No. 89388-8
(Court of Appeals No. 68709-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SMITH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Christopher Smith, defendant and appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Smith seeks review of the Court of Appeals decision affirming his conviction for unlawful possession of a firearm. State v. Christopher Smith, No. 68709-3-I. A copy of the decision dated August 26, 2013, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures and those used as a pretext to avoid the warrant requirement. The trial court determined the deputy's stop of Mr. Smith was constitutional based upon the officer's observation that (1) Mr. Smith was looking into parked cars near an area where vehicle prowling had been reported days earlier and (2) was riding a bicycle without a helmet. The Court of Appeals affirmed the trial court, determining that the act of looking at cars while riding a bicycle justified an investigative stop because there had been vehicle prowls in the area.

a. Bicyclists' safety requires they check parked cars for drivers and passengers to avoid running into an opening car door. Did the officer's observation that Mr. Smith was looking into parked cars as he rode his bicycle combined with the officer's knowledge that vehicle prowling had been reported nearby in the past provide the specific, objective facts to support a reasonable suspicion that Mr. Smith had committed or was about to commit a crime?

b. The City of Shoreline has no law prohibiting people from riding bicycles without a helmet, and the King County Department of Health Code requires helmets only on street and bicycle paths in King County and the City of Seattle. Where Mr. Smith was riding his bicycle on the sidewalk in the City of Shoreline, did the deputy have a valid reason to stop him for violating the county bicycle regulations?

c. The Court of Appeals held the sheriff's deputy's seizure of Mr. Smith was not a pretext stop because the officer had sufficient facts to justify stopping Mr. Smith for car prowling. Does a de novo review of the totality of the circumstances demonstrate the deputy used the helmet infraction as a pretext to investigate the deputy's suspicions of other criminal activity?

2. The defendant has the constitutional right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Mr. Smith was not permitted to possess a firearm, but he retained the right to protect himself or another person. Must Mr. Smith's conviction for unlawful possession of a weapon in the first degree be reversed because the trial court incorrectly refused jury instructions on the defense of necessity?

D. STATEMENT OF THE CASE

Christopher Smith's fifteen-year-old son Kenneth left their Shoreline home after an argument one evening without telling any family members where he was going. RP 16, 152-53, 156. A few weeks earlier, Kenneth had an encounter with young men at a neighborhood park, and a boy pulled a knife on Kenneth. RP 153-54. When Kenneth backed off, the boy called his father, and Kenneth heard the father say he was coming to the park with a gun. RP 154.

Mr. Smith was aware of the incident, so he when Kenneth left their home, he went looking for his son on a bicycle. RP 59, 86-87, 155, 161. King County Sheriff's Deputy Benjamin Callahan saw Mr. Smith riding on 5th Avenue Northeast in Shoreline. RP 11-12, 16, 17-18. He initially noticed that Mr. Smith was not wearing a bicycle

helmet. RP 17-18. He continued to watch Mr. Smith and believed Mr. Smith was riding between parked cars and looking into them. RP 18. Deputy Callahan said he had recently taken reports of auto-prowling incidents within about five blocks of the area. RP 20-21.

Deputy Callahan pulled over to the side of the road and tried to talk to Mr. Smith, but Mr. Smith continued riding. RP 24-25. The deputy got out of his car and stopped Mr. Smith as Mr. Smith rode into his own driveway. RP 28-34. Upon arresting Mr. Smith for obstruction, the deputy found a revolver in the fanny pack Mr. Smith was wearing. RP 36-38.

Mr. Smith had a prior conviction that prohibited him from possessing a firearm, but he explained that he was looking for his son and needed the gun to protect his family. RP 43-44, 48, 59. In addition to Kenneth's encounter in the park, Mr. Smith's niece had been the victim of a rape and was being intimidated by the perpetrator. RP 46.

The King County Prosecutor charged Mr. Smith with unlawful possession of a firearm in the first degree. CP 1. Prior to trial, the court denied Mr. Smith's motion to suppress the firearm, finding Deputy Callahan (1) had a reasonable and articulable suspicion to justify stopping Mr. Smith because he was looking into cars and the

officer was aware of recent car prowls in the area and (2) was justified in stopping Mr. Smith because he was not wearing a bicycle helmet. RP 128; CP 91-92. The court added it was not a pretext stop. RP 149-51.

The State moved to prevent Mr. Smith from presenting evidence of a necessity defense at trial, which the court addressed via a pre-trial offer of proof. CP 114-16; RP 129, 145-48, 151-61. The court ruled that Mr. Smith could not present a necessity defense. CP 94-96; RP 163-66.

