68709-3

68709-3

NO. 68709-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Police officers may conduct an investigatory stop if they have a reasonable and articulable suspicion that an individual is involved in criminal activity; i.e., there is a substantial possibility that criminal conduct has occurred or is about to occur. After dark in an area of several recent car prowls, Deputy Callahan observed Smith riding his bicycle along the sidewalk and peering into the windows of parked cars. Upon noticing the officer, Smith became startled, lost his balance, and started riding in the opposite direction. He then disregarded the officer's attempt to make a casual contact. Did the trial court correctly conclude that the officer had sufficient grounds to make an investigatory stop?

2. The King County Health Code requires anyone riding a bicycle "on a public roadway, bicycle path or on any right-of-way or publicly owned facilities located in King County including Seattle" to wear a bicycle helmet, and authorizes all duly authorized law enforcement officers to enforce that provision. Deputy Callahan observed Smith riding a bicycle on a public right-of-way in King County without a helmet. Did the court correctly conclude the officer had a valid basis to stop Smith for the infraction?

3. A pretextual traffic stop occurs when a police officer relies on some legal authorization as a mere pretext to dispense with a warrant when the true reason for the seizure is not exempt from the warrant requirement. A traffic stop motivated by both reasonable suspicion of criminal activity or traffic infraction and another reason that is insufficient to justify a stop is not unconstitutionally pretextual. Deputy Callahan stopped Smith based on both his suspicion concerning car prowling and the bicycle-related traffic infractions. Did the court correctly conclude the stop was not pretextual?

4. A defendant is entitled to a jury instruction on the affirmative defense of necessity only when he can show he was under unlawful and present threat of death or serious injury and he had no reasonable alternative to breaking the law. Smith testified that he was carrying a firearm on the night of his arrest because he was concerned for the safety of his son, who had been threatened two weeks prior and had left home after an argument. Unchallenged factual findings establish that Smith possessed the firearm even before his son was threatened; there was no immediate and present threat to Smith or his son; Smith took no reasonable alternative action; and Smith was not confronted in any

way by anyone before his arrest. Did the trial court correctly conclude Smith was not entitled to a jury instruction on the defense of necessity?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Christopher Smith, Sr. was charged with unlawful possession of a firearm in the first degree. CP 1. Smith moved to suppress the firearm on grounds that the stop that led to its discovery was unconstitutional. CP 29-40. Deputy Callahan, Smith, and Smith's girlfriend testified at a hearing to address the motion. RP 11-129.[1] The trial court denied Smith's motion, finding that Deputy Callahan had a reasonable and articulable suspicion to justify stopping Smith based on activity consistent with car prowling in an area in which several recent reports of car prowls had been made. RP 126-29. The court also concluded that the stop was permissible to address bicycle-related traffic infractions, and noted that the stop was not pretextual. RP 149-51.

The State moved to preclude Smith from presenting evidence of a necessity defense at trial. CP 114-16. In a pretrial

[1] The Verbatim Report of Proceedings consists of one volume spanning all five days of proceedings, referred to in this brief as "RP."

offer of proof, Smith's son testified that he had been threatened in a park weeks before Smith's arrest, and that Smith owned and carried a firearm even before that incident. RP 152-55, 159. The court ruled that Smith had not established an immediate threat of injury or the absence of a reasonable alternative to breaking the law. RP 163-66. The court therefore excluded the necessity defense. Id.; CP 94-96.

Following the court's ruling, Smith elected to proceed to bench trial on stipulated evidence, including the police reports and Smith's agreement that he had a prior conviction for a "serious offense" as defined by RCW 9.41.010. CP 51-68; RP 167-81, 185. The court found Smith guilty of unlawful possession of a firearm and imposed a low-end standard range sentence of 87 months in prison. RP 185-86, 214-15; CP 80, 82.

2. SUBSTANTIVE FACTS.

At approximately 8:30 p.m. on September 13, 2011, Deputy Callahan was on patrol in a marked cruiser in the City of Shoreline. RP 13, 15-16. Callahan noticed a bicyclist traveling in the opposite direction without a helmet, light, or visible reflectors. RP 17-18. The bicyclist, later identified as Smith, was looking into the windows

of cars parked on the street. RP 18. Callahan had recently taken some auto-prowling reports within five blocks of that location, and he believed Smith might be looking at the cars with the intention of committing a theft. RP 20-21.

