S. Ct. No. 100376-5
COA No. 37154-9-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TRACEY FELCH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Christopher Tracey Felch asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Felch seeks review of the unpublished decision of the Court of Appeals, Division III, filed on October 19, 2021, affirming his convictions and sentence. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Was the evidence insufficient to support the convictions for attempted second degree murder, first degree assault, and second degree assault, all with firearm enhancements, when the State failed to disprove self-defense beyond a reasonable doubt?

2. Did the court err by failing to consider the defense request for an exceptional sentence downward?

D. STATEMENT OF THE CASE

Mr. Felch was charged by second amended information with count I, attempted first degree murder with a firearm enhancement of Joshua Reimers, count II, first degree assault with a firearm enhancement of Mr. Reimers, count III, first degree assault with a firearm enhancement of Everardo Sanchez, count IV, first degree assault – domestic violence with a firearm enhancement of Daisymae Fowler, and count V, first degree unlawful possession of a firearm. (CP 214). Mr. Felch pleaded guilty to the unlawful possession of a firearm charge before trial. (9/9/19 RP 14; CP 321).

The court held an ER 404(b) hearing regarding prior domestic violence incidents between Mr. Felch and Ms. Fowler. The court went through the relevant factors in analyzing whether to admit such bad acts evidence. (9/10/19 RP 63-65). Balancing the highly probative nature of the evidence against its highly prejudicial

value, the court took a middle ground:

> What the court is going to kind of take a middle ground, because I do find that basically these probably occurred, that there's for motive, intent, res gestae, and that fits and is materially relevant.
>
> I'm a little bit concerned about going into great detail about it, so I am going to limit it, though to she can testify that they had a relationship, that they've been in a relationship, and that she left that relationship and started a relationship with Mr. Reimers. . . (9/10/19 RP 64-65).

The case proceeded to jury trial.

Officer Jared Meyer was dispatched to a shots-fired incident at 2014 W. Broadway, # 6, at 9:58 p.m. on May 17, 2018. (9/10/19 RP 79-80). The information was that someone was shot. (*Id*. at 80). He had contact with Ms. Fowler, who had called the police, and Mr. Reimers. They were both visibly upset. (*Id*. at 83). Mr. Sanchez was shot in the big toe of his left foot. (*Id*. at 84, 96). Mr. Felch was the suspected shooter. (*Id*. at 85). Officer Meyer testified the bullets came from the southwest to the northeast. (*Id*. at 86). He saw 9 mm shell casings in

the driveway entrance area of the apartment complex general parking lot. (*Id*.).

Mr. Sanchez had been friends with Mr. Reimers for several years. (9/10/19 RP 102). After he got off work on May 17, 2018, he was hanging out with Mr. Reimers on his porch, drinking beers. (*Id*. at 104). Ms. Fowler was with them and pointed out Mr. Felch, who was walking down the street. (*Id*. at 104-05). Mr. Sanchez and Mr. Reimers went down to talk to Mr. Felch and tell him to leave as he was not welcome there. (*Id*. at 106). They were about five feet away when they talked to Mr. Felch. (*Id*. at 107). Mr. Sanchez and Mr. Reimers were not armed. (*Id*.). But Mr. Sanchez saw Mr. Felch had a pistol and he and Mr. Reimers ran back up the stairs and to the porch. (*Id*. at 107-108). Mr. Felch did not say anything to Mr. Sanchez, who was scared when he saw the gun. (*Id*. at 108). Mr. Felch was still in the street. Mr. Sanchez told him to get the hell out of there and Mr.

Felch mumbled something. (*Id*.). He did not leave. (*Id*. at 109).

Mr. Felch stood there for 30-45 seconds and then started shooting at Mr. Sanchez. (9/10/19 RP 109). He got hit on the left big toe and was later treated at the hospital. (*Id*.). Ms. Fowler called 911 and Mr. Sanchez also talked to the 911 operator. (*Id*. at 116-17). He did not know Mr. Felch at all. (*Id*. at 124). Mr. Sanchez testified he did not threaten him, but just told him to get out. (*Id*. at 125). His son was at their apartment window with a bat. (*Id*. at 129). Mr. Sanchez told Mr. Felch he had messed up right before he shot. (*Id*. at 131). Mr. Felch replied that Mr. Sanchez had messed up and fired. (*Id*. at 131).

Mr. Reimers lived at 2014 W. Broadway, # 6, on May 17, 2018. (9/10/19 RP 135). He and Mr. Sanchez were friends and neighbors. (*Id*. at 136). Ms. Fowler was Mr. Reimers' girlfriend. (*Id*.). Mr. Felch was her ex-

boyfriend. (*Id*.). Mr. Reimers had not personally met Mr. Felch, who had talked to Ms. Fowler earlier that day. (*Id*. 136-37). She pointed him out as he walking back and forth between the driveway and up and down the street some 4-6 times. (*Id*. at 138). No one said anything to anyone. (*Id*. at 139).

