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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERMI RASHAD ZEIGLER, Appellant.	No. 56585-4-II PART PUBLISHED OPINION

MAXA, P.J. – Germi Zeigler appeals his conviction of second degree murder while armed with a firearm[1] and his sentence. The convictions arose from an incident in which Zeigler argued with Ozell Tate while standing over him and then shot him.

Tate was sitting in the passenger seat of a car. Zeigler had an issue with Tate and walked up to talk with him while holding a gun in the pocket of his hoodie. Zeigler stood over Tate, less than a foot away, while yelling "I'm a real gangster" and "You've been disrespecting me" several times. Zeigler claimed that it looked like Tate was reaching for a gun, so he instinctively fired two shots at Tate. Neither of the two witnesses stated that they saw a gun before the shots were fired.

The trial court gave self-defense instructions, but also gave a first aggressor instruction that stated that self-defense was not available as a defense if Zeigler's acts and conduct provoked the fight that necessitated the need to act in self-defense. Zeigler argues that the trial court erred

[1] Zeigler also was convicted of unlawful possession of a firearm, but he does not appeal that conviction.

in giving a first aggressor jury instruction because there was not sufficient evidence to support the instruction. He relies in part on settled law that words alone cannot make a defendant the first aggressor. He also claims that the first aggressor instruction should have included a statement that words alone cannot make a defendant the first aggressor.

We hold that (1) the trial court did not err in giving the first aggressor instruction under the specific facts of this case; and (2) even though it was not error to give the first aggressor instruction, the instruction was defective because it should have included a statement that words alone cannot make a defendant the first aggressor. In the unpublished portion of this opinion, we address evidentiary and instructional issues that may arise on remand.[2]

Accordingly, we reverse Zeigler's second degree murder conviction and remand for a new trial on the second degree murder charge.

FACTS

Background

On March 11, 2020, Zeigler and his girlfriend Lakenya Jones had an argument in the apartment that he and Jones shared. Jones left the apartment and went outside, where she ran into Mandesa Hodges, Tate's girlfriend. Zeigler came outside and exchanged heated words with Hodges. During this exchange, Tate was discussed.

Later that day, Hodges and Tate were next to Tate's car that was parked in the alley behind the apartment. Tate was sitting in the passenger seat of the car with his feet on the ground. Zeigler drove into the alley and told Tate he wanted to talk with him. Ramon Frazier also was in the car. Zeigler parked his car and walked over to Tate.

[2] Zeigler also raises a number of other arguments, which we do not address because we are reversing his conviction.

Zeigler and Tate exchanged heated words, and when Zeigler saw Tate reaching for what he thought was a gun he fired his own gun twice at Tate. Tate later died from a gunshot wound.

The State charged Zeigler with first degree murder, second degree murder, second degree unlawful possession of a firearm, and two counts of tampering with a witness.

Hodges' Testimony

Hodges testified that after her argument with Zeigler, she met up with Tate. Hodges told Tate about the argument and they walked to his car that was parked in the alley so that he could change his shoes.

Tate was sitting in the passenger seat and Hodges was standing outside the car when Zeigler and Frazier drove up. Zeigler yelled out to Tate, saying he wanted to talk to him. Tate responded that he did not have anything to talk with Zeigler about.

Zeigler parked his car and walked toward Tate and Hodges in the alley. Hodges testified that Zeigler had his hand in the front pocket of his hoodie. Hodges thought it looked like Zeigler was holding a gun in the pocket.

When Zeigler walked up, Tate was standing next to the car. Tate said to Zeigler, "So I'm a bitch?" Rep. of Proc. (RP) (Nov. 9, 2021) at 85. Zeigler responded that Tate was "disrespecting" him. RP (Nov. 9, 2021) at 85. Zeigler began yelling that he was a "real gangster." RP (Nov. 9, 2021) at 86. Hodges stated that Zeigler was acting aggressive and very upset, and that he was foaming at the mouth. Zeigler said about four to five more times that he was a "real gangster" and that Tate had "been disrespecting" him. RP (Nov. 9, 2021) at 87. Tate said he did not have a problem and told Zeigler to back up. Tate had his hands up, was shaking, and looked scared.

Tate sat down in the passenger seat with his feet on the ground and Zeigler began to walk away. Then Zeigler came back and stood over Tate, pointing in his face. Hodges stated that Zeigler literally was standing over the top of Tate. Zeigler looked at Hodges and asked her about three to four times, "Are you going to tell? Yes or no?" RP (Nov. 9, 2021) at 89.

At this point, Tate had one hand up, repeating that he did not have a problem. Zeigler was repeating that he was a "real gangster." RP (Nov. 9, 2021) at 89. Hodges heard Zeigler ask Tate what he was reaching for, and then she heard two successive gunshots. Hodges stated that the shots happened so fast that she did not see the gun and that she never saw a gun.

Hodges stated that Tate did not have a gun that day and that she never knew him to have a gun. She also did not have a gun that day.

Frazier's Testimony

Frazier testified that Zeigler drove into the alley and saw Hodges and Tate. Zeigler said to Tate, "I need to talk to you, you know, I need to talk to you man to man." RP (Nov. 10, 2021) at 84. Tate responded, "Yeah, I need to talk to you too, man to man . . . you supposedly told my girl that I was slow and I'm a bitch." RP (Nov. 10, 2021) at 84.

Zeigler parked the car and told Frazier that he was going to "knock [Tate] out." RP (Nov. 10, 2021) at 85. Zeigler then went into the back of his car, grabbed a gun, and said that he was going to shoot Zeigler.

Frazier stayed in the car, but Zeigler walked over to Tate and they began yelling at one another. Tate was in the passenger seat and Zeigler was standing very close to him, less than a foot away.