Mr. Smith was convicted of possession of a firearm after waiving his right to a jury trial. CP 51-68; RP 185-86. His conviction was affirmed on appeal, and he now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The stop violated Article I, section 7 because the deputy did not have a reasonable suspicion based upon articulable facts that Mr. Smith was involved in criminal activity.**

The Court of Appeals upheld Deputy Callahan's stop of Mr. Smith, finding the deputy had reasonable suspicion based upon articulable facts that Mr. Smith committed or was about to commit a crime. Slip Op. at 3-9. The court therefore did not address whether the stop could be justified based upon a bicycle helmet violation. Slip Op.

at 9. Mr. Smith's actions, however, were those of a cautious bicycle rider attempting to avoid an accident. Since the deputy lacked authority to issue a citation for violation of the King County bicycle helmet regulations in the City of Shoreline, the stop was unconstitutional. Moreover, the civil infraction appears to be a pretext. This Court should accept review of this state constitutional issue. RAP 13.4(b)(3).

Article I, section 7 succinctly provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under both the state and federal constitutions Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement applies. State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121, rev. denied, 138 Wn.2d 1014 (1999). Article I, section 7, however, provides broader protection of an individual's "private affairs" than does the Fourth Amendment. State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012); State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). "Under article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited." Arreola, 176 Wn.2d at 291. Thus, "[w]arrantless

disturbances of private affairs are subject to a high degree of scrutiny." Id. at 292.

Warrantless searches are per se unreasonable. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). When a warrantless search is conducted, the State must prove that one of the narrowly-drawn exceptions to the warrant requirement applies. Ladson, 138 Wn.2d at 349-50. The warrant requirement is especially important for an article I, section 7 analysis because "it is the warrant that provides the 'authority of law'" referenced in the constitution. Id. at 350.

a. This Court should accept review because Mr. Smith's conduct did not provide the basis for an investigative stop. One exception to the warrant requirement is an investigative stop. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A police officer may briefly detain a citizen if the officer has "a reasonable, articulable suspicion, based upon specific, objective facts, that the person seized has committed or is about to commit a crime." Gatewood, 163 Wn.2d at 539 (emphasis in original) (quoting State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). The officers'

actions must be justified "at their inception." Id.; Ladson, 138 Wn.2d at 350.

The Court of Appeals held that peering into car windows in an area where car prowls had been reported justified the stop of Mr. Smith. Slip Op. at 8. Innocuous facts, however, cannot support an investigative stop. State v. Armenta, 134 Wn.2d 1, 13-14, 948 P.2d 1280 (1997).

The facts of this case are innocuous. Bicycle riders need to be aware of nearby motor vehicles, even parked cars, in order to protect themselves. An occupant of a parked car may open a car door without checking for bicycle riders, resulting in a possibly fatal accident.[1] Checking inside parked cars is thus necessary to prevent being "doored."[2]

Deputy Callahan knew of reports of vehicle prowls a few blocks away in the past, but not that evening. The fact that Mr. Smith was in the area does not justify a Terry stop. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); State v. Martinez, 135 Wn. App. 174, 180,

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[1] http://en.wikipedia.org/wiki/Door_zone (3% of fatal bicycle accidents in New York City between 1996 and 2005 occurred when bicyclist struck open car door or swerved to avoid the door) (last viewed 9/25/13); see e.g. http://gothamist.com/2012/06/17/cyclist_fatally_doored_in_queens_no.phph (bicyclist killed after riding into car door) (last viewed 9/25/13).

http://bicycling.com/training-nutrician/injury-prevention/doored (last viewed 9/25/13).

143 P.2d 855 (2006) (vehicle prowls had been reported in the area, but not that evening).

In determining that the limited facts in this case support the investigative stop, the Court of Appeals opinion conflicts with Doughty, supra. In Doughty police officers observed the defendant approach a house at 3:20 a.m., remain inside for about two minutes, and then drive away. Doughty, 170 Wn.2d at 59-60. The police were aware of complaints from neighbors about the large amount of "short stay traffic" at the house, and they stopped Doughty because they suspected he was involved in drug activity. Id. After checking Doughty's records, the officer arrested him for driving with a suspended operator's license, searched his car, and found methamphetamine. Id. at 60.

This Court held the investigatory stop was unconstitutional, as the totality of the circumstances known to the police did not provide a reasonable suspicion he was involved in criminal activity. Id. at 65. "The Terry-stop threshold was created to stop police from this very brand of interference with people's everyday lives." Id. at 64.