As Deputy Callahan passed Smith in order to turn around, he and Smith made eye contact. RP 22. Smith looked surprised and nearly lost his balance on the bicycle. Callahan recognized this as a common reaction of people who are "caught doing something they're not supposed to be doing." RP 22.

By the time Callahan had turned his cruiser around, Smith had also turned and was heading in the opposite direction, toward Callahan. RP 23. Callahan then stopped, stepped out of his vehicle, and called "hey" to make a casual contact. RP 24. Smith ignored Callahan, and with eyes fixed straight ahead, he continued riding past the cruiser. RP 24-25.

Based on Smith's suspicious reaction, the bicycle infractions, and his conduct in peering into car windows, Callahan decided to stop Smith. RP 26. He made a U-turn, activated his emergency lights, and yelled "Stop, police." RP 27-28. Smith ignored the instruction and continued riding, veering across a lawn and eventually into his own driveway. RP 29-31. Callahan pursued

Smith on foot and continued to yell "stop." RP 31. At some point, Smith called over his shoulder, "I'm just going home." RP 32-33. Smith eventually stopped at the "dead end" where his driveway met the garage. RP 32. Callahan then pulled him off the bicycle and walked him back to the patrol car. RP 33.

Callahan placed Smith under arrest for obstruction. RP 34. A cursory patdown revealed a heavy object in the fanny pack around Smith's waist. RP 34-35. In Callahan's experience, people commonly conceal pistols in fanny packs. Id. Callahan handcuffed Smith, opened the fanny pack, and discovered a loaded .38 Special revolver. RP 36-38.

After advising Smith of his Miranda[2] rights, Callahan asked Smith if he was supposed to have a gun, where he got it, and whether it was stolen. RP 39-42. Smith admitted that he was a convicted felon and was not supposed to have a gun. RP 43. Smith said that he got the gun from "a guy," and admitted it might be stolen. RP 47. Smith claimed that he was carrying the gun because his niece had been the victim of a crime for which a trial was pending, and he was concerned about her being intimidated by the defendant in that case. RP 47. In a separate conversation,

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Smith later mentioned that he had been out looking for his son. RP 48, 58.

Smith testified at the suppression hearing. RP 86-98. He claimed that he was riding his bike on the sidewalk to look for his son and did not notice the officer "until actually he tried to hit me with his cruiser." RP 89, 91. He said that he swerved and rode over the lawn to avoid being struck. Id. When he heard the officer yell, "stop, police," Smith claimed that he got off of his bike and walked toward the officer. Id. Smith also testified that there were no vehicles parked on the side of the street except for the two in front of his own home. RP 90-91.

Smith's girlfriend, Melissa Kennedy, also testified. RP 69-83. Kennedy said Smith had been riding her bike, which was equipped with reflectors, a working headlight and flashing tail light at the time. RP 72-75. Photos of Kennedy's bike, taken the day before the hearing, showed the headlight and reflectors. RP 72-76.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE DISCOVERED FOLLOWING A LAWFUL TERRY[3] STOP.

Smith contends that Deputy Callahan lacked sufficient basis to stop him, so the firearm discovered subsequent to his arrest should have been suppressed. He argues that his conviction for unlawful possession of a firearm should therefore be reversed and dismissed. Because the record firmly establishes that Callahan had a reasonable and articulable suspicion that Smith was involved in criminal activity, the claim must be rejected.

In reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's factual findings, and whether those findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. Id.

Brief investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Gatewood, 163 Wn.2d 534, 539,

[3] Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

182 P.3d 426 (2008). A Terry stop is justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000). The totality of the circumstances includes factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

The unchallenged findings establish that Smith was peering into the windows of parked cars as he rode his bike along the sidewalk. CP 91. Deputy Callahan knew of a recent rash of car prowls in the immediate area, and had recently taken "a couple of

auto-prowling reports within five blocks of that location." RP 20-21; CP 91. The trial court found that Callahan reasonably concluded that Smith's conduct was consistent with car prowling. Id.

Additionally, Deputy Callahan testified that his initial suspicion was heightened by Smith's reaction when he noticed the officer: Smith looked surprised, nearly lost his balance, and started riding in the opposite direction. RP 22-23. And when the officer attempted a casual contact, Smith avoided eye contact and pedaled on. RP 24-25.

Smith relies on State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006), to argue that innocuous facts do not justify an investigatory stop. In Martinez, a Richland police officer was patrolling the grounds of an apartment complex in a high-crime neighborhood where several vehicle prowls had been reported. Id. at 177. The officer saw Martinez walking briskly and looking around nervously near several parked cars. Id. The officer asked Martinez if he lived in the apartment complex; he did not. Id. at 177-78. During a pat-down for weapons, the officer discovered a container of methamphetamine. Id. Martinez was arrested and charged with possession of methamphetamine. Id.