Frazier heard Zeigler say to Hodges, "Are you going to tell?" RP (Nov. 10, 2021) at 88. Then Zeigler walked back over to Tate and said, "What? What you doing? What you grabbing?

. . . Don't do me like that." RP (Nov. 10, 2021) at 88. Tate responded, "Whoa whoa whoa. Hold on . . . I ain't trying to do nothing. I ain't grabbing nothing." RP (Nov. 10, 2021) at 90. Tate had his hands up and then said, "I ain't trying to grab nothing . . . I am just going to knock your ass out." RP (Nov. 10, 2021) at 90.

Frazier then heard two gunshots. The first shot went through the windshield. Zeigler ran back to the car, upset and crying, and drove off.

Zeigler's Testimony

Zeigler testified that he and Frazier were driving back to the apartment when he saw Tate and Hodges in the alley. Zeigler rolled down his window and asked Tate if he could talk to him. Tate yelled back that "[t]here is no talking." RP (Nov. 17, 2021) at 92. Zeigler parked his car. Because Tate sounded hostile and he knew what Tate was capable of, Zeigler grabbed his gun and put it into the front pocket of his hoodie to prepare himself for any attack.

Zeigler then walked toward the apartment, but Tate yelled, "Hey, where are you going? Come here. Let me talk to you." RP (Nov. 17, 2021) at 94. So Zeigler walked toward Tate, where he was sitting in his car with his feet outside the car. Tate asked Zeigler about his argument with Hodges and Zeigler tried to explain that it was not serious, but that Hodges had gotten in the middle. Things escalated between Tate and Zeigler, so Zeigler turned to Hodges and asked why she was just allowing the argument to continue. Hodges did not say anything.

Tate then said to Zeigler, "I got something for you. I'm going to f[***] you up." RP (Nov. 17, 2021) at 96. Zeigler testified that Tate was sitting with his hands behind the seat and was looking into Zeigler's eyes. Zeigler asked three times, "Bro, what's in your hands?" RP (Nov. 17, 2021) at 96. When Tate didn't respond after the third time and instead raised his arms, Zeigler fired two shots.

Zeigler testified that pulling the trigger was an instinctive reaction. He did not intend for Tate to die or to even shoot him; he was only thinking about defending himself.

During cross-examination, the prosecutor asked, "You pulled the gun out of your sweatshirt, and you pointed it at [Tate]?" and Zeigler responded, "No ma'am." RP (Nov. 17, 2021) at 128. Later, the following exchange took place:

> Q. So Mandesa Hodges testified that he had his hands in the air and said, "There's no need for a gun. No need for a gun. We have got no problem."
> A. No, she made a statement. She testified and said that one of his hands was behind his back.
> Q. Mr. Zeigler, she testified that Ozell Tate said, "There's no need for a gun"; right? And didn't he --
> A. You wouldn't – No, I'm – I'm not sure of any comment like that that she made.
> Q. Didn't he say that to you?
> A. No, ma'am.
> Q. "No need for a gun"?
> A. No, ma'am.

RP (Nov. 17, 2021) at 132. Hodges did not testify that Tate said "there's no need for a gun."

During Zeigler's cross-examination, the State repeatedly asked whether Zeigler made the decision to walk over to Tate instead of ignoring him.

First Aggressor Jury Instruction

The trial court gave a self-defense jury instruction, which stated that "[t]he use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, and when the force is not more than is necessary." Clerk's Papers (CP) at 229. The instruction further stated that the State had the burden of proving beyond a reasonable doubt that the force used by Zeigler was not lawful.

The State proposed a first aggressor jury instruction. Zeigler objected and filed a motion to exclude the instruction. Zeigler did not object on the basis that the proposed instruction failed to state that words alone were not adequate provocation for him to be the aggressor.

The trial court ruled that the first aggressor instruction would be given. The court stated,

> If the jury finds the State's theory of the case to be true, then that does support the fact that the defendant acted as a first aggressor. That that course of conduct leading up to and prior to the shooting itself, the act of arming himself, walking to [Tate], yelling at [Tate], acting aggressively, standing over him, the statements "You're disrespecting me", all while the victim is sitting in his car with one shoe on. The defendant stating, "I'm a real gangster."

RP (Nov. 18, 2021) at 9-10.

The trial court gave the following jury instruction,

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill 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 is not available as defense.

CP at 233.

Closing and Rebuttal Arguments

During closing and rebuttal arguments, the prosecutor argued that Zeigler had many opportunities to prevent the shooting. The prosecutor repeatedly stated that Zeigler created the confrontation and that he went "right up to [Tate] and confronted him. He provoked a fight." RP (Nov. 18, 2021) at 93, 95, 99-100, 133, 135, 136.

The prosecutor also repeated Zeigler's words throughout closing argument, stating that Zeigler yelled and screamed at Tate. The prosecutor stated, "And then he came back to where [Tate] was sitting with [Hodges] standing and [Zeigler] started yelling, 'I'm a real gangster – Are you going to tell?' He repeated these phrases several times, and then he fired two shots. And [Tate] was cornered in his car. He had no escape." RP (Nov. 18, 2021) at 107-08.

In addition, the prosecutor repeatedly stated that Zeigler had his gun visible before the shooting, was waving it around during the verbal altercation, and that Tate told Zeigler, "There's

no reason for a gun." RP (Nov. 18, 2021) at 82, 83, 93, 95, 98, 131, 136. However, nothing in the record supported those statements.

Verdict

The jury found Zeigler guilty of second degree murder while armed with a firearm and second degree unlawful possession of a firearm. Zeigler appeals his second degree murder conviction.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE FOR FIRST AGGRESSOR JURY INSTRUCTION

Zeigler argues that the trial court erred in giving the first aggressor jury instruction because there was not sufficient evidence to support the instruction. We disagree.

