IN THE SUPREME COURT
STATE OF WYOMING
CAROL THOMPSON, CLERK
FILED
October 12, 2015
10:28:59 AM
CASE NUMBER: S-15-0158

IN THE SUPREME COURT

STATE OF WYOMING

JOHN HENRY KNOSPLER, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	No. S-15-0158
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

Peter K. Michael
Wyoming Attorney General

David L. Delicath
Deputy Attorney General

Christyne Martens
Senior Assistant Attorney General

Joshua C. Eames #7-5166
Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
(307) 777-7977

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iv

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

I. Nature of the Case 2

II. Course of Proceedings & Disposition Below 3

A. Knospler's proposed evidence of the victim's criminal history 4

B. Knospler's proposed evidence of the victim's internet search history 8

C. The State's Noticed 404(b) Evidence 12

D. Jury Instructions 16

E. Judgment & Sentence 19

III. Factual Background 19

ARGUMENT 23

I. The district court did not abuse its discretion or violate Knospler's right to present a complete defense when it precluded evidence of Baldwin's conviction of eighteen counts for conspiracy to commit vehicular burglary. 23

A. Standard of Review 23

B. Baldwin's conviction for eighteen counts of conspiracy to commit vehicular burglary were inadmissible under this Court's precedent. 24

C. The district court did not violate Knospler's right to present a complete defense when it excluded evidence of Baldwin's vehicular burglaries. 28

D. Even if the district court abused its discretion, Knospler did not suffer any prejudice. 30

II. The district court did not abuse its discretion when it excluded evidence of the internet search history from Baldwin's phone or otherwise violate Knospler's right to present a complete defense... 32

A. Standard of Review 32

B. The district court properly excluded the internet search history from Baldwin's phone because its probative value was substantially outweighed by the danger of unfair prejudice and because Knospler failed to present any evidence that it was necessary to prove that Baldwin was the first aggressor. 32

C. The district court did not violate Knospler's right to present a complete defense. 38

III. The district court did not abuse its discretion when it rejected Knospler's Proposed Instructions #16 and #17, and when it gave Instruction #27. 39

A. Standard of Review 39

B. The district court did not abuse its discretion when it rejected Knospler's Proposed Instructions #16 and #17. 40

C. The district court did not abuse its discretion when it gave Instruction #27 to the jury. 45

IV. The district court did not abuse its discretion when it did not address the State's alleged discovery violation concerning statements Knospler made shortly before the murder.. 48

A. Standard of Review 48

B. The district court did not abuse its discretion when it permitted the proposed 404(b) evidence. 49

1. Knospler has waived any argument that the district court abused its discretion because he never argued prior to trial that the proposed evidence was inadmissible as being a discovery violation. 50

2. Even if the district court abused its discretion by not addressing whether the State's supplemental 404(b) notice was a discovery violation, Knospler cannot establish that he suffered any prejudice........... 52

CONCLUSION 55

CERTIFICATE REGARDING ELECTRONIC FILING 56

TABLE OF CASES AND AUTHORITIES

Cases **Page No.**

Alberts v. State,
642 P.2d 447 (Wyo. 1982) 42

Anderson v. State,
2014 WY 74, 327 P.3d 89 (Wyo. 2014) 40

Boucher v. State,
2011 WY 2, 245 P.3d 342 (Wyo. 2011) 27

Braley v. State,
741 P.2d 1061 (Wyo. 1987) 6-8, 24-27, 29

Brock v. State,
2012 WY 13, 272 P.3d 933 (Wyo. 2012) 23

Brown v. State,
2014 WY 104, 332 P.3d 1168 (Wyo. 2014) 39

Bush v. State,
2008 WY 108, 193 P.3d 203 (Wyo. 2008) 24, 29

Causey v. State,
2009 WY 111, 215 P.3d 287 (Wyo. 2009) 43

Ceja v. State,
2009 WY 71, 208 P.3d 66 (Wyo. 2009) 48

Collins v. Youngblood,
497 U.S. 37 (1990) 44

Dean v. State,
865 P.2d 601 (Wyo. 1993) 53

Drennen v. State,
2013 WY 118, 311 P.3d 116 (Wyo. 2013) 18, 39, 45-47

Cases **Page No.**

Edwards v. State,
973 P.2d 41 (Wyo. 1999) 4, 5, 24-26, 34

Gruwell v. State,
2011 WY 67, 254 P.3d 223 (Wyo. 2011) 10

Hannon v. State,
2004 WY 8, 84 P.3d 320 (Wyo. 2004) 24, 28

Holloman v. State,
2005 WY 25, 106 P.3d 879 (Wyo. 2005) 25

Holmes v. United States,
547 U.S. 319 (2006) 29, 38

Kubsch v. Neal,
No. 14–1898, 2015 WL 4747942 (7th Cir. Aug. 12, 2015) 29

Lawrence v. State,
2015 WY 97, — P.3d — (Wyo. 2015) 23

Leyva v. State,
2007 WY 136, 165 P.3d 446 (Wyo. 2007) 23

Lindstrom v. State,
2015 WY 28, 343 P.3d 792 (Wyo. 2015) 52

McDowell v. State,
2014 WY 21, 318 P.3d 352 (Wyo. 2014) 28, 38

Mendoza v. State,
2013 WY 55, 300 P.3d 487 (Wyo. 2013) 42, 43

Mersereau v. State,
2012 WY 125, 286 P.3d 97 (Wyo. 2012) 24, 37

Mortimore v. State,
161 P. 766 (Wyo. 1916) 25, 28, 34

Cases	**Page No.**

Nevada v. Jackson,
— U.S. —, 133 S. Ct. 1990 (2013) 29

Ortega v. State,
966 P.2d 961 (Wyo. 1998) 42

Ryan v. State,
988 P.2d 46 (Wyo. 1999) 34, 35

Silva v. State,
2014 WY 155, 338 P.3d 934 (Wyo. 2014) 51, 52

Simpson v. State,
523 S.E.2d 320 (Ga. Ct. App. 1999) 37

State v. Campbell Cnty. Sch. Dist.,
2001 WY 90, 32 P.3d 325 (Wyo. 2001) 26, 36

Toth v. State,
2015 WY 86A, 353 P.3d 696 (Wyo. 2015) 24, 48

Ultra Res., Inc. v. McMurry Energy Co.,
2004 WY 121, 99 P.3d 959 (Wyo. 2004) 26, 36

United States v. Sheffer,
523 U.S. 303 (1998) 29

Warner v. State,
2001 WY 67, 28 P.3d 21 (Wyo. 2001) 51, 52

Williams v. State,
2004 WY 117, 99 P.3d 432 (Wyo. 2004) 53

Willoughby v. State,
2011 WY 92, 253 P.3d 157 (Wyo. 2011) 53

Wimbley v. State,
2009 WY 72, 208 P.3d 608 (Wyo. 2009) 23

Statutes

Wyo. Stat. Ann. § 6-2-602 .... 3, 17, 43, 44

Other Authorities

H. H. Henry, Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self–Defense by One Charged with Assault or Homicide*, 1 A.L.R.3d 571 (1965 and Supp. 2004) 25

2011 Wyo. Sess. Laws 407 44

W.Cr.P.J.I. 5.06 16

W.Cr.P.J.I. 8.06 16

W.Cr.P.J.I. 8.07B 17

W.Cr.P.J.I. 8.09 40

Rules

W.R.Cr.P. 30 42

WRE 401 .... 29, 33, 35, 37, 50

WRE 402 .... 29, 33

WRE 403 .... passim

WRE 404 .... passim

WRE 405 .... passim

STATEMENT OF THE ISSUES

I. A district court has discretion over the admission of evidence. When self-defense is at issue, the defendant may present the victim's criminal history if it involves behavior likely to cause serious bodily injury. After he murdered the victim, John Henry Knospler sought to introduce the victim's conspiracy to commit burglary convictions as evidence that he was the first aggressor. Did the district court abuse its discretion in concluding those convictions were inadmissible?

II. A district court has discretion over the admission of evidence. To prove a victim was the first aggressor, a defendant may introduce specific instances of that victim's conduct involving violence. Knospler sought to introduce the internet search history from the victim's cell phone. Did the district court abuse its discretion in concluding that Knospler's proposed evidence was irrelevant to prove that the victim was the first aggressor?

III. Jury instructions must accurately describe Wyoming law. In the context of self-defense, Wyoming law does not include "vehicle" within the definition of "habitation." The district court declined to give two of Knospler's instructions stating otherwise. The district court gave an instruction consistent with this Court's precedent requiring that a jury must first determine whether a defendant or a victim was the first aggressor. Did the district court abuse its discretion?

IV. A defendant waives a discovery violation if he could, but did not, raise that alleged violation before trial. The district court required both parties to disclose 404(b) evidence six months before trial. The State supplemented its prior 404(b) notice after this deadline, but a month before trial. Knospler did not argue that this constituted a discovery violation until after the evidence was presented at trial. Has Knospler waived any argument concerning this alleged violation?

STATEMENT OF THE CASE

I. Nature of the Case

A jury convicted Knospler of second-degree murder after he shot James Baldwin outside a bar in Casper, Wyoming. Knospler maintained that the murder was committed in self-defense. He raises five issues on appeal. First, he claims that the district court abused its discretion when it excluded evidence of Baldwin's criminal history. To decide this issue, this Court must review its case law discussing the admissibility of a victim's criminal history in the context of a self-defense claim and apply it to the proposed evidence in this case to determine if the district court's decision was reasonable.

Knospler then argues that the district court abused its discretion when it excluded evidence of the internet search history from Baldwin's cell phone. To resolve this issue, this Court must examine the proposed evidence in light of its case law and rules of evidence discussing character evidence in the context of a self-defense claim to determine if the district court's decision was reasonable.

As to the first two issues, Knospler also maintains that the exclusion of his proposed evidence violated his right to present a complete defense. This Court will have to determine if the rules of evidence that required the exclusion of Knospler proposed evidence serve a legitimate purpose and are proportional to the ends they serve.

Knospler's third and fourth assignments of error concern the jury instructions outlining the contours of self-defense. Knospler contends that the district court abused its

discretion when it rejected two of his proposed instructions on self-defense and gave one of the State's proposed instructions on this issue. To decide this issue, this Court must apply Wyo. Stat. Ann. § 6-2-602 to Knospler's proposed instructions and must apply its case law discussing self-defense to the State's proposed instruction to determine if the district court's instructions correctly stated Wyoming law.

