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Appendix A

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion where it declined to instruct the jury on the lesser included crimes of first and second degree manslaughter where there was no evidence that defendant acted in a reckless or negligent manner?
2. Did the trial court properly exercise its discretion in permitting the ballistic expert to use demonstrative evidence to illustrate to the jury the concept of trigger pull?

B. STATEMENT OF THE CASE.

1. Procedure
 - a. General Procedure.

On March 21, 2001, the defendant pled guilty to one count of murder in the second degree, committed by alternative means, intentional and felony. CP 3-10, 11-12.

Following a personal restraint petition, the Court of Appeals determined that defendant's murder conviction was invalid under

*Andress*¹ and *Hinton*² and remanded the matter to the trial court for further proceedings. CP 36-37.

On March 2, 2007, the court vacated the defendant's sentence and conviction and allowed defendant to withdraw his plea of guilty to the invalid charges. *Id.*

On March 2, 2007, the State filed a corrected information, charging defendant with second degree intentional murder, domestic violence and firearm enhanced, contrary to RCW 9A.32.050(1)(a), 10.99.020, 9.41.040, 9.94A.310(3)(a), and 9.94A.370. CP 43-44.

Defendant was convicted as charged, and received a standard range sentence of 220 months, with a 60 month firearm enhancement, for a total sentence of 280 months. CP 132-136.

This timely appeal follows. CP 143.

b. Hearing on trigger pull exhibit.

On November 7, 2007, the trial court conducted a hearing on the admissibility of a demonstrative exhibit illustrating trigger pull. RP 360.³

¹ *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

² *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004).

³ The Verbatim Report of Proceedings is contained in nine volumes. With the exception of volume 9 – Sentencing - each volume is numerically paginated (e.g. Vol I, 1-6, Vol. II, 7-47). The State will cite to the numerical page, rather than volume number.

Matt Noedel, with the Washington State Patrol Crime lab, put together a trigger-pull model for this particular case. RP 362, 366. He constructed the device to help people understand what pressure and trigger pulls feel like. RP 370. As an expert in firearms, Noedel felt this simulator was important because just explaining to a jury the amount of weight involved, is different from “simply lifting a seven-pound bag of sugar with your finger. That’s actually much more difficult to do.” RP 363.

The mechanics of firing a gun deals with the ergonomics of holding a gun, supporting part of the firearm with the web of the hand, and being able to wrap an object. RP 363. Experts in the field used to explain to juries that pulling a trigger is like pulling a Windex bottle, but the experts were never able to quantitate that. “One bottle might be easy to pull, the next one might be hard.” RP 370. Experts need something that is safer than giving 12 unknown jury members a firearm. RP 370.

The device Noedel constructed combines the ergonomics that are similar to a handgun or firearm and the identical weights that are used in laboratory testing. RP 363. In Noedel’s opinion, this is the closest thing that he has come up with to simulate what is actually done in the laboratory to define what trigger pull pressure is, and is the safest and best way to demonstrate trigger pull to the jury rather than actual use of a weapon. RP 364, 386-387. The apparatus does not have the “snap of the firing pin going forward,” like you would in a real firearm, so one would

not hear the snap of the pin going forward. RP 364. A simple pull of a ring device to the point that the weight is engaged allows one to simulate very close to the amount of pressure of the trigger itself. RP 366.

The weight system used in the model is the same brand and device as the weight system at the Washington State Patrol Crime Lab and Noedel was confident in the accuracy of the amount of weight. RP 366.

Noedel demonstrated for the court how the weight system is used with the actual weapon in the lab. RP 368. Noedel added seven pounds of weight to the trigger of the firearm, and demonstrated to the court that the trigger could hold seven pounds, but that when an additional half pound of weight was added to the trigger, the firearm cannot hold that much weight and one can hear the click of the trigger. RP 368. If the weapon were loaded, it would now be a discharged weapon. RP 368. Noedel explained that if each juror were to pull a quarter to a half an inch it would lessen the feel of the pull, but if you pull the full distance, you are actually performing more work than what it takes to pull the actual trigger. RP 380.

The one limitation Noedel felt the model had was that a juror who is inexperienced with firing guns may feel that this is a lot of pressure, when in terms of firearms, this amount of pressure is average. RP 372. Noedel also agreed that the ring device had a different curvature than a trigger and could create a different sensation than feeling the actual

trigger, and that a size of a person's hand could affect the perceived trigger pull. RP 375.

The court concluded that the question for admissibility was whether it is helpful to the jury without being unduly prejudicial and whether the device helps demonstrate trigger pull. RP 393. The court concluded it was helpful to the trier of fact, and that it was more helpful than Noedel simply testifying that there was seven and a half pounds of trigger pull. RP 393. The court imagined that without any assistance, jurors may speculate as to what seven pounds feels like, including trying to balance books on their fingers, and that having listened:

[T]o jurors respond to what they have done – jurors do and talk about and try and relate what they hear in court to their real life experiences.