On appeal, Martinez successfully argued that the officer lacked particularized suspicion to stop him. Id. The appellate court concluded that the officer had no information linking Martinez to any crime. Id. at 181-82. The court observed that "there must be some suspicion of a particular crime or a particular person, and some connection between the two." Id. at 182. The officer's general suspicion that Martinez may have been "up to no good" was not enough to warrant a stop. Id.

If Deputy Callahan had stopped Smith simply for being in a high-crime area and looking nervous, Martinez would support his argument. But Callahan actually observed Smith peering into car windows, activity consistent with car prowling. Thus, unlike the officer in Martinez, Deputy Callahan had particularized suspicion connecting Smith to the crime that Callahan stopped him to investigate.

Smith's reliance on State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010), is similarly misplaced. There, officers were watching a suspected drug house and observed Doughty make a brief, late-night visit to the house. Id. at 59. The majority held that a defendant's mere presence in a high-crime area, late at night, did not provide a legal basis for a Terry stop. Id. at 62, 64. But Deputy

Callahan did not stop Smith based on such limited facts. His observation of conduct consistent with car prowling, together with his knowledge of many car prowls in the same area, gave him the particularized suspicion the officers lacked in Doughty.

Smith nevertheless argues that peering into car windows is innocuous behavior that does not warrant an investigatory stop. He contends that bicyclists must look into parked cars to avoid collisions in case occupants suddenly open doors. As a preliminary matter, the Court should note that this argument is inconsistent with Smith's testimony that he was riding on the sidewalk and that there were no cars parked on the side of the street except those directly in front of his home. RP 90-91. Further, even if Smith's conduct was wholly innocent, that does not render the stop unlawful. "When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention." Kennedy, 107 Wn.2d at 6.

> While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience. ... Further, reasonableness is measured not by exactitudes, but by probabilities.

State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). See also Martinez, 135 Wn. App. at 180 (an officer may rely on experience in evaluating arguably innocuous facts).

Terry itself is instructive. There, a Cleveland patrol officer noticed Terry and another man walk by some stores, pause to look in the windows, and briefly confer. 392 U.S. at 5-6. The men repeated this "ritual" nearly a dozen times. Id. at 6. The officer became suspicious that the men were planning a robbery. Id. The officer approached them, identified himself as a police officer, and asked for their names. Id. at 6-7. After Terry mumbled something in response, the officer patted him down and found a gun in his pocket. Id.

As in this case, the officer in Terry observed behavior that might have been innocuous. Id. at 22-23. Nevertheless, the U.S. Supreme Court held that the officer's observations and substantial experience justified the brief detention. Id. at 23. Indeed, the Court concluded it would have been "poor police work" to have failed to investigate further. Id.

In this case, Deputy Callahan was a patrol officer with knowledge of a recent rash of car prowls in the immediate vicinity. While Smith *could* have been looking into car windows with bicycle

safety in mind, Callahan was not required to disregard the fact that the same conduct was consistent with car prowling.

The totality of the circumstances gave rise to a reasonable and articulable suspicion that Smith was involved in criminal activity. An investigatory stop was justified, and the trial court properly determined that the subsequently discovered evidence was admissible.

2. DEPUTY CALLAHAN HAD AUTHORITY TO STOP SMITH FOR BICYCLE-RELATED TRAFFIC INFRACTIONS.

It is undisputed that Smith was riding a bike without a helmet when he was stopped by Deputy Callahan. The Court concluded this was a violation of the King County Code provision that requires all bicyclists in King County to wear helmets, and thus a valid basis to stop Smith. CP 91. For the first time on appeal, Smith contends that this provision does not apply in the City of Shoreline. Because Smith misinterprets the Code, the Court should reject his argument.[4]

[4] If the Court agrees that the stop is separately justified for investigation of car prowling, it need not reach this question.

The King County Board of Health Code § 9.10.010 provides, in relevant part, as follows:

> Any person operating or riding on a bicycle not powered by motor on a public roadway, bicycle path or on any right-of-way or publicly owned facilities located in King County including Seattle, shall wear a protective helmet designed for bicycle safety.