Mr. Smith was similarly engaged in his everyday live, riding a bicycle on a sidewalk near his home. This Court should review this case. RAP 13.4(b)(1), (3).

b. Review of this case would also permit this Court to determine if the deputy lacked authority to issue Mr. Smith a civil infraction for not wearing a bicycle helmet. The City of Shoreline is a code city with its own municipal code that addresses traffic and public health among many other areas. Shoreline Municipal Code Titles 8, 10; www.cityofshoreline.com/index/aspx?page=43 (last viewed 9/25/13). Shoreline does not have a bicycle helmet law.

The trial court, however, held the stop was justified under a King County Health Board bicycle helmet regulation. CP 91. The regulation requires anyone riding a bicycle "on a public roadway, bicycle path or on any right-of-way or publicly owned facilities located in King County including Seattle" to wear a bicycle helmet.[3] Code of the King County Health Board §§ 9.01.020(A), 9.10.010(A) (hereafter Health Board Code).

By its language, the Health Board Code regulation applies only to public roadways in King County and City of Seattle, not the City of

[3] Violation of this regulation is a civil infraction punishable by a fine that may not exceed $30.00. Health Board Code § 9.15.010(A), (C) (2003).

Shoreline. Health Board Code § 9.10.010(A). When a statute lists only one city, it is impliedly excluding others. See State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (statutes construed pursuant to the rule "expression unius est exclusion alterus").

In addition, the code language does not include bicyclists riding on sidewalks. Health Board Code § 9.10.010(A). In Washington, a "roadway" does not include a sidewalk. RCW 46.04.500 (defining "roadway" as the portion of a highway designed or used for vehicular traffic "exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles."

Whether the King County Health Board Code bicycle helmet regulation applies in cities not mentioned in the code or to riders on sidewalks is an issue of public importance that should be addressed by this Court. RAP 13.4(b)(4).

c. This Court should also review whether the stop of Mr. Smith was a pretext stops. Article I, section 7 prohibits law enforcement from conducting a traffic stop as a pretext to investigate suspected criminal activity. Arreola, 176 Wn.2d at 294; Ladson, 138 Wn.2d at 358. "A pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the

true reason for the seizure is not exempt from the warrant requirements.'" Arreola, 176 Wn.2d at 294 (quoting Ladson, 138 Wn.2d at 358). In short, the "police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." Ladson, 138 Wn.2d at 349. Washington's "constitution requires we look beyond the formal justification for the stop to the actual one." Id. at 353.

This Court recently announced a new rule that a "mixed motive traffic stop"- one based upon both legitimate and illegitimate grounds – is not unconstitutionally pretextual. Arreola, 176 Wn.2d at 297. In that case the police officer admitted he followed a vehicle that matched the description of a possible driving under the influence (DUI) in progress, did not observe any signs of DUI, but observed the vehicle had an altered exhaust in violation of state law. Id. at 288-89. The officer pulled over the vehicle and eventually arrested the driver for outstanding warrants. Id. at 290.

Such a mixed-motive traffic stop is not unconstitutionally pretextual so long as the lawfully-based motive for the stop was actual, independent and conscious. Arreola. at 297-98. Both subjective intent and objective circumstances must be considered in determining

whether there was an actual, independent, and conscious legal basis for the stop in addition to the unconstitutional, pretextual basis. Id. at 298-99.

Here, the deputy testified he noticed that Mr. Smith was riding a bicycle without a helmet or light, but he did not decide to stop Mr. Smith until he saw him look into car windows and until Mr. Smith appeared startled when he saw the police car. RP 18, 22, 54, 64. Deputy Callahan never mentioned the helmet infraction when he talked to Mr. Smith, instead asking questions concerning the possible vehicle prowling and unlawful possession of a firearm. RP 34, 39, 43-44, 46-48, 59-60, 65. Furthermore, failing to wear a bicycle helmet is not a violation that endangers public safety beyond the individual rider. This distinguishes the suspected infraction here from the vehicle exhaust irregularity noted by the officer in Arreola, 176 Wn.2d at 289, 293.

The Court of Appeals held that the stop of Mr. Smith was not pretextual because the stop was justified by the officer's suspicions that Mr. Smith was involved in vehicle prowling. Slip Op. at 11-12. As argued above, however, the deputy did not have a reasonable suspicion that Mr. Smith was involved in criminal activity. This Court should accept review because the deputy's stated reasons for the stop and his

actions proved that the stop was a pretext to circumvent the narrow exceptions to the warrant requirement. RAP 13.4(b)(3).

