing a defendant's guilt or innocence. *Id.* at 518. Under the logic prong, the court noted that "...rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness." *Id.* at 518.

In the present case, defendant does not point to any ruling of the court that excluded spectators or any other persons from the courtroom during the voir dire process. The record indicates that all of the voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Peremptory challenges were made by the attorneys in open court, albeit by a written process. 6RP 290-93. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP Supp 242. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges.

6RP 290-94. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP Supp 242.

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP Supp 242. This document is easily understood and made part of the open court record available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice. The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that is done in the course of a public trial be announced in open court.

Defendant has failed to show that any of the values served by the public trial right were violated by use of the written peremptory challenge procedure during the voir dire process when the written document created

in the peremptory process is later filed, making it a public record. In defendant's case, a public spectator could watch the attorneys writing down their peremptory challenge on a piece of paper and later see which venire persons had been subjected to a peremptory challenge by the fact that they were not called to sit in the jury box. If that spectator were curious as to which attorney had removed a particular venire person, he could ascertain that by examining the written public record. As defendant has failed to show that any improper closure of the courtroom occurred, this issue is without merit.

2. DEFENDANT FURTHER FAILS TO SHOW THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF DEFENDANT'S CONDUCT LEADING UP TO THE ASSAULT WAS BASED ON UNTENABLE GROUNDS WHERE SUCH EVIDENCE FELL WITHIN THE RES GESTAE OF THE OFFENSE AND ALSO SATISFIED THE REQUIREMENTS OF THE 404(b) BALANCING TEST AS IT DID NOT UNDULY PREJUDICE DEFENDANT.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Lormor*, 172 Wn.2d 85, 94, 257 P.3d 624 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*; *State v. Johnson*, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013)(citing *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008), *review granted*, 178 Wn.2d 1001, 308

P.3d 642 (2013); *State v. Johnson*, 159 Wn. App. 766, 773, 247 P.3d 11 (2011)(citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

- a. The evidence of defendant’s mental state in the weeks prior to the assault was properly admitted as res gestae where defendant’s growing paranoia culminated in his assault on his teenage son.

Washington courts have recognized, as a basis for the admission of other crimes evidence, criminal acts which are part of the whole deed. *State v. Bockman*, 37 Wn. App. 474, 490, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984)(citing *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971)). Under this “res gestae” or “same transaction” doctrine, evidence of other crimes or bad acts is admissible to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *Id.* at 490.

In *State v. Tharp*, the defendant was charged with second degree murder. 27 Wn. App. 198, 200, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591 (1981). The trial court admitted evidence of a series of uncharged crimes committed prior to and after the alleged murder. *Id.* at 592. The Court of Appeals held the admission was proper under the “res gestae” exception to ER 404(b). *Id.* at 206. The court explained:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant’s bad character. A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.”

State v. Tharp, 27 Wn. App. at 205. On appeal, the Supreme Court affirmed the “inseparable transaction exception, stating:

[T]he uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight therefrom. *Each offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.*

Id. at 594 (emphasis added).

Similarly, in *State v. Turner*, where the defendant was convicted of three counts of second degree assault and one count of reckless

endangerment arising out of a series of Halloween shooting incidents, the court held that the trial court properly admitted evidence of prior rifle-pointing incidents to show the defendant's frame of mind. *State v. Turner*, 29 Wn. App. 282-83, 290, 627 P.2d 1324 (1981). Turner was charged with having shot a firearm at passing vehicles, including a vehicle occupied by Kenneth Straight. *Id.* at 283-84. Testimony was introduced that, in a separate incident approximately five months earlier, Turner had pointed a gun at Straight and threatened to shoot him. *Id.* at 286. There was also testimony that approximately eight months before the shooting, Turner asked an officer a hypothetical question regarding the use of firearm in defense of his property. *Id.* The court held that the trial court properly exercised its discretion in admitting testimony that Turner had previously pointed a firearm at Straight and had inquired about the use of a firearm in defense of his property. *Id.* at 289-90. The court held that, under the facts of the case, "the prior incidents were relevant and necessary to prove the essential ingredients of the offense," where the evidence of the prior question about defense of property indicated a frame of mind relevant to proof of intent, and evidence of the prior shooting was probative of motive. *Id.* at 290.