1. Legal Principles

A defendant's use of force is lawful and self-defense can be asserted as a defense if the defendant subjectively and reasonably believes that the victim will inflict imminent harm. *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020). "The amount of force used must be 'not more than necessary.' " *Id.* (quoting RCW 9A.16.020(3)). Further, "it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." *State v. Ferguson*, 131 Wn. App. 855, 862, 129 P.3d 856 (2006).

However, self-defense cannot be invoked if the defendant was the aggressor or provoked an altercation. *Grott*, 195 Wn.2d at 266. " '[T]he reason one generally cannot claim self-defense when one is an aggressor is because 'the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.' " *Id.* (quoting *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999)).

Courts should use care in giving the first aggressor instruction because that instruction can impact a defendant's claim of self-defense. *Grott*, 195 Wn.2d at 266. But a first aggressor jury instruction should be given if the evidence supports the instruction. *Id.* Whether a first aggressor instruction is justified depends on a "case-by-case inquiry based on the specific evidence produced at trial." *Id.* at 271. "Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate." *Riley*, 137 Wn.2d at 909-10. "The provoking act must be intentional and one that a 'jury could reasonable assume would provoke a belligerent response by the victim.' " *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011) (quoting *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989)).

However, words alone cannot constitute provocation sufficient to give a first aggressor instruction. *Riley*, 137 Wn.2d at 911. "Numerous courts have held either that one may not use force in self-defense from verbal assaults, or that an aggressor instruction is not justified where the alleged provocation is merely verbal." *Id.* at 912. "Therefore, the giving of an aggressor instruction where words alone are the asserted provocation would be error." *Id.* at 911. The Supreme Court explained the rationale supporting this rule:

> [T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. However, mere words alone do not give rise to reasonable apprehension of great bodily harm.

Id. at 912.

In addition, the provoking act generally cannot be the offense with which the defendant is charged. *Grott*, 195 Wn.2d at 271. "In cases where the defendant undisputedly engaged in a single aggressive act and that act was the sole basis for the charged offense, we agree that the

single aggressive act cannot support a first aggressor instruction." *Id.* at 272. But this rule does not apply "where there is evidence that the defendant engaged in a course of aggressive conduct, rather than a single aggressive act." *Id.*at 273. Again, words alone plus the offense with which the defendant is charged cannot be the course of aggressive conduct sufficient to give the first aggressor instruction. *Riley,* 137 Wn.2d at 911-12.

We review de novo a trial court's decision to give a first aggressor jury instruction. *State v. Kee,* 6 Wn. App. 2d 874, 878, 431 P.3d 1080 (2018). In making this determination, we view the evidence in the light most favorable to the party who proposed the instruction. *Grott,* 195 Wn.2d at 270.

2. Analysis

The trial court's first aggressor instruction stated as follows:

> No person may, by any intentional *act* reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill 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 is not available as defense.

CP at 233 (emphasis added). This instruction was based on WPIC 16.04.[3]

The question here is whether Zeigler's acts or conduct, as opposed to his words, provoked any need for self-defense. *See Riley,* 137 Wn.2d at 911. And the actual shooting alone cannot be the aggressive act because that is the act for which Zeigler was charged with murder. *See Grott,* 195 Wn.2d at 271.

The State argues that the aggressive act was Zeigler pulling out the gun and aiming it at Tate before shooting him. In the facts section of its brief, the State claims as follows: "[Zeigler]

[3] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL: 16.04, at 269 (5th ed. 2021).

walked directly up to Tate and *pulled out a gun and aimed it at Tate*, trapping him in the car." Br. of Resp. at 5 (emphasis added). In the argument section, the State claims as follows: "When he was between a foot and two feet away, [Zeigler] pulled out the gun to which Tate said repeatedly, '*There is no need for a gun!*' and '*Why you have a gun?*' and 'There's no problem here.' " Br. of Resp. at 54 (emphasis added). The State relies on the statement in *Riley* that "[i]f there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction." 137 Wn.2d at 910.

The problem with the State's argument is that its recitation of the evidence is not supported by the evidence. The State provides record cites to the testimony of Hodges and Frazier for its statement in the facts section, but none of those cites come close to supporting the statement that Zeigler "pulled out a gun and aimed it at Tate." In fact, Hodges testified that the shots happened so fast that she did not see the gun and that she never saw a gun. And Frazier never testified that Zeigler pulled a gun on Tate before actually firing the gun, nor did Zeigler. The State did not provide a cite for its statements in the argument section. And nowhere in the record is there evidence that Tate said, "There is no need for a gun!" or "Why you have a gun?"[4]

Because the State has misstated the record, we reject the State's argument that the aggressive act supporting the first aggressor instruction was Zeigler pulling out a gun and pointing it at Tate before Zeigler shot him.

Other than falsely claiming that Zeigler pointed a gun at Tate, the State argues that Zeigler engaged in aggressive actions before shooting Tate that constituted a course of aggressive conduct that culminated with the shooting with which he was charged. The State

[4] The prosecutor asked Zeigler on cross-examination whether Hodges testified that Tate made these comments, but Zeigler denied that she did. Hodges did not testify that Tate said "there's no need for a gun."

references the fact that Zeigler stood over Tate, foaming at the mouth while yelling that he was a real gangster. In addition, the State notes that Zeigler had his hand on a gun in the pocket of his hoodie.

As noted above, whether a first aggressor instruction is justified depends on a "case-by-case inquiry based on the specific evidence produced at trial." *Grott*, 195 Wn.2d at 271. Although the evidence here was not overwhelming, we conclude under the specific facts of this case that there was sufficient evidence to support a finding that Zeigler engaged in a course of conduct in addition to his words that was reasonably likely to provoke a belligerent response.

