Supreme Court No: 95635-9
Court of Appeals No.34360-0-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

MICHAEL L. GEHRKE,

Appellant

Petition for Review

Appeal from Spokane County Superior Court

The Honorable Michael P. Price

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

A. IDENTITY OF PETITIONER

Petitioner Michael Lee Gehrke, the appellant below, asks this Court to review the following Court of Appeals Decision.

B. COURT OF APPEALS DECISION

Petitioner seeks review of Divisions Three's decision in *State v. Gehrke*, No. 34360-0-III (January 25, 2018). That opinion is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

a. Whether the trial court abused its discretion in permitting the State to amend its information after the close of its case-in-chief, but prior to resting, where the State expressly stated it intended to rest regardless of the trial court's ruling?

b. Whether the Court erred in giving a first-aggressor instruction to the jury?

c. Whether the trial court erred in providing a first-aggressor instruction to the jury without also informing the jury of a first-aggressor's ability to regain the right of self-defense upon retreat?

D. STATEMENT OF THE CASE

Michael Gehrke had just arrived at a friend's house in a vehicle driven by his significant other when a man he knew only as "Chaos" rode his bicycle towards him from a nearby alleyway. Verbatim Report of

Proceedings (VRP) at 670. The man was Christopher Pineyro. VRP at 671. The two had a history of conflict, and Mr. Gehrke had been previously threatened by Mr. Pineyro with a club. VRP at 672, 676. Mr. Gehrke noticed that Mr. Pineyro seemed abnormally different than in past encounters, as though under the influence of a controlled substance. Mr. Pineyro stated that he "had something" for Mr. Gehrke. VRP at 674.

At those words, Mr. Gehrke approached Mr. Pineyro, who was still coming towards Mr. Gehrke on his bicycle. Suddenly, Mr. Pineyro stopped his bicycle, and more words were exchanged. VRP at 673-74. Mr. Pineyro then began taking off his backpack and reached behind himself. VRP at 680, Mr. Gehrke reacted, kicking the bicycle. VRP at 680=81. The bicycle and Mr. Pineyro feel to the ground together. VRP at 682.

When Mr. Pineyro stood, he was wielding a hammer. VRP at 684. Mr. Gehrke drew a pocket knife of his own. VRP at 685. He did not open it until Mr. Pineyro swung at him, and began advancing. VRP at 685-86. Ultimately, Mr. Gehrke retreated approximately 17 feet during this encounter. VRP at 513-14, 688-89. At the end of those 17 feet, Mr. Pineyro took yet another swing, and Mr. Gehrke stepped in and jabbed twice, fatally wounding Mr. Pineyro in the neck. VRP at 690.

When police arrived, Mr. Gehrke was cooperative, and admitted striking Mr. Pineyro with the knife, though in self-defense. VRP at 333-

337. Mr. Gehrke waived his *Miranda*[1] rights, and spoke with detectives. VRP at 483. At the end of the police investigation, Mr. Gehrke was released. VRP at 486.

Ultimately, Mr. Gehrke was charged with felony murder, premised upon second degree assault. Clerk's Papers (CP) at 1. On the day of trial, the State determined it "may" move to amend the information to include manslaughter, and notified Mr. Gehrke's counsel of that fact two hours prior to trial. VRP at 122-23. There was a brief colloquy on the record, and during that colloquy, the prosecution stated "I didn't think that it would be prejudicial, and it's a lesser offense. They were not in favor of that [amendment], there, I'm not going to submit that, but I did put them on notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative." VRP at 122.

It was not until after the close of the State's case-in-chief, but prior to resting, that the State moved to amend the information to include the alternative crime of manslaughter. VRP at 543. The State based its motion on CrR 2.1(d). During the motion, the State declared that, although it had not yet formally rested, "[t]he State does intend on resting irregardless [sic] of the Court's decision in this case." VRP at 543.

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

In objecting, defense counsel stated:

> ... defense would likely have looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke's actions were not reckless but an appropriate use of force in self-defense. That's not an issue under the felony murder. All that matters was the fact that we have a justifiable homicide, but for the issue of recklessness that issue could have been something that we may need additional preparation or maybe even potentially additional witnesses. So I do think there is a substantial prejudice to the defense's ability to present the case by allowing this amendment after the trial is already commenced and after the State's case is nearly completed.

