No. 103761-9

THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

BRIAN GOFF,
Petitioner.

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

Amended Petition for Review

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A. Identity of Petitioner

Brian Goff asks this Court to accept review under RAP 13.4 of the Court of Appeals's opinion filed in *State v. Goff*, 39475-1-III.

B. Opinion Below

The trial court refused to apply the rule of completeness in ER 106 where the state offered a small portion of a longer statement of Mr. Goff. And at the close of trial, the court refused to provide an instruction which ensured the jury was properly instructed on self-defense.

The Court of Appeals affirmed, erroneously concluding the trial court properly excluded the additional portions of the same statement because they were not authenticated. The court also concluded that all though Mr. Goff presented the proposed instruction and argued why it was appropriate, he was required to renew objection later.

C. Issues Presented

1. Both the trial court and the Court of Appeals fundamentally misapplied ER 106 denying Mr. Goff a fair trial and his right to present a defense in violation of the Sixth and Fourteenth Amendments.

2. After the trial court refused to provide a proposed instruction regarding self-defense, the remaining instructions did not accurately inform the jury of the relevant law.

D. Statement of the Case

After Brian Goff and Bridgette Phillips's romantic relationship ended they became best friends. RP 425. They co-parent their seven-year-old daughter. RP 425-26.

Helin Perez briefly dated Ms. Phillips after she and Mr. Goff broke up. RP 427. The first time Mr. Goff met Mr. Perez was at a get-together at Perez's house. RP 449. Perez and his friends surrounded one of Mr. Goff's friends and almost beat him up. RP 449. Mr. Perez was armed with brass knuckles and a taser; he snapped the taser back and forth to intimidate Mr.

Goff's friend. RP 449-50. Mr. Goff's friend was lucky to leave unscathed. *Id*.

When Mr. Perez and Ms. Phillips were together, Mr. Goff went to Ms. Phillips' house to assist his daughter with school work. RP 447. While he was there, Mr. Perez punched at his own truck outside the house to intimidate Mr. Goff. RP 447. Mr. Goff was afraid of Mr. Perez. RP 470. He was much smaller in stature than Mr. Perez and had never been in a fist fight. RP 470.

During the Pandemic, Mr. Goff's daughter was homeschooled and the parents had been "tag-teaming" the schoolwork. RP 427. One morning, Mr. Goff came over to Ms. Phillips' house to pick up his daughter for a homeschooling session. RP 427.

Mr. Goff was surprised to find Mr. Perez's truck was in the driveway. RP 427. As Mr. Goff pulled up the driveway, Mr. Perez ran off the porch towards his own truck. *Id*. Mr. Goff was worried Mr. Perez was going to get a weapon from his truck, so

he remained in his own truck. *Id*. Eventually, Mr. Goff made his way towards the porch without making eye contact with Mr. Perez. RP 429.

Ms. Phillips, who had been with Mr. Perez on the porch went inside the house and sat at her dining room table with her head bowed down as she cried. RP 430. Her face was bruised and beaten. RP 451, 459. Her seven-year-old daughter comforted her and cried too. RP 430.

The previous day, when Mr. Goff visited Ms. Phillips' house, he saw someone had punched several holes in the wall. RP 448-49. Mr. Perez had previously threatened Mr. Goff's daughter with a knife. RP 508.

Mr. Goff came out of the house to ask Mr. Perez to leave and never to come back. RP 451, 459; *see* 353. Mr. Goff stepped off the porch and saw Mr. Perez holding a baseball bat behind his leg, waiting for him. RP 451. Mr. Goff backed off; he was unarmed, and still suffered the side effects of a severe traumatic brain injury. RP 451, 453. Physically, he knew he

was no match to fight Mr. Perez. RP 451, 453. Mr. Goff did not get any closer. RP 451, 453.

A neighbor, Anisa Kafka, came out of nowhere yelling at Mr. Perez to leave. RP 368. Ms. Kafka had seen Mr. Perez beating Ms. Phillips earlier that morning. RP 374. She walked up to Mr. Perez yelling: "Get in your truck and leave," "Just leave," "just leave, man," -- "go -- go." RP 368,371, 455. When Mr. Perez refused, Ms. Kafka shoved Mr. Perez causing him to take three steps backwards. RP 456. In return, Mr. Perez struck Ms. Kafka on the forehead with the bat. RP 460, 607. She fell backwards, grabbed onto the bat and did not let go. *Id*. Mr. Perez fell on top of Ms. Kafka as they wrestled over the bat. RP 457. Ms. Phillips, was now outside, and also jumped on top of them to wrest the bat from Mr. Perez. RP 462.

