Supreme Court No. 97991-0
Division III, No. 35884-4-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DEAN CLAYTON,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Julie McKay

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Joseph Dean Clayton asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for Unlawful Possession of a Firearm.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion filed on November 19, 2019. A copy of this unpublished opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1), (3), or (4), because the trial court erred in denying Mr. Clayton's motion to suppress the body cams of law enforcement?

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (3), or (4), because RAP 10.10 sets out the requirements for filing a Statement of Additional Grounds for Review. Here, Mr. Clayton filed a Statement of Additional Grounds raising factual and legal challenges with citations to authority and the record, but the Court of Appeals declined to consider these claims. Does the Court of Appeals refusal to consider Mr. Claytons' Statement of Additional Grounds undermine the court rule?

Issue 3: Whether this Court should accept review under RAP 13.4(b)(1), (3), or (4), because the trial court erred in denying Mr. Clayton's request for a necessity jury instruction?

D. STATEMENT OF THE CASE

On October 7, 2016 law enforcement, including Officer Brown-Bieber responded to 2112 N. Astor in Spokane, Washington. RP Sanchez, Vol. 1, 327-28. Law enforcement's response was to a reported landlord/tenant dispute and the allegation of a firearm being used inside the residence. RP Sanchez, Vol. 1, 327-28. Responding with Officer Brown-Bieber were Officers Guzzo,

Howard, and Henderson. RP Sanchez, Vol. 1, 328. Four of the officers were wearing body cameras, including Officer Brown Bieber and Officer Howard. RP Cochran, Vol 1, 4. None of the officers wearing body cameras advised anyone, including Mr. Clayton, that they were audio and visually recording everything in the house. CP 203. Upon entering the home, Officer Brown-Bieber made contact with Mr. Clayton and discovered a hole in the couch and wall consistent with a gunshot. RP Sanchez, Vol. 1, 328. While in the home Officer Brown-Bieber observed Mr. Clayton's mother, Sandra Grape, remove firearms from a dresser that belonged to her. RP Sanchez, Vol. 1, 330. Mr. Clayton asserted the firearm was a replica. RP Sanchez, Vol. 1, 330. When Mr. Clayton was testifying about the events of October 7, 2016, he recalled specifically telling law enforcement there were no firearms in the house. RP Sanchez, Vol. 3, 488.

While investigating the gun shot hole in the wall law enforcement spoke with Barb Lawley who was residing at 2112 Astor on October 7, 2017. RP Sanchez, Vol. 2, 342. Ms. Lawley testified that she believed one of the firearms belonged to Mr. Clayton. RP Sanchez, Vol. 2, 343. Ms. Lawley further described a situation, about a month prior, where she and Mr. Clayton were arguing he pointed a firearm at her and shot the wall beside her. RP Sanchez, Vol. 2, 344. Ms. Lawley was not able to recall what the argument was about. RP Sanchez, Vol. 2, 344. Ms. Lawley was not able to describe the firearm. RP Sanchez, Vol. 2, 344. Finally, Ms. Lawley was presented with the firearms that the State had entered as evidence and definitively stated those

firearms were NOT the firearm that was used to shoot the wall beside here. RP Sanchez, Vol. 2, 344.

Mr. Clayton testified on his own behalf and admitted that he had paid for the guns on behalf of his mother. RP Sanchez, Vol. 3, 475. Mr. Clayton testified about the presence of a gunshot hole in the wall of the home. RP Sanchez, Vol. 3, 480. Mr. Clayton explained that the gun shot had occurred around June or July of 2016. RP Sanchez, Vol. 3, 481. Mr. Clayton had been out drinking and playing pool when he ran into an acquaintance 'Jeff.' RP Sanchez, Vol. 3, 481. In June of 2016 Jeff and Mr. Clayton returned to the 2112 Astor address because Jeff thought he may know Barb Lawley who was also at the address. RP Sanchez, Vol. 3, 481. When Mr. Clayton arrived home he and Barb got into an argument, and while that argument was happening Mr. Clayton heard a gunshot. RP Sanchez, Vol. 3, 482. Mr. Clayton investigated the gun shot and discovered Jeff, who Mr. Clayton described as intoxicated, holding the firearm. RP Sanchez, Vol. 3, 482. Mr. Clayton took the firearm from Jeff and escorted him to the front door where, after Jeff was on the porch, Mr. Clayton returned the firearm to Jeff and told him to never return to his home again. RP Sanchez, Vol. 3, 483.