VRP at 544-45. Nevertheless, the trial court ruled that the amendment was permissible under the court rule because the defense strategy would not substantially change, and that the defense's decision to not retain an expert would not be impacted by the ruling. VRP at 548.

Prior to closing, the court and the parties engaged in a jury instructions conference. VRP at 726. The primary instruction issues centered around the State's proffered first-aggressor instruction, to which the defense objected. Ultimately, the court determined that the first-aggressor instruction was appropriate under the facts of the case and the appropriate law. VRP at 730-735. That instruction is attached hereto as Appendix B.

In turn, the defense offered an instruction for purposes of

balancing the first-offender instruction. VRP at 742-44; CP at 88. That instruction, though not based upon a formal Washington Pattern Jury Instructions - Criminal (WPIC), cited case-law regarding a first-aggressor's ability to withdraw or retreat, and thereby regain the ability to act in self-defense. *Id.* The court expressed concern that the instruction was not a WPIC instruction, and also determined that the evidence adduced at trial did not "fit" the instruction. VRP at 744. That instruction has been attached hereto as Appendix C.

The jury found Mr. Gehrke guilty of first degree manslaughter, and by special verdict, that he had used a deadly weapon. CP at 189, 191. Mr. Gehrke was sentenced to a mid-point sentence within the standard range, and was given the mandatory enhancement, for a total of 124 months. CP at 232-244. He timely appealed. CP at 246-260. In an unpublished opinion, the Court of Appeals, Divisions Three, found no abuse of discretion and affirmed the trial court. This Petition for Review timely followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court affecting his constitutional rights. RAP 13.4(b)(1).

1. The trial court abused its discretion by permitting the State to amend the information after the close of its case, but prior to resting, where the State expresses no intention of providing any further information.

CrR 2.1(d), states that "the court may permit any information or bill of particulars to be amended at any time before the verdict or finding if substantial rights of the defendant are not prejudiced."

This rule, however, necessarily operates within the ambit of Article I, section 22 of the Washington Constitution which itself provides that "the accused shall have the right [...] to demand the nature and cause of the accusation against him." Indeed, our Supreme Court has stated on many occasions that the fundamental exercise of this right means that an accused must be given notice of those charges which he or she is to defend at trial, and cannot be placed in jeopardy for an uncharged offense. *State v. Markle*, 118 Wn.2d 424, 432, 823 P.2d 1101 (1992); *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

Two exceptions to this constitutional rule exist: (1) where a defendant is convicted of a lesser included offense of the one charged pursuant to RCW 10.61.006; and (2) where defendant is convicted of an offense of which the crime is an inferior degree to that which has been charged under RCW 10.61.003. *Pelkey*, 109 Wn.2d at 488 (citing *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)).

In *Pelkey*, this Court adopted a bright line rule stating that a defendant was *per se* prejudiced if the state moved to amend *after* it has rested its case-in-chief. *Id.* at 491. In that case, the defense moved to dismiss the charge against the defendant after the State's case-in-chief, alleging insufficient evidence. *Id.* at 486-87. In response, the State moved to amend the charge to an offense which was neither a lesser-included, nor an inferior degree. *Id.* The amendment was permitted, and the trial court denied the defense motion to dismiss due to the late amendment. *Id.* The jury found the defendant guilty of the amended charge, though the trial court granted the defense motion to dismiss on the grounds that the offended statute was unconstitutional. *Id.*

The case was certified to this Court, which, in adopting the above-referenced rule, also addressed the State's argument that such an amendment was permissible under former CrR 2.1(e), which operated the same as our current CrR 2.1(d). *Id.* at 490-91. In addressing the State's argument, the Court provided valuable context as to the prejudicial nature of the mid-trial amendment:

> During the investigatory period between the arrest of a criminal defendant and the trial, the State frequently discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the

> defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.
>
> The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial motions, voir dire of the jury, opening argument, questioning and cross examination of witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been empaneled, the defendant is highly vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information.

