Supreme Court No. _____
COA No. 39475-1-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

BRIAN GOFF,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Brian Goff asks this Court to review the opinion of the Court of Appeals filed in his case on December 3, 2024 (Appendix 1-14).

B. ISSUES PRESENTED FOR REVIEW

1. Whether the exclusion of Mr. Goff's statement explaining his action, admissible under the Rules of Evidence, violated Mr. Goff's constitutional right to present a defense.

2. Whether the jury instructions misled the jurors by implying self-defense and defense of others was not available to Mr. Goff.

C. STATEMENT OF THE CASE

Mr. Goff directs the Court to his statement of the case in the opening brief. Br. of Appellant 7-25. Other pertinent facts are summarized under the argument sections.

D. ARGUMENT

1. The Court of Appeals invents procedural hurdles and disregards Mr. Goff's claim that the trial court misapplied ER 106 and the completeness doctrine.

a. The trial court misapplied the completeness doctrine because in fairness it was required to provide the jury Mr. Goff's complete statement.

The purpose of ER 106 "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 applies in two scenarios. Under the first test (the "*Alsup*" test), 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)).

Under the second test (the "*Velasco*" test), a statement should also 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 court's first error was misapplying ER 106 and the rule of completeness. Mr. Goff's complete statement should have been presented to the jury under ER 106 and the rule of completeness. ER 106; *Alsup*, 75 Wn. App. at 133-134; *Velasco*, 953 F.2d at 1475. When the State offered a modified version of his statement as evidence, Mr. Goff insisted it must present his entire unredacted statement to explain to the jury why he struck Mr. Perez. RP 273. The court

originally agreed Mr. Goff's full statement was admissible to give the jury the complete the picture. RP 273-74. But the prosecution said it was ignoring the court's ruling and it offered only the modified and redacted version:

> I had an opportunity to review that audio recorded statement again, and I'm not playing it. I am not required to play it. There is no rule of completeness or best evidence that somehow overcomes a hearsay—exception . . . . This is not admissible evidence. The only [admissible] parts of that interview [are] Mr. Goff's -- admissions.
>
> . . . .
>
> And if he wants to give his story he can take the stand. . . . And I'm not offering those statements. Why would I offer those statements? And counsel can't offer those statements because they're hearsay.

RP 276.

The complete statement with redactions cross off provided:

> ~~Anyway, as soon as he hits her in the face with that baseball bat, and they fall to the~~

> ~~ground, Bridget [aka Ms. Phillips] falls on top of him, and Nana's [aka Mr. Perez] on top of Anissa [aka Ms. Kafka].~~ 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, Anissa finally got the bat. As soon as got the bat off, I cracked him in the shins couple times, and fuckin' walked down the fuckin' driveway. Next thing you know, the cops is pulling in. I was like, "Holy fuck!"

CP 62.

After the State ignored the trial court's ruling, the court's second error—refusing to admit the full statement or the redacted portion—compounded the error. The court would not allow Mr. Goff to introduce his complete statement or the remainder of it. For instance, during Officer Paulette Manuel's direct testimony the prosecution played the video of Mr. Goff's modified statement. RP 300. When Mr. Goff asked, in cross-examination, whether Officer Manuel

saw the part where Mr. Goff described his version of events, the State objected on the basis that he was trying to introduce "self-serving hearsay." RP 303-04. The prosecution insisted: "he doesn't get to bring in Mr. Goff's statements through questions to this witness. . . . they are hearsay. They are not part of this case." RP 304-05. Mr. Goff explained that the prosecutor exploited Mr. Goff's modified statement "taken out of context" to give the jury the wrong impression, precisely what ER 106 seeks to address. *Id.* at 305. Mr. Goff offered to play the whole recording: "I want to play the whole recording. That was denied. But I want to -- have the context given. Because otherwise the jury's given a false impression of it." *Id.* at 306.

The prosecutor was adamant the redacted portion of Mr. Goff's statement was inadmissible: "But he

doesn't get to bring it in – through hearsay. And it's hearsay." *Id.* at 306.

The court ruled it would not allow Mr. Goff to play the whole recording, nor allow him to elicit the redacted portion through cross-examination. *See* RP 309. This was the second error.

The trial court allowed Mr. Goff to make his offer of proof and he tendered the transcript of the whole audio recording, he offered: "I can read it into the record, -- or I could play it into the record." RP 312. The court said: "You've introduce the transcript. Thank you" and it accepted the offer of proof. RP 312-13, 315.