Mr. Clayton was taken into custody and was charged by information with Assault in the Second Degree armed with a firearm and Unlawful Possession of a Firearm in the first degree. CP 7[1] Prior to trial, Mr. Clayton moved the court to suppress any evidence obtained in violation of The Privacy

[1] The Clerks Papers in this case is two volumes, volume 1 is pages 1-435, and volume 2 is pages 436-868 and both will be referenced as CP.

Act, RCW 9.73.090 when law enforcement entered the home at 2112 Astor and activated their body cameras without advising anyone in the home, including Mr. Clayton. [2] CP 82-105. After hearing the argument of counsel, the court entered findings of fact and conclusions of law. CP 232-34. The court engaged in an analysis of whether Mr. Clayton was under arrest, and when law enforcement was required to advise that the contact was being audio and visually recorded. CP 200-03. Ultimately, the court concluded that all the recordings that occurred after Mr. Clayton was formally arrested would be suppressed. CP 234.

Prior to instructing the jury, Mr. Clayton, through his counsel requested a 'Necessity' instruction pursuant to WPIC 18.02. CP 767-68. On November 20, 2017 the jury returned a verdict of not-guilty to count 1, Assault in the Second Degree. CP 708. The jury convicted Mr. Clayton of counts 2, 3, and 4. CP 709, 710, 711. Mr. Clayton now seeks review by this Court.

The facts are further set forth in the Appellant's Opening Brief and in the Statement of Additional Grounds for Review. The facts as outlined in each of these pleadings are incorporated by reference herein.

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[2] The Verbatim Report of Proceedings (RP) consist of FOUR separate Court Reporters and will be identified by the reporter (Heather GIPSON, Terri COCHRAN, Crystal HICKS, Mark, SANCHEZ), the volume number, and the page.

- February 9 and 16, 2017 RP Gipson, Vol. 1, 1-29.
- March 2, 2017, RP Gibson, Vol. 2, 1-11
- March 2 (Motion to Suppress) and April 7(Presentment), 2017 RP Cochran (1-53)
- August 17 and November 14, 2017 RP Sanchez, Vol. 1-2, 1-381
- November 15, 2017 RP Hicks, Vol. 3, 382-450
- November 16-17, 2017 and February 2, 2018, RP Sanchez, Vol. 4, 451-621.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1), (3), or (4), because the trial court erred in denying Mr. Clayton's motion to suppress the body cams of law enforcement.

Review by this Court is merited because the Court of Appeals' decision conflicts with Washington's Privacy Act. "Washington's privacy act broadly protects individuals' privacy rights." *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). Indeed, "[i]t is one of the most restrictive electronic surveillance laws ever promulgated." Id.

> The Privacy Act makes it unlawful for any individual, partnership, corporation, [or] association . . . to intercept, or record any . . . (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b). The Privacy Act, Chapter 9.73 *RCW*, is "one of the most restrictive in the nation." *State v. Christensen*, 153 Wn.2d 186, 198, 102 P.3d

789 (2004); accord *State v. O'Neill*, 103 Wn.2d 853, 878, 700 P.2d 711 (1985) (Dore, J., concurring in part, dissenting part) Excepted from this prohibition are conversations that "convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." *RCW* 9.73.030(2)(b). "Any information obtained in violation of *RCW* 9.73.030 . . . **shall be inadmissible** in any…criminal case in all courts of general… jurisdiction in this state" unless the crime jeopardizes national security. *RCW* 9.73.050. (Emphasis added)

The Privacy Act does not define the term "private." The Washington Supreme Court has adopted a dictionary definition of the term "private," which, for the purposes of the privacy act means, ""'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'"" *Kardoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992) (quoting *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1979) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY (1969))). To determine whether a conversation is private, courts "consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties." *Roden*, 179 Wn.2d at 900. Thus, courts have adopted the dictionary definition, "'belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship

to something ... a secret message: a private communication ... secretly: not open or in public.'" *State v. Christensen*, 153 Wn.2d at 192-93 (quoting Webster's Third New International Dictionary (1969)). Where, as here, the facts are not in dispute, the determination of whether a communication is private is a question of law. *State v. Christensen*, 153 Wn.2d at 192; *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). A communication is private when 1) the parties to the communication manifest a subjective intention that it be private, and 2) that expectation is reasonable. *State v. Christensen*, 153 Wn.2d at 193. The first criterion focuses on whether the parties subjectively intended the information conveyed in the conversation to remain confidential. *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996). In analyzing the second criterion, courts look to such factors as the duration and subject. *Id.*

In *Lewis*, the court considered whether conversations recorded by police during traffic stops without the drivers' consent violated the privacy act. *Lewis v. Dep't of Licensing,* 157 Wn.2d 446, 452-57, 139 P.3d 1078 (2006). The court rejected the drivers' claims under *RCW* 9.73.030 because it determined that citizens' conversations with officers during traffic stops were not private. *Id.* at 460. Nonetheless, the court concluded that the officers violated *RCW* 9.73.090(1), which unequivocally requires law enforcement officers to advise persons they are being recorded. *Id.* at 465-66. In analyzing the statutes, the court stated, "if a police officer accidentally recorded a truly private conversation during a traffic stop, *RCW* 9.73.030 would protect that private conversation." *Id.* at 465. This statement reveals our Supreme Court's

clear belief that RCW 9.73.030 makes even accidental or inadvertent recordings unlawful.