Id. at 490. In affirming the trial court's dismissal, albeit on different grounds, this Court also noted that the amended charge was a related offense, thereby implicating the mandatory joinder rule and subject to a motion to dismiss pursuant to CrR 4.3.1. *Id.* at 491. In the interest of judicial economy, this Court simply stated that the State was to be precluded from refiling the amended charge. *Id.*

This Court's revisited its ruling in *Pelkey* in *State v. Schaffer,* 120 Wn.2d 616, 845 P.2d 281 (1993). In that case, the sole issue before the court was the constitutional validity of an amendment to a charging document *during* the State's case, as the Appellant sought to extend the *Pelkey* rule to apply to mid-trial amendments. *Id.* at 619-20. The *Schaffer* court declined to extend the *Pelkey* rule to mid-trial amendments prior to the state resting, noting that former CrR 2.1(e) (now CrR 2.1(d), appropriately covered such situations, and had been cited with approval by

the *Pelkey* court. *Id.* at 621. Nevertheless, the court did state, albeit in *dicta*, that when a jury is involved, and the amendment occurs late in the State's case, impermissible prejudice would be more likely. *Id.* at 616, 621-23.

Here, the logic of *Pelkey* and its progeny ought to have provided applicable guidance to demonstrate that the trial court erred in permitting the State to amend its charges against Mr. Gehrke pursuant to CrR 2.1(d), and in so doing, abused its discretion.

Indeed, the record shows that on the day of trial the State determined it "may" move to amend the information to include manslaughter and notified Mr. Gehrke's counsel of that fact two hours prior to trial. VRP at 122-23. There was a brief colloquy on the record noting this fact, and during that colloquy, the prosecution stated "I didn't think that it would be prejudicial, and it's a lesser offense. They were not in favor of that [amendment], there, I'm not going to submit that, but I did put them on notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative." VRP at 122.

It was not until after several days of trial, encompassing nine witnesses, that the State moved to amend the information to include the alternative crime of manslaughter. VRP at 543. The State based its motion on CrR 2.1(d). Critically, the State noted that, although it had not yet

formally rested, "[t]he State does intend on resting irregardless [sic] of the Court's decision in this case." VRP at 543.

In objecting, defense counsel noted that if reasonable notice had been provided,

> defense would likely have looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke's actions were not reckless but an appropriate use of force in self-defense. That's not an issue under the felony murder. All that matters was the fact that we have a justifiable homicide, but for the issue of recklessness that issue could have been something that we may need additional preparation or maybe even potentially additional witnesses. So I do think there is a substantial prejudice to the defense's ability to present the case by allowing this amendment after the trial is already commenced and after the State's case is nearly completed.

VRP at 544-45. In permitting the amendment, the trial court appeared to rely upon the fact that the State provided notice that it "may" move to amend the information after presenting its case, thereby eliminating the element of surprise from the defense perspective. CRP at 547. The court went on to find that the amendment did not substantially prejudice Mr. Gehrke, and appeared to state that the amendment conformed to the evidence. VRP at 548. The court went on to discuss its experience, and then noted that the defense likely would not have had a "radical" difference in strategy, and that the possibility that the defense may have hired a defense expert was not

changed by the amendment because it was a strategic decision. VRP at 549. For reasons discussed below, the court's decision was in error.

This Court reviews a trial court's decision to permit amendment under the abuse of discretion standard. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, or based upon untenable grounds or reasons. *Id.* at 127. A court's decision is based upon untenable grounds or reasons if it is based upon an incorrect standard or the facts to do not meet the requirements of the correct standard. *Id.* Moreover, a trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices under the facts of the case when the applicable legal standard is applied. *Id.*

Here, the governing rule is, as the trial court correctly noted, CrR 2.1(d). In that analysis, the trial court was to determine whether Mr. Gehrke suffered substantial prejudice by the amendment. It is plain that, under *Pelkey*, had the State formally rested its case prior to the request for amendment, there would have been *per se* prejudice to Mr. Gehrke meriting a reversal since manslaughter is neither a lesser-included offense of felony-murder, nor is it an inferior degree thereof. *E.g.*, *State v. Gamble,* 154 Wn.2d 457, 468, 114 P.3d 646 (2005). As such, the gravamen of the question before this Court is whether the formality of resting has any substantive meaning where the State makes plain that it did not intend to

call any further witnesses, and that it would rest its case whatever the trial court's decision as to the amendment request. VRP at 543. If so, this Court must determine whether Mr. Gehrke was sufficiently prejudiced as to merit reversal.