First, when he approached Tate, Zeigler had his hand in his pocket and Hodges perceived that he was holding a gun in the pocket. Viewing the evidence in the light most favorable to the State, we can infer that Tate also thought that Zeigler was holding a gun. This would explain the fact that Tate was shaking and looked scared as Zeigler was yelling at him. Carrying a weapon without displaying it is not necessarily an act of first aggression. *See State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). But Zeigler's conduct in holding the gun in his pocket was part of the totality of the circumstances.

Second, Hodges testified that Zeigler literally was standing over Tate as he yelled at Tate that he was a "real gangster" and that Tate was "disrespecting him." RP (Nov. 9, 2021) at 83-89. Frazier testified that Zeigler was less than a foot away from Tate while they were arguing. The law is clear that Ziegler's yelling alone cannot support the giving of a first aggressor instruction. *Riley*, 137 Wn.2d at 911. But this was very aggressive conduct, not just words. Tate essentially was trapped in his car, with no means of escaping this aggressive conduct. *See State v. Anderson*, 144 Wn. App. 85, 89-90, 180 P.3d 885 (2008) (holding that the defendant's conduct

of yelling at, and leaning over, his girlfriend with his hands on the arms of the chair she was sitting in was sufficient to support an aggressor instruction).

Third, although words alone cannot support a first aggressor instruction, the defendant's words can be considered along with the defendant's course of conduct. Viewing the evidence in a light most favorable to the State, it can be inferred that Zeigler's repetition of the phrase "I'm a real gangster" coupled with the gun in his pocket and the aggressive conduct reasonably placed Tate in fear of imminent harm.

Viewing the evidence in the light most favorable to the State, the totality of the circumstances shows that Zeigler's conduct and not his words alone supported giving the first aggressor instruction. Therefore, we hold that the trial court did not err in giving the instruction.[5]

B. LANGUAGE OF FIRST AGGRESSOR JURY INSTRUCTION

Alternatively, Zeigler argues that the trial court erred in giving the first aggressor jury instruction because the language of the instruction was not complete and it permitted the jury to find that he provoked the altercation based on words alone. We agree.

1. Legal Principles

Jury instructions must be supported by substantial evidence, permit the parties to argue their theories of the case, and properly inform the jury of the applicable law. *Kee*, 6 Wn. App. 2d at 880. "Self-defense instructions are subject to heightened scrutiny and 'must make the relevant

[5] As discussed below, we are remanding for a new trial. We recognize that the evidence presented in the second trial may differ from the evidence presented in the first trial. Whether the first aggressor instruction should be given at the second trial will depend on the specific evidence presented.

legal standard manifestly apparent to the average juror.' " *Id.* (quoting *State v. Woods*, 138 Wn. App. 191, 196, 156 P.3d 309 (2007)).

In *Kee*, the defendant and the victim engaged in a physical altercation where the defendant and the victim were hitting each other, and the defendant hit and broke the victim's nose with the final punch. 6 Wn. App. 2d at 877. The altercation started after the defendant witnessed the victim arguing with a third person. *Id.* The defendant then approached the victim and made a derogatory comment to the victim and then threatened to kick the victim's ass. *Id.* The court gave the standard first aggressor instruction, based on WPIC 16.04. *Id.* at 878. The instruction did not include a statement that words alone are not adequate provocation to preclude self-defense.

During closing argument, the prosecutor stated,

> "[T]he Defendant walked up to this situation – the situation that didn't involve her in any way. She initiated this entire incident. She was the first person to speak to [the victim]. . . . There was no reason for her to walk up there – there was no reasons for her to become a part of it. And as the court mentioned one of the instructions says if she . . . is the aggressor in this situation she can't claim self-defense. . . . And she created this situation – she created this argument – she created this conflict and it ended in a broken nose."

Id. at 881 (quoting the RP).

This court noted that the evidence supported giving the first offender instruction because there was evidence that the defendant threw the first punch and she was charged only for the final punch. *Id.* at 880. However, the court also concluded that "the evidence supported a finding that [the defendant's] words, rather than her physical acts, first provoked the physical altercation." *Id.* And the court stated that a reasonable juror could find that the defendant's comments to the victim provoked the assault. *Id.* at 881. In fact, the court emphasized that the prosecutor made such an argument. *Id.* The prosecutor stated that the defendant initiated the

entire incident by speaking first to the victim. *Id.* In addition, the prosecutor argued that walking up to someone, speaking in a raised tone, and threatening to kick their ass was pretty aggressive. *Id.*

The court stated, "By failing to instruct the jury that words alone are insufficient provocation for purposes of the first aggressor jury instruction, the trial court did not ensure that the relevant self-defense legal standards were manifestly apparent to the average juror." *Id.* at 881-82. And the instruction affected the defendant's ability to argue that she acted in self-defense. *Id.* at 882.

The court concluded,

> We recognize that WPIC 16.04 does not include an express statement that words alone cannot constitute aggression that negates self-defense. The pattern instruction's reference to an "intentional *act*" and the "defendant's *acts*" could be viewed as requiring some physical conduct. WPIC 16.04 (emphasis added). . . . But verbally abusing someone also constitutes an "act." *When there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.04 is inadequate* to convey the law established in *Riley*.
>
> Accordingly, we hold that the trial court erred in giving the first aggressor jury instruction *without also instructing the jury that words alone are not adequate provocation to make a defendant the first aggressor in an altercation*.

Id. (emphasis added).

In the May 2021 edition of volume 11 of *Washington Practice*, WPIC 16.04 was amended to include the following language at the end of the instruction: "[Words alone are not adequate provocation for the defendant to be the aggressor.]" 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL: 16.04, at 269 (5th ed. 2021). The comment on WPIC 16.04 cites to *Kee* and states, "In a case *where the provoking conduct includes the defendant's words*, the court should inform the jury that words alone are not adequate provocation to negate self-defense." WPIC 16.04, comment (emphasis added).