2. **The trial court's refusal to instruct the jury on the defense of necessity violated Mr. Smith's constitutional right to present his defense.**

While a person with felony a conviction is legally prohibited from possessing a firearm, he maintains the right to use a firearm if necessary to defend himself or another person. The trial court ruled that Mr. Smith would not be entitled to a jury instruction explaining the defense of necessity, and the Court of Appeals affirmed the ruling. Slip Op. at 12-16. This Court should accept review because Mr. Smith's constitutional right to present his defense was violated and because this Court has never addresses the necessity defense in prosecutions for unlawful possession of a firearm. RAP 13.4(b)(3), (4).

The federal and state constitutions provide the accused the right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). In order to honor this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the

trial court's failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm. State v. Jeffrey, 77 Wn. App. 222. 224, 889 P.2d 805 (1998); Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. 1527, 1727-28 (2005). Although Mr. Smith was legally prohibited from possessing a firearm, he retained the limited right to use a firearm if necessary to defend himself or another person. State v. Stockton, 91 Wn. App. 35, 43-44, 955 P.2d 805 (1998); Jeffrey, 77 Wn. App. at 225-26. This defense applies when the defendant acts in defense of another as well as when he acts in self-defense. United States v. Newcomb, 6 F.3d 1129, 1135-36 (6th Cir. 1993); United States v. Paolello, 951 F.2d 537, 542 (1991).

Moreover, both the federal and the state constitutions guarantee citizens the right to bear arms. U.S. Const. amends. II, XIV; Const. art. I, § 24. The right to arm oneself in self-defense is particularly important in Washington. State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995 (2010) (art. I, § 24 "means what it says. From time to time, people of the West had to use weapons to defend themselves and were not

interested in being disarmed") (quoting Hugh Spitzer, Bearing Arms in Washington State 9 (Proceedings of the Spring Conference of Municipal Attorneys (4/24/97)).

The Jeffrey Court found that the defendant did not meet the criteria for a necessity defense, as alternatives to using a weapon were available to him. Jeffrey, 77 Wn. App. at 227. In so ruling, the court made it clear that a felon is not required to forgo the use of a weapon if he is threatened with immediate danger.

> We agree it is clear that handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns. However, the statute does not address the unforeseen and sudden situation when an individual is threatened with impending danger. Certainly, the Legislature did not intend for a person threatened with immediate harm to succumb to an attacker rather than act in self-defense.

Id. at 226.

In deciding whether to instruct the jury on a defense the trial court must look at the evidence in the light favorable to the defendant; it is the jury's job to weigh the evidence and evaluate witness credibility. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d. 1010 (2006). Mr. Smith's son had been threatened with a weapon, and Mr. Smith was carrying a gun because he was afraid for his son's safety. This Court has never

addressed the necessity defense for the charge of unlawful possession of a firearm. This Court should accept review of this constitutional issue. RAP 13.4(b)(3).

F. CONCLUSION

Petitioner Christopher Smith asks this Court to accept review of the Court of Appeals decision affirming his conviction for unlawful possession of a firearm.

DATED this 25th day of September 2013.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS DECISION TERMINATING REVIEW

August 26, 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 68709-3-I
Respondent,	)	DIVISION ONE
v.	)	
CHRISTOPHER M. SMITH, SR.,	)	UNPUBLISHED
Appellant.	)	FILED: August 26, 2013

Cox, J. — A Terry stop requires a well-founded suspicion that the defendant has committed or is about to commit a crime.[1] The State has the burden to show by clear and convincing evidence that under the totality of the circumstances, a Terry investigatory stop is justified.[2] And a defense of necessity instruction requires sufficient evidence to support that defense.[3]

Here, the State established that the investigatory stop of Christopher Smith by a sheriff's deputy was proper. He does not challenge the search incident to his subsequent arrest. And Smith fails to show that there was

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[1] State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

[2] Id.; State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

[3] See State v. Jeffrey 77 Wn. App. 222, 224-25, 889 P.2d 956 (1995) (noting that a defendant may only obtain a defense of necessity instruction if he can prove four factors by a preponderance of the evidence).

sufficient evidence to support his requested instruction of necessity to the charge of unlawful possession of a firearm. We affirm.