In order to demonstrate felony murder, the State was required to prove: (1) Mr. Gehrke attempted to commit, or did commit, the felony of assault in the second degree; (2) in the course and furtherance of that assault, did cause the death of Mr. Pineyro; (3) Mr. Pineyro was not acting in concert with Mr. Gehrke to commit the crime; and (4) the acts took place in the State of Washington. RCW 9A.32.050.

Unlike the felony murder rule, the crime of Manslaughter in the First Degree requires that the State demonstrate (1) That Mr. Gehrke engaged in reckless conduct; (2) that Mr. Pineyro died as a result of that conduct; and (3) that the act took place in the State of Washington. RCW 9A.32.060. The primary difference then, is the *mens rea* element of recklessness.

Under our criminal code, "a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010.

Contrary to the trial court's assertion, it was prejudicial to Mr. Gehrke that he was unable to call an expert witness to discuss what a reasonable person would do in Mr. Gehrke's situation. Moreover, counsel was deprived of the ability to focus cross-examination on that issue with the State's witnesses. Also, although the trial court stated that the amendment made little difference to the defense decision not to call an expert, had the defense known of the additional information to be proven, that may have persuaded the defense to hire an expert. VRP at 544-45.

It is also noteworthy that, contrary to the trial court's statement, the defense strategy could well have been different to the crime of Manslaughter, since Mr. Gehrke elected the affirmative defense of self-defense to the charge of Felony Murder – a defense to which the jury apparently agreed to some extent. Accordingly, Mr. Gehrke's inability to defend the recklessness element by simply presenting evidence of the reasonableness of his actions in that circumstance was a prejudicial violation of this constitutional rights, and an abuse of the trial court's discretion under CrR 2.1(d). This result is consistent with not only this Court's logic in *Pelkey*, but the policy of preferring substance over form – a technicality upon which the State relied in this matter when it chose to amend prior to "resting" despite stating it would take no further action during its case-in-chief.

Thus, in this case, it was of little practical importance whether the State rested prior to its amendment request given its stated intent to do nothing further. Under the logic of *Pelkey* and *Schaffer,* Mr. Gehrke was plainly prejudiced, that prejudice was overlooked by the trial court in its ruling, and was therefore an abuse of discretion. The Court of Appeals' decision to affirm plainly contravenes this Court's decisions in *Pelkey* and *Schaffer*, and therefore requires reversal.

2. The trial court erred in providing the jury with a first-aggressor instruction without providing an additional, offered instructed regarding the ability to regain the right to self-defense after a withdrawal.

In general, the right of self-defense may be lost where the individual claiming self-defense either acts aggressively or provokes the altercation, unless he or she in good faith first withdraws from the combat in such a way as to let other person know that he or she is withdrawing or intends to withdraw from further aggression. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). However, first aggressor instructions should be used sparingly because other self-defense instructions generally permit the State to argue its theory of the case. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 625 (1999); *State v. Douglas*, 128 Wn. App. 555, 116 P.3d 1012 (2005). Such an instruction is warranted however, where:

> (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts

> as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon."

State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). This Court reviews a trial court's instructions to a jury on a *de novo* basis, evaluating it within the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, the trial court determined that sufficient evidence existed to warrant the first aggressor instruction. VRP at 730-35. However, the trial court declined to instruct the jury as to the defense's proffered instruction regarding withdrawal, expressing concern that it was not a formal WPIC instruction. VRP at 743; CP at 88. The court went on to state that it did not consider that the defense had presented a fact pattern that warranted such an instruction. VRP at 744.

However, the court erred in two respects. First, the trial court erred because there was, at a minimum, a genuine question of fact as to whether Mr. Gehrke was the first aggressor – the court apparently agreed given its instruction.