After a while, Mr. Reimers and Mr. Sanchez approached Mr. Felch, telling him to leave them alone and get out. (9/10/19 RP 139). He had his back to them, but when he turned around, Mr. Sanchez saw he had a gun. (*Id*.). Scared, Mr. Reimers and Mr. Sanchez ran up the stairs and stepped into the apartment. Ms. Fowler was next to Mr. Reimers. (*Id*. at 140). Mr. Felch shot when he was again told to get out. (*Id*.). 911 was called after the shots were fired at about 9:58 p.m. (*Id*. at 143).

Neither Mr. Reimers nor Mr. Sanchez was armed. (9/11/19 RP 154). Mr. Reimers had known Ms. Fowler only about a week before the shooting. (*Id*. at 157).

When Mr. Reimers and Mr. Sanchez contacted Mr. Felch, it lasted 20 seconds. (*Id*. at 161). Mr. Reimers did not see a gun; Mr. Sanchez did. (*Id*. at 162). Mr. Reimers said he was going to go back down to get Mr. Felch. (*Id*. at 167).

Michael Patterson, physician's assistant, treated Mr. Sanchez for a gunshot wound on May 17, 2018. (9/11/19 RP 151). The top of his left big toe was shot off. (*Id*.). He was treated and released. His injury was not life threatening. (*Id*. at 152).

Thomas McFadden built the security system for the apartment location. (9/11/19 RP 188). The system was functioning properly on May 17, 2018. (*Id*.). That day, he heard voices raised in an argument and gunfire followed. (*Id*. at 191). He talked with the police and reviewed video with them. (*Id*. at 192).

Officer Jeremy McKay was at the scene on May 17, 2018. (9/11/19 RP 213). He found no one with a K9

track, but Mr. Felch was a suspect. (*Id*. at 214-15). After a search warrant was obtained for 2214 W. Broadway where Mr. Felch lived with his mother, the officer found two handguns in a basement safe. (*Id*. at 216-17). Neither of those guns had been fired that evening. (*Id*.).

Detective Cory Turman applied for the search warrant of Mr. Felch's home. (9/11/19 RP 221). Officer McKay turned the two handguns over to the detective. Mr. Felch was arrested on either May 21 or 22, 2018. (*Id*. at 229-30). Detective Turman testified injuries from a handgun could range from a minor flesh wound to a fatality. (*Id*. at 290).

Ms. Fowler lived with her boyfriend, Mr. Reimers, at his apartment. (9/11/19 RP 239-40). She had previously gone out with Mr. Felch for two years or so. (*Id*. at 239). Their relationship was mostly OK, but sometimes it was unsafe and unabusive. (*Id*. at 240). On May 17, 2018, she had seen Mr. Felch in the afternoon at Broadway

Foods. (*Id*. at 241). He told her to "tell your [N-word] boyfriend that next time he walks past my house, I'm going to shoot him." (*Id*.). Although concerned, she shrugged it off. (*Id*.).

After Mr. Reimers got off work, they were hanging out at the building, drinking beer and listening to music. (9/11/19 RP 242). Mr. Sanchez was also hanging out with them. (*Id*.). Ms. Fowler told Mr. Reimers what Mr. Felch had said to her earlier. (*Id*. at 243). He did not take the threat as seriously as she did. (*Id*.).

While hanging out, she saw Mr. Felch walk by the apartment complex about 4-5 times. (9/11/19 RP 243). Mr. Reimers and Mr. Sanchez went down to talk to Mr. Felch to tell him to leave Ms. Fowler alone and stop scaring her. (*Id*.). She was in the doorway. (*Id*. at 244). They ran back up the stairs and Mr. Sanchez said Mr. Felch had a gun. (*Id*.). Mr. Reimers and Mr. Sanchez headed back down the stairs and shots were fired as they

were halfway there. (*Id*. at 245). Mr. Sanchez got hit. (*Id*.). Ms. Fowler called 911 after the shots were fired. (*Id*. at 255).

Brett Bromberg-Martin, a WSP forensic scientist, testified the cartridge casings at the scene were fired from the same gun, but not the particular gun that could shoot 9 mm shells found at the home of Mr. Felch's mother. (*Id*. at 273-74). The 9 mm semiautomatic handgun used by Mr. Felch on May 17, 2018, was never found. (*Id*. at 289-90).

Mr. Felch's son, Christopher, knew Ms. Fowler for 12 years. (9/12/19 RP 39). On May 17, 2018, he called his father's cell phone between 11 and noon and talked to him as well as Ms. Fowler, who was at Mr. Felch's home. (*Id*. at 40-41). His son said everyone sounded like they were having a good time. (*Id*. at 41).

Mr. Felch testified in his own behalf. He knew Ms. Fowler for some 12 years and had dated her. (9/12/19

RP 43). He broke up with her around the end of April 2018. (*Id*. at 44, 47). But she still came over to Mr. Felch's house and played darts in the backyard. (*Id*. at 45). He figured she was staying at Mr. Reimers' place as he had seen them around. (*Id*. at 46). Mr. Felch did not see Ms. Fowler for a few days after May 6, Bloomsday. (*Id*.). But then she came over to his house to play darts every day. (*Id*.). Mr. Felch recalled getting a call from his son on May 17, 2018, while she was at his house. (*Id*. at 47). He did not go to Broadway Foods that day. (*Id*.).