Mr. Goff became concerned Mr. Perez would get control of the bat and strike Ms. Kafka, Ms. Phillips, and him with it. RP 458. Mr. Goff was unarmed, so he ran back towards the house and returned with a jack handle. RP 355, 358, 462. Mr.

Perez was about to wrest the bat from Ms. Kafka's grip and strike her with it again. RP 463; 608.

Mr. Goff hit Mr. Perez with the jack handle at least twice, but otherwise could not remember how many times the jack handle actually connected with Mr. Perez. RP 469. After Mr. Perez let go of the bat and curled up in a ball, Ms. Kafka took the bat and threw it onto Ms. Phillips' porch. RP 464.

Mr. Perez's account was markedly different, claiming Mr. Goff pulled a box cutter and yelled: "I'm gonna fuckin' kill you!" RP 195. He claimed Ms. Kafka and Mr. Goff and chased Mr. Perez up to the road. RP 195. All the while Mr. Perez held a baseball bat behind him, and he never swung it once. *Id*. No other witness confirmed Mr. Perez's account.

Mr. Goff, and several people at the scene, called police, who called an ambulance as well. RP 465. Mr. Goff recorded a snapchat video, with the ambulance in the background, explaining what had just happened. RP 271, 538. Police later

took statements from all involved but did not arrest anyone. RP 467.

On cross-examination of Mr. Goff, the State played a small portion of his statement in a Snapchat video he made at the scene. RP 526, Ex 30. Mr. Goff noted he did not object so long as he could provide additional portions of his statement on redirect. RP 525. But when Mr. Goff attempted to do just that, as permitted by ER 106, the State objected arguing it was hearsay. RP 557. The court agreed. RP 557-58. Mr. Goff presented an accurate transcript of the additional portions of his statements as an exhibit for the record. Exhibit 31.

E. Argument

1. The fundamental misapplication of ER 106 by the trial court and Court of Appeals substantially impedes on the Sixth Amendment right to present a defense and Fourteenth Amendment right to a fair trial.

a. ER 106 requires the proponent of a statement to present additional portions of the statement where in fairness those additional portions are necessary.

Out of concerns for fair presentation of evidence the rule of completeness, ER 106, allows the adverse party to "require [the proponent of the evidence] at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." The purpose of the rule is "is 'to prevent a party from misleading the jury."' *United States v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (*quoting United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996)).

The rule requires a partial statement must be completed where the partial statement distorts the meaning of the whole or

excludes information that is substantially exculpatory. *State v. Larry*, 108 Wn. App. 894, 909, 34 P.3d 241 (2001) (*citing State v. Alsup*, 75 Wn. App. 128, 133-134, 876 P.2d 935 (1994)). Put another way a statement must be admitted if it (1) explains other statements already admitted, (2) places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *Id.* (*citing United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992)).

The trial court misapplied this rule. During their cross-examination of Mr. Goff, the prosecution offered a portion of a statement made by Mr. Goff on a Snapchat video containing Mr. Goff's. Ex. 30. Mr. Goff offered testimony of additional portions of his statement in the video immediately preceding and following the snippet contained in Exhibit 30. RP 557-58. Ex. 31. Mr. Goff explained the testimony was offered to provide context to the portion of his statement in Exhibit 30. The prosecutor insisted such testimony was hearsay. RP 557-

58. The trial court agreed and refused to permit the testimony. RP 558.

The point of ER 106 is to prevent one party from wrongly exploiting a statement offered for its truth, but taken out of context. And this is precisely what the prosecution achieved here.

The statement the court admitted told jurors Mr. Goff stated that without explanation he grabbed a tire iron and simply decided to start striking Mr. Perez. The statement provided, in part: "I had this little tire iron thing in my hand. Fuck it. I just stood over him and just busted him in his face . . . about . . . I don't even know. I don't even know. They said I hit him 10 times, but his fuckin' shit was fucked up. He was leaking, leaking. Then, I hit him so many times" Ex. 30; EX 31.

While the prosecution claimed they offered this statement only to show how many times Mr. Goff struck Mr. Perez, that

does not explain inclusion of the first sentence.[1] Plainly, the prosecutor sought to allow jurors to conclude Mr. Goff admitted his act was unprovoked and inexplicable. But that is not what Mr. Goff said.

Ignoring everything else in Exhibit 31, the addition of just the sentence immediately preceding mention of the tire iron, fundamentally changes the context of Mr. Goff's statement and admission to violence. What Mr. Goff actually said was:

> Anyways, as soon as he hits her in the face with that baseball bat, and they fall to the ground, Bridget jumps in, on top of him, and Nano's on top of Anissa. I had this little tire iron thing in my hand . . . .

Ex. 31. That one sentence alone changes Mr. Goff's statement from an admission of inexplicable violence, to a statement

[1] The only possible explanation for inclusion of the first sentence was to provide context for what followed. And yet, the prosecutor did that by presenting the first sentence out of context itself. If context matters, and it does, the prosecution must also agree that accurate context matters.

putting the admission in proper context. And that is the point of ER 106.