Finally, Knospler contends that the district court abused its discretion when it permitted the State to introduce statements Knospler made shortly before the murder. To resolve this issue, this Court must review the record and determine if Knospler waived the ability to raise any argument regarding this evidence when he failed to raise it before trial. If he did not, then this Court must determine if Knospler suffered any prejudice when the State provided notice of this evidence over a month before trial and he did not move for a continuance.

II. Course of Proceedings & Disposition Below

The State charged Knospler with one count of second-degree murder after he shot and killed James Baldwin in the parking lot of Racks bar outside Casper, Wyoming. (R., Vol. I, at 8). Knospler claimed the murder was committed in self-defense. (*See* Trial Tr., Vol. I, at 212–56) (Knospler's Opening Statement). Specifically, Knospler maintained that he was sleeping in his car in the bar parking lot when Baldwin punched out the driver's side window with his fist and began crawling into Knospler's car. (Aplt's Br., at 4). Knospler claimed he killed Baldwin because he feared for his own life. (*Id.*).

A. Knospler's proposed evidence of the victim's criminal history

Before trial Knospler's attorneys filed a notice of his intent to offer evidence of Baldwin's criminal history. (R., Vol. I, at 175, 181). His notice, however, did not specifically identify the criminal history he was seeking to introduce. (*See generally id.* at 181–82).

On the same day, the State filed a motion in limine to exclude any evidence of Baldwin's criminal history that did not qualify for introduction under this Court's decision in *Edwards v. State*, 973 P.2d 41 (Wyo. 1999). (*Id.* at 185). In *Edwards*, this Court held that a victim's criminal history might be relevant to prove that the victim was the first aggressor if the proposed criminal history "illustrates that the victim engaged in life-threatening behavior or in behavior which may have resulted in serious bodily harm." *Edwards*, 973 P.2d at 47. The State claimed that it "d[id] not believe that any of the victim's criminal history illustrates that [he] engaged in life-threatening behavior or behavior which may have resulted in serious bodily injury." (R., Vol. I, at 187).

On July 23, 2014, the district court ordered that by August 15, 2014 Knospler provide the State with specific evidence of Baldwin's criminal history that he was seeking to introduce. (R., Vol. II, at 284). Knospler filed a second notice regarding Baldwin's criminal history that referenced "Baldwin's . . . arrests for breach of the peace, battery, interference with a police officer, eluding police, burglary, DUIs (2), and conspiracies to commit vehicular burglary (19)." (*Id.* at 334, 337 n. 5).

Eventually, Knospler identified four instances from Baldwin's criminal history that he was seeking to introduce. First, he cited an arrest from sometime between 2002 and 2004 where Baldwin allegedly "showed up uninvited to a party . . . [and] [w]hen asked to leave, [he] and another male karate [sic] throwing stars and started throwing them at people." (*Id.* at 346). Second, Knospler referenced a June 18, 2008 arrest where Baldwin was allegedly "walking up a[n]d down the railroad tracks yelling and swearing." (*Id.*). Third, Knospler cited a February 12, 2009 arrest where Baldwin was allegedly with a group of other males who attacked another person, and Baldwin fled when police arrived. (*Id.* at 346–47). Finally, Knospler referenced Baldwin's May 28, 2009 arrest for eighteen counts of conspiracy to commit vehicular burglary and one count of eluding police. (*Id.* at 347). Knospler argued that all of these instances were necessary to prove that Baldwin was the first aggressor. (*Id.*). In response, the State disclosed Baldwin's arrest records relating to the instances Knospler cited in his notice. (*Id.* at 418).

At the August 22, 2014 motions hearing, the district court discussed Knospler's desire to introduce Baldwin's criminal history. (Mot. Hr'g, Aug. 22, 2014, at 15). Discussing *Edwards*, 973 P.2d 41, the State argued that Baldwin's prior crimes did not involve life-threatening behavior or behavior that may have resulted in serious bodily injury, and therefore were irrelevant to the issue of who was the first aggressor. (*Id.* at 17–27).

In response, Knospler appeared to claim that the evidence he sought to introduce was to show that Baldwin's criminal history was "accelerat[ing]." (*Id.* at 28). Knospler referenced Baldwin's booking photos where "his face . . . [shows] a very angry young man, and he gets angrier and angrier with every book-in." (*Id.*). The district court reserved ruling on the evidence. (*Id.* at 32). After the hearing, Knospler filed a number of police reports and records involving Baldwin to support his motion to introduce Baldwin's criminal history. (R., Vol. III, at 510).

On December 2, 2014, the district court filed its written order admitting Baldwin's February 12, 2009 arrest for Battery and Interference with a Police Officer, but excluded his remaining arrests. (R., IV, at 825, 829). The district court noted, "a victim's criminal record may be relevant if it illustrates the victim engaged in life-threatening behavior, or in behavior which may have resulted in serious bodily harm." (*Id.* at 828) (citing *Braley v. State*, 741 P.2d 1061, 1069 (Wyo. 1987)). As to Baldwin showing up uninvited to a party sometime between 2002 and 2004, his arrest for breach of the peace on June 18, 2009, and his May 28, 2009 arrest for eighteen counts of conspiracy to commit vehicular burglary and arrest for eluding police, the district court held these were inadmissible because they did not involve Baldwin engaging in "life-threatening behavior, or in behavior which may have resulted in serious bodily harm." (*Id.* at 828–30).

Three days before trial, Knospler filed a "Supplemental Motion for Exception and Offer of Proof" seeking "[e]xception to allow reference to all of Mr. Baldwin's arrests to

demonstrate for the jury Mr. Baldwin's escalating criminality and as foundation for his evolving and escalating aggression and violence to prove that he was the first aggressor[.]" (*Id.* at 950–51). Knospler maintained that evidence of Baldwin's entire criminal history "demonstrate[d] that his character trait for aggression was manifesting itself more frequently and more serious forms (which quickly escalated from a Breach of the Peace to 18 counts of Conspiracy to Commit Burglary)." (*Id.* at 953).

In what appears to be a supplement to his supplement, Knospler filed an additional motion the same day concerning Baldwin's criminal history. (*Id.* at 959). Knospler argued that Baldwin's entire criminal history was admissible under this Court's decision in *Braley v. State* "because burglary is so inherently potentially capable of triggering events that lead to serious bodily harm that it is one of the triggering behaviors for felony murder." (*Id.* at 961). Knospler posited that *Braley* "does not limit pro[of] of aggression to incidents of life-threatening behavior." (*Id.*) (citing *Braley*, 741 P.2d 1061).

On the first day of trial, the district court heard argument on Knospler's two supplemental motions. (Trial Tr., Vol. I, at 157). Knospler argued that Baldwin's entire arrest record was necessary to prove that he "engaged in an escalating cycle of violence and aggressivity." (*Id.* at 160). As to the burglary charges, Knospler appeared to rely on the police report that, after police attempted to stop Baldwin's car, he "[wa]s blowing down the streets, he turn[ed] off his lights because he's trying to evade [] and get away." (*Id.* at 168). Thus, Knospler contended that "[h]ere's somebody who is willing to risk the life of

[] other people in his truck and everybody else on the road so he can continue to get away with burglaries. That's a violent crime." (*Id.*). The district court denied Knospler's new motions, again holding that Baldwin's burglaries and eluding charges did not involve "life-threatening behavior or . . . behavior which may have resulted in serious bodily harm." (*Id.* at 176) (citing *Braley*, 741 P.2d 1061) (quotations omitted).

Before the district court heard argument on Knospler's two supplemental motions, around mid-day on the same day, Knospler filed another motion to introduce Baldwin's burglary charges and eluding police charge. (R., Vol. V., at 965). Knospler again argued that "[e]vidence of Mr. Baldwin's arrests for numerous burglaries and reckless driving and high-speed eluding of the police at night, with his car lights off as he ran through intersections, is a criminal record that he engaged in life-threatening behavior and behavior that may easily have resulted in seriously bodily harm." (*Id.* at 971) (citing *Braley*, 741 P.2d at 1069). It does not appear in the record where the district court ruled on this motion. However, given the two previous rulings, it is fair to assume that its reasoning would equally apply to the denial of this motion that included previously addressed contentions.

B. Knospler's proposed evidence of the victim's internet search history

In conjunction with his motion to introduce evidence of Baldwin's criminal history, Knospler also sought to introduce the name of a number of websites (URLs) found on Baldwin's phone's internet search history. Specifically, Knospler argued that some of the URLs on Baldwin's phone involved videos of bestiality-type pornography. (R., Vol. I, at

146–47). Knospler opined, "[s]cholastic research suggests statistical relationships between childhood bestiality and adult interpersonal violence." (*Id.* at 149).

Knospler never claimed or provided any evidence that Baldwin was exposed to or had a predilection for bestiality-type pornography in his childhood. Nevertheless, Knospler contended that viewing bestiality-type pornography "tend[ed] to make Mr. Baldwin's character trait of aggressivity and violence more probable than without the evidence, relevant under W.R.E. 404(a) and 405(b) and favorable to Knospler's self-defense claim." (*Id.* at 150). Later, he filed a specific motion to allow the introduction of these URLs. (*Id.* at 175).

In a separate response, Knospler asserted that the URLs were "relevant to establishing an increased likelihood that Mr. Baldwin was the aggressor and that Mr. Knospler reacted reasonably in self-defense[.]" (R., Vol. II, at 265). According to Knospler, "[s]pecialized knowledge" existed that supported his position that Baldwin's supposed viewing of bestiality contributed to his supposed likelihood of aggression. (*See id.*). On August 28, 2014, Knospler filed nearly eleven pages of URLs found within the internet search history on Baldwin's cell phone. (R., Vol. III, at 614–24).

Before trial, the State moved to exclude the URLs because they were only meant "to try and degrade the character of the victim," and, thus, were not relevant. (R., Vol. I, at 187–88). In addition, it was unclear who watched the videos and visited the sites listed in Baldwin's phone, or even when someone visited them. (*Id.* at 188). The State argued that

the evidence sought was inadmissible "profile evidence," meant only to show that "since the victim viewed bestiality, he has the character trait of aggressiveness and violence." (*Id.* at 240) (citing *Gruwell v. State*, 2011 WY 67, 254 P.3d 223, 225 (Wyo. 2011)). The State posited that, even if this type of evidence was relevant to the case, its probative value was substantially outweighed by its danger of unfair prejudice, and, thus, inadmissible under Rule 403. (*Id.*); (*see also id.* at 236). In the alternative, the State requested that if the district court concluded that the proffered evidence was relevant and admissible, then Knospler should "provide all documentation and support that would be relied on by any experts including reports generated by the expert . . . [or] provide a report including conclusions reached and the basis for such conclusions." (*Id.* at 238).