What the court here failed to address was the fact that no one was aware, or consented, to the recording by law enforcement officers. In the findings of fact and conclusions of law the court parsed the ruling into two parts before formal arrest, and after formal arrest. The court suppressed the use of the recordings after formal arrest. This ruling is fashioned more like a *Miranda* violation, but this diminishes the broad application of the The Privacy Act in all cases. The trial court noted in its letter to counsel that there were 'I counted at least six civilians in the home and a dog.' CP 200. While the argument focuses on when Mr. Clayton was formally arrested no one in the home was aware they were being surreptitiously recorded by law enforcement. If there is not a violation of The Privacy Act related to Mr. Clayton individually, how is there not a violation of the Privacy Act when law enforcement enters a home and audio and visually recording everything for an extended period of time, but doesn't tell anyone? Defense counsel at trial here states the problem created, "...a strange statutory dichotomy where a person who is being recorded during a traffic stop must be informed of the recording, but someone being recorded in their home somehow has less of a privacy interest."

Washington courts consider four prongs of analysis to determine whether a violation of the privacy act has occurred: "There must have been (1) a private communication transmitted by a device, which was (2)

intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of *all parties* to the private communication." *Roden*, 179 Wn.2d at 899 (citing *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004)). In light of these factors, the record before this court reveals a violation of the privacy act necessitating reversal.

Here, the recording of almost every conversation in the home that day, without consent, violated *RCW* 9.73.030(1). This violation rendered the recording inadmissible under *RCW* 9.73.050. The trial court erred in concluding otherwise. RCW 9.73.030(1) unambiguously states that it is unlawful to record a private conversation unless all party's consent to the recording. "If [statutory] language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume that the legislature says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). This court should give effect to the unambiguous language of *RCW* 9.73.030(1) by holding that the recording of the conversation without consent was unlawful. The trial court ignored the plain language of *RCW* 9.73.030(1) by focusing on the fact of when the recording was made and Mr. Clayton's status as under arrest or not.

The trial court erred in grounding its admissibility determination on the time when Mr. Clayton was under formal arrest rather than on *RCW* 9.73.030(1)'s plain text. Under the statute, when the subject of an investigation is under arrest is not the critical question. *RCW* 9.73.030(1)'s focus is on the unlawfulness of a nonconsensual recording, not on the

intention of the person or entity who records, or when the subject of an investigation is arrested. Moreover, the trial court here did not discuss or distinguish the location of a recording from any of the other cases. *Lewis* deals with a traffic stop presumably in a public setting. No case deals with law enforcement entering a home and surreptitiously recording, audio and visually, virtually everything the camera can see. *RCW* 9.73.030(1) strictly makes any nonconsensual recording of a private conversation unlawful, regardless of the intent of the person who first receives or hears the recorded communication. It is hard to believe that when The Privacy Act was enacted the drafters envisioned a situation where FOUR law enforcement officers would be able to enter the home of a citizen turn on an audio and video recording device and not tell anyone in the home, including a suspect that they were being recorded. This court should reject the trial court's misconstruction of *RCW* 9.73.030.

When a trial court errs in admitting evidence, reversal is required where, within reasonable probabilities, the admission of the evidence materially affected the outcome of trial. *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). In this case, it is reasonably probable the admission of the recording affected the jury's verdict. The failure to suppress evidence obtained in violation of the Privacy Act "is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004).

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (3), or (4), because the trial court erred in denying Mr. Fleming's motion to suppress the buccal swabs taken from him pursuant to the search warrant.

Review by this Court is merited because the Court of Appeals' decision The Court of Appeals cursorily and summarily rejected Mr. Clayton's Statement of Additional Grounds for Review, not addressing them at all. Yet RAP 10.10, and the form provided by the Court to implement this rule, specifically direct an appellant to provide only "brief" assertions in a 'Statement of Additional Grounds.' Because the court rule and the procedures used to enforce the rule discourage an appellant from extensively raising and arguing an issue, and since Mr. Clayton provided significant briefing in his Statement of Additional Grounds, the Court of Appeals improperly overlooked his claims without addressing them on the merits.