When the prosecutor offered Exhibit 30 defense counsel expressly noted they did not object so long as they could address other portions of the statement on redirect. RP 525. Yet when Mr. Goff's attorney presented Mr. Goff with a transcript of additional portions of the video, and asked that he read it aloud the prosecution objected arguing it was hearsay. RP 557-58. The court sustained that objection. RP 558.

Again, ER 106 permits a party to require the proponent of a statement or recording to play any other portion or to require the proponent introduce any other writing or statement that in fairness should be considered contemporaneously. Yet when Mr. Goff asked for just that the court refused on grounds that it was hearsay.

As one commentator explains the interaction of ER 106 and other rules:

> The hearsay objection . . . will seldom be available because the hearsay rule does not normally bar statements offered for the purpose of providing background or context for statements already admitted. As always, the evidence offered under Rule 106 may be excluded under Rule 403 if its probative value is outweighed by the fact that it is unduly prejudicial, misleading, or a waste of time.

5 *Wash. Prac.*, Evidence Law and Practice § 106.3 (6th ed.) (Footnotes omitted). Mr. Goff offered other portions of the recorded statement (Exhibit 31) so that the small portion offered by the prosecution was not taking out of context. RP 558. Thus, the additional portions of the statement were not hearsay.

Additionally, by its terms, ER 106 requires the proponent of the statement to offer other portions required in fairness. Thus, requiring the prosecutor to present those additional portions of Mr. Goff's statement presents no more of a hearsay problem than the prosecutor offering only a portion of Mr. Goff's statement. In both instances, they are a statement of a party of opponent offered by the prosecutor. And that is what

Mr. Goff argued at trial and again on appeal. The prosecutor's hearsay objection rests entirely on its mistaken view that ER 106 did not require them to present the additional portions in the first place.

On appeal, the prosecutor mints a new theory for exclusion; that because Mr. Goff did not insist that the prosecution must also play other portions at the same time it played one portion at the time the video was played, he did not preserve his ER 106 claim. Brief of Respondent at 33-34. This argument is both disingenuous and legally incorrect.

First, when the prosecutor played other videos earlier in trial, Mr. Goff had insisted ER 106 required they play other portions to provide context. *See* RP 233-45, 253-61, 276-81. That was met with the same erroneous hearsay objection by the prosecutor, and insistence that no rule required that. Indeed, the prosecutor at that point insisted "there is no rule" requiring they provide additional portions of the statement to provide needed

context. RP 278. On each occasion, the trial court agreed with that mistaken argument. RP 281-82. ER 106 says otherwise.

Second, when the prosecutor sought to play Exhibit 30 (a snippet from the Snapchat Video), defense counsel expressly noted they did not object so long as they could address other portions of the statement on redirect. RP 525. While ER 106 is written in terms of requiring the proponent to offer the additional portions, it also permits just what Mr. Goff offered. "The opposing party may, however, bring out the remainder of the conversation on cross-examination or as part of his or her own case." 5 Wash. Prac., § 106.1 (6th ed.) (Footnote omitted). And as discussed above, if that process is employed as the means to comply with ER 106, the statements are still not excludable as hearsay. The issue is fully preserved.

Nonetheless, the Court of Appeals refused to address the claim concluding the trial court properly rejected Exhibit 31 and excluded Mr. Goff's testimony because Exhibit 31 was not authenticated. Opinion at 7.

First, authentication was not basis of prosecutor's objection at trial because there was no dispute the exhibit was an accurate transcription of additional portions of Mr. Goff's statement. Instead, the only objection the prosecutor raised was that the exhibit could not be admitted or read because it was hearsay. As set forth above, that is incorrect.

And for the same reasons the trial court did not exclude the exhibit or Mr. Goff's testimony because of lack of authentication. The court excluded the exhibit and testimony as hearsay, based on a fundamental misunderstanding of the rule of completeness. RP 557-58. Again, that ruling fundamentally misapplies ER 106.

In fact, Exhibit 31 was authenticated. Prior to offering the exhibit or asking Mr. Goff questions concerning the transcript, defense counsel questioned Mr. Goff.

> Q: Okay. And is it an accurate transcript?
> A: It's incomplete.
> Q: In what way.

A: It's just not the whole thing. It’s -- it’s -- There's parts missing from the beginning, there's parts missing from the end.
Q: Okay. Is it complete around the area of the description of the tire iron?
A: Oh yes, absolutely. That -- that portion, I mean,--
Q: Okay.
A: --what was told to the jury not, but what's here, yes.
Q: Yeah. Okay. Very well.