At the pretrial conference on December 3, 2014, the district court took Knospler's motion to introduce the URLs under advisement. (Pretrial Conf., Dec. 3, 2014, at 29–30). Five days later, the district court granted the State's motion in limine to exclude reference to the URLs, holding the evidence pertaining to the URLs was inadmissible under Rule 401 and Rule 403 because its probative value was substantially outweighed by the danger for unfair prejudice. (R., Vol. IV, 841–42).

Four days before trial, Knospler filed a "Motion for Exception and Offer of Proof," regarding the URLs. (*Id.* at 922). He cited to a proposed expert witness, Dr. Suzanne Tallichet, who he claimed could testify that "it is common for those individuals that view bestiality pornography to be aggressive in nature and commit violent crimes; that

pornography with animals is abuse of animals and satisfies a predisposition to dominate others and to be in control and the type of bestiality on his mobile phone is of the type commonly associated with violent criminals." (*Id.* at 922, 925). He argued that the URLs were necessary to present his self-defense claim. (*Id.* at 927).

In response, the State again argued that Knospler's proposed evidence was impermissible "profiling evidence." (*Id.* at 933). It also maintained that any experts Knospler wished to have testify about the effects of the URLs were improper because Knospler violated the district court's pretrial order that all expert witness CVs and a summary of their testimony be provided a week before trial. (*Id.* at 934). Although trial was to begin on December 15, 2014, Knospler did not provide any information about expert witnesses until late on December 11, 2014.

On the morning of trial, the district court addressed Knospler's motions regarding the URLs. (Trial Tr., Vol. I, at 171). Specifically, the district court reiterated that Knospler had failed to "specific[ally] identif[y] [] the proposed evidence until" the Thursday before trial. (*Id.* at 171). Presumably, the district court referred to Knospler's late disclosure of his proposed experts' CVs, reports, and summaries of their testimony. (*See id.*). This appears to be in reference to the fact that, although Knospler had identified the URLs he wished to introduce, he had failed to specify and identify how he intended to tie that to Baldwin's alleged aggression on the night of the murder. (*See id.*). Rather, Knospler waited until less than a week before trial to try to identify an expert that would testify about viewing

bestiality during childhood and its supposed connection to aggression in adulthood. (*See id.*). In addition, the proposed evidence was simply intended to establish Baldwin's alleged state of mind at the time he was murdered. (*Id.* at 173). The district court had already excluded this type of evidence in its order granting the State's motion in limine to exclude state of mind testimony. (*Id.*). Finally, the district court again held that the proposed evidence's probative value was substantially outweighed by its danger for unfair prejudice under Rule 403. (*Id.* at 174).

C. The State's Noticed 404(b) Evidence

In its pretrial discovery order, the district court ordered that the parties file all notices to introduce evidence under Rule 404(b) by June 23, 2014—nearly six months before trial. (R., Vol. I, at 140).[1] On November 19, 2014, the State provided notice of its intent to introduce three statements under Rule 404(b), this was after the State had already provided three other notices of potential 404(b) evidence. (*See* R., Vol. I, at 159, 201; Vol. II, at 399). In its November filing, the State provided notice of statements received only after re-

[1] The district court entered this pretrial order with the trial scheduled for September 22, 2014. (R., Vol. I, at 141). After Knospler's motion to continue that date, the district court moved the trial to December 15, 2014. (R., Vol. II, at 286; 394). It does not appear that the district court entered any order moving the applicable motions filing dates or the deadline to provide notice of Rule 404(b) evidence.

interviewing three witnesses on November 17 and 18, 2014. (R., Vol. IV, at 791). Specifically, Westy Guill, a bouncer at Racks the night of the murder, disclosed that Knospler asked him if he had any cocaine. (*Id.*). The State contended that this contradicted Knospler's statement to police later that night that he was not a drug user. *Id.* at 792).

In addition, Chris Syverson, a friend of Baldwin who was with him that night, disclosed that Baldwin had asked him for a lighter so he could smoke marijuana with Knospler outside the bar. (*Id.* at 791–92). The State maintained that this was evidence that Knospler knew Baldwin before he shot and killed him. (*Id*. at 792).

Finally, Crystal Mize, an employee at the bar, disclosed that Knospler discussed with her "how easy it would be to kill someone, you would take them to the ground and beat them." (*Id.*). Knospler then told her that "nobody means nothing to me." (*Id.*). The State argued that this was evidence of the crime at issue. (*Id.*).

Before trial, Knospler filed a motion to exclude this evidence. (*Id.* at 832). His only argument was that the evidence was irrelevant and inadmissible hearsay and only meant "for character assassination purposes." (*Id.* at 833–34).

At the pretrial conference, the district court addressed the State's supplemental notice by first noting that it was provided outside the deadline for 404(b) notices. (Pretrial Conf. Tr., Dec. 3, 2014, at 16). The State responded that the statements referenced in the supplemental notice were just recently discovered after re-interviewing witnesses and were immediately disclosed to Knospler and his attorneys. (*Id.* at 17). Moreover, the State

contended that the general nature of the statements made by theses witnesses during the November interviews were already generally known by Knospler and had been previously disclosed. (*Id.* at 17–18). The supplemental notice recited those same statements, but in greater detail after the witnesses were re-interviewed and provided more specificity. (*Id.*).

Knospler did not raise any issue at the hearing or in his motion to exclude the noticed evidence on the basis that it was disclosed late. (*Id.* at 21). Rather, his sole argument was that the evidence was irrelevant under Rules 401 and 403. (*Id.* at 23).

The district court admitted the noticed evidence. (R., Vol. IV, at 941, 946). After weighing the applicable *Gleason* factors, the district court held that "course of conduct (natural progression of event), the Defendant's level of intoxication and effects and/or after effects of marijuana use, and intent are all potentially at issue in this case, and as a result, the proposed evidence would be proper for those purposes." (*Id.* at 942). It also held, after weighing the applicable factors, that the probative value of the noticed evidence outweighed its prejudicial effect. (*Id.*).

At trial, consistent with the State's supplemental notice, Westy Guill testified that while Knospler was in the bar he asked Guill if he could get Knopsler some cocaine. (Trial Tr., Vol. III, at 828). Crystal Mize testified that Knospler made her uncomfortable when he told her "out of the blue" that "it didn't matter to him if someone gets in his way, he'll . . . take care of them, he'll shoot them, he'll stomp their face in the ground, stomp their face in the concrete, it doesn't matter to him." (Trial Tr., Vol. IV, at 1016). Finally, Chris

Syverson testified about Baldwin being outside with Knospler during the evening and how Baldwin was looking for a lighter so he and Knospler could smoke marijuana. (*Id.* at 1085). Knospler did not contemporaneously object to any of the above testimony.

Following Syverson's testimony, Knospler's attorney claimed that the subject matter of Mize's and Syverson's testimony was not disclosed before trial. (*Id.* at 1097). He informed the district court that he would be moving to strike their testimony as a "result of two direct discovery violations." (*Id.* at 1098). In response, the State argued that it had disclosed "every scrap of paper" to Knospler. (*Id.*).

Four days later, on the second to last day of trial, Knospler's attorneys filed a motion to strike Syverson's and Mize's testimony. (R., Vol. VI, at 1218). As to Syverson's testimony, Knospler's attorneys posited that the State never provided them with notice that Syverson would testify about Baldwin looking for a lighter so he and Knospler could smoke marijuana. (*Id.* at 1225). Knospler argued, for the first time, that this violated the district court's June 23, 2014 deadline to disclose 404(b) evidence and the December 8, 2014 deadline to disclose witness statements. (*Id.* at 1226). As to Mize's testimony, Knospler's attorneys argued, for the first time, that it too violated the 404(b) deadline, and, because of that violation, they were not prepared to conduct an effective cross-examination. (*Id.* at 1227–28). Knospler requested that the district court instruct the jury to disregard Syverson's and Mize's testimony. (*Id.* at 1225, 1231). The next day the district court denied Knospler's motion. (Trial Tr., Vol. VII, at 1865).

D. Jury Instructions

The district court declined to give Knospler's Proposed Instructions #16 and #17, which read:

Knospler's Proposed Instruction #16

> A person may defend his home or habitation against anyone who manifestly intends or endeavors in a violent or riotous manner, to enter that home or habitation and who appears to intend violence to any person in that home or habitation. The amount of force that the person may use in resisting such trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. A person is not bound to retreat even though a retreat might safely be made. A person may resist force with force, increasing it in proportion to the intruder's persistence and violence if the circumstances apparent to him are such as would excite similar fear and a similar belief in a reasonable person. If the person kills under the influence of such fear, the homicide is not felonious homicide but is justified.

(R., Vol. VI, at 1355–56) (citing Wyoming Criminal Pattern Jury Instruction 8.06 and 5.06, and Wyo. Stat. Ann. § 6-2-602(d)(i)).[2]

Knospler's Proposed Instruction #17

> A person who unlawfully and by force enters or attempts to enter another's home or habitation is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

---

[2] Some of the representations Knospler makes in his brief pertaining to the instructions he claims to have proposed at trial are incorrect. These issues will be addressed in the Argument section below.

(*Id.* at 1356) (citing Wyoming Criminal Pattern Jury Instruction 8.07B and Wyo. Stat. Ann. § 6-2-602(c)).

Other than proposing these instructions and the accompanying citation allegedly supporting them, Knospler did not provide any additional argument at trial. During the jury instruction conference at trial, the district court held that Wyoming law did not support these proposed instructions. (Trial Tr., Vol. VII, at 1915). Specifically, the district court held that the definition of habitation in Wyo. Stat. Ann. § 6-2-602(d)(i) no longer includes vehicles, and, thus, Knospler's Proposed Instructions #16 and #17 were not appropriate. (*Id.*). Knospler did not object or provide any argument in response to the district court's decision.

In addition, the district court gave the jury Instruction # 27, which read:

> In considering the claim of self-defense in this case, you must first determine whether the Defendant was the aggressor in this case or whether Mr. Baldwin was the aggressor in this case. Some sort of physical aggression or a threat of imminent use of deadly force is required before a person will be considered an aggressor. Verbal provocation without more is generally insufficient to justify an initial aggressor. If you find that the Defendant was the aggressor in this case, you should consider his duty under Instruction 28. If you find that Mr. Baldwin was the aggressor you should review the Defendant's actions under Instruction 29.