Second, there was likewise a genuine issue of fact as to whether Mr. Gehrke attempted to withdraw from conflict given that there was ample evidence in the record from Detective Cestnik, and Mr. Gehrke stating that Mr. Gehrke had retreated from the point where Mr. Pineyro's bicycle was

struck, and that the distance was somewhere around 17 feet. VRP at 513-514, 688, 709. Certainly, even if there was contrary information in the record, a question of fact nevertheless remained as to whether Mr. Gehrke had attempted to retreat from the victim, and in so doing, regained the right to self-defense under *Wilson* and *Craig*. By failing to instruct the jury concerning Mr. Gehrke's legal ability to regain the right to self-defense after being a first aggressor, the trial court committed reversible error because in effect the first-aggressor instruction – No. 30 – became an improper statement of the law.[2] The Court of Appeals permitted precedent to be set in Division Three when it affirmed this erroneous decision while ostensibly making a finding of fact.[3]

F. CONCLUSION

For reasons discussed above, Mr. Gehrke was deprived of his constitutional rights when the trial court permitted the information to be amended after the State had finished its case-in-chief. That error merits a

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[2] Both Instruction 30 and Mr. Gehrke's proffered instruction regarding the ability of an aggressor to regain the right to self defense have been attached as Appendix D.

[3] Pursuant to GR 14.1, unpublished opinions of the Court of Appeals may be cited in appellate briefing. Further, unpublished opinions may be cited at the trial level, and so Division Three's opinion, while unpublished, nevertheless requires this Court's intervention in order to provide future guidance to the lower courts.

vacation of Mr. Gehrke's conviction with prejudice, owing to the mandatory joinder rule. Further, the trial court's failure to properly instruct the jury likewise mandates a vacation of Mr. Gehrke's conviction. Accordingly, the decision of the Court of Appeals merits reversal.

Respectfully submitted this 22nd day of February, 2018 by:

s/ John C. Julian

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this PETITION FOR REVIEW to be delivered to the following individual(s) addressed as follows:

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE GEHRKE, Appellant.	)	No. 34360-0-III UNPUBLISHED OPINION

SIDDOWAY, J. — Michael Gehrke appeals his conviction for first degree manslaughter, a charge the trial court allowed to be added by amendment at the conclusion of the State's evidence, but before it rested. Mr. Gehrke argues the late timing of the amendment prejudiced his substantial right to notice of the charge and a reasonable opportunity to defend against it. He also challenges the trial court's giving of a first aggressor instruction without instructing the jury on a first aggressor's revived right to defend himself following a retreat. We find no error or abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

Four days after a street fight with Michael Gehrke in September 2015, Christopher Pineyro died from a stab wound sustained in the fight that severed his carotid artery and jugular vein. There was conflicting evidence whether Mr. Gehrke initiated the fight or

was defending himself following a threat and assault by Mr. Pineyro. Within a couple of months, the State decided to charge Mr. Gehrke with second degree felony murder predicated on assault.

The case proceeded to trial three months later. On the morning of the first day of trial, the prosecutor informed the trial court that he was considering amending the charges to include manslaughter in the first degree as an alternative. He told the court he had spoken to defense counsel about amendment that morning and defense counsel objected. For that reason, the prosecutor said, he was not presently asking for such an amendment, "but I did put [the defense] on notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative." Verbatim Report of Proceedings (VRP) at 122. The parties then proceeded to other pretrial matters and to trial.

Trial witnesses included three eyewitnesses to the fight between Mr. Gehrke and Mr. Pineyro. The State's first witness was Ty Olmstead, who was driving home when his path was blocked by a white SUV and two men moving into the middle of the road. One, whom he later learned was Mr. Pineyro, was approaching on a bicycle and slowed down as he approached the other, who Mr. Olmstead later learned was Mr. Gehrke. Mr. Gehrke was outside the SUV and approached Mr. Pineyro. According to Mr. Olmstead, upon reaching Mr. Pineyro, Mr. Gehrke kicked him, causing both the bicycle and Mr. Pineyro to fall to the ground. Mr. Olmstead noticed that Mr. Gehrke was holding what appeared to be a cell phone, but after Mr. Pineyro was on the ground Mr. Olmstead saw

that it was a knife, and that Mr. Gehrke had flipped open its blade. Mr. Pineyro stood up and produced a hammer, after which Mr. Olmstead described the two men as "sparring, debating on who was going to strike first." VRP at 176. Mr. Olmstead testified that the two men swung their weapons at one another, moving away from Mr. Olmstead's car, until Mr. Gehrke stabbed Mr. Pineyro and Mr. Pineyro fell to the ground, holding his neck. Mr. Olmstead testified that at that point, Mr. Gehrke stood there for a second, then threw down his knife, held up his hands and said "'self-defense, self-defense.'" VRP at 178. Asked by the prosecutor "who initiated this confrontation between the two individuals," Mr. Olmstead answered, "Mr. Gehrke." VRP at 179.