Thus, Mr. Goff established Exhibit 31 was a “absolutely” a complete and accurate transcript of what Mr. Goff said “around the area of the description of the tire iron.” That is all Exhibit 31 purports to be and that is all defense counsel sought to elicit in their questions to Mr. Goff. Exhibit 31 was fully authenticated.

And Exhibit 31 is a part of the record on appeal, despite the Court of Appeals statement to the contrary.

The statements in Exhibit 31 explain and offer context to the snippet offered by the prosecution. Those additional portions of Mr. Goff’s statements would have helped avoid misleading the trier of fact and ensure a fair and impartial understanding of the evidence. The remaining portions of Mr.

Goff's statement should have been presented to the jury. ER 106; *Alsup*, 75 Wn. App. at 133-134; *Velasco*, 953 F.2d at 1475.

b. The misapplication of ER 106 in this case would substantially impede the Sixth Amendment right to present a defense and the basic expectation of Fourteenth Amendment of a fair trial.

As applied by the courts below, ER 106 has almost no application to statements of a defendant offered by the prosecution. By the courts' logic a prosecutor may freely offer snippets and bits of a person's statement without any surrounding context to present a fundamentally alter the statement's intent. By the court's logic, defendants have no ability to rely on ER 106 in that scenario. What the prosecution did here, is exactly vice the rule is intended to confront. The rule is intended to ensure the trial remains fair. A fair trial is the minimum requirement of due process. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Effectively eliminating the application of ER 106 to a

defendant's statement creates great risk to the constitution right to present a defense.

"The right to a fair opportunity to defend against the State's accusations" entails the right to challenge the State's evidence of an accused in a criminal trial to due process is, in essence, *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Sixth Amendment right to present a defense "is . . . plain terms . . . the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967); *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed.2d 798 (1988).

ER 106, in its plain terms, furthers these goals. Here, the rule was brushed aside merely because the statement to be completed was the defendant's. In such a case, the ability to confront and defend against the prosecution's evidence is lost. Instead, the prosecution freely offered altered versions of Mr.

Goff's statement wildly changing the statement's substantive intent. And Mr. Goff had no ability to challenge, correct or even contextualize that misrepresentation of his statement.

The opinion rules that Mr. Goff's was not denied his right to present a defense as "there was nothing prohibiting Mr. Goff from testifying to what he said in the redacted portions of the video." Opinion at App. 9-10. What the opinion suggest Mr. Goff should have done is exactly wat ER 106 permits. And, that is exactly what Mr. Goff attempted to do, only to be precluded by the trial court. RP 557-58. Defense counsel asked him to read Exhibit 31, "what he said in the redacted portions of the video" in the opinions terms, and the trial court refused to permit him to do so. RP 558. The trial court excluded the testimony as hearsay. *Id.* What the opinion suggests should have happened is exactly what Mr. Goff was precluded from doing. Rather than an unexplored remedy to the error, it is exactly where the error occurred.

The Court of Appeals opinion cements the constitutional violation and gives rise to substantial constitutional concerns. Review is warranted under RAP 13.4.

2. The trial court's instructions did not make the law of self-defense manifestly clear.

Mr. Goff submitted a proposed jury instruction providing: "One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect the person even if, in fact, the person whom the actor is defending is the aggressor." CP 29 (WPIC 16.04.01); RP 480. Counsel explained "the concern is that the jurors might view that Anissa Kafka was the initial aggressor insofar as she shoved Nano Perez, requiring Mr. Goff to then defend her." RP 480. The court refused to provide the instruction to the jury.

Without this instruction Mr. Goff was denied his theory of defense and the law of self-defense was not made manifestly clear to the jury. As counsel predicted the prosecution argued

Ms. Kafka "attacked" Mr. Perez and pushed him on behalf of Mr. Goff. RP 665, 685. Ms. Kafka provoked the fight as the first aggressor. Yet the jury was not told Mr. Goff could still lawfully defend her.

"Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt." *State v.O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); U.S. Const. amend. XIV.

A person is entitled to a jury instruction on self- defense when there is "some evidence" demonstrating the justifiable use of force. *State v. Irons*, 101 Wn. App. 174, 449, 4 P.3d 174 (2000). Failure to instruct the jury on the defendant's theory of the case is reversible error if there was any evidence to support that theory. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016)(internal citations omitted).

Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Self-defense instructions

that do not make the relevant law manifestly apparent are "presumed prejudicial." *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

The evidence certainly supported the proposed instruction. Viewed in the light most favorable to Mr. Goff, evidence established he became involved in a fight between Ms. Kafka and Mr. Perez only after Mr. Perez hit her with a bat. The proposed instruction would have explained to the jury it could find Mr. Goff acted in self-defense even if it found Ms. Kafka provoked the fight when she "attacked" Mr. Perez.