Waiting for a friend at a street corner, Mr. Felch ended up walking past Mr. Reimers' apartment complex. (9/12/19 RP 47-48). His friend did not show up, so Mr. Felch got bored and started pacing. (*Id*.). He wanted to go talk to Mr. Reimers and let him know Ms. Fowler was still coming over to his place as it was just not right since Mr. Reimers was her boyfriend. (*Id*. at 48). People then started yelling at him about being a racist and he needed

to leave or else they were going to make him leave. (*Id*.). Confronted by them, Mr. Felch got scared as the guys were bigger than him and they came running toward him. (*Id*. at 48-49). The time was later in the evening as it was dark. (*Id*. at 49).

Mr. Felch thought he was going to get beat up. (*Id*. at 50). He said nothing to them at that point. Mr. Felch was worried about his safety and pulled his gun. He did not want to hurt anyone and figured they would pull back up. (*Id*.). The two men went back to the apartment. (*Id*. at 51). Mr. Felch feared they were getting a gun. (*Id*.). The men went into the apartment and came back out. (*Id*. at 51-52). He figured they armed themselves. (*Id*. at 52). The two men started yelling again at Mr. Felch, who said nothing. (*Id*.). He was scared when they both came back out, thinking he was going to die or get beat up. (*Id*.). Mr. Felch believed they had a gun because he had one and they would have been nuts to come back out if

they did not have a weapon. (*Id*. at 53). He then saw someone with a bat on another porch. (*Id*.). Mr. Felch thought he was going to get hit with the bat, which would not have been good because he had a metal plate in his arm. (*Id*. at 55). He then pulled the trigger of his gun. (*Id*. at 56). Seeing the bat terrified him to the point where he started shooting. (*Id*.). Mr. Felch started leaving and shot one round, afraid they would come out at him again. (*Id*. at 57). His intent when he fired his gun that night was to get out alive. (*Id*.).

The jury found Mr. Felch not guilty of count I, attempted first degree murder; guilty of the lesser included offense in count 1 of attempted second degree murder; guilty of count II, first degree assault; guilty of first degree assault in count III; not guilty of count IV, first degree assault; and guilty of the lesser included offense in count IV of second degree assault. (9/16/19 RP 241-42). The jury also returned special verdicts finding Mr.

Felch was armed with a firearm on all counts. (*Id*. at 242). As to count IV, the jury also returned a special verdict finding of domestic violence. (*Id*.).

At sentencing, the court, the State, and the defense agreed that the first degree assault of Mr. Reimers in count II merged into the attempted second degree murder in count I, as same criminal conduct. (10/17/19 RP 258). Accordingly, the judgment and sentence made no mention of count II. (*Id*. at 258; CP 321). All agreed as well that Mr. Felch's starting offender score was 2. (10/17/19 RP 256). The State asked for the high end on all counts, with counts I and III running consecutively and counts IV and V running concurrently with each other and count I. (*Id*. at 258-64). The State's recommendation was for total confinement of 485.25 months, including the firearm enhancements. (*Id*.).

The defense requested an exceptional sentence downward based on the mitigating circumstance that to a

significant degree, the victims were initiators, aggressors, or provokers of the incident. (10/17/19 RP 265). Defense counsel also cited as a mitigating factor the multiple offense policy resulting in an excessive sentence of over 40 years when an actual second degree murder carried a far lower sentence of 144-244 months with an offender score of 2. The defense also pointed out the mandatory minimum of 60 months on count III had to be submitted to the jury before it could be imposed. (*Id*. at 267). Counsel did not request such an instruction, but it mattered as to the whether an exceptional sentence could be fashioned to avoid that mandatory minimum. (*Id*.).

The court imposed the low end on all counts, with counts I and III running consecutively and counts IV and IV running concurrently with each other and count I. (10/17/19 RP 273-74). Total confinement was 380.25 months. (*Id*. at 274, 277-78; CP 321). Mr. Felch

appealed. (CP 407). The Court of Appeals affirmed in its unpublished decision of October 19, 2021.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because the Court of Appeals' decision conflicts with other appellate decisions. RAP 13.4(b)(1), (2).

Mr. Felch acted in self-defense. The State must prove beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Since a claim of self-defense negates the essential element of intent for second degree assault, the burden is on the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P2d 1069 (1984). The court gave a self-defense and aggressor instruction. (CP 86; CP 145).

For self-defense, the defendant must have subjectively feared he was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Evidence of self-defense must be viewed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury then is to stand in the shoes of the defendant, consider all the facts and circumstances known to him, and determine what a reasonable person in the same situation would have done. *Id*.

Even viewed in a light most favorable to the State, its evidence fell far short of disproving beyond a reasonable doubt that Mr. Felch acted in self-defense.