Jill Swenson, a roommate of Mr. Gehrke's girlfriend, testified on his behalf. She and Mr. Gehrke's girlfriend had been running errands with Mr. Gehrke that day. Mr. Gehrke's girlfriend, who was driving the white SUV encountered by Mr. Olmstead, had returned home to drop off Ms. Swenson. Ms. Swenson testified she was walking toward the house when she heard yelling and turned around. She saw Mr. Pineyro and Mr. Gehrke in the middle of the street, and saw that Mr. Pineyro was swinging a hammer at Mr. Gehrke. According to Ms. Swenson, Mr. Gehrke was dodging Mr. Pineyro's attempted blows, moving side to side and backward. She testified that she saw Mr. Pineyro swing the hammer at Mr. Gehrke "at least five" times but saw Mr. Gehrke strike at Mr. Pineyro with his knife only once, striking him "on the jugular." VRP at 569-70. Mr. Pineyro fell to the ground. Ms. Swenson testified that after that happened, she

returned to the front passenger seat of the SUV and she and Mr. Gehrke's girlfriend drove off, calling 911 as they left. Mr. Gehrke stayed behind.

Mr. Gehrke testified in his own defense. He told the jury he met Mr. Pineyro two years earlier, when Mr. Gehrke was living with a prior girlfriend. Mr. Pineyro would visit the girlfriend's daughter and Mr. Gehrke eventually had a "heated discussion" in which he told Mr. Pineyro he was no longer welcome in the home. VRP at 661. Mr. Gehrke said he had had a second run-in with Mr. Pineyro months later at a convenience store, where Mr. Pineyro threateningly brandished a baton or club and Mr. Gehrke suggested they meet up the road if Mr. Pineyro wanted to fight. Mr. Pineyro did not show up.

Mr. Gehrke testified that on the day he fatally injured Mr. Pineyro, he was standing outside his girlfriend's SUV, smoking and checking his phone for messages, when he saw someone riding a bicycle toward him. He realized it was Mr. Pineyro, and when Mr. Pineyro flashed a menacing smile, Mr. Gehrke walked around the SUV to where Mr. Pineyro was pulling up in the street. Mr. Pineyro said to Mr. Gehrke "I've got something for you," and, straddling the bicycle, began taking off his backpacks and reaching behind himself. VRP at 674. This made Mr. Gehrke nervous. Mr. Gehrke testified he "reacted" and kicked Mr. Pineyro's bicycle frame, causing the falling bicycle to take Mr. Pineyro to the ground. VRP at 680. When Mr. Pineyro got up, he had armed himself with a hammer. Mr. Gehrke claims it was only then that he reached for a knife

that was clipped to his waistband. According to Mr. Gehrke, he didn't even flip the blade open until Mr. Pineyro swung the hammer at him.

As Mr. Pineyro was making "lunging-type" swings, Mr. Gehrke testified that he was "backing up. I'm dodging it." VRP at 688. "[W]hen [the hammer] would get close to me, I would dodge, or, you know, kind of move out of the way so I wouldn't be struck with it." *Id.* When cross-examined, he elaborated on what he meant by "backing up":

> Q. And then your testimony is, you start backing away and retreating; is that correct?
> A. Well, yeah, I wasn't going to move forward to get hit with the hammer so I did back away.
> Q. You've testified before you're not the type of person to run away from a fight; isn't that true?
> A. No. I was raised in a family with a lot of military tradition and we face our fears.
> Q. You weren't retreating and leaving the scene, were you, sir, at this point?
> A. I was not retreating or leaving the scene at any moment. I was retreating from being hurt.

Id. at 709.

When Mr. Gehrke's backing up had taken him near a fence, limiting his ability to dodge the hammer, he struck at Mr. Pineyro twice with the knife, stabbing him first in the arm and then in the neck. When he saw Mr. Pineyro grab his neck, stumble backward, and saw a lot of blood, he knew Mr. Pineyro was badly injured.

Mr. Gehrke returned to the SUV where he spoke to his girlfriend and Ms. Swenson, telling them he had done nothing wrong, was not going anywhere, and would wait for police to arrive. The two women drove off.