(*Id.* at 1279). This instruction appears to be from the State's Proposed Instruction #14. (*See id.* at 1414).[3]

When Knospler provided his set of proposed instructions, he included a short memorandum objecting to the State's Proposed Instruction #14. (*Id.* at 1337–38).[4] He argued that, under *Drennen v. State*, "a jury instruction regarding an aggressor's duty to retreat is only appropriate where it is clear that the defendant was the aggressor." (*Id.* at 1337) (citing *Drennen v. State*, 2013 WY 118, ¶ 31, 311 P.3d 116 (Wyo. 2013). According to Knospler, "there is no evidence that Mr. Knospler was the aggressor." (*Id.*). Moreover, he contended, "a duty to retreat instruction is not appropriate where one has the right to stand their ground." (*Id.*) (citing *Drennen*, ¶ 26, 311 P.3d at 126). During the formal jury instruction conference, at which the parties are required to make their record, Knospler did

---

[3] Knospler refers to the State's proposed instruction as the State's #14. (Aplt's Br., at 57). Even though the State's set of proposed instructions do not contain assigned numbers the State will refer to its proposed instruction that Knospler assigns error to as its Proposed Instruction #14.

[4] Although the memorandum does not refer specifically to which of the State's proposed instructions Knospler was objecting to, the substance of his argument in paragraph 1 of his memorandum clearly points to the State's Proposed Instruction #14. (Trial Tr., Vol. VI, at 1337).

not provide make this argument; he simply reiterated his objection to the instruction. (Trial Tr., Vol. VII, at 1919).

E. Judgment & Sentence

The jury convicted Knospler after it rejected his self-defense claim. (Trial Tr., Vol. VII, at 1991). The district court sentenced him to thirty to fifty years in prison. (R., Vol. VII, at 1539). This appeal followed. (*Id.* at 1543).

III. Factual Background

On October 3, 2013, Knospler went to Racks bar outside Casper, Wyoming at about 5:30 p.m. (Trial Tr., Vol. II, at 318; 322). Despite the cold rain, the bar's owner found him outside dancing in the rain and acting suspiciously. (*Id.* at 408–17). After Knospler moved his car several times to different parking spots, he went inside and sat at the bar alone. (*Id.* at 322–25). Bar employees began to talk to him, but Knospler would vacillate between friendly conversation and acting "creepy" by talking to himself and glaring at employees and customers. (*See id.* at 478–79; Vol. III, at 749; Vol. IV, at 1010, 1014–16, 1053). He asked numerous employees where he could get cocaine. (Vol. III, at 828; Vol. IV, at 1015).

Around 8:30 p.m., James Baldwin arrived at Racks with two of his friends, Kara Sterner and Chris Syverson, to celebrate his birthday. (Trial Tr., Vol. II, at 325). Despite his intoxication, many of the bar's employees characterized Baldwin as a "happy drunk." (Trial Tr., Vol. II, at 484; Vol. IV, at 1017). He also had trouble standing on his own. (Trial Tr., Vol. IV, 1054). Shortly after arriving, Baldwin and Knospler went outside together to

smoke marijuana. (Trial Tr., Vol. II, at 327; Vol. IV, at 1085). While Baldwin tried to find a lighter, Knospler went back inside the bar. (*See* Trial Tr., Vol. IV, at 1085). When Baldwin came back outside with a lighter, he could not find Knospler so he too went back inside. (*Id.* at 1085). Neither had any other interactions the rest of the night before the murder.

Just after 10:30 p.m., the bar's bouncer, Ervin Andujar, told Knospler he needed to leave after Knospler dropped a marijuana "joint" in front of Andujar. (Trial Tr., Vol. III, at 755; 821). Knospler left without any altercation. (*See id.* at 755).

Shortly before midnight, Baldwin's friends left. (Trial Tr., Vol. II, at 333; Vol. III, at 760, 820; Vol. IV, at 1073). They told him that they would be back to pick him up soon. (Trial Tr., Vol. IV, at 1073, 1088). Not long after that, bar employees found Baldwin passed out on a table and asked him to leave. (Trial Tr., Vol. II, at 354; Vol. III, at 760). Despite several offers from Andujar to call a cab for him, Baldwin declined and said that he saw what he thought was his car with his friends waiting for him. (Trial Tr., Vol. II, at 459, 492; Vol. III, at 760, 762, 822). Andujar and another bouncer, Westy Guill, watched Baldwin go over to the car he thought was his and watched as Baldwin pulled on the passenger side door handle and knocked on the window. (Trial Tr., Vol. III, at 765, 823). When he did not get an answer, Baldwin stumbled over to the driver's side and knocked on it. (Trial Tr., Vol. II, at 487; Vol. III, at 765). Then, Andujar and another bar employee watched Baldwin turn slightly towards the bar and fall face first to the ground. (Trial Tr.,

Vol. II, at 487; Vol. III, at 768). No witness saw Baldwin hit the window or punch at it. (Trial Tr., Vol. II, at 487; Vol. III, at 767). Andujar did not hear anything because of the loud music inside the bar. (Trial Tr., Vol. III, at 768). Another bar patron had left shortly after Baldwin. (Trial Tr., Vol. IV, at 1106). As she was outside waiting for her car to warm up, she did not hear any gunshot, shouting, or breaking of glass. (*Id.*).

When the car sped away, Andujar went outside to see what had happened. (Trial Tr., Vol. II, at 545). When he got to Baldwin, he was struggling to breathe. Because no one heard a gunshot, some thought Baldwin had been stabbed. (Trial Tr., Vol. III, at 771; Vol. IV, at 885). Other bar employees immediately called 911. (Trial Tr., Vol. IV, at 885).

Roughly 15 minutes after the 911 call, Natrona County Sheriff's Deputy Johnny Taylor spotted a car matching the description of the one that had sped away from Racks. (*Id.* at 894). The driver, later determined to be Knospler, was driving at 50 m.p.h. in a 30 m.p.h. construction zone and swerving, so Deputy Taylor stopped him. (*Id.* at 895–99). Deputy Taylor could smell alcohol and marijuana when he got to the drivers' side window. (*Id.* at 980). He also noticed that the driver's side window was missing and appeared to have been broken. (*Id.* at 982). When he asked Knospler what happened to it, Knospler replied, "I wonder how that happened." (*Id.* at 997). Knospler also told Deputy Taylor that he had not been in any altercation that night. (*Id.* at 1002). During the arrest and booking process, Knospler had an "antagonistic" and "care-free" attitude. (*Id.* at 1133). Knospler

did not have any marks or evidence on him that would have suggested that he was in an altercation earlier that night. (*Id.* at 1132).

At the time of his autopsy, Baldwin had a .206 BAC, but no marijuana in his system. (Trial Tr., Vol. III, at 676, 683). The gunshot entered just above the center of Baldwin's chest, fractured his first rib, went through his heart, and exited just below his twelfth rib and out his lower right back. (*Id.* at 699–710). The pathologist classified the gunshot wound as being fired from an "indeterminate" range because the wound did not have any gunshot residue around it. (*See id.* at 697). Inside the entry wound were glass fragments consistent with the type of glass used in a car window. (*Id.* at 699–700). Baldwin had "superficial" injuries to his right hand and shoulder consistent with coming into contact with glass. (*Id.* at 705). But Baldwin did not have any significant injuries to his right hand or shoulder, and there were no fractures found in his right hand. (*Id.* at 734; Vol. VI, at 1651).

Analysts found gunshot residue along the window frame of the driver's side door. (Trial Tr., Vol. V, at 1241). No blood or DNA from Baldwin was found inside Knospler's car or on Knospler himself. (*Id.* at 1431–50; 154–75).

The State's firearm expert, Steve Norris, tested the gun Knospler used with the bullets that were still in the gun. (Vol. VI, at 1545). Based on his testing, he concluded that Knospler fired the shot that killed Baldwin from greater than arm's length or through an "intervening target," such as a window, based on the lack of gunshot residue on Baldwin's shirt. (*Id.* at 1548–58).

ARGUMENT

I. The district court did not abuse its discretion or violate Knospler's right to present a complete defense when it precluded evidence of Baldwin's conviction of eighteen counts for conspiracy to commit vehicular burglary.

Knospler contends that the district court abused its discretion and violated his right to present a complete defense when it excluded evidence of Baldwin's previous conviction for 18 counts of conspiracy to commit burglary. (Aplt's Br., at 28–39). The district court, however, properly excluded this evidence based on this Court's precedent because it did not involve life-threatening behavior or behavior which could have resulted in serious bodily harm.

A. Standard of Review

A district court's decision on whether evidence is admissible is reviewed for an abuse of discretion. *Lawrence v. State*, 2015 WY 97, ¶ 10, — P.3d — (Wyo. 2015) (citing *Brock v. State*, 2012 WY 13, ¶ 23, 272 P.3d 933, 939–40 (Wyo. 2012)). This Court will not disturb a district court's evidentiary decision absent a finding that the decision was unreasonable. *Id.* "A trial court's decision on the admissibility of evidence is entitled to considerable deference, and will not be reversed on appeal unless the appellant demonstrates a clear abuse of discretion. '[A]s long as there exists a legitimate basis for the trial court's ruling, that ruling will not be disturbed on appeal.'" *Wimbley v. State*, 2009 WY 72, ¶ 10, 208 P.3d 608, 611 (Wyo. 2009) (quoting *Leyva v. State*, 2007 WY 136, ¶ 17, 165 P.3d 446, 452 (Wyo. 2007)).

If the district court erred in excluding the evidence, Knospler also must demonstrate that the error was prejudicial. *Toth v. State*, 2015 WY 86A, ¶ 29, 353 P.3d 696, 705 (Wyo. 2015). "'Error is prejudicial if there is a reasonable possibility that the verdict might have been more favorable to the defendant if the error had not been made.'" *Id.* ¶ 29, 353 P.3d at 705–06 (quoting *Mersereau v. State*, 2012 WY 125, ¶ 17, 286 P.3d 97, 106 (Wyo. 2012)).