State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The Court of Appeals determined the evidence of his subjective fear was weak. It improperly made its own determination of Mr. Felch's credibility. *See State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Indeed, there is no better evidence that Mr. Felch subjectively feared imminent danger of death or great bodily harm than his own testimony. The standard is not an objective one, but is subjective, as to this element. The Court of Appeals erred by using an objective standard and its decision thus conflicts with *Callahan*. RAP 13.4(b)(1).

The Court of Appeals also decided Mr. Felch's conduct was not objectively reasonable. To the contrary, the record establishes Mr. Sanchez and Mr. Reimers were the aggressors initiating contact with Mr. Felch, were bigger than him, and threatened him. He was protecting himself as he feared he was going to die or get

beat up by them. Subjectively and objectively reasonable, Mr. Felch's conduct was reasonable. The court's determination to the contrary conflicts with *Callahan*, thus warranting review under RAP 13.4(b)(1).

The Court of Appeals found Mr. Felch used more force than reasonably necessary to defend himself. It pointed to the person with a bat being "many yards away" and the fact that Mr. Sanchez and Mr. Reimers were, as it turned out, unarmed. (Op. at 13). But Mr. Felch did not know the two were unarmed; rather, he rightfully figured they were because they would have been nuts to come back out without a weapon when they knew he was armed. The jury stands in the shoes of Mr. Felch, considering all the facts and circumstances known to him at the time. *Callahan*, 87 Wn. App. at 929. The Court of Appeals' focus on after-the-fact circumstances is erroneous and Mr. Felch's use of force was not greater than necessary under the circumstances known to him

when Mr. Sanchez and Mr. Reimers came back down after him. Review is warranted under RAP 13.4(b)(1) as the decision conflicts with *Callahan*.

The Court of Appeals also determined Mr. Felch "likely was the aggressor." (Op. at 13). The record shows, however, that Mr. Sanchez and Mr. Reimers were the aggressors, who purposefully made contact with Mr. Felch and threatened him. He did not provoke the altercation; rather, he was simply pacing where he had a right to be. The Court of Appeals' reliance on *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999), to show Mr. Felch was the aggressor is misplaced. RAP 13.4(b)(1).

As to the issue of an exceptional sentence downward, Mr. Felch based his request on the mitigating circumstances that to a significant degree, the victims were initiators, aggressors, or provokers of the incident and the multiple offense policy resulted in a presumptive sentence that was clearly excessive. RCW

9.94A.535(1)(a), (g). The court, however, did not address the defense request at all when it sentenced Mr. Felch. (10/17/19 RP 273-75). The Court of Appeals reasoned the trial court did consider it by "implicitly [rejecting] Felch's claim that Reimers and Sanchez were the initial aggressors." But the trial court's silence, or "implicit rejection," cannot be considered a reasoned consideration of his request.

The court can deny an exceptional sentence downward in its discretion, but it must meaningfully consider the defense request. *State v. Korum*, 157 Wn.2d 614, 637, 141 P.3d 13 (2006). A defendant cannot appeal a standard range sentence unless, like here, the sentencing court has refused to exercise its discretion at all. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). The court did not even address the defense request for an exceptional sentence downward when it imposed its standard range sentence

on Mr. Felch. (10/17/19 RP 273-75). Discretion unexercised is discretion abused. *State v. McFarland*, 197 Wn.2d 47, 56, 399 P.3d 1106 (2017); *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d ; 643 (1999). Because the court failed to consider the defense request for an exceptional sentence downward, the case should be remanded for resentencing. *Id*.

The Court of Appeals stated *Korum* does not stand for the proposition that the trial court abuses its discretion by not meaningfully considering a request for an exceptional sentence downward. It relied on a quote from *Korum* that "[e]*ven though it was not required to do so*, the sentencing court did consider a downward departure." 157 Wn.2d at 637 (emphasis by court). What the Court of Appeals failed to recognize was that the defense in *Korum* did ask for a downward departure and the court did consider and address the request. *Id*. at 620-21. Mr. Felch asked for the downward departure and the trial

court was then obligated to meaningfully consider his request. It did not and thus categorically refused to even consider Mr. Felch's request. The Court of Appeals' decision conflicts with *Korum* and *Garcia-Martinez*. Review is warranted under RAP 13.4(b)(1) and (2).

F. CONCLUSION

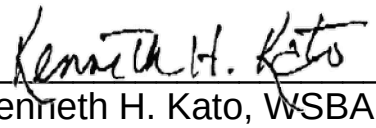
Based on the foregoing facts and authorities, Mr. Felch respectfully asks this Court to grant his petition for review.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17, I certify this document contains 3776 words.

DATED this 15th day of November, 2021.

Respectfully submitted,



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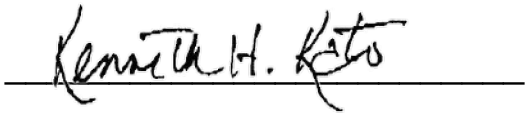
CERTIFICATE OF SERVICE

I certify that on November 15, 2021, I served a copy of the petition for review by USPS on Christopher Tracey Felch, # 969112, PO Box 769, Connell, WA 99326; and through the eFiling portal on Jerry Scharosch at his email address.