RAP 10.10 was promulgated in 2002, replacing a court rule that relied on pro se briefs as the forum for raising additional issues in a criminal appeal. See Former RAP 10.1(d) (2002). The former rule required pro se briefs adhere to the same briefing format counsel followed. The new rule dispenses with the formalities, and instead allows appellants in criminal cases to file a statement of additional grounds for review, in which an appellant need only "identify and discuss those matters" the appellant believes were not adequately addressed in counsel's opening brief. RAP 10.10(a). To implement RAP 10.10, this Court crafted a form in which the appellant is directed to "summarize [ ]" additional grounds that are not addressed in the opening brief. See Washington Courts, Appellate Case Processing Guide.

The form allots four lines to "summarize" one or two grounds for review and tells the appellant to provide a "brief summary" of other additional grounds in the appellant has more than two. (Emphasis added). It does not suggest that any more than four lines should be spent summarizing an issue. See also RAP 10.10(c) ("Reference to the record and citation to authorities are not necessary or required. . . ." (emphasis added)). RAP 10.10(f) permits the appellate court to ask counsel to provide additional briefing of issues raised in the Statement of Additional Grounds, in its discretion. Moreover, Mr. Clayton did identify and discuss his claims, and therefore complied with RAP 10.10.

In sum, the rule and its attached form not only encourage but direct an appellant to merely summarize, in a "brief" four lines or less, the legal and factual basis for a claim of error. The court's own form, and the language of the court rule, emphasize short summary of an issue. The Rule directs the court to alert counsel if it believes further briefing is required. See RAP 10.10(f). The requirements of RAP 10.10 have not been addressed by this Court and should be considered a matter of substantial public interest, as this Court is best placed to interpret rules it promulgates. At the least, RAP 10.10 contemplates that any cognizable issue should either require additional briefing or be decided on its merits. The court's own form discourages explicit and detailed analysis in a Statement of Additional Grounds and courts of appeal should not be free to summarily disregard a pro se Statement that is not frivolous only because further citations are needed to decide the

issue. Furthermore, as argued below, Mr. Clayton raised potentially meritorious claims that should be considered by this Court, or upon remand to the Court of Appeals.

Issue 3: Whether this Court should accept review under RAP 13.4(b)(3) or (4), because Mr. Clayton was denied a "Necessity" jury instruction.

Review by this Court is merited because the issue raises a significant question of law under the United States Constitution, the right to present a defense. Whether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). U.S. Const. amend. VI; RAP 13.4(b)(3). Review is also merited because ensuring the right to effective assistance of counsel is an issue of substantial public interest. RAP 13.4(b)(4). Appellate courts review a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. Ponce,* 166 Wn. App. 409,412, 269 P.3d 408 (2012) (citing to *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas,* 128 Wn. App. 555, 561, 116 P.3d 101 2 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is reversible error to refuse to

give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Here, Mr. Clayton proposed a necessity instruction. CP 768.

Necessity" is a common law defense. *State v Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 63 (2d ed. pocket part 1998) (WPIC). "Necessity" is available "when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury." *State v. Jeffrey*, 77 Wn.App. at 224. The affirmative defense of necessity is available to defend against a charge of unlawful possession of a firearm in the first degree. *State v. Stockton*, 91 Wn.App. 35, 44, 955 P.2d 805 (1998); WPIC 18.02. For the "necessity" defense to be available, the defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. *State v. Jeffrey*, 77 Wn.App. at 225; WPIC 18.02. The defendant must prove the defense by a preponderance of the evidence. *State v. Jeffrey,* 77 Wn.App. 5 at 225; WPIC 18.02.

To prevail on a necessity defense, a defendant charged with unlawful possession of a firearm must demonstrate by a preponderance of the evidence that: (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. Jeffrey*, 77 Wn. App. At 225. A

defendant who establishes the necessity defense is relieved of culpability for the crime committed because social policy dictates that result. *State v. Diana*, 24 Wn.App. 908, 913-14, 604 P.2d 1312 (1979). The necessity defense relieves a defendant of legal liability "when the physical forces of nature or the pressure of circumstances [have caused] 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." *Diana*, 24 Wn.App. at 913-14.