Recently, in *State v. Grier*, this Court held that under the res gestae doctrine evidence of the defendant's prior threats and possession of a firearm in a murder case was admissible. 168 Wn. App. 635, 644-51, 278

P.3d 225 (2012). In that case, Grier was charged with the second degree murder of one of her friends, Gregory Owens. *Id.* On the day of the murder, Grier, Owens, and several of their friends were at Grier's house. *Id.* At some point during the day one of Grier's friends initiated a conversation with her about whether she could shoot anyone. *Id.* Grier responded that "yes, she could," saying "she could shoot [one of her friends] if she wanted to," then proceeded to pull out a gun that she owned, waived it around, and pointed it at one of her friends. *Id.* That evening, several hours later, Grier and Owens got into an altercation and Grier proceeded to shoot Owens. *Id.*

In affirming the trial court's admission of Grier's statements and acts prior to the murder, this Court noted that it did not characterize res gestae evidence as an exception to ER 404(b), noting that res gestae "bears little or no resemblance to the exceptions that ER 404(b) enumerates." *Id.* at 645-46. Rather, this Court stated that res gestae more appropriately relates to ER 401's definition regarding relevant evidence:

In our view, "res gestae" evidence more appropriately falls with ER 401's definition of "relevant" evidence, which is generally admissible under ER 402. For these reasons, we agree with the trial court that Grier's threatening behavior on the night of the murder was admissible as "res gestae" evidence, (1) not only because it arguably might have fallen under an ER 404(b) exception, but (2) also because it was evidence in the continuing events leading to the murder, relevant under ER 401, and, thus, not "prior misconduct" of the type generally inadmissible under ER 404(b).

Id. at 646-67 (internal citations omitted).

The case at hand is analogous to *Tharp*, *Grier*, and *Turner*. Here, defendant was charged with second degree assault, which required the jury to find that defendant: “acted with the intent to inflict bodily injury upon another, tending but failing to accomplish it and [the act was] accompanied with the apparent ability to inflict the bodily injury if not prevented;” or, acted “with the intent to create in another apprehension and fear of bodily injury” and “in fact create[d] in another a reasonable apprehension and imminent fear of bodily injury even though [he] did not actually intend to inflict bodily injury.” *See* CP 1-2, CP 156.

Both the victim, R.J.N, and another of defendant’s children, R.E.N., testified that in the weeks leading up to the assault defendant became increasingly aggressive, paranoid, and would often have dramatic mood swings. 11RP 426-28; 10RP 690-93. R.J.N. recounted how defendant would constantly accuse him of stealing defendant’s marijuana, so much so that it lead to a contentious and volatile relationship between the two which culminated in defendant expelling R.J.N from the residence three days prior to the assault. 12RP 447, 451-52, 56. Both children testified that as a result of this paranoia, defendant began punching holes in the ceiling of his house to catch people he thought were conspiring to steal his marijuana. 11RP 427; 10RP 685. R.J.N also testified to defendant’s suicide threat as an example of his unstable and

temperamental mental state at the time around when the offense occurred.
12RP 452-55.

This evidence was highly relevant to defendant's mental state at the time of the offense. Defendant's suicide threats reveal a man who was considering violence, even to himself, as a viable means of dealing with the stress of his situation. Defendant's actions of poking holes in the ceiling to capture persons trying to steal his marijuana are indicative of his poor mental process and paranoid beliefs at the time, which ultimately culminated to him threatening his son with a knife. As in *Tharp*, each of these actions was a link in the chain of events leading up to the assault. *State v. Tharp*, 27 Wn. App. at 594. It was necessary for this evidence to be admitted in order for the jury to have the full picture of defendant's mindset and actions leading up to the incident.