Further, a criminal defendant has a constitutional right to present a complete defense, and the limits on that ability are reviewed *de novo*. *Bush v. State*, 2008 WY 108, ¶¶ 58–59, 193 P.3d 203, 217 (Wyo. 2008) (citing *Hannon v. State*, 2004 WY 8, ¶ 11, 84 P.3d 320, 328 (Wyo. 2004)). Because Knospler's touches on both of these issues, the State will address both issues below.

B. Baldwin's conviction for eighteen counts of conspiracy to commit vehicular burglary were inadmissible under this Court's precedent.

A criminal defendant may present "[e]vidence of a pertinent trait of character of the victim[.]" W.R.E. 404(a)(2). In Wyoming, a criminal defendant may use specific instances of conduct of the victim to help prove that the victim was the first aggressor. W.R.E. 405(b); *see also Edwards*, 973 P.2d at 46. However, when a defendant claims self-defense to justify a murder, evidence of a victim's criminal history is admissible to prove that the victim was the first aggressor only if that criminal history establishes "that the victim engaged in life-threatening behavior or in behavior which may have resulted in serious bodily harm." *Edwards*, 973 P.2d at 47 (citing *Braley*, 741 P.2d at 1067–69). Before a

defendant can introduce a victim's criminal history to prove the reasonableness of his actions in the context of a self-defense claim, the defendant must be aware of that criminal history at the time the defendant claims he acted in self-defense. *Mortimore v. State*, 161 P. 766, 772 (Wyo. 1916) ("[W]here there is evidence tending to show that the defendant acted in self–defense . . . , evidence of specific acts of violence by deceased in the presence of the defendant, or communicated to him before the homicide, is held to be admissible by many of the authorities[.]"); *see also Holloman v. State*, 2005 WY 25, ¶ 16, 106 P.3d 879, 885 (Wyo. 2005) (citing H. H. Henry, Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self–Defense by One Charged with Assault or Homicide*, 1 A.L.R.3d 571 (1965 and Supp.2004)).

In this case, Knospler sought to introduce Baldwin's conviction for eighteen counts of vehicular burglary for two reasons: (1) to show that Baldwin was the first aggressor; and (2) to establish the reasonableness of Knospler's actions when he shot Baldwin based on his defense that Baldwin broke through the driver's side window and began entering the car. (*See* Aplt's Br., at 30–39). Neither basis was sufficient to allow admission of the proffered evidence.

Because Baldwin's vehicular burglaries were not supported by any evidence that Baldwin engaged in life-threatening behavior or behavior that may have resulted in serious bodily harm, the district court properly excluded the conviction and underlying facts relying on *Edwards* and *Braley*. Knospler's offer of proof supporting the admission of the

burglaries did not include any evidence that the burglaries exposed anyone to serious bodily injury, let alone a threat to their lives. By contrast, in *Edwards*, the criminal history at issue involved the victim holding his wife hostage and firing a gun into the air. *Edwards*, 973 P.3d at 47. This Court concluded that the firing of a gun in *Edwards* was evidence of life-threatening behavior, and, thus, admissible to prove that the victim was the first aggressor. *Id.* No similar conduct was involved in Baldwin's vehicular burglaries.

The evidence that Knospler relied on below—that Baldwin was eluding police at high speeds without his headlights on in the dark—went to the eluding charge, not the burglary charges. (R., Vol. II, at 443–45). Although the district court excluded the eluding charge and the facts underlying it, in addition to the burglary charges, Knospler has not raised any issue on appeal concerning the eluding charge. Thus, that charge and the facts underlying it are not before this Court. *See, e.g.*, *Ultra Res., Inc. v. McMurry Energy Co.*, 2004 WY 121, ¶ 8, 99 P.3d 959, 962 (Wyo. 2004) ("'Under this court's long-standing precedent, this court will not frame the issues for the litigants and will not consider issues not raised by them and not supported by cogent argument and authoritative citation.'") (quoting *State v. Campbell Cnty. Sch. Dist.*, 2001 WY 90, ¶ 35, 32 P.3d 325, 333 (Wyo. 2001)).

On appeal, Knospler appears to concede that Baldwin's conspiracy to commit vehicular burglary charges were inadmissible under *Edwards* and *Braley*, but he simply argues that "*Braley* . . . was inapposite because Baldwin's **escalating** criminal record was

evidence of **escalating** aggression; the jury should have been allowed to consider Baldwin's **escalating** criminal history as it determined whether Baldwin was the first aggressor and whether Knospler's actions were reasonable under the totality of the circumstances." (Aplt's Br., at 33) (emphasis added).

It appears Knospler is relying on Baldwin's supposed "escalating aggression." (*See id.*). It is unclear what that term means or what it relates to, but what is sure is that "escalating aggression" is not the standard for admitting a victim's criminal history when self-defense is at issue. Rather, it appears that this argument would seem be that because a victim's criminal history was "escalating" in severity, it is somehow more likely that the victim acted in an aggressive manner at the time the defendant decided to use deadly force and was, therefore, more likely to have been the first aggressor. Knospler, however, has not provided any authority for his proposition that a victim's "escalating" criminal history is admissible to show that he or she was the first aggressor. This Court "will not address issues that are unaccompanied by cogent argument or citation to pertinent legal authority." *Boucher v. State*, 2011 WY 2, ¶ 32, 245 P.3d 342, 357–58 (Wyo. 2011).

Moreover, such an argument would be the exact type of evidence that the Rules of Evidence are meant to exclude. *See Braley*, 741 P.2d at 1068 ("[O]ne of the most ancient and successful defenses in homicide cases is to try the victim[.]"). Rule 404(a)(2) permits a defendant to introduce evidence of pertinent trait of a victim's character to prove that that victim was the first aggressor. *See also* W.R.E. 405(b) (allowing specific instances of

conduct). It does not permit a defendant to present a victim's non-violent criminal history in an effort to show that it is more likely that a victim was the first aggressor because his or her criminal history was "escalating."

Finally, as to Knospler's assertion on appeal that Baldwin's conviction for conspiracy to commit burglary helped established the reasonableness of Knospler's actions, it must fail. Nowhere in the record is there any argument, assertion, or evidence that Knospler was aware of Baldwin's criminal history, or even knew who Baldwin was. *Mortimore*, 161 P. at 772 ("[W]here there is evidence tending to show that the defendant acted in self–defense . . . , evidence of specific acts of violence by deceased **in the presence of the defendant**, or communicated to him before the homicide, is held to be admissible by many of the authorities[.]") (emphasis added).

C. The district court did not violate Knospler's right to present a complete defense when it excluded evidence of Baldwin's vehicular burglaries.

Knospler also asserts that the district court violated his right to present a complete defense, despite the fact that Baldwin's conviction for conspiracy to commit burglary did not meet the requirements for admission. (Aplt's Br., at 35–39). Although, a defendant has a constitutional right to present a complete defense, he cannot seek admission of otherwise inadmissible evidence simply by couching it as necessary for a complete defense. *See generally McDowell v. State*, 2014 WY 21, ¶ 25, 318 P.3d 352, 360 (Wyo. 2014) ("A defendant is entitled to present 'competent and reliable' evidence which is necessary to present a meaningful defense.") (citing *Hannon*, ¶¶ 63–64, 84 P.3d at 347). Moreover, "[a]

defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Sheffer*, 523 U.S. 303, 308 (1998) (citations omitted). "Only rarely has the Supreme Court 'held that the right to present a complete defense was violated by the exclusion of evidence under a state rule of evidence.'" *Kubsch v. Neal*, No. 14–1898, 2015 WL 4747942, at *16 (7th Cir. Aug. 12, 2015) (quoting *Nevada v. Jackson*, — U.S. —, 133 S. Ct. 1990, 1991–92 (2013)).

A rule of evidence that excludes a defendant's proposed evidence is unconstitutional only if it serves no legitimate purpose or is disproportionate to the ends it serves. *See Holmes v. United States*, 547 U.S. 319, 326 (2006). As discussed above, this Court has held that evidence of a victim's criminal history is only permitted if it involves life-threatening behavior or behavior involving the danger of serious bodily harm. *Braley*, 741 P.2d at 1068. In fashioning that rule of law, this Court relied exclusively on Rules of Evidence 401, 402, 403, and 404. *Id.* The purpose of this rule is to preclude a defendant from generally attacking a murder victim's character in an effort to establish that he or she "deserved what he got and that society is none the worse for it." *Id.* This rule serves a legitimate purpose, but still allows a defendant to introduce evidence of a victim's criminal history if it meets the stated criteria. *See Bush*, ¶ 59, 193 P.3d at 218 ("The Constitution permits judges to exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice or confusion of the issues.") (citing *Holmes*, 547 U.S. at 327). Other than Knospler citing generally to cases discussing a defendant's right to present a complete

defense, he has not identified any case or authority establishing that the rule utilized in this case was unconstitutional when the district court relied on it to exclude evidence of Baldwin's burglary convictions. A defendant is entitled to a fair trial, but that does not mean a trial outside the bounds of "well-established rules of evidence." *Id.*, ¶ 59, 193 P.3d at 217–18. Consequently, the district court did not violate his right to present a complete defense.

D. Even if the district court abused its discretion, Knospler did not suffer any prejudice.

If this Court concludes that the district court erred by excluding evidence of Baldwin's vehicular burglaries, Knospler suffered no prejudice. The facts underlying Baldwin's burglary charges did not advance Knospler's argument that Baldwin was the first aggressor. None of the police reports supporting Baldwin's charges contain any evidence of aggression or violence against another person. Again, the evidence about Baldwin eluding police only went to the eluding charge and that charge is not before this Court. Moreover, the evidence in this case did not support Knospler's theory that Baldwin punched out Knospler's driver-side window and began climbing through that window. The eyewitnesses testified that they never saw Baldwin swing at or towards Knospler's car. (Trial Tr., Vol. II, at 487; Vol. III, at 767). Thus, evidence of Baldwin's conspiracy to commit vehicular burglary charges would not have aided Knospler's defense because the direct evidence contradicted that defense.

Moreover, the exclusion of the burglaries did not prevent Knospler from offering other evidence to try to establish his theory that Baldwin punched out the window before Knospler shot him. Indeed, Knosper had two expert witnesses testify in an effort to bolster his theory. (Trial Tr., Vol. IV, at 915–37; Vol. VI, at 1679–1764). The facts underlying Baldwin's burglary conviction did not include any evidence that he punched any car windows to commit those burglaries. (*See* R., Vol. V, at 974–1204) (burglary victim statements). Thus, any nexus between those burglaries and Knospler's theory of defense was tenuous at best. Consequently, he did not suffer any prejudice because of their exclusion.