2. Failure to Object

Initially, the State argues in a footnote that we should not consider this argument because Zeigler did not preserve this issue for appeal when he did not object to the wording of the instruction at the trial court. We disagree.

At trial, Zeigler objected to giving the first aggressor instruction, but he did not object to the language of the instruction. Therefore, he did not preserve the alleged error. But RAP 2.5(a) states that the "appellate court may refuse to review any claim of error which was not raised in the trial court." By using the word "may," this rule necessarily gives us discretion regarding consideration of unpreserved errors.

In *Kee*, as in this case, the defendant objected only to giving the first aggressor instruction. 6 Wn. App. 2d at 877-78. Nevertheless, this court addressed the defendant's argument on appeal that the language of the instruction was inadequate. *Id.* at 880. We also exercise our discretion to consider this issue.

3. Analysis

As discussed above, Zeigler engaged in some conduct that reasonably provoked a belligerent response. But a majority of the altercation involved Zeigler's words. Hodges testified that Zeigler repeated several times that he was a "real gangster" and "you been disrespecting me." RP (Nov. 9, 2021) at 85-86. Therefore, the evidence supported a finding that Zeigler's words, rather than any physical act, provoked Zeigler's perceived thought that Tate was reaching for a gun. And as in *Kee*, the evidence here could have led a reasonable juror to conclude that Zeigler yelling at Tate provoked the shooting.

The instruction also allowed the prosecutor to argue to the jury that it should focus on Zeigler's initiating an argument with his words rather than focusing on any aggressive actions.

See Kee, 6 Wn. App. 2d at 881. And the prosecutor made such an argument. During closing argument, the prosecutor spoke extensively about the words that Zeigler said to Tate, repeating Zeigler's heated words throughout closing argument and emphasizing that Zeigler yelled and screamed at Tate.

Kee controls the result here. As in *Kee*, there is evidence here that Zeigler provoked the altercation with his offensive words. *See* 6 Wn. App. 2d at 882. As in *Kee*, the State suggested that those words could constitute the first aggression. *See id.* Therefore, as in *Kee*, "the trial court erred in giving the instruction without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation." *Id.* In addition, the comment to WPIC 16.04 supports including in the first aggressor instruction a sentence stating, "Words alone are not adequate provocation for the defendant to be the aggressor."

The State argues that this additional sentence was unnecessary because no reasonable juror could find that words alone provoked Tate's response. We disagree. The words Zeigler used were a significant portion of the altercation with Tate. Even though we conclude above that some conduct also was involved, a reasonable juror could find that it was the words alone that constituted the first aggression.

Therefore, we hold that the trial court erred in giving the first aggressor jury instruction without also instructing the jury that words alone are not adequate provocation to make a defendant the first aggressor in an altercation.

CONCLUSION

We reverse Zeigler's second degree murder conviction and remand for a new trial on the second degree murder charge.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we address Zeigler's evidentiary and instructional arguments that may arise on remand.

We hold that (1) the trial court erred when it prevented Zeigler from questioning Frazier about his knowledge of Hodges removing Tate's belongings from the crime scene; (2) the trial court arguably erred in excluding evidence that Tate was in a gang and routinely carried a gun, but on remand the trial court should conduct an ER 404(b) analysis before determining whether to admit or exclude this evidence; (3) the trial court did not err in excluding evidence that Zeigler's brother was shot in the same location; (4) the trial court did not err in admitting expert testimony from a police detective regarding flinching upon firing a weapon; and (5) the trial court did not err in refusing to instruct the jury on the lesser included offense of second degree manslaughter.

Zeigler also raises arguments of ineffective assistance of counsel, prosecutorial misconduct, and community custody supervision fees. Because we reverse the second degree murder conviction and sentence on other grounds, we decline to address these issues.

ADDITIONAL FACTS

Pretrial Motions

Zeigler submitted to the trial court a declaration stating that he knew Tate was affiliated with the Hilltop Crips and that his brother was shot in July 2019 in the same alley as Tate's shooting. The State filed motions in limine requesting the trial court to exclude allegations of Tate's gang ties and testimony regarding the shooting involving Zeigler's brother.

The trial court granted the State's motions, ruling that there was "no evidence that [Tate] had gang ties or had a violent criminal past." CP at 179. The trial court also ruled that there was "no allegation that [Tate] was involved in [the shooting of Ziegler's brother]" and that the "incident [was] too far removed in time from the current incident, and has no bearing on the current case." CP at 179.

Opening Statement

During Zeigler's opening statement, defense counsel stated,

> [N]ow, obviously, if you're attempting – you really want to kill someone, you intend to and you're premeditated, you're not going to shoot them in the leg. And what happens is two shots go off fast, and Mr. Zeigler runs away. He shot in the leg. Not shot in the body. He's not shot in the head. He's not shot four times.

RP (Nov. 8, 2021) at 32.

Witness Testimony

Jeff Thiry, a sergeant with the Tacoma Police Department (TPD), testified that it was "common for people to be in disagreements in the area" where Tate's shooting occurred. RP (Nov. 8, 2021) at 82, 99. He also stated that people had a lot of arguments "over property and everything else," and previously had responded to the same area for numerous fights. RP (Nov. 8, 2021) at 99, 101-02.

Jacob Martin, a detective for TPD, testified that no firearms were recovered from the crime scene. But based on the shell casings that were left behind, it was likely that Zeigler used a semiautomatic firearm. Although Martin could not say much about the specific firearm that was used, he was able testify about the general effect a trigger pull could have on a firearm.