As in *Turner*, "the prior incidents were relevant and necessary to prove the essential ingredients of the offense." *State v. Turner*, 29 Wn. App. at 290. Although irrational, defendant's acts were intentional as a means of confronting his son over the perceived threat to his marijuana grow operation. The defendant's erratic behavior and suspicion of R.J.N was indicative of his intent to inflict bodily injury upon R.J.N. In the same manner, such actions are also relevant to show that R.J.N. would have a reasonable fear that his father would actually hurt him. Defendant's suicidal tendencies were also relevant to show that he had a

violent mindset and also would reasonably cause R.J.N. fear and apprehension that because his father was not behaving normally, he could be at risk of harm. All of this evidence was relevant to proving that an assault occurred when defendant approached R.J.N. with a knife.

Thus, the trial court did not base its decision on untenable reasons or untenable grounds when it found that this conduct was res gestae of the charged offense. 5RP 142-43. As the trial court aptly articulated: "...the activities of the defendant in the days leading up to this are...part of the res gestae, considering the children were talking about a pattern of behavior causing them to have fear of the defendant." 5RP 142-43. The jury was entitled to know why the children might have had a reasonable fear of the defendant, and therefore was permitted to know what events transpired immediately prior to the offense that ultimately caused defendant to act the way he did on the incident date. Defendant fails to show how the trial court abused its discretion when the evidence was properly admitted under the doctrine of res gestae.

- b. Defendant's actions leading up to the assault were properly admitted under ER 404(b) and any alleged error is harmless where the record contains ample evidence for the reviewing court to properly find the probative value of the evidence outweighed any prejudicial effect.

The decision to admit evidence of other misconduct lies within the sound discretion of the trial court; it will not be disturbed absent an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed.2d 322 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds. *Id.*; *State v. Johnson*, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013)(citing *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008), *review granted*, 178 Wn.2d 1001, 308 P.3d 642 (2013); *State v. Johnson*, 159 Wn. App. 766, 773, 247 P.3d 11 (2011)(citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Evidence of other misconduct is admissible under ER 404(b) to prove premeditation, motive, intent, opportunity, and to explain the circumstances surrounding an alleged offense. *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1994), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed.2d 322 (1998); *State v. Cook*, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). "ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case,

but...to prevent the State from suggesting...a defendant is guilty because he...is a criminal-type person who would likely commit the crime charged.” *State v. Foxhoven*, 161 Wn.2d 1687, 175, 163 P.3d 786 (2007)(quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

A trial court applying ER 404(b) is to: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identifiable fact more probable; and (3) balance the probative value of the evidence against its prejudicial effect on the record. *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995); *State v. Dennison*, 155 Wn.2d 609, 628, 801 P.2d 193 (1990). Although balancing should always be articulated on the record, a trial court’s ER 404(b) ruling may be affirmed in the absence of explicit balancing if the appellate court can determine the evidence was properly admitted from its review of the entire record. See *State v. Powell*, 126 Wn.2d at 264-65; *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996); *State v. Gomez*, 75 Wn. App. 648, 651-52, 880 P.2d 65 (1994).

“The trial court’s failure to articulate its balancing process on the record does not make admissible evidence inadmissible. The principal reason advanced for putting the balancing process on the record is that a

reviewing court needs it in order to decide whether the probative value of the evidence outweighed its prejudicial effect.” *Id.* In cases where the reviewing court can decide issues of admissibility without the aid of an articulated balancing process, the trial court’s failure to state the reasons for its ruling on the record becomes harmless error because it does not affect the admissibility of the evidence in question or impede effective appellate review of a trial court’s decision. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 p.2D 683 (1986). “To send a case back for retrial under such circumstances would be pointless.” *Id.*

Here, the trial court did not engage in an ER 404(b) balancing test because it admitted the evidence under a different theory, but the record is sufficiently developed to show that the evidence could have been admitted under the provisions of this rule. As noted above, defendant’s odd behavior in the days prior culminating in the assault of his son was properly admitted to prove defendant’s intent to inflict bodily injury. His actions were further probative in showing that he acted with intent to create apprehension and fear; and that R.J.N.’s fear was reasonable as it allowed the jury to understand the complete picture of why R.J.N feared his father might harm him at the time near the assault occurred.