Here, while the trial court believed that Mr. Clayton may have put himself in this situation and potentially had alternative legal means to deal with the situation. The analysis of the trial court is flawed because it assesses qualitatively the evidence presented to the court, not whether Mr. Clayton by a preponderance of the evidence established the elements sufficient to give the 'Necessity' instruction. The trial courts analysis does not view the evidence in a light most favorable to Mr. Clayton. A defendant is entitled to present jury instructions regarding his or her theory of the case, so long as there is some evidentiary support. *State v. Fisher*, 185 Wn.2d 836, 848–49, 374 P.3d 1185 (2016). Here, the court viewed the evidence in the light of what was possible or even what the court thought Mr. Clayton should have done. This prejudiced Mr. Clayton. Viewing evidence in a light most favorable to Mr. Clayton, there was sufficient evidence presented to instruct the jury on necessity. This error requires reversal.

CONCLUSION

For the reasons stated herein, Mr. Clayton respectfully requests that this Court grant review pursuant to 13.4(b).

Respectfully submitted this 18th day of December, 2019.

Derek Reid, WSBA #34186
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. JOSEPH DEAN CLAYTON Defendant/Appellant	)	COA No. 35884-4-III PROOF OF SERVICE

I, Derek Reid, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 18, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Joseph Dean Clayton DOC #958074
C/O Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001-2049

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 18th day of December, 2019.

Derek Reid, WSBA #34186
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FILED
NOVEMBER 19, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOSEPH DEAN CLAYTON, Appellant.	))))))))))	No. 35884-4-III OPINION PUBLISHED IN PART

KORSMO, J. — Joseph Clayton Sr. appeals from three convictions for unlawful possession of a firearm, challenging the use under our Privacy Act of a police body camera recording. We affirm.

FACTS

The charges arose from a visit by law enforcement to a Spokane home. On the evening of October 7, 2016, multiple officers responded to the residence following a report of shots being fired. Mr. Clayton let officers in the residence and consented to a search. There were six people in the residence in addition to the officers who entered. Three officers had active body cameras recording the investigation, but none of the residents were advised of that fact.

An officer discovered two revolvers in a dresser and also observed bullet holes in a couch, wall, and the floor. Upon learning that Mr. Clayton was ineligible to possess the revolvers, officers arrested him for unlawful possession of the weapons. The prosecutor charged two counts of unlawful possession of a firearm based on the October arrest.

Clayton's girlfriend, Barbara Lawley, told officers that one month earlier, Clayton had fired a shot in the apartment that struck the couch on which she was sitting. Ultimately, the prosecutor charged Clayton with one count of second degree assault and one count of unlawful possession of a firearm for the September incident, as well as two counts of unlawful possession of a firearm for the two weapons recovered in October. The defense objected to the joinder of the September charges to the existing October counts, but the court permitted the amendment. The court also denied a motion to sever the counts at the conclusion of the State's case.

After conducting a CrR 3.6 hearing on a defense motion to suppress the recordings, the court permitted the video evidence only to the point where the officer discovered the guns and arrested Clayton. Body camera footage from one of the officers was played for the jury at trial.

Clayton testified at trial that an acquaintance, Jeff, had fired the shot at Lawley in June and that Clayton had momentarily possessed the weapon before returning it to the man. He also told jurors that he had purchased the two replica weapons for his mother at an estate sale because she collected old guns and wanted the weapons; he never owned or

possessed them. During the instruction conference, the court declined to give the defense's request for a necessity instruction, ruling that the defense had failed to make the necessary showing to obtain the instruction.

Defense counsel argued that his client had not assaulted Lawley and that her behavior in not immediately reporting to police and remaining with Clayton was inconsistent with her claim that he had shot at her a month earlier. He also argued that his client's momentary control over the weapons did not constitute dominion and control of them.

The jury acquitted Clayton on the assault charge, but convicted him of all three unlawful possession charges. After the court imposed standard range sentences for the offenses, Mr. Clayton timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

Mr. Clayton raises three issues in his appeal. In order, we consider his contentions that the court erred in admitting the body camera evidence, in denying his motion to sever, and in refusing to instruct on necessity.

Body Camera Recording

Mr. Clayton argues that the police body camera recording was made in violation of the "Privacy Act," chapter 9.73 RCW, rendering the evidence inadmissible. Because

the police interaction with Mr. Clayton and his family was not a private conversation, there was no error.

The Privacy Act prohibits intercepting or recording a private communication unless all parties to the communication consent. RCW 9.73.030(1)(b). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. "Whether a conversation is private is a question of fact but may be decided as a question of law where . . . the facts are not meaningfully in dispute." *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008).

The Privacy Act does not define "private," but courts have previously found it means "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996) (alterations in original) (quoting *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189-90, 829 P.2d 1061 (1992)). A communication is private under the act when (1) the parties have a subjective expectation that it is private, and (2) that expectation is objectively reasonable. *Modica*, 164 Wn.2d at 88. Among other things, the subject matter of the calls, the location of the participants, the potential presence of third parties, and the roles of the participants are relevant to whether the call is private. *Clark*, 129 Wn.2d at 225-27.