Police and paramedics arrived. Mr. Pineyro was taken to Sacred Heart Medical Center. Mr. Gehrke identified himself to police officers, saying "I'm the guy. I stabbed him and it was self-defense." VRP at 334. He was removed from the scene by an officer who later drove him to be interviewed by Detective Brian Cestnik.

The detective's video recorded interview of Mr. Gehrke was played for the jury. During it, Mr. Gehrke told Detective Cestnik that he knew Mr. Pineyro always carried a weapon and "I thought he was pulling a gun on me at first . . . so I defended myself . . . I [knew] my life was in danger so I did what I had to do." Ex. P-92 at 8 hrs., 22 min., 38 sec. through 8 hrs., 23 min., 32 sec. Later in the interview, he told the detective it was obvious that Mr. Pineyro did not "know how to fight or even how to nail in a nail." Ex. P-92 at 8 hrs., 36 min., 20 sec.; VRP at 711. Asked if he was ever hit by Mr. Pineyro, Mr. Gehrke said, "No, I'm too fast for that." Ex. P-92 at 8 hrs., 46 min., 40 sec.

After the State called its last witness but before resting, the prosecutor moved to amend the information to add the manslaughter charge, as forewarned. He said he intended to rest at that point "irregardless of the Court's decision." VRP at 543.

Defense counsel objected to the amendment, stating:

> The manslaughter charge has into it a reckless standard. I would first suggest that there's no probable cause to charge manslaughter in this case because all the testimony that we've heard elicited to this point was that this was an intentional act of self-defense, not an act of recklessness. Were the Court to find there's probable cause to allow the amendment, defense would have likely looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke's actions were not reckless but an appropriate use of force in self-defense. That's not an issue under the felony murder. All that matters was the fact that we have a justifiable homicide, but for the issue of recklessness that issue could have been something that we may need additional preparation or maybe even potentially additional witnesses. So I do think there is a substantial prejudice to the defense's ability to present the case by allowing this amendment after the trial is already commenced and after the State's case is nearly completed.

VRP at 544-45.

The trial court granted the State's motion, explaining that Mr. Gehrke's defense to a first degree manslaughter charge was "essentially the same" as the defense he had presented to the second degree murder charge. *Id.* at 550. As for defense counsel's statement that he would have engaged a self-defense expert, the court stated, "[Y]ou could have also employed a self-defense for the initial charge of murder in the second degree. That's a strategy situation that isn't affected either way." *Id.*

Following the defense case, the court entertained objections to its jury instructions. The defense had previously objected to giving the Washington pattern "first aggressor"

instruction[1] and restated its objection, reminding the court that comments to the pattern instruction state that the instruction is to be used sparingly. The trial court responded that "used sparingly doesn't mean you shouldn't use it when it applies." VRP at 734.

If the first aggressor instruction was to be given, the defense asked that the trial court also give what it referred to as a "withdrawal" instruction, based on *State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973). Its proposed instruction stated in relevant part that even a first aggressor has a revived defense of self-defense if "the provoker . . . in good faith withdraws from the combat at such time and in such a manner as to clearly apprise the other person that he or she was desisting or intended to desist from further aggressive action." Clerk's Papers (CP) at 87. The trial court declined to give the instruction, noting that it was not a pattern instruction and finding that there was no evidence Mr. Gehrke withdrew in the manner described.

The jury found Mr. Gehrke not guilty of second degree felony murder but guilty of first degree manslaughter. It made a special finding that Mr. Gehrke committed the crime

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[1] The pattern instruction states: "No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill, use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016).

with a deadly weapon. The trial court sentenced Mr. Gehrke to a total of 124 months' confinement. Mr. Gehrke appeals.

ANALYSIS

Mr. Gehrke assigns error to the trial court's decisions (1) granting the State's motion for leave to amend the information, given its timing, and (2) refusing to give Mr. Gehrke's proposed withdrawal instruction. We address the issues in that order.