APPENDIX

FILED
OCTOBER 19, 2021
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. CHRISTOPHER TRACY FELCH, aka CHRISTOPHER TRACEY FELCH, Appellant.	))))))))))	No. 37154-9-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Christopher Felch appeals after he was convicted of attempted murder in the second degree, first degree assault, second degree assault, and first degree unlawful possession of a firearm. We accept the State's concession that the trial court erred when it imposed a mandatory minimum term of 60 months' confinement on count 3, first degree assault. We remand for the trial court to enter an order modifying the judgment and sentence by striking that phrase. We otherwise affirm.

FACTS

The shooting

On May 17, 2018, Daisymae Fowler, Joshua Reimers, and Everardo Sanchez were drinking beer on Reimers's second-story porch. Fowler noticed Christopher Felch walking back and forth on the street near the apartment complex. Felch was Fowler's recent ex-boyfriend and their relationship had been abusive.

Reimers and Sanchez came down from the porch and told Felch he was not welcome there. They were concerned for Fowler's safety. They were near Felch for about 20 seconds before Sanchez saw that Felch had a pistol, told Reimers, and the two ran back upstairs. Felch remained silent and kept standing in the street.

Once upstairs, Sanchez told Felch, "Get the hell out of here." Report of Proceedings (RP) (Sept. 10, 2019) at 108. Felch mumbled something back at him and stood there for 30 to 45 seconds in silence. Felch then pulled out the pistol and started shooting at the upstairs apartment. As Sanchez and Reimers ran inside, one bullet hit Sanchez in the left toe and several bullets came within feet of Reimers.

Both Fowler and Reimers called 911. When the police arrived, Felch was no longer there. The police recovered five shell casings from the scene. The shooting was captured by a video surveillance system, which the police reviewed that evening.

On May 21, 2018, the Spokane police department located and arrested Felch. The State charged Felch by amended information with first degree attempted murder and first degree assault as to Reimers (counts 1 and 2), first degree assault as to Sanchez (count 3), first degree assault as to Fowler (count 4), and first degree unlawful possession of a firearm (count 5).

Before trial, Felch moved to sever count 5 from the remaining charges. The State opposed the motion. The court denied severance, finding any prejudice did not outweigh the concern for judicial economy.

On the morning of trial, Felch pleaded guilty to the unlawful possession of a firearm charge. He proceeded to trial on the remaining counts.

Trial

The State's case

The State played video surveillance from the apartment complex for the jury. The footage shows Felch pacing back and forth on the street, Sanchez and Reimers coming down the stairs, their subsequent retreat, their reemergence from the apartment, and shots fired at the second-story porch. The State called several witnesses including Sanchez, Reimers, Fowler, and the responding police officers.

Sanchez's testimony

Sanchez testified that he, Reimers, and Fowler were drinking beer when Fowler pointed out Felch pacing the street. Sanchez came down from the porch to tell Felch to leave because he was not welcome there. When Sanchez was about five feet away from Felch and saw the gun, he was scared. Felch did not point the gun at Sanchez initially, but he later heard Felch say, "'you messed up'" before opening fire. RP (Sept. 10, 2019) at 132. Sanchez ran into the apartment when Felch started shooting. He received medical treatment that evening for the bullet wound to his big toe. It was not a life-threatening injury.

On cross-examination, Sanchez acknowledged that his 12-year-old son came out and stood on a nearby second-story porch with a baseball bat before the shots were fired.

Reimers's testimony

Reimers testified that he initially approached Felch to tell him to leave. He maintains that he did not threaten Felch during the approximately 20 seconds he was near Felch. Reimers did not see Felch's gun, but heard Sanchez say, "'he's got a gun'" or something about a strap.[1] RP (Sept. 11, 2019) at 162. He and Sanchez ran back onto the upstairs porch and went inside the apartment, but neither of them retrieved a weapon.

[1] "Strap" is slang for gun.

When they came back outside, they started yelling at Felch to leave. Felch still said nothing and then opened fire.

Fowler's testimony

Earlier on the day of the shooting, Fowler saw Felch at a grocery store. Felch told Fowler "to tell your [racial slur] boyfriend that next time he walks past my house I'm going to shoot him." RP (Sept. 11, 2019) at 241. That evening, she told Reimers about this interaction that she took seriously but then "shrugged it off." RP (Sept. 11, 2019) at 241.

When Fowler saw Felch pacing below the apartment that evening, she was concerned. She heard Reimers and Sanchez tell Felch to stop scaring her; they did not threaten Felch. One of them said, "'he's packing'" as they ran upstairs from the street. RP (Sept. 11, 2019) at 254. Fowler stood in the doorway to the porch. When Reimers and Sanchez went back outside to see if Felch had left, Fowler heard the shots. She ran inside the apartment when the shots were fired.