II. The district court did not abuse its discretion when it excluded evidence of the internet search history from Baldwin's phone or otherwise violate Knospler's right to present a complete defense.

Knospler argues that the district court abused its discretion when it precluded him from introducing expert testimony regarding Baldwin's supposed interest in bestiality-related pornography and how that supported Knospler's argument that Baldwin was the first aggressor. (Aplt's Br., at 39–48). But he cannot establish how this proposed evidence was relevant to whether Baldwin was the first aggressor or that it was admissible under our rules of evidence.

A. Standard of Review

The same standard applied in Issue I applies here—abuse of discretion.

B. The district court properly excluded the internet search history from Baldwin's phone because its probative value was substantially outweighed by the danger of unfair prejudice and because Knospler failed to present any evidence that it was necessary to prove that Baldwin was the first aggressor.

To begin, the manner in which the URL evidence was first proposed and the numerous and mixed pleadings related to it makes the record difficult to follow when addressing this proposed evidence. In any event, there appears to be two reasons for the district court's exclusion of this proposed evidence. First, and most important, more than a week before trial, the district court concluded that the proposed evidence was inadmissible under Rules 401 and 403 because it was irrelevant and its probative value was substantially outweighed by its danger for unfair prejudice. (R., Vol. IV, at 841). Second, it appears that,

on the morning of the first day of trial, the district court discussed whether Knospler could have his proposed experts testify about the supposed relationship between exposure to bestiality-type pornography in childhood and adult interpersonal violence. (Trial Tr., Vol. I, at 171). The district court had ordered that witness statements be exchanged a week before trial. (*Id.* at 838). The district court concluded that Knospler's experts could not testify because he did not provide the requisite disclosures as ordered and because of its previous order regarding Rules 401 and 403. (*See id.*).

On appeal, Knospler's argument as to the URLs is confusing at best. At first, it appears he is arguing that the district court abused its discretion by excluding evidence of the URLs and expert testimony relating to it. (Aplt's Br., at 40–43). But his argument actually focuses almost exclusively on the district court's decision the morning of trial to preclude the expert testimony because he did not provide the expert witness reports and statements relied upon until a week before trial. (*Id*. at 44–48). His argument, however, fails even to address the district court's initial reason for excluding this proffered evidence—it was irrelevant under Rule 401 and its probative value was substantially outweighed by its danger for unfair prejudice under Rule 403.

Rule 401 states that 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." W.R.E. 401. Under Wyoming Rule of Evidence 402, all relevant evidence is admissible. Generally, in a

homicide or assault case, Rule 404(a)(2) allows a defendant to introduce evidence of a victim's violent character to prove that he or she was the first aggressor. *Edwards*, 973 P.2d at 46. In Wyoming, a defendant may accomplish this under Rule 405(b) by using specific instances of a victim's conduct to prove he or she was violent. *Id.* A defendant, however, is generally not permitted to introduce "profile evidence" of a victim. *See, e.g.*, *Ryan v. State*, 988 P.2d 46, 55 (Wyo. 1999) ("Profile . . . evidence is developed through expert testimony and tends to classify people by their shared physical, emotional, or mental characteristics. . . . Many courts find profile evidence irrelevant.") (citations omitted).

Knospler relied on both these rules, 404(a)(2) and 405(b), in his effort to introduce evidence that someone had searched, and potentially watched, bestiality-type pornography on Baldwin's phone. (R., Vol. II, at 266–67) (Knospler relying on Rules 404(a)(2) and 405(b) as the basis for admission of the URLs). But Knospler's proposed evidence did not illustrate specific instances of conduct of Baldwin being or acting violent. *See Mortimore*, 161 P. at 772 ("[W]here there is evidence tending to show that the defendant acted in self-defense . . . evidence of specific acts of violence by deceased . . . is held to be admissible by many of the authorities[.]"). It would only establish, at best for Knospler, that Baldwin perhaps had an unusual sexual interest. It was not evidence of a specific instance of conduct establishing that he was a violent man. Thus, it was not admissible under 404(a)(2) and 405(b), and, thus, not relevant under Rule 401. Consequently, the district court did not abuse its discretion when it excluded the URLs on this basis.

In addition, introducing this evidence through expert testimony that a person is more likely to be violent as an adult if they watched bestiality-type pornography as a child is also not admissible under Rule 404(a)(2) and 405(b). Expert testimony about general traits of character based on childhood predilections is not evidence of specific instances of violence that would tend to support the conclusion that a person is violent. *See* Rules 404(a)(2) and 405. Rather, the expert testimony would have presumably been that if a person is exposed to bestiality-type pornography as a child he or she may be more likely to be aggressive as an adult. That is not evidence of any specific instance of conduct of violence that Rule 405(b) contemplates, but rather is inadmissible profile evidence. *See, e.g.*, *Ryan*, 988 P.2d at 55 ("Profile . . . evidence is developed through expert testimony and tends to classify people by their shared physical, emotional, or mental characteristics. . . . Many courts find profile evidence irrelevant.") (citations omitted). Consequently, the proffered expert testimony was not admissible under Rules 404(a)(2) and 405(b) for much the same reasons as the actual URLs.

Even if Knospler's proposed evidence satisfied the requirements for admission under Rules 404(a)(2) and 405(b), and, thus, Rule 401, he also has not addressed the district court's decision that the evidence also was inadmissible under Rule 403. (*See generally* Aplt's Br., at 40–48). That rule requires evidence be excluded if the court determines that its "probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." W.R.E. 403.

The vast majority of Knospler's argument focuses on the district court's oral pronouncement the morning of the first day of trial that Knospler's failure to provide the State with his proposed exerts' reports, summaries, or statements meant they could not testify. (Aplt's Br., at 44–48). Yet, by this point, the district court had already ruled, nearly a week earlier, that the URLs were not admissible under Rule 403. By extension, Knospler's desired experts could not testify about the supposed effects of viewing bestiality-type pornography and aggression. The district court's oral statement about Knospler failing to abide by the pretrial discovery order was secondary to the initial reason for excluding the evidence. Thus, Knospler's entire appellate argument only addresses the procedural reason for the exclusion, and not the substantive reason. His failure to address the real issue—that the proposed evidence was excluded under Rule 403—requires a finding that he has waived any argument on this issue. *See, e.g.*, *Ultra Res., Inc.*, ¶ 8, 99 P.3d at 962 ("'Under this court's long-standing precedent, this court will not frame the issues for the litigants and will not consider issues not raised by them and not supported by cogent argument and authoritative citation.'") (quoting *Campbell Cnty. Sch. Dist.*, ¶ 35, 32 P.3d at 333).

In any event, the district court's decision was correct. Evidence that may otherwise be admissible, still is properly excluded if its probative value is substantially outweighed

by other factors such as its likelihood to confuse the issues for the jury or its danger of unfair prejudice. W.R.E. 403. In this case, for one thing, it is unclear who viewed the bestiality-type pornography on Baldwin's phone, when it was viewed, or how long it was viewed. Based on the deficiencies in foundation, this proposed evidence would have opened the trial to a "mini-trial" about who viewed the materials, when they were viewed, and for how long. This would have potentially caused confusion amongst the jurors in trying to ferret out and decide the actual issues. This is the type of distraction that Rule 403 was enacted to avoid. W.R.E. 403.

For another, introducing evidence that a murder victim may have viewed this type of pornography would only serve to prejudice the State unfairly by attacking the victim's general character, since it does not address any material issue or element in the case. *See generally Mersereau*, ¶ 25, 286 P.3d at 109 ("'[I]nterest in sexual activity does not necessarily point to deviant behavior, even circumstantially[.]'") (quoting *Simpson v. State*, 523 S.E.2d 320, 321–22 (Ga. Ct. App. 1999)).

In sum, the proffered evidence was not admissible under Rule 401 because it did not meet the requirements of Rules 404(a)(2) and 405(b). Even if it was, Knospler has failed to address the district court's additional rationale for excluding this evidence—it was inadmissible under Rule 403. Finally, even if he had addressed it, the district court's decision to exclude the evidence under Rule 403 was reasonable given the type of evidence that was being proffered and the attendant issues regarding a proper foundation.

C. The district court did not violate Knospler's right to present a complete defense.

As he did in Issue I, Knospler claims that the district court's decision to exclude the URL evidence violated his right to present a complete defense. It did not.

As in Issue I, a rule of evidence that excludes a defendant's proposed evidence is unconstitutional only if it serves no legitimate purpose or is disproportionate to the ends it is meant to serve. *See Holmes*, 547 U.S. at 326. This Court has expressly held that excluding evidence because it does not qualify for admission under Rules 404 and 405, does not violate a defendant's right to present a complete defense. *McDowell*, ¶ 29, 318 P.3d at 362. Consequently, the district court did not violate Knospler's right to present a complete defense when it excluded his proposed evidence.

III. The district court did not abuse its discretion when it rejected Knospler's Proposed Instructions #16 and #17, and when it gave Instruction #27.

Knospler raises two issues concerning the jury instructions.[5] First, he claims the district court erred when it declined his proposed instructions #16 and #17. (Aplt's Br., at 48–56). Wyoming law, however, does not support either proposed instruction.

Second, Knospler claims the district court erred when it gave Instruction #27 that required the jury first to determine the first aggressor before deciding if Knospler was justified in his alleged use of self-defense. (*Id.* at 56–58). He erroneously claims that Wyoming law does not support this type of instruction. (*Id.* at 57). But Instruction #27 was directly from this Court's decision in *Drennen*, 311 P.3d 116, and in compliance with this Court's requirements on how a jury should be instructed on self-defense.

A. Standard of Review

This Court reviews jury instructions for an abuse of discretion. *Brown v. State*, 2014 WY 104, ¶ 14, 332 P.3d 1168, 1173 (Wyo. 2014) (citation omitted). As long as the instructions correctly state the law, this Court will affirm. *Id.* (citation omitted).

As to Knospler's argument that the district court abused its discretion by excluding his two proposed instructions, because he did not put on the record his objection to their

---

[5] Knospler splits his argument concerning the propriety of the instructions into two sections. Because both issues concern the law of self-defense and share the same standard of review, the State has placed both issues into one single issue.

exclusion or the reasons underlying that objection, if this Court determines that Knospler has not waived this issue, review is for plain error. Plain error requires Knospler to demonstrate that: (1) the record clearly reflects the error; (2) the alleged error violated a clear and unequivocal rule of law; and (3) the alleged error caused Knospler material prejudice. *Id.* (citation omitted). *Anderson v. State*, 2014 WY 74, ¶ 40, 327 P.3d 89, 99 (Wyo. 2014).