The legislature has crafted some specific provisions that address the recording of conversations involving law enforcement. Two of those provisions are of particular interest to this case. Law enforcement may record people who have been arrested upon (i) informing the person that a recording is being made, (ii) stating the time of the beginning and ending of the recording in the recording, and (iii) advising the person at the commencement of the recording of his or her constitutional rights. In addition, (iv) the recording may be used only for valid police or court activities. RCW 9.73.090(1)(b).[1]

Vehicle mounted cameras may also make audio and visual recordings from video cameras mounted in police vehicles. RCW 9.73.090(1)(c).[2] Absent exigent circumstances, the person must be told that he or she is being recorded. *Id*. However, there is no requirement that the individual consent to the recording.

Here, the trial court concluded that the investigation did not involve a private conversation and that the provisions of RCW 9.73.090(1)(b) did not apply until Mr. Clayton was arrested. Mr. Clayton argues on appeal that the conversations in his home were private and should have been suppressed under the authority of RCW 9.73.030.[3]

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[1] This provision originated with Laws of 1970 (2d Ex. Sess.), ch. 48.

[2] This provision was enacted by Laws of 2000, ch. 195, § 2.

[3] In his motion to reconsider the result of the CrR 3.6 hearing, Mr. Clayton argued that the recordings were made in violation of City of Spokane policy to advise citizens that they were being recorded and, thereby, obtain consent to the recording. Clerk's Papers at 234 et seq. He does not assert on appeal that the city policy could amend the Privacy Act or otherwise has application to this appeal.

Case law informs our analysis of this argument. This court has held that communications taking place in the street during an arrest were not private conversations. *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992). At issue in *Flora* was an attempted prosecution of a man and his friend for secretly recording the man's conversations with officers who were investigating whether there was a violation of a protection order. *Id*. This court ruled that there was no violation of RCW 9.73.030 because the conversation was not private. *Id*. at 805. This court rejected the idea that the officers performing official functions in the presence of a third person maintained a privacy interest under the Privacy Act. *Id*. at 806.

The Washington Supreme Court agreed with *Flora* in *Clark*. At issue in *Clark* were conversations between would-be drug sellers and strangers passing by on the street. 129 Wn.2d at 214. Acting under a court authorization, police recorded conversations between drug sellers and an undercover informant who consented to the recordings. *Id.* at 216-17. *Clark* stated a multi-factor test for determining whether a conversation is "private" under the Privacy Act. That test looked to the subjective expectations of the parties to the conversation, duration and subject matter of the conversation, location of the conversation and potential presence of third parties, and the role of the nonconsenting party and his relationship to the consenting party. *Id*. at 225-27. The court concluded that the drug sales communications, many of which happened in front of third parties or

otherwise were exposed to the general population, were not private conversations. *Id*. at 227-32.

The court made two observations that inform our decision in this case. First, while approving *Flora*, the *Clark* majority noted that generally "the presence of another person during the conversation means that the matter is not secret or confidential." *Id*. at 226. The court also noted that public transactions do not become private conversations merely because they take place in the home, a constitutionally protected area.[4] *Id*.

Also informative is *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 139 P.3d 1078 (2006). There, several consolidated cases presented the issue of the admissibility of car-mounted camera recordings. Citing to *Clark* and *Flora*, the court noted that "this court and the Court of Appeals have repeatedly held that conversations with police officers are not private." *Id*. at 460. It concluded its analysis of the topic by announcing: "we hold that traffic stop conversations are not private for purposes of the privacy act." *Id*.

An unusual variation on this problem was presented in *State v. Mankin*, 158 Wn. App. 111, 241 P.3d 421 (2010). There, some police officers being interviewed by a criminal defense attorney refused to consent to the recording of the interview. *Id*. at 115.

[4] The *Clark* majority relied, for this principle, on *State v. Hastings*, 119 Wn.2d 229, 830 P.2d 658 (1992). There, undercover officers had knocked on the door of a house, indicated their purpose was to purchase drugs, and were permitted into the dwelling. *Id*. at 231. *Hastings* rejected the defendant's argument that he had a reasonable expectation of privacy in selling drugs in his house. *Id*. at 232.

This court concluded that the pretrial interviews were not private conversations under the Privacy Act, noting that officers regularly are interviewed by defense attorneys and expect that statements made in the interviews might be used at trial. *Id*. at 118-19. Relying on *Flora*, the court determined that officers performing public duties were not engaging in private conversations. *Id*. at 119-21.[5]

With these decisions in mind, we now turn to Mr. Clayton's argument that his conversations in the home were private conversations that could not be recorded without his consent. The balance of the *Clark* factors establish that the conversations among the police and the various occupants of the apartment were not private.