Smith argues that the language "including Seattle" indicates the provision does not apply to Shoreline, or to any other city in King County, under the doctrine of *expressio unius est exclusio alterius*.[5] This maxim holds that, "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." State v. Swanson, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (quoting Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)). It "'is to be used only as a means of ascertaining the legislative intent where it is doubtful, and not as a means of defeating the apparent intent of the legislature.'" State v. Williams,

[5] Smith cites State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003), for this proposition. Delgado has to do with the "two strikes" law for sexual offenders. That statute specified the offenses that constituted strikes and did not provide for others to count based upon comparability to enumerated offenses, unlike the "three strikes" law. 148 Wn.2d at 728-29. The Court used the *expressio unius* doctrine to infer that the legislature, which had provided for comparability in one statute, did not intend to so provide in the statute that omitted that language. Id. Delgado is unhelpful to this analysis.

94 Wn.2d 531, 537, 617 P.2d 1012 (1980) (quoting DeGrief v. Seattle, 50 Wn.2d 1, 12, 297 P.2d 940 (1956)).

The intent of the King County Board of Health to apply the helmet law broadly is clear from its findings. The Board recites statistics of bicycle-related deaths and hospitalizations "in King County, including Seattle," and estimates substantial cost savings "if every cyclist were wearing a helmet in King County." § 9.04.010 (A), (B). Further, the use of expansive terms like "any person" (and "every cyclist") "evinces an intention to render the statutory requirements broadly applicable[.]" Williams, 94 Wn.2d at 537. The Court should not apply the *expressio unius* doctrine to subvert the clear intent of the legislation.

Smith also argues that the helmet provision does not apply when bicyclists are riding on sidewalks.[6] He points to a state statute that defines "roadway" to exclude sidewalks. *See* RCW 46.04.500. But the bicycle helmet requirement is not limited to bicyclists on "roadways"; it also applies on "any right-of-way or publicly owned facilities located in King County." Health Board

[6] Although the trial court entered no written conclusion about the applicability of the helmet regulations to the sidewalk, the court orally observed, "I have looked at the King County ordinance cited in the briefs. It seems to me it would apply whether you're on the sidewalk or not." RP 127.

Code § 9.01.010. State law defines "sidewalk" as the area between the road margin and the line where the public right-of-way meets abutting property. RCW 35.70.010 ("the term sidewalk as used in this chapter shall be construed to mean and include any and all pedestrian structures or forms of improvement for pedestrians included in the space between the street margin, as defined by a curb or the edge of the traveled road surface, and the line where the public right-of-way meets the abutting property"). Since the sidewalk is part of the public right-of-way, the helmet law applies.

Additionally, the helmet violation was not the only traffic infraction the officer observed. Deputy Callahan testified that Smith was riding after dark without lights or visible reflectors, in violation of RCW 46.61.780.[7] The failure to display the required lights and reflectors justifies a traffic stop, even when the bicyclist rides on the

[7] RCW 46.61.780 provides, in relevant part, "Every bicycle when in use during the hours of darkness as defined in RCW 46.37.020 shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least five hundred feet to the front and with a red reflector on the rear of a type approved by the state patrol which shall be visible from all distances up to six hundred feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle."

sidewalk. State v. Rowell, 138 Wn. App. 780, 783-84, 158 P.3d 1248 (2007).[8]

The bicycle-related traffic infractions provided additional justification to support Deputy Callahan's lawful stop of Smith. The trial court properly determined that the firearm subsequently found on his person was admissible.

3. THE STOP WAS NOT PRETEXTUAL.

Smith contends that any stop justified by the helmet infraction was mere pretext for the officer's real motive, which was to investigate car prowling. He relies on State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), and the Court of Appeals decision in State v. Arreola, 163 Wn. App. 787, 260 P.3d 985 (2011), rev'd, 86610-4, 2012 WL 6621148 (December 20, 2012), for the proposition that evidence of an officer's improper subjective

[8] The trial court made no finding as to whether Smith's bike had the appropriate lights and reflectors because "it's admitted by both sides that he wasn't wearing a helmet," and the court concluded that the helmet infraction was a valid basis for the stop. RP 127. The only evidence that the bike had the required lights came from Smith's girlfriend, who testified that Smith had been riding her bicycle, pictures of which were admitted as Pretrial Exhibits 5 through 8. RP 72. Although the court made no findings about the light, it was "not persuaded that the bike shown in the photographs admitted by the defense is the same bike the defendant was riding at the time of the incident." CP 90.

intent will invalidate an otherwise lawful stop. The argument is off the mark.