B. The district court did not abuse its discretion when it rejected Knospler's Proposed Instructions #16 and #17.

Before addressing the merits of Knospler's argument pertaining to the jury instructions, it is necessary to identify the instructions Knospler actually proposed to the district court and, thus, are actually at issue on appeal. In his brief, Knospler claims that, in addition to the district court allegedly abusing its discretion when it rejected his proposed instructions #16 and #17, it also abused its discretion when it rejected his proposed instruction #18. That proposed instruction read:

> It is lawful for a person who is being assaulted to defend himself from attack if he has reasonable grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, he may use all force that would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury that appears to be imminent.

(R., Vol. VI, at 1356) (citing Wyoming Criminal Pattern Jury Instruction 8.09). The district court, however, gave this instruction verbatim as Instruction #26. (R., Vol. VI, at 1322). Thus, this Court is not faced with any issue regarding Knospler's Proposed Instruction #18.

Next, Knospler claims in his brief that his proposed instruction #17 actually read:

> "Habitation" means any structure that is designed or adapted for overnight accommodation, including, but not limited to, buildings, modular, trailers, campers, tents and vehicles.

(Aplt's Br., at 51) (citing R., Vol. VI, at 1356). This is wrong. Nowhere in the record, especially not on page 1356 as Knospler claims, does this proposed instruction exist. Granted, in Knospler's table of contents attached to his proposed instructions, it lists his proposed Instruction #17 as "HABITATION – DEFINED." (*Id.* at 1340). That is not sufficient, however, to put this instruction properly before the district court because it is not even an instruction; it is a title for what could have been a proposed instruction. Consequently, the only instructions Knospler proposed that are properly before this Court are his proposed Instructions #16 and #17 that are quoted in the course of proceedings above and that are actually found in the record.

Turning to the merits, when the district court rejected Knospler's proposed instructions #16 and #17, Knospler did not object on the record and succinctly state the reasons for his objection. (*See* Trial Tr., Vol. VI, at 1915). Thus, he did not properly preserve this issue for appeal under Rule 30 of the Wyoming Rules of Criminal Procedure. Rule 30 states:

> (a) . . . [A]ny party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . Before instructing the jury the court shall conduct a formal instruction conference out of the presence of the jury at which the court shall inform counsel of the proposed action upon their requests and shall afford them an opportunity to offer specific, legal objection to any instruction the court intends to give and to offer alternate instructions. **No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury is**

> **instructed, stating distinctly the matter to which the party objects and the grounds of objection**[.]

W.R.Cr.P. 30(a) (emphasis added). If a party does not object to the exclusion of an instruction on the record or the reasons for that objection, Rule 30(a) mandates that he or she has waived any appellate issue as to that instruction. *See Ortega v. State*, 966 P.2d 961, 966 (Wyo. 1998). The only way a defendant can overcome this waiver is if he or she can establish that plain error occurred. *See Mendoza v. State*, 2013 WY 55, ¶ 9, 300 P.3d 487, 490 (Wyo. 2013). Here, Knospler waived any issue regarding his two proposed instructions; and, in any event, he cannot establish that their exclusion amounted to plain error.

It appears that the district court held an "informal jury conference" off the record at the end of the sixth day of trial. (Trial Tr., Vol. VI, at 1839, 1841). When the district court discussed instructions on the record on the seventh day of trial, however, Knospler did not place on the record his objections to the district court's refusal to give his proposed instructions #16 and #17. Because he never put on the record his objection to the district court's rejection of his proposed instructions, or the reasons for that objection, Rule 30(a) prohibits him from claiming error on appeal. *See Ortega*, 966 P.2d at 966 ("The spirit and policy of our rules with reference to jury instructions is to apprise and inform the district court of the purpose of offered jury instructions and of objections to proposed jury instructions so that the court may have an opportunity to correct and amplify them before submission to the jury.") (citing *Alberts v. State*, 642 P.2d 447, 453 (Wyo. 1982)).

Because of his waiver, the only way Knospler can succeed on his claim is if he can establish that the district court committed plain error when it refused his proposed instructions #16 and #17. *See Mendoza*, ¶ 9, 300 P.3d at 490. But Knospler has failed to provide any analysis or argument that the district court committed plain error when it refused his proposed instructions. (*See generally* Aplt's Br., at 48–56). This failure standing alone would support this Court's decision that plain error did not occur. *See Causey v. State*, 2009 WY 111, ¶ 19, 215 P.3d 287, 293 (Wyo. 2009) (citation omitted).

Even if this Court addresses Knospler's claim under the plain error standard, he cannot identify what clear and unequivocal rule of law the district court violated in a clear and obvious manner. Rather, his sole argument was that his car was a "habitation" under Wyoming law, and that, therefore, he should have been entitled to the self-defense related presumptions that attach to a "habitation." (*See* Aplt's Br., at 50–56). He is mistaken.

In Wyoming, a person has a greater right to use self-defense within one's "home or habitation." Wyo. Stat. Ann. § 6-2-602. A "habitation" is defined as "any structure which is designed or adapted for overnight accommodation, including, but not limited to, buildings, modular units, trailers, campers and tents[.]" Wyo. Stat. Ann. § 6-2-602(d)(i). That definition does not include "car" or "vehicle." Therefore, the district court correctly rejected the proposed instructions pertaining to a person's "habitation" and the attendant application of self-defense because they did not accurately state the law. (Trial Tr., Vol. VI, at 1915) (citing Wyo. Stat. Ann. § 6-2-602).

Yet, Knospler contends that the Wyoming Legislature amended § 6-2-602(d)(i) in 2014 by removing "vehicle" from the definition of "habitation." (Aplt's Br., at 52–54). Thus, Knospler argues that the use of the amended definition of "habitation" at his trial somehow violated the *ex post facto* clauses of the United States and Wyoming Constitutions. (Aplt's Br., at 53–54). He is wrong.

An *ex post facto* law is:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed[.]

Collins v. Youngblood, 497 U.S. 37, 42 (1990).

Knospler murdered Baldwin in October 2013. His argument that the amendment of "habitation" occurred in 2014 is incorrect. Although the Wyoming Legislature amended the definition of "habitation," § 6-2-602(d)(i), it did so in 2011, not in 2014. *See* 2011 Wyo. Sess. Laws 407, eff. July 1, 2011. Thus, no *ex post facto* issue exists because the legislative change did not deprive Knospler of any defense—the change occurred over two years before he murdered Baldwin. The district court's conclusion that "vehicle" is not included within "habitation" was and is correct. Because the sole basis for Knospler's *ex post facto* argument rests on a faulty premise it has no merit.

C. The district court did not abuse its discretion when it gave Instruction #27 to the jury.

Knospler also posits that the use of Instruction #27 "was an erroneous statement of the law, unduly emphasized [the State's] version of the events and improper under *Drennen v. State*, 2013 WY 118, ¶ 20, 311 P.3d 116 [(Wyo. 2013)]." (Aplt's Br., at 57). Instruction #27 read:

> In considering the claim of self-defense in this case, you must first determine whether the Defendant was the aggressor in this case or whether Mr. Baldwin was the aggressor in this case. Some sort of physical aggression or a threat of imminent use of deadly force is required before a person will be considered an aggressor. Verbal provocation without more is generally insufficient to justify an initial aggressor. If you find that the Defendant was the aggressor in this case, you should consider his duty under Instruction 28. If you find that Mr. Baldwin was the aggressor you should review the Defendant's actions under Instruction 29.

(R., Vol. VI, at 1279).

If the jury determined that Knospler was the first aggressor, Instruction #28 instructed that he must first withdraw or retreat before resorting to deadly force. (*Id.* at 1280). If the jury determined, however, that Baldwin was the first aggressor, Instruction #29 instructed that Knospler must use other reasonable, legal alternatives before resorting to deadly force. (*Id.* at 1281).

Knospler maintains that it was error to require the jury to "'first determine' who was the aggressor[.]" (Aplt's Br., at 57). He contends that the jury's only duty was "to determine whether the defendant reasonably perceived a threat of immediate bodily injury under the circumstances and whether he defended himself in a reasonable manner, by evaluating the

totality of the circumstances and his options in protecting himself from such a perceived threat of harm." (*Id.* at 57–58) (citing *Drennen*, ¶ 13, 311 P.3d at 122). Knospler's argument, however, misconstrues *Drennen*.

In *Drennen*, this Court provided greater clarification on the law of self-defense in Wyoming. *Drennen*, 2013 WY 118, 311 P.3d 116. As to the issue here, this Court outlined when and how a district court should provide instructions relevant to whether a defendant or a victim is the first aggressor. *Id.* ¶ 39, 311 P.3d at 129. This Court held that, "[w]hen the defendant has met the minimal burden of presenting a prima facie case that the deceased was the aggressor, the district court must instruct the jury on the legal definition of 'aggressor.'" *Id.* The jury must then be instructed on the duties that a defendant has if the jury determines that he or she was the first aggressor, or if the jury determines that the victim was the first aggressor. *Id.* Without this requisite dichotomy, the definition of who was the first aggressor would be a superfluous duty. *See id.*

Here, Instruction #27 correctly stated the law because it required the jury to determine first who was the first aggressor so it could then apply the proper legal principles and duties that a defendant is required to undertake before resorting to deadly force. (*See* R., Vol. VI, at 1279–81) (Instructions #27 (who is the first aggressor), #28 (duties if the defendant is the first aggressor), #29 (duties if the victim is the first aggressor)). Without instructing the jury to determine first who the first aggressor was, Instructions #28 and #29 would be confusing because it would be unclear when the duty applicable to each would

apply to the case. This Court expressly adopted in *Drennen* this principle and method of instructing the jury, and, therefore, the district court did not abuse its discretion when it gave Instruction #27 to the jury here.

IV. The district court did not abuse its discretion when it did not address the State's alleged discovery violation concerning statements Knospler made shortly before the murder.