The defense's case

Felch's testimony

On the night of the shooting, Felch was pacing the street and waiting for a friend. Felch heard people yell from the porch that he "needed to leave or else they were going to

make [him] leave." RP (Sept. 12, 2019) at 48. He saw Reimer and Sanchez, who were bigger than him, and he was scared they were going to beat him up. Felch pulled his gun so "they would leave [him] alone," but he "didn't want to hurt nobody." RP (Sept. 12, 2019) at 50. He heard them say something about a strap when they ran upstairs. He testified, "I was thinking they armed themselves because they were yelling about a strap, and I couldn't see anybody coming back out when someone had a gun. That's crazy behavior." RP (Sept. 12, 2019) at 52. When Reimer and Sanchez came back out of the apartment, they continued yelling. Felch was "[w]orried about dying or being beat up." RP (Sept. 12, 2019) at 52. He explained, "[T]hey came back out and I had a gun. I figure they must have had one, too. Why would someone do that if they didn't have a weapon? That's nuts. It scared me to death." RP (Sept. 12, 2019) at 53.

Felch saw someone on a nearby porch come out with a baseball bat. He thought someone would hit him with the bat, which would do a lot of damage to the metal plate in his arm. He testified, "I pulled the trigger on my gun. I didn't know if they were coming at me or what. They hollered at me that they would—" RP (Sept. 12, 2019) at 56. His intent upon firing was "[t]o get out of there alive." RP (Sept. 12, 2019) at 57. He "wasn't really aiming" and was "just pointing [in] that direction." RP (Sept. 12, 2019) at 68. He

intended to shoot once, but after the first shot the "gun started going" and "jumped in [his] hand." RP (Sept. 12, 2019) at 65, 73.

On cross-examination, Felch explained he was disappointed that Fowler was staying with Reimer. Although he had broken up with Fowler one month prior to the shooting, he had been in love with her and had previously asked her to marry him. He wanted to see if Fowler's stuff would be safe if he brought it to Reimer's house. He also wanted to talk to Reimer to tell him that Fowler was still hanging around his house sometimes.

Felch did not leave immediately after the shooting because he was in shock. He testified that he was terrified, but acknowledged that he stayed there after Reimers and Sanchez went inside—rather than going home or calling for help.

Jury instructions, verdict, and sentencing

The jury was instructed on first and second degree murder, first and second degree assault, and the following defense:

> It is a defense to a charge of attempted murder, (any degree), and assault, (any degree) that the attempted murder, or assault was justifiable as defined in this instruction.
>
> Any attempted murder, and any assault is justifiable when committed in the lawful defense of the defendant when:
>
> (1) the defendant reasonably believed that the person attempted to be slain or assaulted or others whom the defendant reasonably believed were acting in concert, intended to inflict death or great personal injury;

> (2) the defendant reasonably believed that there was imminent danger of such harm being accomplished; and
>
> (3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the attempted murder, and assault was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return verdicts of not guilty.

Clerk's Papers (CP) at 256. The next instruction provided that the law imposes no duty to retreat.

The jury found Felch (1) not guilty of attempted murder in the first degree of Reimers as charged in count 1 but guilty of the lesser included crime of attempted murder in the second degree, (2) guilty of first degree assault of Reimers as charged in count 2, (3) guilty of first degree assault of Sanchez as charged in count 3, and (4) not guilty of first degree assault of Fowler as charged in count 4, but guilty of the lesser included offense of second degree assault. By special verdicts, the jury found that Felch and Fowler were members of the same family or household and that Felch was armed with a firearm for each count.

The trial court found that counts 1 and 2 merged. At sentencing, Felch requested an exceptional sentence downward. He first argued that Reimers and Sanchez were the

"initiators or aggressors or provokers" and his failed self-defense could be a basis for a downward sentence. RP (Oct. 17, 2019) at 265. Second, he argued the multiple offense policy results in a clearly excessive sentence—the State asked for 485 months when the midpoint range for attempted second degree murder is 194 months.

Felch also requested the court revisit the mandatory minimum on count 3. He argued that under *State v. Dyson*, 189 Wn. App. 215, 360 P.3d 25 (2015), any mandatory minimum requirement has to be submitted to the jury for specific findings.

The State asked the court to impose the high end within the standard sentencing range. It reminded the court that Felch both brought a gun to the victims' home that night and argued they were not the initiators.

After allowing Felch to make a statement, the following exchange took place:

> THE COURT: . . . What the Court saw is that you and [Fowler] had a relationship, didn't work out for you, and you're pacing in front of her new boyfriend's apartment complex. You don't live there, and you got a gun on you, and it shows you went back and forth across several times.
>
> . . . .
>
> . . . Then they come down to confront you to tell you to leave and you pull out a gun, and they run back to their apartment. You should have left.
>
> [FELCH]: I was trying to leave when they came back out and started yelling at me again.
>
> THE COURT: Listen to what I'm saying. You could have left. Instead they came back out, and they're thinking they're out on their porch. Even if you take your scenario that they're yelling at you from the second floor, you still could have left, but instead you pull it out and start shooting

> at an apartment complex that could have resulted in a lot more deaths in that building, and then you got a kid who hears the shots and comes out with a baseball bat on the second floor.
>
> [FELCH]: Ma'am, he was out with the bat before I fired.
>
> THE COURT: And you continued to walk, and then you stopped and shot again.
>
> . . . .
>
> So when the Court looks at that with the weapons enhancement, you got a lot of time just on the minimums. I probably think considering this crime that you probably should get the high end, but based on your history and the amounts you've got here, I think I'm going to end up just giving you the low end on each of these.