Instead, the court instructed the jury only that Mr. Goff could not act lawfully in defense of Ms. Kafka, if he was the aggressor. RP 55. That left no room for the jury to find Ms. Kafka was the aggressor but Mr. Goff nonetheless acted lawfully in her defense.

The court's instructions erroneously denied Mr. Goff his right to fully present his defense theory of the case, and it

relieved the prosecution of its burden of disproving his defense beyond a reasonable doubt.

But rather than reach the merits of this constitutional error, the Court of Appeals found the issue was not properly preserved. Mr. Goff proposed an instruction, CP 29, and explained how the evidence supported it and why it was necessary. RP 480. Yet the Court of Appeals surmises more was required. The opinion insists RAP 2.5 required Mr. Goff to again object after the court refused his proposed instruction in order to raise the claim on appeal. Opinion at 11.

The rule says no such thing. And the opinion does not point to any court rule which requires a superfluous renewal of argument in order to challenge the refusal to provide an instruction. Where the court rules require renewal of objection in order to preserve the ability to appeal, the rules explicitly say so. See e.g. CrR 4.4(a)(2) (severance motion is waived if not renewed prior to close of evidence.)

In their brief, the prosecutor pointed to CrR 6.15 as requiring the superfluous objection. That rule does not require renewal of an objection or argument it only says the courts must provide parties the opportunity to object and offer argument regarding proposed instructions. That happened here.

At the instruction conference, defense counsel explained why he believed the instruction was justified. Counsel said: "Well, the concern is that the jurors might view that Anissa Kafka was the initial aggressor insofar as she shoved Nano Perez, requiring Mr. Goff to then defend her." RP 480. No rule or case requires anything more in order for Mr. Goff to raise the issue on appeal.

Nor does the opinion point to a single case that requires more. In support of its novel theory that a party must renew its objection, the opinion relies on *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998) But *Hickman* had nothing to do with ability to challenge trial court's refusal to provide a proposed instruction on appeal. Instead, *Hickman* concerned the

law of the case doctrine and whether the State assumed the burden of proving an unnecessary element where it was included in a "to convict" instruction which the State proposed. *Hickman* case has nothing to do with RAP 2.5.

But the opinion goes further. Building on its incorrect conclusion that an additional superfluous objection was required, and noting that superfluous objection was not made, the opinion concludes RAP 2.5 generally precludes review. And then, the opinion concludes the absence an argument addressing RAP 2.5(a)(3) conceded the error was not manifest constitutional error. Opinion at 12-13.

The absence of an argument regarding 2.5(a)(3) is not a concession to anything. Instead it is a recognition that RAP 2.5(a)(3) has no application where a party proposes an instruction, explains why the instruction is appropriate and the court refuses to provide it. In that case, the record for review is clear nothing more is required and RAP 2.5 does not apply.

The opinion is wrong on both the facts and law.

Creating from wholecloth a new requirement that litigants make superfluous objections after they have already proposed an instruction is a substantial public interest. And minting such a new requirement where it concerns instructions muddying the law of self-defense is a significant constitutional issue. Review is warranted under RAP 13.4.

E. Conclusion

This Court should accept review in this matter.

This pleading complies with RAP 18.7 and contains 4,406 words.

DATED this 6th day of June, 2025.

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

STATE OF WASHINGTON, Respondent, v. BRIAN WAYNE GOFF, Appellant.	)	No. 39475-1-III UNPUBLISHED OPINION

COONEY, J. — A jury found Brian Goff guilty of assault in the second degree and returned special verdicts finding he recklessly inflicted substantial bodily harm on the victim and committed the assault with a deadly weapon.

Mr. Goff appeals, arguing the trial court violated his constitutional right to present a defense, erred in its instruction to the jury on the defense of another, and improperly ordered the victim penalty assessment (VPA) and DNA collection fee. We affirm Mr. Goff's conviction and remand for the limited purpose of striking the VPA and DNA collection fee.

BACKGROUND

On the morning of March 17, 2021, Mr. Goff went to the home of his former girlfriend, Bridgette Phillips. Mr. Goff and Ms. Phillips have a daughter in common.

Upon arrival, Mr. Goff noticed Helin Perez's truck at the residence. Mr. Perez, who also had a previous relationship with Ms. Phillips, was at the residence to drop off his daughter for Ms. Phillips to babysit. Mr. Perez's one-year-old daughter was asleep in the truck while he visited with Ms. Phillips.