The court erred again a third time. During Mr. Goff's case-in-chief, the trial court erred again by not allowing Mr. Goff to play whole video or even read for the jury portion the State redacted. RP 557. When Mr. Goff tried to present his full statement, the State

renewed its objection on the basis that it presented the modified video for the limited purpose of showing how many times Mr. Goff struck Mr. Perez and nothing else. *Id.* And it insisted: "Now why he [Mr. Goff] struck him [Mr. Perez] or what led up to it is hearsay, self-serving hearsay, and not relevant to what it was offered for." RP 557.

Mr. Goff reminded the court that the prosecution presented the modified video out of context and it misled the jury. RP 558. To be clear, Mr. Goff moved to admit his whole statement, as evidence, or in the alternative, asked it to be deemed as part of the record as his offer of proof. RP 558-59. The court refused to admit it as evidence but it accepted it as an offer of proof. RP 559.

In short, in both the State's and Mr. Goff's case-in-chief the court allowed the prosecution to play the

modified video, but it would not admit Mr. Goff's full statement or even the portion redacted by the State. RP 300-01, 537, 558-59.

As the trial court itself expressed, it is clear what exact statements Mr. Goff sought to admit. RP 312-13, 315.

Nonetheless the State and the Court of Appeals incorrectly claim Mr. Goff did not preserve his argument or did not make a sufficient record. App. 11; Br. of Resp. at 22-23. The Court of Appeals believed the prosecution's incorrect contention that Mr. Goff did not move to play the complete video, or that he offered an incomplete transcript. *See* Br. of Resp. at 28-30. But the record clearly belies this claim.

This was a credibility contest between Mr. Goff and Mr. Perez. The State multiple times played for the jury a modified video of Mr. Goff saying he beat Mr.

Perez several times with a jack handle. But the trial court's errors prevented the jury from hearing Mr. Goff's preceding explanation why he needed to intervene. The missing context was critical to the defense. No other admissible evidence corroborated his claim as well as his own words.

The modified partial statement the jury heard distorted the meaning of the whole by leaving the jury with an inference that Mr. Goff wantonly attacked Mr. Perez for no reason at all. In actuality, Mr. Goff qualified his statement by saying he did not start the melee but came to the aid of Ms. Kafka and Ms. Phillips who would be assaulted if Mr. Perez wrested the baseball bat from them. *See* CP 62. In context, his entire statement was not incriminating at all. If anything the entire statement showed his conduct was lawful.

Review is necessary because Mr. Goff's entire statement would have helped avoid misleading the jury, and helped to ensure a fair and impartial understanding of the evidence. RAP 13.4(b)(1)-(3).

b. The entire snapchat video was not hearsay. It was a statement of a party opponent, or an excited utterance, or a present-sense impression.

The court erred in excluding as "self-serving hearsay" the first exculpatory part of his snapchat video.

There is no "self-serving hearsay" rule that bars admission of statements that would otherwise satisfy a hearsay rule exception. *State Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011). The whole statement was clearly admissible.

i. Mr. Goff's whole statement was admissible as an admission of the party.

The prosecution prevailed on the theory that Mr. Goff's statements were admissions. *See* RP 279 (The State insisting Mr. Goff's snapchat video contained "statements of a party opponent against interest and admission.")

The State was right: the entire video was "simply a statement of Mr. Goff." RP 272-73. The entire video was one statement—an admission that included Mr. Goff's explanation why he beat Mr. Perez with a tire iron. His whole statement was either all admissible or not at all.

ii. Mr. Goff's statements were admissible as excited utterance.

Mr. Goff's statements were also admissible as an excited utterance.

The "excited utterance" exception permits the admission of hearsay statements "relating to a startling event or condition made while the declarant

was under the stress of excitement caused by the event or condition." ER 803(a)(2).

A statement falling within the excited utterance exception must be a spontaneous response to external shock, not one based on reflection. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The entire snapchat video contained Mr. Goff's statements, he was clearly on the scene, with the ambulance in the background, and he was talking about what just happened. RP 272-73. The trial court erred in excluding Mr. Goff's spontaneous response to the external shock of having to defend two women from an angry man with a bat as these statements were excited utterances. RP 281.

iii. Mr. Goff's statements were admissible as present sense impressions.

Mr. Goff's statements were further admissible as present sense impressions.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1).

Here, Mr. Goff was at the scene, with the ambulance in the background, describing conditions immediately after he perceived them. His statements in the video were a present sense impression.

c. Moreover, review is appropriate because the Court of Appeals misapplied the "open the door" doctrine to preclude admissible evidence.

Independently of the hearsay rule, moreover, the State opened the door to the exculpatory first part of Mr. Goff's statement by introducing the second inculpatory part. RP 269, 271.