Finally, any potential prejudice of the evidence was greatly outweighed by its probative value. A trial judge is best suited to evaluate a piece of evidence’s potential for prejudice within the dynamics of a jury

trial. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007)(citing *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)). As noted by the trial court, defendant's behavior, while certainly odd, was not criminal; nor was it used to argue conformity. Rather, it was used to establish that defendant was not acting normally at the time of the assault and that his odd behavior had started a short time prior to the assault. As the trial court aptly noted prior to admitting the evidence:

Where another offense constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury. These are not...poking a hole in the ceiling is not a crime, obviously, but it is odd....To the extent that the defense wants to go into this whole issue about looking into the backpack to find marijuana, this is the sort of is at least some indication maybe of a victim's fear of just how far he is willing to go about all kinds of things if he is willing to do things like that. That occurred in times proximate to that backpack search and the alleged wielding of the knife here.

5RP 137.

Given that the evidence admitted was not of any prior criminal acts or anything tending to prove defendant's propensity to commit an offense, any prejudicial affect was greatly outweighed by the evidence's probative value. If the court had balanced the probative value against its potential prejudice under ER 404(b), the record indicates the court would have found the probative value outweighed any unfair prejudice. The trial court's ruling could also be upheld under an ER 404(b) analysis.

- c. Defendant fails to show a limiting instruction, which he failed to request and now argues for the first time on appeal should have been given, would have changed the outcome of the trial.

Generally, failing to request a jury instruction at trial precludes appellate review of any alleged errors. *State v. Stevens*, 69 Wn.2d 906, 908, 421 P.2d 360 (1966). In *State v. Russell*, our Supreme Court held that under the plain language of ER 105, “the trial court has a duty to issue a limiting instruction only *upon request* for such an instruction.” 171 Wn.2d 118, 123, 249 P.3d 604 (2011)(emphasis in the original). “Nothing in ER 105 creates an affirmative duty on the part of the trial court to sua sponte give a limiting instruction in the context of ER 404(b) evidence.” *Id.* “This holding is consistent with over 40 years of Washington case law expressly addressing this issue.” *Id.*

Defendant does not identify in his brief where he requested a limiting instruction regarding the challenged evidence from the trial court. Ap.Br. at 27-28. Nor could the State locate in the record any such request. Defendant did not request a limiting instruction following the court’s pretrial ruling. 5RP 143. Nor did he request such an instruction following the admission of such testimony at trial. 11RP 371-77; 12RP 496-98. Defendant further did not request such an instruction at the conclusion of the trial before the case went to the jury. 7RP 798-803.

Defendant now argues, for the first time on appeal, that the lack of a limiting instruction prejudiced the outcome of the case. Ap.Br. at 27. Defendant claims that the absence of a limiting instruction resulted in the jury misusing the challenged evidence to convict him for being a bad person. Ap.Br. at 27. The law does not presume an otherwise properly instructed jury automatically defaults to deciding a case on superficial assessments of a defendant's character in the absence of a limiting instruction; otherwise, a special instruction would be mandatory whenever ER 404(b) evidence is admitted; it would not be a discretionary matter. *See, e.g. State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009). Having failed to request a limiting instruction in the trial court, defendant may not assign error to the failure to give one on appeal.