While in his vehicle, Mr. Goff noticed Mr. Perez jump off Ms. Phillips's porch and run to his truck. Mr. Goff walked to Ms. Phillips's house where he found Ms. Phillips crying. After speaking with Ms. Phillips, Mr. Goff left the house to tell Mr. Perez to leave. Mr. Perez was standing near the open driver's side door of his truck. Mr. Goff approached the other side of the driver's door, coming within feet of Mr. Perez. Mr. Goff's presence caused Mr. Perez to grab a bat from his truck. Shortly thereafter, Anissa Kafka, a neighbor, appeared.

Ms. Kafka shoved Mr. Perez, "up the driveway to the street." Rep. of Proc. (RP) at 368. As Mr. Goff and Ms. Kafka verbally confronted Mr. Perez, Mr. Perez retreated down the driveway and into the street, with the bat held down by his side. After Mr. Goff and Ms. Kafka returned to the property, Mr. Perez attempted to return to his vehicle out of concern for his own daughter. Ms. Kafka grabbed the bat as Mr. Perez attempted to walk past Mr. Goff and Ms. Kafka. While tussling for control of the bat, Mr. Perez released his grip, causing it to strike Ms. Kafka in the head. Ms. Kafka and Mr. Perez fell

to the ground where they continued to wrestle over the bat. As Mr. Perez attempted to stand up, Mr. Goff repeatedly struck him with what Mr. Goff described as a tire iron.

After the altercation, Mr. Goff posted a video of the incident he filmed at the scene to Snapchat. Ex. 23. Later, Mr. Goff posted an additional video to Snapchat in which he described the altercation and justified his defense of Ms. Kafka. Ex. S30. In the redacted video, Mr. Goff states:

> I had this like little tire iron thing in my hand. Fuck it. And I just stood over him and just busted him in his face about I don't even know. I don't even know. They said I hit him ten times, but his fuckin' shit was fucked up. He was leaking, leaking. And then, I hit him so many times, Anissa finally got the bat. As soon as she got the bat off, I cracked him in the shins a couple times and fuckin' walked down the fuckin' driveway. And next thing you know, the cops is pulling in.

Ex. 30.

The State charged Mr. Goff with second degree assault. The State further alleged Mr. Goff was armed with a deadly weapon and that he recklessly inflicted substantial bodily harm on Mr. Perez. The case was tried to a jury.

At trial, Mr. Goff testified he attacked Mr. Perez in defense of Ms. Kafka. Mr. Goff testified he remembered striking Mr. Perez twice with the tire iron. During the State's cross-examination of Mr. Goff, the court admitted exhibit S30, the redacted Snapchat video posted hours after the incident. The State offered exhibit S30 to impeach

Mr. Goff's testimony that he only struck Mr. Perez twice. Defense counsel did not object to admission of the video provided he could inquire into the context of the video.

During defense counsel's redirect examination, Mr. Goff was asked what he said in the video prior to the portion that was admitted into evidence. The State lodged a hearsay objection. In response, defense counsel argued that Mr. Goff should be allowed to testify about the redacted portions of the video under the rule of completeness. The trial court agreed with defense counsel. However, after the court's ruling, defense counsel abandoned the question.

Defense counsel then attempted to lay the foundation for a purported transcript of the Snapchat recording, which was marked as exhibit 31. When asked to authenticate exhibit 31, Mr. Goff responded: "It's incomplete," "It's just not the whole thing," "There's parts missing from the beginning, there's parts missing from the end." RP at 557. Defense counsel requested Mr. Goff read a portion of exhibit 31. The State objected, citing hearsay. The court sustained the objection.

Defense counsel then moved to admit exhibit 31:

> [DEFENSE COUNSEL]: So I would like to move for admission of that [exhibit 31], for the record, as my—And I understand the court's inclined to deny it, but that's my motion.
>
> [STATE]: The transcript is nothing but hearsay.
>
> THE COURT: Excuse me. For the record, court will grant you your request to make it part of the record, but it will not be read to the jury.

RP at 558.

At the conclusion of evidence, the State proposed, among other instructions, Washington Pattern Jury Instruction: Criminal (WPIC) 16.04. WPIC 16.04 reads:

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

Clerk's Papers (CP) at 55. Mr. Goff proposed WPIC 16.04.01, which reads:

> One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor.

CP at 30. After the court offered defense counsel the opportunity to address the proposed instructions, defense counsel stated, "I don't have anything further to add on that, in terms of my record." RP at 625. Defense counsel did not object to the inclusion of WPIC 16.04, nor did he advance any argument in support of WPIC 16.04.01. After considering the evidence, the court determined, "[WPIC 16.04] seems to be the more appropriate WPIC. So the court intends to give 16.04." RP at 626.

Ultimately, the jury found Mr. Goff guilty of second degree assault. The jury also returned special verdicts, finding Mr. Goff recklessly inflicted substantial bodily harm on

Mr. Perez and was armed with a deadly weapon during the commission of the crime. The court later sentenced Mr. Goff to a standard range sentence. Although the court found Mr. Goff to be indigent, he was ordered to pay the VPA and DNA fee.