Under the "open door" doctrine, the trial court has the discretion to admit otherwise inadmissible evidence when the opposing party raises a material

issue. *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Once the State has raised a material issue, the defense is permitted to explain, clarify, or contradict on cross examination. *Berg*, 147 Wn. App. at 939.

The doctrine is independent of the Rules of Evidence and is not superseded by any rule of exclusion. *State v. Brush*, 32 Wn. App. 445, 451, 648 P.2d 897 (1982). That is because the doctrine is intended to ensure fairness by preventing one party from bringing up a subject to gain an advantage and then barring the other party from further inquiry. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *citing State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The Court of Appeals invented a lack of preservation as a convenient excuse to disregard all the evidentiary errors raised in this case. App. 8-10.

d. Review is required because the record belies the Court of Appeals claim that Mr. Goff did not authenticate the video or provide the transcript.

The Court of Appeals refused to consider the misapplication of ER 106, the completeness rule and the open the door doctrine because it believed the prosecution's contention that Mr. Goff failed to authenticate the video below and failed to designate the complete video or the complete transcript. App. 6, 15-17 (Exhibit 30 and 31 were designated for appeal). The Court of Appeals is mistaken. As discussed above, the defense counsel proffered the video and complete transcript below and it was made part of the record. App. 4 citing RP 558; RP 312-13, 315.(The court said: "You've introduce the transcript. Thank you" and it

accepted the offer of proof.) The Court of Appeals incorrectly claimed neither the video nor the transcript was not offered as evidence, nor as an offer of proof and refused to entertain Mr. Goff's claims. App. 6. Review of this important constitutional issue is appropriate under RAP 13.4(b)(3).

2. Contrary to the view of the Court of Appeals, the substance of the evidence Mr. Goff sought to present was plainly before the court. Its exclusion violated his constitutional right to present a complete defense.

a. *Mr. Goff's has a constitutional right to present evidence relevant to his defense.*

The right of the accused to defend against the State's accusations is guaranteed by the state and federal constitutions. U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 296 (1973). The right to present a defense is intended to ensure

"fairness and reliability in the ascertainment of guilt and innocence," and the right to "a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294, 302. This includes 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." *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed.2d 798 (1988)(internal citation omitted.).

The threshold to admit relevant evidence is low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

If the State moves to exclude relevant evidence, it bears the burden of proving the evidence is so prejudicial "as to disrupt the fairness of the fact-finding process at trial" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Next, the court must balance the

State's interest to exclude the prejudicial evidence versus the defendant's need for the evidence. *Id.* Only when the State's interest outweighs the defendant's need can the court withhold the evidence. *Id.* For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* (internal citations and emphasis omitted).

b. The entire snapchat video was highly relevant to Mr. Goff's defense.

The trial court erroneously denied Mr. Goff's request to introduce the first part of his statement explaining that he came to the aid of Ms. Kafka to prevent Mr. Perez from further assaulting her with a baseball bat. This evidence was highly relevant to his defense as it supplied the missing context for why Mr. Goff struck Mr. Perez.

It was relevant to Mr. Goff's defense of another theory of the case to show his actions towards Mr. Perez were lawful. This evidence was the core of Mr. Goff's defense, thus meeting the threshold for relevant evidence a defendant is entitled to present in his defense. *Jones*, 168 Wn.2d at 720.

The prosecutor objected to Mr. Goff playing or even reading for the jury the relevant portions of the snapchat video, arguing it was "self-serving hearsay" and irrelevant to this case. RP 255. Mr. Goff argued his entire unadulterated statement would be admissible for a non-hearsay purpose, such as consistent statements, if he testified. RP 258 ("There isn't like -- some parts are improper and some parts aren't."). See ER 801(d)(1)(ii). Mr. Goff also argued this evidence rebutted the suggestion that he wantonly attacked Mr. Perez for no reason.

The trial court's erroneous ruling deprived Mr. Goff of the opportunity to present evidence critical to his defense. *Jones*, 168 Wn.2d at 724.

c. The Court of Appeals disregarded that this evidence was crucial for Mr. Goff to present a complete defense.

The Court of Appeals applies circular logic to conclude that the evidence was neither Mr. Goff's entire defense or not highly probative. App. 9. The opinion rules that Mr. Goff's was not denied his right to present a complete defense because he could have taken the stand but did not do so: "there was nothing prohibiting Mr. Goff from testifying to what he said in the redacted portions of the video." App. 9-10. But Mr. Goff's statement of what the video said would have still been "hearsay" according to the State. And the constitutional right to present a defense does not

require the defendant to sacrifice their constitutional right to silence.