Finally, even if this evidence was improperly admitted, the error is harmless. Evidentiary errors, even those under ER 404, are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Tharp*, 96 Wn.2d at 599, 637 P.2d 961 (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

In this case, while the challenged evidence is relevant to defendant's mental state at the time of the assault and his creation of a reasonable fear of injury, it is not reasonably probable that the jury's

verdict would have been different without it. The fact that there was a grow operation in the house was seen by the officers responding to the call regarding the assault; they also saw the holes defendant had punched in the ceiling. Defendant's own statements to police reflected his paranoia that his children were conspiring to steal his marijuana from him. Thus, these aspects of the challenged evidence were before the jury in other unchallenged evidence. That leaves only the evidence of his prior threats of suicide and evidence that his paranoia had been growing worse leading up to the assault. Neither aspect creates any doubt about the credibility or reliability of the victim or eyewitness to the assault, thus it is more than probable that the verdict would have been the same even if the challenged evidence had not been admitted. Any error would be harmless.

3. THE TRIAL COURT PROPERLY DECLINED TO HEAR DEFENDANT'S WRIT OF HABEAS CORPUS WHERE SUCH A WRIT WAS NOT PROPERLY BEFORE THE COURT.

A writ of habeas corpus is a civil action for the enforcement of the right to personal liberty. *Honore v. Board of Prison Terms & Paroles*, 77 Wn.2d 660, 663-64, 466 P.2d 485 (1970). Such a writ is generally subject to the rules governing civil proceedings. *In re Becker*, 96 Wn. App. 902, 907, 982 P.2d 639 (1999)(citing *Summers v. Rhay*, 67 Wn.2d 898, 902,

410 P.2d 608 (1966), *modified on other grounds by Honore*, 77 Wn.2d at 664, 677).

In order for habeas corpus petitions to be heard, they must be perfected and properly filed and served. *See State v. Dallman*, 112 Wn. App. 578, 583, 50 P.3d 274 (2002). Because habeas corpus petitions are civil matters, they should be filed under a separate, non-criminal, case number. *Id.* at n.7. “This insures that the trial court examines the petition, not the details or facts underlying the criminal action, in determining whether the petition presents a prima facie claim of unlawful detention.” *State v. Dallman*, 112 Wn. App. at 584, n.7.

In *State v. Dallman*, the defendant, who was incarcerated at the Washington State Department of Corrections, filed a habeas corpus petition under his criminal case number, which was ultimately dismissed by the superior court. 112 Wn. App. at 581-82. On appeal, this Court held that Dallman did not properly file nor serve his petition, and thus the court correctly dismissed it. *Id.* at 583-84. This Court noted that “[b]ecause Dallman was detained by the Washington State Department of Corrections, the proper respondent to his habeas corpus petition was the Attorney General’s Office of the State of Washington, not the Pierce County Prosecutor’s Office.” *Id.* at 584. This Court concluded that because there was no proof that Dallman ever properly served the petition

on the proper parties, the petition was not perfected for the trial court's review and thus properly dismissed. *Id.* at 584.

Dallman controls here. Defendant in this case brought forth a writ of habeas corpus at his sentencing hearing. CP 172-220; 9RP 5-7. The writ had the same caption and case number as the criminal case. CP 172. The court declined to hear defendant's writ, noting that sentencing was not the appropriate time for this issue to be raised. 9RP 6, 23. As this Court aptly noted in *Dallman*, defendant's petition was not perfected as he did not properly file nor serve his petition. Defendant filed his writ under his criminal case number, and did not notify the proper party: the entity detaining him. The court was under no obligation to entertain an improper writ of habeas corpus. The trial court properly declined to hear defendant's petition.

D. CONCLUSION.

Defendant has failed to show that there was a closure of the courtroom during jury selection when all proceedings occurred in an open courtroom. Defendant has further failed to show that the trial court's decision to admit evidence of defendant's conduct leading up to the assault was based on untenable grounds where such evidence was crucial in establishing the res gestae of the offense, satisfied the requirements of the ER 404(b) balancing test, and did not unduly prejudice defendant.

Finally, the trial court properly declined to hear defendant's writ of habeas corpus where such a writ was not properly before the court. For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: May 18, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-18-15 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTOR

May 19, 2015 - 9:00 AM

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