When the prosecutor asked Martin about the term "flinch," Zeigler objected, stating that he was "talking in generalities and not specifics to this case." RP (Nov. 15, 2021) at 57-58. The trial court ruled that testimony regarding flinching was relevant. But the State could not ask for Martin's opinion; he could testify only about what it means to flinch and could not relate his testimony directly to Zeigler's case. The trial court also pointed out that Zeigler would have the opportunity to cross-examine Martin.

When direct examination began again, the prosecutor again asked Martin about flinching. Martin stated,

> One of the common . . . issues that we as instructors have to look at and help shooters with is this thing called flinching or this pre-ignition push is what it's often referred to as. . . . And when we press the trigger of a firearm, you have this explosion that's happening. And . . . that flinching, is a thing that happens where at the last second or while that trigger is being pressed, . . . they kind of push the gun away from themselves. . . . If you're right-handed, it, kind of, typically tends to go low and right. If you're left-handed, it typically goes low and to the left. So this can impact somebody's – they're aiming at a particular spot, and they might be hitting low on that because of this flinching. And . . . this happens with . . . new shooters. It happens with seasoned shooters. It's something that I personally have to deal with . . . this is something that I practice.

RP (Nov. 15, 2021) at 69-70. Martin further stated, "If a person has that flinching, it does not matter whether, you know – certainly on a larger caliber it might be a bigger and on a smaller there might be less, but it is – it's a common thing that can happen in shooting." RP (Nov. 15, 2021) at 70.

During cross-examination, Zeigler asked Martin whether he had any information in this case upon which to form an opinion on flinching, to which he responded that he did not.

Zeigler asked Frazier if he remembered "saying that [Hodges] took all [Tate's] belongings, and money and stuff came missing from the scene?" RP (Nov. 10, 2021) at 156. The prosecutor objected and the trial court sustained the objection based on relevance.

During Jones's testimony, and outside the presence of the jury, Zeigler asked the trial court whether he could elicit testimony from Jones that Tate routinely carried a firearm. During a previous interview, Jones had stated that Tate "carried a gun around." RP (Nov. 17, 2021) at 61-62.

The State objected and the trial court sustained the State's objection, ruling,

> The issue in this case . . . boils down to self-defense and . . . the jury to be able to see what was in the mind of Mr. Zeigler at the time of this incident. He can certainly, if he chooses to testify, which I don't know if he's going to, will be allowed to testify about the reputation of Ozell Tate in the community and his observations with regard to Ozell Tate and whether or not he owned or possessed weapons. . . . The – the fact of – that Mr. Tate may have carried a firearm at this point is unknown if that's known to Mr. Zeigler. So at this time I don't think it's relevant as far as the defense of self-defense . . . we're not talking about what's in the mind of Mr. Zeigler. It's something that Ms. Jones is indicating.

RP (Nov. 17, 2021) at 62-64.

Second Degree Manslaughter Jury Instruction

Zeigler proposed jury instructions on the lesser included offenses of first degree and second degree manslaughter.

The trial court allowed for the first degree manslaughter instruction to be given, but regarding the second degree manslaughter instruction, the court ruled that it was "not supported in any way by the evidence that there was a negligent act. In fact, the defendant's own testimony refutes that entirely." RP (Nov. 18, 2021) at 13.

Verdict

In addition to finding Zeigler guilty of second degree murder while armed with a firearm, the jury also found Zeigler guilty of the lesser included crime of first degree manslaughter while armed with a firearm. Because the jury returned a guilty verdict of second degree murder, the trial court vacated the conviction for first degree manslaughter to avoid a double jeopardy violation.

ANALYSIS

A. RIGHT TO PRESENT EVIDENCE

Zeigler argues that the trial court violated his constitutional right to present evidence in support of his self-defense theory. We address several evidentiary issues because they may arise on remand.

1. Legal Principles

In analyzing whether a criminal defendant's right to present a defense has been violated, we first analyze the trial court's evidentiary rulings for abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). Trial courts determine whether evidence is relevant and admissible. *Id.* at 59. "A trial court abuses its discretion if 'no reasonable person would take the view adopted by the trial court.' " *Id.* (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

a. Relevancy and Constitutional Analysis

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. But although relevant, evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. And trial courts are permitted to " 'exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.' " *Id.* at 63. (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant's right to present a defense. *Jennings*, 199 Wn.2d at 63. Therefore, after analyzing the evidentiary rulings for an abuse of discretion, if the evidence was properly excluded under evidentiary rules we then consider de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. *Id.* at 58. We determine whether excluding relevant evidence violates the defendant's constitutional rights by weighing the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence. *Jennings*, 199 Wn.2d at 63.

b. Self-Defense Evidence

The jury must consider all the facts and circumstances known to the defendant in considering a claim of self-defense. *State v. Duarte Vela*, 200 Wn. App. 306, 319, 402 P.3d 281 (2017). "Because the 'vital question [for self-defense] is the reasonableness of the defendant's apprehension of danger,' the jury must stand 'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.' " *Id.* (quoting *State v. Wanrow*, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)).

"Evidence of a victim's propensity toward violence that is known by the defendant is relevant to a claim of self-defense 'because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at that time, had reason to fear bodily harm.' " *Duarte*

Vela, 200 Wn. App. at 319 (quoting *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972)). Therefore, such evidence is admissible to show the defendant's reason for fear and the basis for acting in self-defense. *Duarte Vela*, 200 Wn. App. at 319-20.

The ER 403 balancing of probative value versus unfair prejudice is weighed differently when a defendant seeks to admit evidence that is central to their defense. *Duarte Vela*, 200 Wn. App. at 320. ER 403 cannot be used to exclude " 'crucial evidence relevant to the central contention of a valid defense.' " *Id.* at 320-21 (quoting *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987)).