The opinion erred erecting a non-existent procedural hurdle and disregarding Mr. Goff's constitutional right to present a defense. App. 6, 9-10.

This issue also concerns a significant question of state constitutional law, further meriting review. RAP 13.4(b)(3).

3. Review should be granted because although the trial court failed to accurately instruct the jury when it refused to give the "aggressor—defense of others" instruction, the Court of Appeals erred in ruling the issue was not preserved.

Mr. Goff argued that the trial court erred in not giving the "Aggressor—defense of others" instruction as requested after acknowledging Mr. Goff had presented some evidence justifying it. RP 624. Without this instruction Mr. Goff was denied his

theory of defense. 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. But the jury was incorrectly instructed Mr. Goff could not lawfully protect Ms. Kafka from being further assaulted by Mr. Perez.

No eyewitnesses saw Mr. Goff with a knife. A jury could have disbelieved Mr. Perez's account that Mr. Goff chased him with a knife. The jury could believe Ms. Duncan's testimony that things had calmed down, and everyone seemed to have kind of relaxed. RP 399. But when Ms. Kafka shoved Mr. Perez, this sparked the melee. Mr. Perez picked up the bat, and struck Ms. Kafka on her forehead. RP 399; 409. Mr. Goff then came to Ms. Kafka's aid. RP 400.

> 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.

WPIC 16.04.01 Aggressor—Defense of Others, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.04.01 (5th Ed).

But instructions the trial court gave did not explain for the jury the interplay between Ms. Kafka, as the first aggressor, and Mr. Goff's lawful use of force to protect her from being struck again by Mr. Perez.

It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case. *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847, 850 (1990).

a. The State must prove each element of the offense as well as the absence of self-defense.

"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; Const. art. I, § 3.

The trial court may not undercut an accused person's claim of self-defense through its evidentiary rulings or instructions to the jury. *State v. Irons*, 101 Wn. App. 174, 549-50, 4 P.3d 174 (2000). A criminal defendant is entitled to a jury instruction on self-defense when there is "some evidence" demonstrating the justifiable use of force. *Irons*, 101 Wn. App. at 449. 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).

b. The court erred in giving the first aggressor and defense of other instructions while simultaneously refusing to explain that Mr. Goff was not the aggressor if he was defending another person.

Self-defense 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). An instruction that does not make the relevant law manifestly apparent "amounts to an error of constitutional magnitude and is presumed prejudicial." *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

i. Without the "Aggressor—defense of other" instruction, the court's first aggressor instruction misled the jury.

Here, Mr. Goff argued at trial that he acted in self-defense and in defense of others. The State countered that self-defense was not available because he was the aggressor. Mr. Goff argued to properly instruct the jury on the law of self-defense and defense of others, the trial court was required to give, the "aggressor—defense of others" instruction as well.

This instruction would have explained to the jury it could find that Ms. Kafka provoked the fight when she "attacked" Mr. Perez. RP 665. But when Mr. Perez struck Ms. Kafka with a bat, Mr. Goff acted lawfully in coming to her aid.

A "first aggressor" instruction tells the jury the defendant is not entitled to act in lawful self-defense if he "provoked or commenced the fight." CP 55; RP 657, 668; *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010). If the instruction is erroneously given, it impermissibly denies the accused person the right to act in self-defense. *Id.* Thus, if the first aggressor instruction effectively prevents a defendant from fully asserting her self-defense theory, it would not be justified for a court to give it. *Stark*, 158 Wn. App. at 960–61.

The Supreme Court recently clarified that the first aggressor instructions are disfavored if they are not justified. *State v. Grott*, 195 Wn.2d 256, 271, 458 P.3d 750(2020). To determine whether first aggressor instructions are justified, appellate courts should apply ordinary standards of review, which require a case-by-case inquiry based on the specific evidence produced at trial. *Id.* at 271. The inquiry must be fact specific and based on the evidence presented at trial, and not based on broad, bright-line rules. *Id.* at 274-75.

"[A]n aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction." *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

To be the "first aggressor," the defendant's own unlawful conduct must provoke the later need to act in self-defense. *State v. Brower*, 43 Wn. App. 893, 901, 721 P.2d 12 (1996). To qualify for the instruction, the defendant's initial provoking act must be intentional; it must be an act that would reasonably provoke a belligerent response from the victim; and it must be related to the eventual assault for which the claim of self-defense arises. *Wasson*, 54 Wn. App. at 159.