RP (Oct. 17, 2019) at 272-73.

The court imposed a total term of 380.25 months' imprisonment with a mandatory 60-month minimum for count 3.

Felch timely appealed.

ANALYSIS

SUFFICIENCY OF EVIDENCE

Felch contends the State brought insufficient evidence to disprove his self-defense claim. We disagree.

Self-defense claims are defined by statute. Homicide is justifiable when it is committed:

> In the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished.

RCW 9A.16.050.

To raise a self-defense claim, "the defendant must first offer credible evidence tending to prove self-defense." *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999). That evidence must show (1) the defendant subjectively feared imminent danger of death or great bodily harm, (2) this belief was objectively reasonable, (3) the defendant used no greater force than was reasonably necessary, and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). The first element "requires the jury to stand in the shoes of the defendant and consider all of the facts and circumstances known to him or her" while the second element "requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done." *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

When a defendant brings evidence supporting self-defense, the burden shifts to the State to disprove the claim beyond a reasonable doubt. *State v. Miller*, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997). A defendant claiming the State failed to disprove self-defense must show that the evidence, when viewed in the light most favorable to the State, would convince no reasonable person to find the essential elements of the crime

beyond a reasonable doubt. *See State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (sufficiency of evidence standard generally).

The jury was instructed on self-defense. Felch's self-defense evidence does not meet the four-element standard articulated above. First, the evidence of his subjective fear was weak. Although he testified that he was "terrified" when Sanchez and Reimers confronted him, they retreated when he brandished a gun. He alleges they continued yelling at him from the porch, but he chose not to leave. Nor did he leave when Reimers and Sanchez went back into the apartment. This evidence tends to show Felch was *not* afraid for his life despite his testimony to the contrary. The jury determined Felch's testimony was not credible and such determinations are not subject to appellate review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Second, Felch's conduct was not objectively reasonable. Sanchez, Reimers, and Fowler testified consistently about the events leading up to the shooting. Felch testified inconsistently with their accounts. The jury watched the video footage. Evidently, the jury determined a reasonably prudent person in Felch's situation would not have reasonably feared imminent danger from Sanchez and Reimers. Felch's decision to stay where he was after brandishing his weapon and then shoot at an apartment complex

almost one minute after Reimers and Sanchez retreated does not support his claim that his fear of harm was objectively reasonable.

Third, Felch used more force than reasonably necessary to defend himself. Although he saw Sanchez's 12-year-old son with a bat, Sanchez's son was many yards away from Felch on a second-story porch. Neither Reimer nor Sanchez was armed, and they too were quite far from Felch on a second-story porch. His use of force (shooting) was certainly greater than necessary given these circumstances.

Fourth, Felch likely was the aggressor. Generally, "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws . . . ." *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Here, Felch was armed and pacing by his ex-girlfriend's house, refused to leave when asked, and escalated the situation by brandishing his gun. Although Reimers and Sanchez approached Felch first and yelled at him to leave, they testified—consistent with Fowler—that they did not threaten him. Felch could have left but he instead initiated violence by drawing and later shooting his gun. *See id.* at 910 (when "the defendant made the first move by drawing a weapon" the aggressor instruction is warranted).

Viewing the evidence in the light most favorable to the State, we conclude that a reasonable person could find that the State disproved Felch's self-defense claim beyond a reasonable doubt.

EXCEPTIONAL SENTENCE

Felch argues the trial court erred in failing to consider his request for an exceptional sentence downward. We disagree.

"Under the Sentencing Reform Act of 1981 [(SRA), chapter 9.94A RCW], a trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure." *State v. Smith*, 82 Wn. App. 153, 160-61, 916 P.2d 960 (1996); RCW 9.94A.535. Generally, appellate review is precluded for defendants challenging sentences that fall within the standard sentencing range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). However, a defendant may challenge such a sentence if the trial court "has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *Id.* at 330. Such a refusal must be "categorical," i.e., the court "takes the position that it will never impose a sentence below the standard range." *Id.* When "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence," a defendant may not appeal that discretionary ruling. *Id.*

This court will not reverse a trial court's discretionary decision unless it is manifestly unreasonable, made on untenable grounds, or with untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Citing *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006), Felch argues the trial court abused its discretion by not meaningfully considering his request for an exceptional sentence downward on the record. *Korum* does not stand for that proposition. The *Korum* court noted, "*Even though it was not required to do so*, the sentencing court did consider a downward departure . . . ." *Id.* at 637 (emphasis added). It reiterated that a trial court "has the discretion to determine whether the circumstances warrant an exceptional sentence downward." *Id.*

Felch argued that two mitigating factors supported an exceptional sentence downward. First, Reimers and Sanchez were the initial aggressors, and, second, the multiple offense policy resulted in a presumptive sentence that is clearly excessive. *See* RCW 9.94A.535(1)(a), (g).