As his final assignment of error, Knospler argues that the district court abused its discretion when it permitted the introduction of testimony under Rule 404(b) that the State provided notice of a month before trial. (Aplt's Br., at 58–64). Knospler claims that, given the district court's discovery order, the testimony at issue was inadmissible because the State noticed this testimony too late. (*Id.* at 60). In his brief, Knospler does not contend that this evidence was inadmissible under Rule 404(b) or any other rule of evidence. Rather, he claims that the district court abused its discretion by not addressing this alleged discovery violation. His argument ignores the fact that, even if the noticed evidence equated to a discovery violation, he received the State's disclosure of that evidence a month before trial and never alerted the district court that it amounted to a discovery violation before trial.

A. Standard of Review

A district court's rulings on discovery matters are reviewed for an abuse of discretion. *Ceja v. State*, 2009 WY 71, ¶ 11, 208 P.3d 66, 68 (Wyo. 2009) (citation omitted). In this context, "'[e]rror is prejudicial if there is a reasonable possibility that the verdict might have been more favorable to the defendant if the error had not been made.'" *Toth*, ¶ 29, 353 P.3d at 705–06.

B. The district court did not abuse its discretion when it permitted the proposed 404(b) evidence.

Before trial, the district court ordered that all notices to introduce evidence under Rule 404(b) be filed by June 23, 2014. (R., Vol. I, at 140). On November 19, 2014, the State supplemented its previous 404(b) notices with its intent to introduce statements from Guill, Syverson, and Mize that it had received after re-interviewing them on November 17 and 18. (R., Vol. IV, at 791).[6] Specifically, Guill disclosed that Knospler asked him if he had any cocaine. (*Id.*). Syverson disclosed that Baldwin had asked him for a lighter so he could smoke marijuana with Knospler outside the bar. (*Id.* at 791–92). Finally, Mize disclosed that Knospler discussed with her "how easy it would be to kill someone, you would take them to the ground and beat them." (*Id.*). Knospler then told her that "nobody means nothing to me." (*Id.*).

Before reaching the substance of Knospler's argument on appeal, it is necessary to ferret out his allegations and what is actually at issue. He is not arguing that the testimony from Guill, Mize, or Syverson was inadmissible under Rule 404(b). (*See generally* Aplt's Br., at 58–64). He also is not arguing that the district court erred by denying his motion to strike Syverson's and Mize's testimony; indeed, in that motion, he did not even address

[6] This was after the State had already provided three other notices of potential 404(b) evidence. (*See* R., Vol. I, at 159, 201; Vol. II, at 399). None of the matters noticed in these earlier filings are at issue.

Guill's testimony as he does on appeal. (*See id.*). Rather, his sole argument on appeal is that the district court abused its discretion when it did not fashion an appropriate remedy when Knospler claimed, after the witnesses testified, that the State violated the district court's pretrial discovery order regarding notice of 404(b) evidence. (Aplt's Br., at 58–64). Contrary to Knospler's claim on appeal, however, the district court did not abuse its discretion because: (1) Knospler waived any argument that the State violated its discovery obligations by not raising it in a timely fashion; and (2) Knospler did not suffer any prejudice because of the alleged discovery violation.

1. Knospler has waived any argument that the district court abused its discretion because he never argued prior to trial that the proposed evidence was inadmissible as being a discovery violation.

The testimony at issue was disclosed to Knospler in mid-November 2014—nearly a month before trial. Knospler responded to this notice by moving to exclude the evidence solely on the basis that it was irrelevant. (R., Vol. IV, at 833–34). He never argued before trial that this notice violated the district court's prior order concerning notice of 404(b) evidence. At the pretrial conference, when the district court addressed this proposed evidence, Knospler again did not raise any argument that it amounted to a discovery violation. (Pretrial Conf. Tr., Dec. 3, 2014, at 21, 23). His only argument was that the proposed evidence was irrelevant and inadmissible under Rules 401 and 403. (*Id.*). The district court ultimately admitted the noticed evidence under 404(b) after weighing the applicable *Gleason* factors. (R., Vol. IV, at 941, 946).

If a defendant, who has notice of the disputed evidence before trial, does not raise the issue of a discovery violation before the evidence is presented at trial, he or she waives the ability to raise that issue on appeal. *Cf. Warner v. State*, 2001 WY 67, ¶ 25, 28 P.3d 21, 29 (Wyo. 2001) (noting that a district court is not required to hold a hearing after an alleged Rule 26.2 discovery violation if the alleged violation is not brought to the district court's attention prior to the disputed evidence being admitted at trial); *see generally Silva v. State*, 2014 WY 155, ¶ 9, 338 P.3d 934, 936–37 (Wyo. 2014) ("[This Court] strongly adheres to the rule forbidding [it] to consider for the first time on appeal issues that were neither raised in, nor argued to, the trial court, except for those issues which are jurisdictional or are fundamental in nature.") (citations and quotation omitted).

The first time Knospler raised the issue of an alleged discovery violation, was after all three witnesses testified. (Trial Tr., Vol. IV, at 1097–98). He raised the issue again in his post-trial motion for a new trial, and, even then, he only focused on Syverson's and Mize's testimony. (R., Vol. IV, at 1218). Because he did not present this argument to the district court before it ruled that the evidence was admissible, he has waived the ability to raise any argument that it was inadmissible as being a discovery violation after the evidence was presented without an objection before or at trial. To hold otherwise would provide an incentive for a defendant to sit on an alleged discovery violation until after the disputed evidence is introduced at trial and then move for a mistrial on the grounds of that alleged discovery violation. The fact Knospler waited over a month to raise the alleged discovery

violation foreclosed his ability to seek a remedy for the reasons discussed. *See Warner*, ¶ 25, 28 P.3d at 29. The same is true on appeal. *See generally Silva*, ¶ 9, 338 P.3d at 936–37.

2. Even if the district court abused its discretion by not addressing whether the State's supplemental 404(b) notice was a discovery violation, Knospler cannot establish that he suffered any prejudice.

Even if the district court abused its discretion, Knospler must still establish that a reasonable possibility existed that he would have been acquitted but for the error. Because of Knospler's decision to wait to raise the alleged discovery violation, he cannot meet his burden.

Generally, prejudice does not exist when it comes to discovery violations if a defendant, who had notice of the disputed evidence before trial, did not move for a continuance because of that alleged violation. *Cf. Lindstrom v. State*, 2015 WY 28, ¶ 28, 343 P.3d 792, 799 (Wyo. 2015) ("In his objection to the [Information] amendment . . . Lindstrom could . . . have requested a continuance . . . if he believed [it] prejudiced his ability to prepare his defense. He did not . . . and courts are hesitant to find prejudice if a continuance was . . . not requested.") (citations and quotations omitted). When the State provided its supplemental 404(b) notice a month before trial, Knospler did not move for a continuance and he did not raise any issue regarding the testimony contemporaneously at trial. This is evidence that even he did not believe he suffered prejudice as result of the supplemental 404(b) notice.

"Criminal discovery is a shield which serves to protect a defendant from surprise, and which gives him or her **reasonable notice** to allow preparation of a defense." *Willoughby v. State*, 2011 WY 92, ¶ 25 n. 5, 253 P.3d 157, 165 n. 5 (Wyo. 2011) (emphasis added). A defendant should not be allowed to play a game of "gotcha" when a discovery violation is alleged after the evidence is admitted, even though the defendant was provided notice of the evidence well in advance of trial. *Id.* The State's supplemental 404(b) notice in mid-November clearly identified the witnesses and the statements at issue. (R., Vol. IV, at 791). Knospler had a month to investigate these statements. *See Dean v. State*, 865 P.2d 601, 612 (Wyo. 1993) ("We also find appellant was not prejudiced by the introduction of state exhibits presented to appellant after the cutoff date for discovery. Appellant received the exhibits prior to trial[.]"), *abrogated on other grounds by Williams v. State*, 2004 WY 117, 99 P.3d 432 (Wyo. 2004). Notwithstanding any discovery violation, Knospler had ample time to prepare his defense and prepare his cross-examination of these witnesses.

Moreover, as to Syverson's testimony about Baldwin trying to find a lighter so he and Knospler could smoke marijuana, this was in accord with previously noticed 404(b) evidence. In particular, the State had already provided notice of Knospler dropping a marijuana joint before leaving the bar and THC was found in his urine hours after the murder. (R., Vol. I, at 160–61). Thus, admitting additional evidence of Knospler using marijuana was cumulative at best, and, therefore, did not materially prejudice Knospler. As to Knospler and Baldwin being outside together, that too was already before the jury.

Guill's testimony about Knospler seeking to get some cocaine was also cumulative because two other bar employees testified that Knospler was seeking to get some cocaine. (Trial Tr., Vol. IV, at 1015, 1066). Knospler did not object to this testimony and has not raised any issue regarding it on appeal. (*See* Aplt's Br, at 61). Thus, even if Guill's and Syverson's testimony was stricken from the record the substance of their respective testimony was still before the jury.

Finally, as to Mize's testimony about Knospler discussing killing people, Ervin Andujar testified to similar statements Knospler made. (Trial Tr., Vol. III, at 805). In fact, in cross-examining Andujar, Knospler's own attorney read from Andujar's statement to police wherein Andujar said that Knospler was "talking about just killing people." (*Id.*). This testimony occurred prior to Mize testifying. Consequently, as with Syverson's and Guill's testimony, even if Mize's cited testimony was stricken from the record, the substance of it remained properly before the jury—Knospler was making statements about killing people shortly before he murdered Baldwin.

CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that Knospler's conviction and sentence be affirmed in all respects.

DATED this 12th day of October 2015.

/s/Peter K. Michael________________________
Peter K. Michael
Wyoming Attorney General

/s/David L. Delicath_______________________
David L. Delicath
Deputy Attorney General

/s/Christyne Martens_______________________
Christyne Martens
Senior Assistant Attorney General

/s/Joshua C. Eames________________________
Joshua C. Eames
Wyoming State Bar No: 7-5166
Attorney for Appellee
Wyoming Attorney General's Office
Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-7977
josh.eames@wyo.gov

CERTIFICATE REGARDING ELECTRONIC FILING

I, Joshua C. Eames, hereby certify that the foregoing BRIEF OF APPELLEE was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 12th day of October 2015.

Tim Newcomb, 5-2594
P.O. Box 928
170 North Fifth
Laramie, WY 82073
P: 307-761-0206
F: 307-742-7160

Joseph H. Low IV, 194897
The Law Firm of Joseph H. Low IV
1 World Trade Center/ Suite 800
Long Beach, CA 90831
P: 562-901-0840

The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Joshua C. Eames________________________
Joshua C. Eames
Assistant Attorney General