King County Sheriff's Deputy Benjamin Callahan observed Smith riding his bike without a helmet while the deputy was patrolling an area in the city of Shoreline. The deputy was aware of recent reports of car prowling in a nearby area. As Smith rode along the sidewalk, he peered into the windows of the cars parked along the street. Deputy Callahan testified at the suppression hearing that after Smith passed him on his bike, he turned his car around to follow Smith. He did so both to conduct an investigatory stop based on Smith's conduct and because of his failure to wear a bike helmet. Deputy Callahan attempted to talk to Smith, who ignored him. The deputy then turned on his patrol car's lights and told Smith to "stop." Smith ignored this command and continued to bike toward his house. Deputy Callahan ran after Smith and physically seized him. In a search incident to arrest, the deputy discovered a gun in the fanny pack around Smith's waist. Following Miranda warnings, Smith admitted that he was not supposed to have a firearm because of his felony convictions. He claimed he needed the gun to protect his family.

The State charged Smith with first degree unlawful possession of a firearm. Smith moved to suppress evidence of the gun as well as his statements to the deputy on the basis that the investigatory stop was unconstitutional. The court disagreed, denying the motion. Thereafter, the court entered written findings of fact and conclusions of law, which incorporated his oral rulings denying the motion.

The State moved in limine to prevent Smith from arguing a defense of necessity at trial. Smith, in an offer of proof to the trial court, argued that his possession of the gun was necessary because of threats made to his son two weeks before the night in question. The trial court ruled that Smith had not shown by a preponderance of the evidence that he met any of the requirements to present a defense of necessity. Thus, it granted the State's motion.

Smith then waived his right to a jury trial and agreed to a trial on stipulated evidence. Based on this evidence, the court found Smith guilty of unlawful possession of a firearm.

Smith appeals.

SUPPRESSION MOTION

Smith argues that the trial court erred in denying his motion to suppress the gun as evidence. We disagree.

Terry Stop

Smith first argues that the trial court erred when it concluded that Deputy Callahan had a reasonable suspicion based on articulable facts to conduct an investigatory stop. We hold that the stop was valid.

Article I, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[4] The Fourth Amendment to the United States Constitution provides "the right of the people to be secure in their persons, houses, papers, and effects,

[4] WASH. CONST. art. I, § 7.

against unreasonable searches and seizures . . . ."[5] Thus, under both the Washington and federal constitutions, warrantless searches and seizures are presumptively unconstitutional, unless they fall within several narrow exceptions.[6] A Terry investigatory stop is such an exception.[7]

We review de novo whether a warrantless stop is constitutional.[8] Similarly, we review de novo whether the trial court's conclusions of law are supported by the findings of fact.[9] The trial court's findings of fact are reviewed for substantial evidence.[10] Unchallenged findings of fact are verities on appeal.[11]

Here, Smith does not challenge the trial court's findings of fact, and thus they are verities on appeal. Rather, he challenges the trial court's conclusions of law on the validity of the stop. We reject this argument.

As noted above, a Terry stop requires a well-founded suspicion that the defendant has committed or is about to commit a crime.[12] "The officers' actions must be justified at their inception."[13] "'[I]n justifying the particular intrusion the

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[5] U.S. CONST. amend. IV.

[6] Doughty, 170 Wn.2d at 61.

[7] State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

[8] State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006) (citing State v. Rankin, 151 Wn.2d 698, 694, 92 P.3d 202 (2004)).

[9] Id. (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

[10] Id. (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)).

[11] State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006).

[12] Doughty, 170 Wn.2d at 62 (citing Terry, 392 U.S. at 21).

[13] Gatewood, 163 Wn.2d at 539.

police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion.'"[14] The State has the burden to show by clear and convincing evidence that under the totality of the circumstances, the Terry stop was justified.[15]

In Terry v. Ohio,[16] the United States Supreme Court determined that an officer can detain a suspect for an investigatory stop without probable cause if the officer has a well-founded suspicion that criminal activity is taking place.[17] In Terry, a detective noticed Terry and another man standing on a street corner.[18]

> [The detective] saw one of the men leave the other one and walk southwest . . . past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. . . . The two men repeated this ritual alternatively between five and six times apiece—in all, roughly a dozen trips.[19]

The United States Supreme Court held that the actions of Terry and the other man constituted facts sufficient to substantiate the deputy's articulable suspicion, justifying the investigatory stop.[20]

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[14] Doughty, 170 Wn.2d at 62 (alteration in original) (quoting Terry, 392 U.S. at 21).

[15] Id.; Glover, 116 Wn.2d at 514.