In addition, if the evidence is weak or false, then cross-examination will reveal this and invite prejudice to the defendant who introduced such evidence. *Duarte Vela*, 200 Wn. App. at 321. Therefore, the trial court should admit probative evidence, even if suspect, and allow it to be tested by cross-examination. *Id.* The jury then will retain its role as the trier of fact and will determine whether the evidence is weak or false. *Id.*

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." But such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). This list is not exclusive. *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011).

A court may admit evidence of "other crimes, wrongs, or acts" under ER 404(b) for other purposes, as long as the court (1) finds by a preponderance of evidence that the act occurred, (2) identifies the purpose for introducing the evidence, (3) determines that the evidence is relevant to prove the crime charged, and (4) weighs the probative value of the evidence against the prejudicial effect. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

2. Evidence that Hodges Removed Items from the Crime Scene

During Frazier's testimony, Zeigler asked Frazier if he remembered "saying that [Hodges] took all [Tate's] belongings, and money and stuff came missing from the scene?" RP (Nov. 10, 2021) at 156. The State objected and the trial court sustained the objection based on relevance.

We conclude that it is relevant to Zeigler's self-defense theory that Tate was armed. If Hodges removed a potential weapon, then it was relevant to Zeigler's claim of self-defense because it was direct evidence that Tate had a gun that he might have been reaching for when he was shot. Therefore, the evidence had the tendency to make Zeigler's need for self-defense more probable.

Because the evidence was relevant, we weigh Zeigler's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of the evidence. *Jennings*, 199 Wn.2d at 63. The State argues that such "after the fact" evidence would be prejudicial and speculative because (1) Frazier would not have had any personal knowledge as to whether Hodges took anything from the scene and (2) Hodges would not have had an opportunity to take or dispose of a gun if there had been one.

But if Hodges did remove a gun from the scene, then this would be crucial evidence relevant to the central contention of Zeigler's valid defense. *See Duarte Vela*, 200 Wn. App. at 320. The prosecutor could cross-examine Frazier about how he knew that Hodges removed items from the crime scene and the State could ask Hodges what, if anything, she removed from the crime scene. And the prosecutor could and did present evidence that Frazier left the scene immediately after the shooting and that the scene was immediately secured, in which Hodges

was with an officer the entire time. Accordingly, the jury would determine whether the evidence is weak or false. *See Duarte Vela*, 200 Wn. App. at 321.

Therefore, we hold that the trial court erred when it prevented Zeigler from cross-examining Frazier about his knowledge of Hodges removing items belonging to Tate from the crime scene.

3. Evidence that Tate was in a Gang

Zeigler stated in a declaration that Tate was affiliated with the Hilltop Crips and it caused him to fear Tate. The trial court excluded any references to Tate being involved in a gang because there was "simply no evidence to support that allegation." RP (Nov. 1, 2021) at 25. This ruling was incorrect because Zeigler was prepared to testify that Tate was in a gang. This testimony was evidence supporting the allegation.

In addition, the evidence was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. We conclude that evidence that Tate was in a gang was relevant to Zeigler's claim of self-defense because it related to Zeigler's state of mind – it had the tendency to make the existence of Zeigler's fear of Tate more probable.

The State argues that gang evidence is not admissible under ER 404(b). We agree that evidence that Tate was in a gang may be subject to ER 404 – subsection (a) if considered character evidence or subsection (b) if considered past bad acts. Therefore, on remand the trial court should consider conducting an ER 404 analysis as outlined in *Gunderson*, 181 Wn.2d at 923, to determine the admissibility of this evidence.

4. Evidence that Tate Routinely Carried a Firearm

In a pretrial interview, Jones stated that Tate carried a gun. But because there was not any evidence that this fact was known to Zeigler before Tate's shooting, the trial court ruled that this evidence was irrelevant to Zeigler's claim to self-defense.

A victim's propensity toward violence that is *known* by the defendant and all facts and circumstances *known* to a defendant are relevant to a claim of self-defense. *Duarte Vela*, 200 Wn. App. at 319. Because there was no evidence that Jones communicated to Zeigler that Tate carried a gun before Zeigler shot Tate, we cannot say that her testimony was relevant to Zeigler's state of mind at the time of the shooting. However, the fact that Tate routinely carried a gun was direct evidence that Tate in fact had a gun that he may have been reaching for when he was shot. Therefore, the evidence had the tendency to make Zeigler's need for self-defense more probable.

This evidence also may be subject to ER 404(b) because carrying a gun might constitute an "other wrong." Therefore, on remand the trial court should consider conducting an ER 404(b) analysis as outlined in *Gunderson*, 181 Wn.2d at 923, to determine the admissibility of this evidence.

5. Evidence that Zeigler's Brother Was Shot in the Same Location

The trial court granted the State's motion to exclude evidence of a shooting involving Zeigler's brother because Zeigler did not allege that Tate was involved in his brother's shooting and because the shooting was "too far removed in time from the current incident." CP at 179.

Zeigler claims that evidence of his brother having been shot in the same location as Tate's shooting was relevant to his claim of self-defense because it showed why he had a heightened level of fear. Although this may be true, it is only marginally relevant to Zeigler's

state of mind at the time of the shooting. Tate was not involved in Zeigler's brother's shooting and so this evidence does not tend to show Zeigler's apprehension of danger regarding *Tate*.

In addition, Sergeant Thiry testified that it was common for people to have disagreements in the area and that he previously responded to the area for numerous fights. Presenting evidence that Zeigler's brother was shot in the same location would have been a "needless presentation of cumulative evidence" of the dangers associated with the area. ER 403.

Therefore, we hold that the trial court did not err when it prevented Zeigler from testifying that his brother was shot in the same location as Tate's shooting.