First, the circumstances of this stop simply do not implicate pretext. "A pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.'" Arreola, 86610-4, 2012 WL 6621148 (December 20, 2012) (quoting Ladson, 138 Wn.2d at 358). But here, Deputy Callahan had reasonable and articulable suspicion justifying a Terry stop to investigate car prowling, in addition to the bicycle-related traffic infractions. Thus, the principal reason for the seizure *was* exempt from the warrant requirement. There could be no pretext.

Further, even if it were relevant, Ladson is easily distinguishable. There, it was significant that the gang emphasis officers testified that they did not routinely make traffic stops, but instead used the traffic code to stop people in order to initiate questioning unrelated to driving. 138 Wn.2d at 346. By contrast, Deputy Callahan is a patrol officer tasked with addressing crimes or violations that he witnesses during patrol. RP 12. He commonly "stop[s] and identif[ies] and occasionally even cite[s] bicycle

violations." RP 18. In other words, stopping Smith for bicycle-related traffic infractions was entirely within Callahan's routine patrol duties and does not indicate pretext.

Finally, Smith can no longer rely on the Court of Appeals decision in Arreola. Though the Court of Appeals held that a traffic stop is pretextual when the officer's primary reason for the stop is to investigate separate criminal activity, the Supreme Court recently rejected that conclusion:

> A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop.

Arreola, 86610-4, 2012 WL 6621148 (Wash. Dec. 20, 2012). Thus, even if Deputy Callahan lacked reasonable suspicion to stop Smith for car prowling, his interest in investigating that offense does not render an otherwise lawful traffic stop for helmet and light infractions unconstitutional.

Because Deputy Callahan used Smith's traffic infractions not as a pretext to investigate other criminal activity, but as an additional basis for a stop that was independently justified by reasonable and articulable suspicion, the pretext analysis is inapposite. The trial court properly found there was no pretext. RP 150-51.

4. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE DEFENSE OF NECESSITY.

Smith contends that the trial court violated his constitutional right to present his defense by refusing to instruct the jury on the defense of necessity. Because the unchallenged findings demonstrate that Smith failed to meet the foundational requisites for that defense, the argument fails.

A defendant is entitled to jury instructions on his theory of the case if there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Where the trial court decides not to give an instruction because no evidence supports the claimed defense, the decision is reviewable only for

abuse of discretion. State v. Walker, 136 Wn.2d 767, 777, 966 P.2d 883 (1998).

In Washington, the common law necessity defense is available "when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law." State v. Diana, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979). A defendant asserting a necessity defense for the crime of unlawful possession of a firearm must establish: "(1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." State v. Stockton, 91 Wn. App. 35, 41, 955 P.2d 805 (1998) (quoting State v. Jeffrey, 77 Wn. App. 222, 225, 889 P.2d 956 (1995)). But there is no necessity if the defendant possessed the weapon before any specific or immediate threat arose. See Jeffrey, 77 Wn. App. at 225 (defendant who possessed

handgun before any threat arose was not entitled to instruction on necessity); State v. Parker, 127 Wn. App. 352, 110 P.3d 1152 (2005) (defendant who carried firearm as protection after being shot nine months earlier was not entitled to necessity instruction).

Here, the trial court found that Smith possessed the gun at least a month before he was arrested, and weeks before the event that made him concerned for his son's safety. CP 94-95. The court also found that Smith "was not confronted or threatened in any way by anyone" on the day of his arrest and "there was no immediate and present threat to either [the defendant's son] or the defendant." CP 95. Additionally, Smith took no alternative action, like enlisting the police to help look for his son. Id. In fact, Smith did not mention that he was looking for his son until after his arrest. RP 48, 58.

Based on these unchallenged findings, the trial court properly concluded that Smith had not established an unlawful or present threat of death or serious injury or that he had no reasonable alternative but to carry the firearm. Accordingly, Smith was not entitled to an instruction on the defense of necessity.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Smith's conviction for Unlawful Possession of a Firearm in the First Degree.

DATED this 22nd day of January, 2013.

Respectfully submitted,

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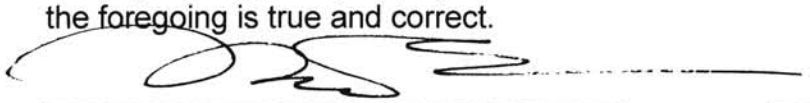
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine L. Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, STATE V. CHRISTOPHER SMITH, Cause No. 68709-3 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Bora Ly
Done in Washington

Date