Mr. Goff timely appeals.

ANALYSIS

On appeal, Mr. Goff argues the trial court violated his constitutional right to present a defense, erred in its instruction to the jury on the defense of another, and improperly ordered him to pay the VPA and DNA collection fee.

WHETHER THE TRIAL COURT VIOLATED MR. GOFF'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Mr. Goff contends the trial court violated his constitutional right to present a defense when, during the State's cross-examination of him, it admitted a redacted version of a Snapchat video (exhibit S30), but later denied his motion to admit an incomplete unredacted transcript of the Snapchat video (exhibit 31). Because Mr. Goff failed to authenticate the transcript before the trial court and failed to designate the complete video or the complete transcript for our review, we reject his alleged error.[1]

[1] The State argues Mr. Goff failed to move for admission of exhibit 31. Mr. Goff's attorney stated, "So I would like to move for admission of [exhibit 31], for the record, as my—And I understand the court's inclined to deny it, but that's my motion." RP at 558. We interpret defense counsel's statement as making a record of his attempt to admit the transcript, rather than a motion to have the transcript made part of the record.

One criminally accused is entitled to due process, including "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, the right is not unfettered. *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810 (2015). An accused does not have "'[the] right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Id*. (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

In analyzing constitutional claims involving evidentiary rulings, we apply a two-step standard of review. *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017). First, we review the trial court's evidentiary rulings for abuse of discretion. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). If the evidentiary ruling amounted to an abuse of discretion that resulted in prejudice, then we would avoid the constitutional claim altogether. *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). However, if the ruling was within the trial court's discretion or the abuse of discretion was harmless, we proceed to the second step of evaluating the constitutional question. *Id.*

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Brockob*, 159 Wn.2d 311, 348, 150 P.3d 59 (2006). A court "abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable." *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). "A decision is based 'on untenable

grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

A "recorded statement of the defendant and a properly authenticated transcript thereof may, within the sound discretion of the trial court, be admitted as exhibits and reviewed by the jury during its deliberations." *State v. Frazier*, 99 Wn.2d 180, 188, 661 P.2d 126 (1983). To authenticate a transcript, the proponent of the exhibit must make a prima facie showing that the transcript accurately portrays the recording. ER 901.

During his testimony, Mr. Goff was provided with a purported transcript of the Snapchat video. When asked to authenticate the exhibit, Mr. Goff responded: "It's incomplete," "It's just not the whole thing," "There's parts missing from the beginning, there's parts missing from the end." RP at 557. Mr. Goff failed to make a prima facie showing that the transcript accurately portrayed the recording. It was not an abuse of the trial court's discretion to reject the unauthenticated exhibit.

Notwithstanding Mr. Goff's failure to authenticate exhibit 31, also fatal to Mr. Goff's claimed error is neither the unredacted video nor a complete transcript of the recording were designated as a part of the record on appeal. RAP 9.2(b) requires an appellant to provide a sufficient record to review the issues raised on appeal. "An

insufficient appellate record precludes review of the alleged errors." *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012). We cannot consider matters outside of the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The trial court did not abuse its discretion in rejecting the unauthenticated transcript of the Snapchat video from evidence. Therefore, we proceed to the second step of evaluating the constitutional question.

We review a claim of a denial of a constitutional right to present a defense de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Any State interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted. *Id*. at 720. In weighing whether a defendant's right to present a defense is violated, we consider whether the excluded evidence constitutes the defendant's "entire defense." *Arndt*, 194 Wn.2d at 812-13. Evidence of "extremely high probative value . . . cannot be barred without violating" constitutional safeguards. *Jones*, 168 Wn.2d at 724.

Since exclusion of the transcript was not an abuse of discretion, the determinative factor is whether the transcript was either Mr. Goff's entire defense or of extremely high probative value. *Arndt*, 194 Wn.2d at 812-13; *Jones*, 168 Wn.2d at 724. The transcript was neither. Absent admission of the transcript, there was nothing prohibiting Mr. Goff from testifying to what he said in the redacted portions of the video. Rather than inquire

of Mr. Goff what statements he made in the redacted portion of the video, Mr. Goff's attorney attempted to admit the statements through the transcript. Therefore, we find no constitutional violation.

WHETHER THE TRIAL COURT FAILED TO ACCURATELY INSTRUCT THE JURY

Mr. Goff argues the court erred when it failed to provide the jury his proposed instruction (WPIC 16.04.01). The State asserts Mr. Goff failed to preserve the claimed error, and even if the alleged error was preserved, it was harmless and not a manifest constitutional error. We agree with the State.