B. EXPERT TESTIMONY REGARDING FLINCHING

Zeigler argues that the trial court erred in admitting expert testimony from Detective Martin regarding flinching upon firing a weapon because the testimony was speculative and not relevant. We disagree.

As noted above, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. We review a trial court's ruling on whether the evidence is relevant for abuse of discretion. *Jennings*, 199 Wn.2d at 59.

Here, during opening statement, Zeigler stated that if one intended to commit a premeditated murder, then they would not shoot the person in the leg.

Although the firearm that Zeigler used to shoot Tate was never recovered, Martin testified generally about the effect of flinching when shooting a firearm. He testified that flinching was a common issue among new and seasoned shooters. And it was typical for right-handed shooters to end up shooting lower and to the right from where they were aiming, and left-handed shooters typically ended up shooting lower and to the left from where they were aiming.

Martin's testimony showed that flinching had common effects, no matter who the shooter was, and that he knew how flinching typically affected a shooter's aim. Although he could not specifically tie his testimony to Zeigler and the gun he used, it was not speculative because flinching had similar effects on all types of individuals. And the testimony was relevant circumstantial evidence because it had the tendency to make the fact that Zeigler was intending to kill Tate more probable based on where he was aiming instead of where the bullet actually hit Tate.

Therefore, the trial court did not err in admitting Martin's testimony regarding flinching upon firing a weapon.

C. SECOND DEGREE MANSLAUGHTER JURY INSTRUCTION

Zeigler argues that the trial court erred in refusing to instruct the jury on the lesser included offense of second degree manslaughter. We disagree.

1. Legal Principles

RCW 9A.32.070(1) states, "A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person."

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d).

Although defendant's have a statutory right to lesser included offense instructions, they are not automatically entitled to them. *State v. Avington*, 2 Wn.3d 245, 258, 536 P.3d 161 (2023). A two-pronged test must be satisfied to give a lesser included offense instruction: " '(1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) evidence in the case supports an inference that the lesser crime was committed

(factual prong).' " *Avington*, 2 Wn.3d at 258 (quoting *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). It is not disputed that the legal prong of the test is satisfied here. Therefore, this issue concerns only the factual prong. *See Avington*, 2 Wn.3d at 258.

The factual prong requires "that some evidence must be presented – from whatever source, including cross-examination – that affirmatively establishes the defendant's theory before an instruction will be given." *Id.* at 259. Relevant conflicting evidence presents a question of fact for the jury, who are the sole judges of the weight and credibility of the evidence. *Id.*

In *State v. Fluker*, the defendant pulled a gun from a holster on his pants, intentionally pointed the gun at the victim, and shot the victim eight to 10 times at close range. 5 Wn. App. 2d 374, 399-400, 425 P.3d 903 (2018). The defendant claimed that he was entitled to an instruction on second degree manslaughter because he "reasonably believed he was in imminent danger and needed to act in self-defense but negligently used more force than necessary." *Id.* at 399. But he did not testify that he was unaware of the risk of death or that he fired his gun accidentally. *Id.* at 400. Instead he testified that he intentionally shot and pulled the trigger each time to "stop [the victim]". *Id.*

The court held that the defendant's testimony that he wanted to stop the victim, and not kill him, did not " 'overcome the presumption that an actor intends the natural and foreseeable consequences of his conduct.' " *Id.* (quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000)).

We review a trial court's decision on a lesser included offense instruction for an abuse of discretion if it was based on a factual determination. *Avington, 2 Wn.3d* at 260. We review the

evidence in the light most favorable to the party requesting the instruction. *Fluker*, 5 Wn. App. 2d at 397.

2. Analysis

When denying the lesser included offense instruction on second degree manslaughter, the trial court stated, "I concur with the State that that is not supported in any way by the evidence that there was a negligent act. In fact, the defendant's own testimony refutes that entirely." RP (Nov. 18, 2021) at 13.

Zeigler contends that he was entitled to an instruction on second degree manslaughter because he negligently used more force than necessary. But similar to *Fluker*, Zeigler pulled out his gun from his hoodie pocket, intentionally pointed the gun at Tate, and shot twice at close range. Although Zeigler testified that shooting was an "initial reaction," he also testified that he fired the gun to defend himself. RP (Nov. 17, 2021) at 96, 128-29. He did not testify that he was unaware of the risk of death or that he fired his gun accidentally.

Zeigler's testimony that he did not intend to kill Tate did not overcome the presumption that he intended the " 'natural and foreseeable consequences of his conduct.' " *Fluker*, 5 Wn. App. 2d at 400 (quoting *Perez-Cervantes*, 141 Wn.2d at 481).

Zeigler argues that *Fluker* incorrectly stated and applied the law. The concept that the evidence presented must support an inference that only the lesser included offense was committed was abrogated by *State v. Coryell*, 197 Wn.2d 397, 414-15, 483 P.3d 98 (2021). However, this language cannot be " '[r]ead in isolation" and must instead be considered 'in context.' " *Avington*, 2 Wn.3d at 262 (quoting *Coryell*, 197 Wn.2d at 406). We must consider the court's substantive analysis. *Id.*

The court in *Fluker* engaged in a detailed analysis of the evidence in the case and therefore applied the correct legal standard when assessing the factual prong.

Zeigler also claims that *Fluker* does not address negligence regarding self-defense and that the question should be whether intentionally pulling the trigger was due to him negligently using more force than necessary. But the defendant in *Fluker* asserted the same argument; that he acted negligently in using more force than necessary in self-defense. 5 Wn. App. 2d at 400.

Therefore, we hold that the trial court did not err in refusing to instruct the jury on the lesser included offense of second degree manslaughter.

CONCLUSION

We reverse Zeigler's second degree murder conviction and remand for a new trial on the second degree murder charge.

MAXA, P.J.

We concur:

PRICE, J.

CHE, J.