[16] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[17] Id. at 27.

[18] Id. at 5.

[19] Id. at 5-6.

[20] Id. at 27-28.

Given the totality of the circumstances here, Deputy Callahan had a reasonable and articulable suspicion that Smith had committed or was going to commit a crime: car prowling. It was an undisputed fact that Deputy Callahan knew of a rash of recent car prowl reports near the area where he encountered Smith riding his bike. The trial court also found that Smith "rode along the sidewalk . . . peering into windows of cars parked along the street."[21] The trial court concluded that Smith's "action of peering into cars as he rode along was a reasonable basis to conclude this was consistent with car prowling."[22] We agree.

Smith relies on state authority reaching contrary results. The cases on which he relies are distinguishable.

In State v. Doughty, the supreme court held that the accused's actions did not support a Terry stop.[23] There, a police officer observed Doughty at 3:20 a.m., "park his car, approach a house, return to his car less than two minutes later, and drive away."[24] The officer did not see either what Doughty did at the house or with whom he interacted.[25] But the officer was concerned because neighbors had reported "'large quantities of short stay traffic' at the house,

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[21] Clerk's Papers at 91.

[22] Id.

[23] 170 Wn.2d 57, 60, 239 P.3d 573 (2010).

[24] Id.

[25] Id.

prompting police to identify it as a 'drug house.'"[26] The officer consequently stopped Doughty based on suspicion of drug activity.[27]

The State argued that Doughty was not unconstitutionally stopped. It pointed to (1) law enforcement's identification of the house where Doughty stopped as a drug house; (2) the previous complaints received by police from neighbors about the house; (3) Doughty's visit to the house at 3:20 a.m.; and (4) the fact that this visit lasted less than two minutes.[28]

The supreme court held that these facts were insufficient for a stop, given the totality of the circumstances.[29] Doughty's presence "in a high-crime area at a 'late hour'" [did] not, by itself, give rise to a reasonable suspicion" that justified detaining him.[30] The court viewed the stop as one based on Doughty's visiting a location—even a suspected drug house --- at 3:20 a.m. for only a few minutes.[31] That was not enough for a valid stop.

Similarly, in State v. Martinez, Division Three of this court held that the mere fact that Martinez was walking at 12:46 a.m. in a "high crime" area where vehicle prowls had been reported did not justify a Terry stop.[32] "The problem here is not with the officer's suspicion; the problem is with the absence of a

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[26] Id.

[27] Id.

[28] Id. at 62-63.

[29] Id. at 63.

[30] Id. at 62.

[31] Id. at 63.

[32] 135 Wn. App. 174, 177-78, 181-82, 143 P.3d 855 (2006).

particularized suspicion."[33] Thus, "there must be some suspicion of a particular crime or a particular person, and some connection between the two" to warrant a Terry stop.[34]

As demonstrated by Doughty and Martinez, any one of the unchallenged facts supporting the stop in this case, by itself, would not have provided a constitutional basis for Smith's stop.[35] If, as in Martinez, Deputy Callahan had only observed Smith riding his bike down the street in an area where car prowls had been reported, that fact alone would not have been sufficient to justify a Terry stop.[36] But Deputy Callahan also observed Smith peering into cars as he rode down the sidewalk. Together with the other facts, including the deputy's knowledge of recent car prowls in a nearby area, there was sufficient information to justify Deputy Callahan's investigatory stop of Smith. Thus, the trial court did not err when it concluded that:

> Deputy Callahan had a reasonable suspicion, based on articulable facts, to detain the defendant to investigate his action of peering into cars as he rode along the street. The deputy's attempt to stop the defendant to investigate was a reasonable 'Terry' stop, given the defendant's actions and the information the officer knew about recent car prowls in the area.[37]

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[33] Id. at 181-82 (some emphasis added) (citing State v. Duncan, 146 Wn.2d 166, 179, 43 P.3d 513 (2002); State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

[34] Id. at 182.

[35] See e.g., Martinez, 135 Wn. App. at 179-80; Doughty, 170 Wn.2d at 62.

[36] See Martinez, 135 Wn. App. at 179-80.

[37] Clerk's Papers at 91-92.

Smith contends that the fact that he appeared to be looking into parked cars "is innocuous." He states that:

> Bicycle riders are wise to be aware of any nearby motor vehicles in order to protect themselves. This is even true of parked cars . . . . The best way to prevent being "doored" is "a continued eye scanning and seeking on the part of the biker to see if there are people in the upcoming parked cars, and to give enough room in case a door does swing open to avoid getting clipped."[38]

But even "innocuous" behavior may provide the basis for an investigatory stop.[39] Thus, though looking in car windows while riding a bike could be an effort to avoid being "doored," it may also be consistent with car prowling, as the trial court determined. This was a valid investigatory stop on the basis the trial court decided.