Generally speaking, "the alleged act of first aggression cannot 'be the actual assault' with which the defendant is charged." *Grott,* 195 Wn.2d at 271 (*quoting State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)). Where the defendant "undisputedly engaged in a single aggressive act and that act was the sole basis for the charged offense," that act cannot support a first aggressor instruction. *Id*. at 272. But

"where the defendant engaged in a course of aggressive conduct, rather than a single aggressive act", a first aggressor instruction is appropriate. *Id.* at 271.

Here, all eye-witnesses did not see Mr. Goff chasing Mr. Perez with a knife. The jury could have disbelieved Mr. Perez's account that Mr. Goff chased him with a knife and still convicted Mr. Goff for protecting Ms. Kafka, after she provoked the fight.

Without an instruction explaining fully Goff's theory of defense, the first aggressor instruction misled the jury by telling them that self-defense was not available to Mr. Goff even if Ms. Kafka was the first aggressor. 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. CP 55; RP 657 (Jury Instruction No. 15).

ii. The court's instructions prevented the jury from considering Mr. Goff's lawful right to defend others.

Mr. Goff asked the court to instruct the jury on the standard of self-defense and defense of others that applied when Ms. Kafka provoked the fight by shoving Mr. Perez, who struck Ms. Kafka with a baseball bat, moments before Ms. Phillips joined the melee, and moments before Mr. Goff ran to look for the jack handle to come their aid. Mr. Goff sought to argue to the jury his acts constituted lawful use of force, intended to protect Ms. Kafka, Ms. Phillips, and his daughter by stopping Mr. Perez from assaulting them with a baseball bat. RP 624-626. Even if the jury disbelieved Mr. Perez, without this "Aggressor–defense of others" instruction, the jury could only view his conduct with the jack handle as the first act of aggression. *Id.*

A court abuses its discretion when it refuses to give an instruction that lets a party argue its theory of defense and is supported by "some evidence." *See Irons*, 101 Wn. App. at 449. Furthermore, "[a] defendant in a criminal case is entitled to have the jury fully instructed on the *defense theory* of the case." *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000) (emphasis added, internal citation omitted).

As set forth in WPIC 17.02, using force is lawful when a person reasonably believes he is aiding a person who is "about to be injured" in preventing an offense against that person, when the force used is not more than necessary. *Id.*; citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02 (4th ed. 2016); see RCW 9A.16.020(3) (force "is not unlawful" if reasonably used to aid a

person in "preventing or attempting to prevent an offense" against a person).

Mr. Goff's theory of defense rested on his use of reasonable force in response to Mr. Perez's assaultive conduct with a bat primarily towards Ms. Kafka, then towards Ms. Phillips and towards himself.

Although the Court gave this basic self-defense instruction, and the 'defense of others" instruction, it refused to give the "aggressor—defense of others" instruction as well. RP 626, 644.

The court did not instruct the jury it could find Ms. Kafka was the first aggressor, and view Mr. Goff's act of intervening to prevent the imminent assault of Ms. Kafka as lawful if he acted reasonable defense of others, based on his perceptions of the harm the others faced. RP 626.

The first aggressor instruction the court gave allowed the prosecution to argue to the jury Mr. Goff was guilty because he "never expressed any fear" of Mr. Perez. RP 671, 677. And that self-defense required Mr. Goff to fear imminent personal injury before he could use any force. Mr. Goff could not explain to the jury it could view Ms. Kafka as the first aggressor and weigh whether Mr. Goff was acting lawfully when he struck Mr. Perez to protect Ms. Kafka from an imminent assault with a bat. RP 624-626. In short, the court's instructions improperly deprived Mr. Goff of his right to act in defense of others.

c. ***The Court of Appeals incorrectly believed that Mr. Goff failed to fully explain why he was requesting the defense of others instruction and rejected his claim that the jury was not accurately instructed.***

The Court of Appeals holds that Mr. Goff failed to preserve his claim that the jury was not accurately

instructed on the law of self-defense. App. 11. The Court of Appeals incorrectly concludes that defense counsel did not explain why WPIC 16.04 proposed by the State was not accurate and why the WPIC 16.04.01 instruction Mr. Goff was seeking was necessary. App. 11. It believed defense counsel refused to explain to the court the reasons for requesting the defense of others instruction by saying: "I don't have anything further to add on that, in terms of my record." RP at 625. The opinion misconstrues the record and incorrectly manufactures a lack of preservation rationale for denying relief. App. 11. Review should be granted.

E. CONCLUSION

Mr. Goff respectfully requests this Court accept review.

This brief complies with RAP 18.7 and contains 4,971 words.

DATED this 3rd day of January 2025.

Respectfully submitted,

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APPENDICES

FILED
DECEMBER 3, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

C●●NEY, 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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