Amendment of the information

CrR 2.1(d) deals with the amendment of an information. It provides that a trial court has discretion to permit amendment of an information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d). A defendant objecting to amendment bears the burden of showing prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). If a defendant is misled or surprised by an amendment, he is entitled to move for a continuance if needed to prepare a defense. *Id.* "The fact a defendant does not request a continuance is persuasive of lack of surprise and prejudice." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

We review a trial court's decision to allow amendment for abuse of discretion. *State v. Guttierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or exercised for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Gehrke argues in part that by allowing the State to amend the information before resting but after stating it had presented all of its evidence, the trial court violated the spirit if not the letter of a per se rule adopted by our Supreme Court in *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). In that case, the State rested, the defense moved to dismiss the charge for insufficient evidence, and the State responded with a motion to add a charge it *had* proved. Our Supreme Court observed that while the timing was literally permissible under CrR 2.1, the criminal rule "necessarily operates within the confines of article 1, section 22" of the Washington Constitution, which protects a defendant from being tried for an offense not charged. *Id.* at 490. The court expressed concern that where an amendment is allowed after the State rests, "[a]ll of the pretrial motions, voir dire of the jury, opening argument, questioning and cross examination of witnesses [have been] based on the precise nature of the charge alleged in the information," making a defendant "highly vulnerable" to confusion or prejudice. *Id.* The per se rule it adopted is that a criminal charge may not be amended after the State rests its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included defense. *Id.* at 491.

A few years later, the court held in *State v. Schaffer* that there was "no need to redraw the line established in *Pelkey* to a point earlier in the criminal process"—in particular, no need to extend the rule to midtrial amendments. 120 Wn.2d 616, 622, 845 P.2d 281 (1993). It found that CrR 2.1(d)'s standard for amendment was adequate,

because it recognizes the "precise evil that article 1, section 22 was designed to prevent": charging documents that prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice. *Id.* at 620. The rule allows the trial court to assess prejudice in each case on its facts. *Id.*

Applying CrR 2.1(d), *Pelkey* and *Schaffer* to this case, the trial court did not abuse its discretion in finding that Mr. Gehrke would not be prejudiced by the amendment. His defense to the second degree murder charge was always self-defense. *See, e.g.*, CP at 25, 36, 71, 79, 81, 82, 83 and 89 (all mentioning or discussing Mr. Gehrke's claim of self-defense). His argument that he might have engaged a self-defense expert if first degree manslaughter had been charged earlier is therefore not persuasive. And Mr. Gehrke did not request a continuance, further undercutting his claim of prejudice.

The absence of prejudice is clearer here than it was in the controlling case of *Schaffer*. As in *Schaffer*, the State in this case made its motion after calling its last witness but before resting. But in *Schaffer*, the State did not give notice of its interest in amending until it had called its next to last witness. Here, Mr. Gehrke was aware of the possibility of amendment before the trial started, even if only a few hours before it started. Mr. Gehrke does not demonstrate an abuse of discretion.

Contention that "withdrawal" instruction should have been given along with any "first aggressor" instruction

Mr. Gehrke does not contend on appeal that it was error for the trial court to give the first aggressor instruction. He contends only that it was error to refuse to give a companion withdrawal instruction.

Jury instructions are sufficient if they permit the parties to argue their theory of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A jury instruction need be given only if it is supported by the evidence presented at trial. *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010).

A first aggressor can invoke the right of self-defense to justify a homicide if he in good faith has withdrawn from the combat, clearly communicated that withdrawal to his adversary, and the adversary persists in the attack. *Craig*, 82 Wn.2d at 783-84. While Mr. Gehrke's proposed instruction accurately stated the law, the trial court reasonably concluded that there was no evidence of such a withdrawal by Mr. Gehrke. The walking backward that Mr. Gehrke did during his fight with Mr. Pineyro was not a withdrawal from the conflict; by all reports, including his own, he continued to face Mr. Pineyro and was only dodging attempted blows. As Mr. Gehrke testified, "I was not retreating or leaving the scene at any moment." VRP at 709. He was not entitled to the instruction.

Affirmed.

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

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

APPENDIX B

INSTRUCTION NO. 30

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

APPENDIX C

INSTRUCTION NO. _____

As a general rule, one who is the aggressor or who provokes an altercation in which another is killed cannot invoke the right of self-defense to justify or excuse the homicide. However, the right of self-defense is revived as to the aggressor or the provoker if that person in good faith withdraws from the combat at such time and in such a manner as to clearly apprise the other person that he or she was desisting or intended to desist from further aggressive action.

See State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973); State v. Wilson, 26 Wn.2d 468, 174 P.2d 553 (1946); see also State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).

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