Conversations with uniformed, on-duty law enforcement officers are typically not private conversations. *Flora*, 68 Wn. App. 802; *Lewis*, 157 Wn.2d 446. People understand that information they provide to officers conducting an investigation is going to turn up in written police reports and may be reported in court along with the observations made by the officers. Mr. Clayton never expressed a subjective belief that the conversations were private and no officer could claim such an interest.[6] *Flora*, 68 Wn. App. 802. The conversations took place in his apartment, a place where he had

[5] We need not address the question of whether a "private conversation" can exist under the statute if one side, the police, cannot have a privacy expectation in the conversation.

[6] There was no testimony at the CrR 3.6 hearing and Mr. Clayton never submitted an affidavit. The court viewed the videos and heard the argument of counsel.

some subjective expectation of privacy, but they also occurred in the presence of five others. The subject matter of the visit—a report of a gun being fired and subsequent search for the weapon—was not a private one. The relationship between the parties, investigators and the person being investigated, was not a personal one and does not suggest that the conversation was a private one. In sum, the *Clark* factors indicate that no private conversations took place within the meaning of the Privacy Act. The trial court correctly recognized that only when the police arrested Mr. Clayton did the provisions of RCW 9.73.090(1)(b) come into play. There was no reasonable expectation that the investigation involved a private matter. *Modica*, 164 Wn.2d at 88. The trial court did not err in denying the motion to suppress.

The Privacy Act does not address police body cameras. It is up to the legislature to extend the protections of the act to the use of those cameras if it so desires. In the meantime, we are not in a position to treat the on-duty public activities of law enforcement officers as private matters.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Severance

Mr. Clayton argues that the court erred by joining the offenses and by denying his request at trial to sever them. Because joinder and severance involve slightly different tests for prejudice, arising from the fact that one is forward-looking and the other is backward-looking, we address the two claims separately. However, in neither circumstance did the trial court abuse its discretion.

Joinder is proper under CrR 4.3(a) when two offenses are of the same character or are based on connected acts. Severance is appropriate if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). The decision whether to sever charges is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

It is the defendant's burden to establish abuse of discretion by showing that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Factors to be considered when analyzing prejudice in the context of a motion to sever include (1) whether the defendant was confounded in presenting separate defenses, (2) whether the

jury might infer a criminal disposition from the two offenses, and (3) whether the jury might cumulate evidence to find guilt where it would otherwise not. *Id*. In assessing prejudice pretrial when considering a joinder argument, courts consider four factors: (1) the strength of the State's case on each count, (2) the clarity of defense on each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of other charges in the absence of joinder. *State v. Bluford*, 188 Wn.2d 298, 311-12, 393 P.3d 1219 (2017).

Joinder. The September and October events were "of the same character" for purposes of the permissive joinder rule. CrR 4.3(a). All four counts arose from the defendant's alleged use, possession, and control of firearms in his apartment. The trial court properly found that the events were of the same character when it allowed the amendment joining the September offenses with the existing October offenses. The remaining consideration is whether Mr. Clayton established prejudice.

The first factor, the strength of the State's case on each count, does not favor Mr. Clayton. Although the October charges were arguably stronger, having been captured in part on videotape, the essence of both cases was the credibility of Ms. Lawley with respect to her allegation that Mr. Clayton was the one who possessed the guns. The second factor, the clarity of defenses on each count, also favors joinder. In each instance,

the defense was lack of possession due to ownership by someone else or by momentarily handling of another's weapon. The defenses were clear and consistent.

The third factor, the ability of the court to instruct the jury to consider each count separately, also favored joinder. The offenses were distinct in time, allowing the court to instruct that they be considered separately. The final factor, the cross admissibility of the evidence, is largely neutral. While there is always prejudice from evidence of multiple criminal acts, the evidence of each set of offenses may well have been admissible at each trial. The possession of weapons in the apartment in October supported Lawley's claim that Clayton had a weapon in the apartment a month earlier. Lawley's testimony that Clayton had a weapon in September undercut his claim that he did not possess the weapons found in the apartment in October.

On balance, the evidence did not establish prejudice. Hence, the court did not abuse its discretion by allowing the September charges to be joined with existing October offenses.

Severance. With respect to the trial motion to sever, Mr. Clayton argued that the evidence in the two cases was not cross admissible, one factor for determining prejudice in a *joinder* analysis. *Bluford*, 188 Wn.2d at 312. On appeal, he solely argues the four *Bluford* factors. However, *Bythrow* recognizes three factors governing the determination

of prejudice in *severance* issues.[7] Assuming, without deciding, that he did preserve a separate severance argument for appeal, we will briefly discuss each of those factors.