Because this investigatory stop was valid on the basis we just discussed, there is no need to consider whether the stop was also valid on the basis that Smith was allegedly violating a King County ordinance for not wearing a bicycle helmet.

Smith does not challenge the search incident to his subsequent arrest. Because the stop was valid, we need not discuss this aspect of this case.

Pretextual Investigation

Smith next argues that the Terry stop was unconstitutional because the alleged civil infraction of riding without a helmet was a pretext to investigate

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[38] Brief of Appellant at 11-12 (quoting http://www.colbachlaw.com/portland_bicycle_lawyers.html (last viewed 12/3/12)).

[39] Kennedy, 107 Wn.2d at 6.

unrelated alleged criminal activity. We hold that there was no pretextual stop here.

We discussed earlier in this opinion why the seizure of Smith was a valid Terry stop based on the deputy's suspicion that Smith was car prowling. Smith's claim of pretext does nothing to diminish that conclusion.

Relying primarily on State v. Ladson[40] and its progeny, Smith argues that the stop was pretextual. We disagree.

This court reviews de novo conclusions of law, such as whether a stop is pretextual.[41]

As the supreme court explained in Ladson, a pretextual stop occurs when:

> the police [pull] over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.[42]

Under Ladson, a court determines whether a stop is pretextual by considering the totality of the circumstances.[43] In doing so, the court must consider "both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior."[44]

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[40] 138 Wn.2d 343, 979 P.2d 833 (1999).

[41] State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

[42] Ladson, 138 Wn.2d at 349.

[43] Id. at 358-59.

[44] Id.

Here, the trial court made an oral ruling on the claim of pretext. In its ruling, the court appears to have decided that both the objective and subjective elements of this test supported the validity of the stop.[45] And the trial court's written findings and conclusions expressly incorporated the court's oral rulings. In reviewing this record, we conclude that Ladson does not control.

Moreover, the supreme court's most recent opinion on pretextual stops, State v. Arreola,[46] further supports the validity of this investigatory stop. In Arreola, the supreme court held that a traffic stop motivated primarily by an uncorroborated tip "is not pretextual so long as the desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop."[47] In Arreola, Officer Valdivia's primary motivation in pulling the defendant's car over was to investigate a reported DUI.[48] But, because his secondary motivation, the car's altered exhaust in violation of RCW 46.37.390, was an actual reason to stop the defendant, the stop was not pretextual.[49]

In this case, a valid reason for the stop existed: suspected car prowling. Even if we assume Smith's alleged violation of the King County ordinace played

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[45] Report of Proceedings at 149-151.

[46] 176 Wn.2d 284, 290 P.3d 983 (2012).

[47] Id. at 288.

[48] Id. at 289.

[49] Id. at 299-300.

a role in the decision to stop Smith, it makes no difference to the validity of the stop. An independent basis for the stop existed. There was no pretext.

Smith argues that "'it is not enough for the State to show there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.'"[50] Smith quotes State v. Montes-Malindas,[51] a Division Three opinion. But in view of the supreme court's holding in Arreola, this case does not control here.

The Montes-Malindas court, in holding that a stop was pretextual and unconstitutional, stated that "[t]o satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code."[52] This is no longer the law after the supreme court's holding in Arreola. In sum, this stop was valid.[53]

DEFENSE OF NECESSITY INSTRUCTION

Smith argues that the trial court erred when it ruled that he was not entitled to an instruction on the defense of necessity. We disagree.

[50] Brief of Appellant at 19 (quoting State v. Montes-Malindas, 144 Wn. App. 254, 261, 182 P.3d 999 (2008)).

[51] 144 Wn. App. 254, 182 P.3d 999 (2008).

[52] Id. at 260.

[53] See Arreola, 176 Wn.2d at 298-99.

A criminal defendant has a constitutional right to present a defense.[54] "A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense. In evaluating whether the evidence is sufficient to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant."[55]

This court reviews de novo a claim of a denial of Sixth Amendment rights, including the denial of a defendant's right to present a defense.[56]

In State v. Jeffrey, Division Three of this court was the first Washington court to address whether necessity is an available defense for a violation of unlawful possession of a firearm.[57] It held that to obtain a defense of necessity instruction, a defendant must demonstrate that: (1) he "reasonably believed he or another was under unlawful and present threat of death or serious bodily 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 legal alternative;" and (4) "[t]here was a direct causal relationship between the criminal action and the avoidance of the threatened harm."[58]

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[54] Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[55] State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000)).