The trial court implicitly rejected Felch's claim that Reimers and Sanchez were the initial aggressors. It noted that Felch was pacing outside his ex-girlfriend's house, where he did not live, was told to leave, and could have left after displaying his weapon. Instead of leaving, he escalated the situation by standing outside, waiting for the victims to

reemerge, and shooting at an apartment complex. The trial court's rejection of Felch's self-defense argument was not impermissible and its imposition of a sentence within the standard range was reasonable.

The trial court also implicitly rejected Felch's argument that the presumptive sentence was clearly excessive. After noting that Felch could have killed many people and he probably should get a high-end sentence, it instead imposed a low-end sentence, noting the amount of time he was facing.

Finally, contrary to Felch's contention, the trial court did not refuse to exercise its discretion. That is, it did not take a position that it would *never* impose a sentence below the standard range. The court explained the facts and exercised its discretion in a reasonable manner. The court had discretion to consider an exceptional sentence, but was "in no way required to depart from the presumptive sentence." *Korum*, 157 Wn.2d at 637. We will not reverse such a decision absent abuse of discretion or misapplication of the law, neither of which occurred here. *See State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

MANDATORY MINIMUM

Felch contends the trial court erred in imposing the mandatory minimum sentence for count 3 without the jury making a separate factual finding that he used force likely to

result in death or intended to kill the victim. The State concedes this issue. We accept the State's concession but disagree that remand is necessary.

In *Dyson*, this court addressed the issue Felch raises here. There, we held that the imposition of a mandatory minimum based on judicial findings not submitted to the jury violates a defendant's constitutional rights. 189 Wn. App. at 227-28. We explained that, under *Alleyne v. United States*, 570 U.S. 99, 228, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), "a jury must find beyond a reasonable doubt those facts that trigger a mandatory minimum sentence." *Dyson*, 189 Wn. App. at 228. Mandatory minimums prejudice defendants because they preclude the ability to apply for early release, thus potentially resulting in a longer imprisonment. *See id.*

Here, the jury did not make the required factual finding provided for in RCW 9.94A.540(1)(b).[2] The court cannot impose a mandatory minimum without the jury's finding. However, the 60-month mandatory minimum sentence imposed on count 3 represents substantially less than Felch's 153-month standard range sentence on that count. To order resentencing would serve no useful purpose. Instead, we remand for the trial court to enter an order modifying paragraph 4.1(a) of Felch's judgment and sentence

[2] "An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years."

by striking the language that imposes a 60-month minimum term of confinement on count 3.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review (SAG), Felch raises two issues, both of which are framed as instances of judicial bias. We lay out the relevant standards before addressing each issue.

"At a minimum, due process 'requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (internal quotation marks omitted) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)). We presume a trial court performs its duties without bias. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). The party alleging bias must overcome that presumption with specific facts to evince actual or apparent bias. *Davis*, 152 Wn.2d at 692; *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). "Judicial rulings alone almost never constitute a valid showing of bias." *Davis*, 152 Wn.2d at 692.

SAG #1: Judicial bias—prejudice

Felch contends the trial judge demonstrated prejudice against him at sentencing because when he brought up the portion of his testimony that was struck from the record (due to hearsay issues), the judge told him the rules were different because he was the defendant. Felch argues this statement shows the judge believed Felch was guilty before trial. We disagree.

The hearsay rules treat a party differently than a witness. ER 801 provides in relevant part:

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if—
>
> . . . .
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement . . . .

Therefore, the trial judge properly permitted witnesses to testify about what Felch said while not allowing Felch to testify about what witnesses said. The trial judge did not show bias. Instead, the judge correctly applied this rule of evidence.

Felch also says the trial judge would not permit him to bring up that he is disabled. He does not provide specific facts evincing actual or apparent bias nor does he provide citation to the record or authority. We decline to review this claim. RAP 10.3(a)(6).

SAG #2: Judicial bias—family member

Felch next argues that the trial judge went to high school with the mother of his nephew.[3] Felch's point is unclear. We do not see how a judge going to high school with a distant relative of a defendant creates any improper risk of bias. Judges should disqualify themselves when they are within three degrees of relationship to a party or material witness. CJC 2.11(A)(2). But having gone to high school with a party's extended relative is not prohibited by the ethics rules.

Felch also argues the trial judge conceded bias when the judge instructed the jury several times to ignore the judge's behavior because the Washington Constitution forbade the judge from assuming guilt. Again, he does not cite to the record. We are confident, however, that the trial judge's instruction to the jury was a standard cautionary one routinely given throughout trial. The instruction, given as a concluding instruction before the jury deliberated, states:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I

[3] His SAG reads: "Judge Plese went to high school with Michelle Dietz . . . mother of Maria Constance Schlienger mother of my nephew Paul David Felch's daughter whom Judge Plese is not suppose to have anything to do with. My nephew that is, so this might have influenced the Judge's behavior . . . ."

> have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP at 224. The giving of this or a similar standard instruction does not establish the trial judge was biased. We reject Felch's claims of judicial bias.

Affirm, but remand for entry of order striking minimum term on count 3.

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.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

November 15, 2021 - 9:19 AM

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