The first factor is whether the defense is "confounded" by inconsistent defenses. Mr. Clayton's defense was not. His defense to each claim was the same—he did not possess or own the firearms. This factor does not favor severance.

The second factor is whether a jury might infer a "criminal disposition" from both sets of charges. Given that the evidence was cross admissible, the multiple charges do not present a significant prejudice concern. This factor is largely neutral.

The third factor is whether a jury might cumulate evidence against the defendant. Again, multiple charges always present that risk, but since the evidence developed at trial was admissible in each case and was not significantly prejudicial, this factor does not favor severance.[8]

Severance of properly joined charges is necessary only when the prejudice to the defendant outweighs the interest in judicial economy resulting from a single trial.

[7] We recognize that there is confusing language in some of the cases concerning the appropriate standard to review this claim. That arises from the fact severance is both a remedy for improperly joined charges as well as a remedy for properly joined charges that eventually proved, at trial, too prejudicial to remain joined.

[8] The jury's acquittal on the assault count also presents post hoc evidence that it did not cumulate the evidence and convict Mr. Clayton because he possessed a criminal disposition.

Bythrow, 114 Wn.2d at 724. Here, the same witnesses testified to both incidents, a factor favoring judicial economy. Since the slight prejudice did not outweigh the interest in judicial economy, the trial court did not abuse it discretion by denying the motion to sever. *Id*.

Necessity Instruction

Mr. Clayton next argues that the trial court erred in refusing his necessity instruction. Once again, there was no abuse of discretion.

Trial courts have an obligation to provide instructions that correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968). A court should give an instruction only if it is supported by substantial evidence. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983).

The defense of necessity is recognized by Washington common law. That defense excuses criminal conduct when pressure brought on "by forces of nature" leads to a criminal act that avoids a greater harm. *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994); *State v. Turner*, 42 Wn. App. 242, 247, 711 P.2d 353 (1985); *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312, *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). Citing to the Model Penal Code, this court concluded in *Diana* that the defense would be available when the defendant established

that due to outside circumstances not of her own causing she committed an illegal act in order to avoid a greater harm. 24 Wn. App. at 913-14. The common law defense is unavailable when the legislature has provided a statutory defense. *Id.*

The defendant bears the burden of establishing the defense of necessity by a preponderance of the evidence. *Gallegos*, 73 Wn. App. at 651. The elements of the necessity defense are:

> Unlawful possession of a firearm is necessary when (1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical 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. Parker, 127 Wn. App. 352, 354-55, 110 P.3d 1152 (2005).[9]

The trial court doubted that the second element was established, but concluded that the third was not. Before turning to the propriety of that ruling, the initial inquiry is whether the defense presented *any* evidence of necessity as to the charged offense. The State charged the unlawful possession offense based on an incident that occurred in September 2016. Mr. Clayton's testimony about the "Jeff" incident was that it occurred

[9] The pattern instructions list the elements in a different order: (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016).

in June 2016. Since his testimony did not even address the charged offense, there was no need for the trial court to even consider the issue. All of the parties, however, treated the testimony as if it were relevant to the charged crime and continue to do so on appeal. Accordingly, we will address the merits of this argument.

The trial court concluded that Mr. Clayton's action in picking up the gun and returning it to the shooter was not an act of necessity in light of more reasonable alternatives such as calling the police or secreting the weapon from the shooter. Whether this action truly implicates the third element (no reasonable alternative) or the first (reasonable apprehension of risk of death or serious injury)[10] is a debatable proposition. Viewed in its entirety, however, we agree with the trial court that Mr. Clayton's decision to take possession of the gun *and* return it to the shooter was unreasonable as a matter of law under the facts presented by Mr. Clayton's testimony. If he had taken possession of the gun and called the police or otherwise kept the gun apart from the shooter, it would be a question for the jury to decide. But the evidence presented here showed no necessity.

[10] We agree with the trial judge that the testimony that Jeff fired a shot indiscriminately in the apartment would satisfy the first element, but that action had taken place before Clayton committed the unlawful act of taking possession of the weapon. The act of returning the weapon to the shooter certainly undercuts the perceived danger presented by the shooter and appears more as assistance to the gunman than resistance.

The trial court correctly determined that the evidence did not support a necessity defense. There was no abuse of discretion in denying the requested instruction.

Affirmed.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

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CASE # 358844
State of Washington v. Joseph Dean Clayton
SPOKANE COUNTY SUPERIOR COURT No. 161039147

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

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