Jury instructions are reviewed de novo for legal accuracy. *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 127, 471 P.3d 181 (2020). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

A proper objection to the inclusion or exclusion of an instruction is a condition precedent for our review. CrR 6.15(c) provides, in part: "The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." A party who objects to the inclusion or exclusion of an instruction must "state distinctly the matter to which counsel objects and the grounds of counsel's objection." *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310, 372

P.3d 111 (2016) (quoting CR 51(f)). "[T]he purpose of the rule is to afford the trial court an opportunity to know and clearly understand the nature of the objection to the giving or refusing of an instruction in order that the trial court may have the opportunity to correct any error." *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). When a party fails to take exception to the inclusion or exclusion of an instruction, thereby failing to discuss the basis for their reasoning, the issue will not be considered on appeal. *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998).

Here, the trial court compared the State's proposed WPIC 16.04 instruction against Mr. Goff's proposed WPIC 16.04.01 instruction. After the court made preliminary remarks about the two instructions, both parties were afforded an opportunity to present argument on the inclusion of their proposed instruction and the exclusion of the others. In response, defense counsel stated, "I don't have anything further to add on that, in terms of my record." RP at 625. The trial court was not advised of the grounds of Mr. Goff's objection to WPIC 16.04 nor his reasons for the inclusion of WPIC 16.04.01. Consequently, the trial court was deprived of the opportunity to know and clearly understand the nature of the objection to its exclusion of WPIC 16.04.01; the trial court lacked the opportunity to correct any error. Mr. Goff failed to preserve his claimed error.

Although we generally decline to review claims of error not raised in the trial court, an exception to that rule permits a party to raise a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). This exception is limited and does not allow all asserted constitutional claims to be raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Instead, the alleged error must be "manifest," which requires a showing of actual prejudice. *Id*. at 935. To establish actual prejudice, the appellant must make a plausible showing that the alleged error had practical and identifiable consequences during trial. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). "[T]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

Because Mr. Goff failed to object to the trial court's failure to provide the jury with WPIC 16.04.01, we could decline review under RAP 2.5, unless he could show that it was of constitutional magnitude and manifest, or that another exception to the rule applies. However, on appeal, Mr. Goff does not argue that the error is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Nor does he argue that another exception to RAP 2.5 applies. Notably, Mr. Goff fails to even cite RAP 2.5 in his briefing. We consider his failure to cite RAP 2.5(a)(3) and advance argument that the

alleged error is reviewable under RAP 2.5(a)(3) as a concession that the claimed error is not manifest.

VICTIM PENALTY ASSESSMENT AND DNA COLLECTION FEE

Mr. Goff contends that, because he is indigent, the trial court erred when it ordered the VPA and the DNA collection fees. The State concedes. We accept the State's concession.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute H.B. 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants. RCW 7.68.035 (as amended); LAWS OF 2023, ch. 449, § 1. H.B. 1169 took effect on July 1, 2023. Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Similarly, pursuant to former RCW 43.43.754 (2018), the trial court was required to impose a DNA collection fee for every sentence imposed for the crimes specified in RCW 43.43.754. Effective July 1, 2023, the legislature amended RCW 43.43.754 by eliminating language that made imposition of the DNA collection fee mandatory. *See* LAWS OF 2023, ch. 449, § 4.

Because Mr. Goff's case is pending on direct appeal, the amendments apply. Further, the trial court found Mr. Goff to be indigent at the time of his sentencing. Thus, we remand for the trial court to strike the VPA and DNA collection fee from Mr. Goff's judgment and sentence.

CONCLUSION

We affirm Mr. Goff's conviction but remand for the limited purpose of striking the VPA and DNA collection fee.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Staab, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON, Plaintiff, vs. Brian Goff, Defendant	No. 21-1-00072-4 Court of Appeals No. 39475-1-III State's Designation of Clerk's Papers and Exhibits

TO THE CLERK OF THE COURT:

Please prepare and transmit to the **Court of Appeals, Division Three** the following clerk's papers. **Upon transmittal, please provide our office a copy of the transmitted Index to Clerk's Papers and Clerk's Papers in this case**.

1. Exhibit List 12/09/2022
2. Exhibit 1 admitted 12/06/2022

Albert H. Lin, Prosecuting Attorney
Okanogan County Prosecutor's Office
237 Fourth Avenue North
PO Box 1130, Okanogan, WA 98840
Phone: 509-422-7280 Fax: 509-422-7290

3. Exhibit 23 marked 12/07/2022

4. Exhibit 30 admitted 12/08/2022

5. Exhibit 31 marked 12/08/2022

DATED this 7th day of February, 2024.

/s/ Thomas C. Paynter
Thomas C. Paynter, #27761
Deputy Prosecuting Attorney
Okanogan County Prosecutor's Office

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OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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