[56] State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

[57] 77 Wn. App. 222, 224, 889 P.2d 956 (1995).

[58] Id. at 224.

The Jeffrey court concluded that the defendant in that case was not entitled to an instruction on the defense of necessity.[59] Skip Jeffrey and his wife saw an individual directly outside their kitchen window and called the police.[60] The police arrived and searched the area, but, finding no one, left.[61] Jeffrey then called a friend who came over to the house and stayed for about an hour.[62] Before leaving, the friend left a handgun under the Jeffreys' couch.[63] The Jeffreys later heard noises outside the house and saw a figure outside the window.[64] Jeffrey fired the gun left by his friend through the headboard of the bed.[65] The Jeffreys then called the police again.[66] The police subsequently charged Jeffrey with unlawful possession of a firearm.[67]

Division Three concluded that the evidence presented did not support an instruction on the defense of necessity. "There was no verification of an individual actually lurking outside the house."[68] Nor was there "evidence he or she was capable of immediately entering the home or in any way posed a threat

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[59] Id. at 227.

[60] Id. at 223.

[61] Id.

[62] Id.

[63] Id.

[64] Id.

[65] Id.

[66] Id.

[67] Id.

[68] Id. at 227.

of imminent serious bodily injury or death to the Jeffreys."[69] And, the Jeffreys had an adequate alternative to the possession of a gun, a phone call to the police.[70]

Here, Smith presents even less evidence to support a defense of necessity instruction than Jeffrey did.

The trial court's unchallenged findings of fact state that:

> Approximately two weeks prior to September 13, 2011, the defendant's son, Kenneth Smith . . . had gotten into an altercation at a park with another teenager. . . . When Kenneth refused to fight, the other teenager called his father. Kenneth could overhear the father say that he was going to come to the park with a gun.[71]

Kenneth then went home and told Smith what had happened at the park. "Approximately two weeks later . . . the defendant got into an argument with Kenneth. Kenneth left the house."[72] Thus, Smith argues, he reasonably believed his son "was under a present, unlawful threat of death or serious bodily injury."[73] But Smith cannot demonstrate that his son was under a ***present*** threat. Likewise, he cannot point to any evidence to substantiate the other three Jeffrey factors. Smith had a reasonable legal alternative to leaving his house. If he was truly concerned about his son, he could have called the police. And, as the court trial found, Smith "had owned the gun for at least a month prior to September

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[69] Id.

[70] Id.

[71] Clerk's Papers at 94-95.

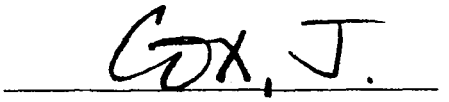
[72] Id. at 95.

[73] Brief of Appellant at 28.

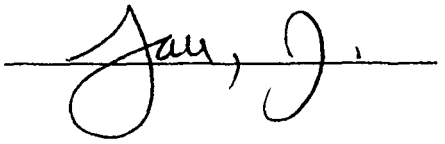
13th."[74] Thus, based on this unchallenged finding of fact, Smith could not demonstrate that any violence he might have feared was imminent. There was no basis to support the giving of the instruction he requested.

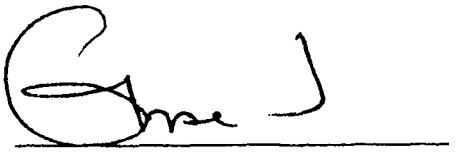
In arguing that the trial court erred in its exclusion of evidence regarding a defense of necessity, Smith relies on United States v. Newcomb.[75] This case is not helpful because its facts are distinct from Smith's. Newcomb argued he only had possession of the gun at issue in the case because he had taken it and the ammunition from another individual.[76] He had done so, he argued, because he felt "an obligation to prevent [that individual's] imminent violence toward an unknown third party."[77] He was thus able to demonstrate a fear of imminent violence, which Smith is not able to do. Thus, Newcomb is not helpful.

We affirm the judgment and sentence.



WE CONCUR:





[74] Clerk's Papers at 95.

[75] 6 F.3d 1129 (6th Cir. 1993).

[76] Id. at 1131.

[77] Id.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68709-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Jennifer Joseph, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: September 25, 2013