So, in that sense, you could say, well, we're better off with something concrete, something controlled, rather than some uncontrolled attempt to decipher what the words mean.

...

So, I am separating this into two aspects. There's the amount of effort it takes to pull and then the dynamics of the pull, itself. Is it somehow unfair to give them half a loaf, to give them the information with regard to the trigger pull and what it means to lift seven and a half pounds, but not the dynamics? I don't think so. I think they're better off having the feel of seven and a half pounds and the dynamics in words, rather than everything in words."

RP 395.

Following entry of its oral ruling, the court entered detailed findings of fact and conclusions of law regarding the admissibility of the trigger pull device as demonstrative evidence. CP 119-128 (Appendix A).

c. Argument on jury instructions.

The Court considered argument on whether to give defense proposed instructions on the lesser included crimes of first and second degree manslaughter. CP 72-90. The court declined to give the instructions, but stated that it wanted to include the excusable homicide instruction even though the defense had not requested it. RP 547. The court reasoned:

[E]ither there was intent or there wasn't intent. If there was intent, the State prevails with Murder in the Second Degree. If there wasn't intent, then excusable homicide is the result, but there's no scenario presented from either the defense or part of the State's evidence that supports reckless or negligent conduct to the extent that it would be a Manslaughter One or a Manslaughter Two.

RP 554-55.

Initially the defense agreed that if the court was not going to give the lesser included instructions that it wanted the excusable homicide instruction. However, the defense changed its position and asked that justifiable homicide instructions not be given. RP 550, 556.

The defense took exception to the Court's failure to give instructions on first and second degree manslaughter. RP 548.

2. Facts

Victim Ethel Jean Sergeant moved in with the defendant several months before January of 2000, with the intent of marrying defendant. RP 98.

On January 15, 2000, defendant called Nicole Williams, the daughter to his ex-wife. CP 70 (Stipulation regarding testimony of Nicole Williams). During the conversation, Ms. Williams noticed the defendant sounded different than normal and asked him if everything was alright. CP 71. Defendant told her that things were “read bad” and asked her for her mailing address. CP 71.

On January 17, 2000, Tacoma Officers responded to a 911 call and attempted to make contact with the occupant of the apartment. RP 106, 109-110. The 911 caller, later identified as defendant, reported that he had a “situation that I probably need to have a consultation, I mean to talk to a police officer with a . . . I’m gonna leave my door unlocked so he can come in.” CP 152 (Plaintiff’s Ex. 2). Defendant reported that he “had a accident and the only way that I know to correct it, with the exception of calling someone else to come over here and check this thing out. I figured I better call. . .” *Id.* When the 911 operator asked what kind of accident, defendant reported, “Well, I’m threatening to go in the bathroom and just shoot myself.” *Id.*

After no response, officers opened the door of the apartment with a key from the assistant manager. RP 110. Officers announced their

presence and defendant called out, "I've got a gun in my mouth. I'm in the bathroom, and I have a gun in my mouth." RP 113. Officer Field tried to talk defendant through the situation, reassuring defendant that they would work it out. RP 113. Defendant then announced, "I killed my girlfriend." RP 115. Officer Field tried to negotiate with defendant for approximately six to eight minutes, attempting to reassure him. Defendant eventually threw out a .45 caliber gun and then a magazine clip. RP 116, 117. Defendant began to slowly crawl out of the apartment and appeared obviously upset. RP 119. Defendant, who is approximately 6'2" to 6'3" and 190-200 pounds, was then taken into custody and the home was searched for other occupants. RP 120. Sergeant Yerbury examined the defendant to see if there was any evidence of a defense wound and could not locate any. RP 156.

Defendant told Officer Field, "It was an accident." RP 115. Defendant then instructed, "My baby's in the bathtub." RP 137, 147. Officer Field asked when it happened and defendant said, "A day or two ago." RP 137.

Sergeant White located the victim in the bathtub, and it was immediately apparent that she was dead. RP 124, 126, 147. There was a bullet wound in Ms. Sergeant's head and a burn on her arm. RP 147-48, 260-61. A bullet hole was found in the shower wall and the hole lined up with a hole in the shower curtain and line. RP 192-94. The bathroom smelled of incense and had the odor of a decaying body. RP 126, 163.

Police documented blood and trace evidence throughout the bathroom. Blood was located on both the inside and outside of the shower curtain, as well as inside the baseboard heater. RP 194, 288-89. Police recovered a shirt, three rugs, a bath mat, and a hand towel from on top of Ethel Sergeant. RP 201. The items had bloodstains, tissues, and bone fragments on them. RP 202-03.

Some attempt had been made to clean up the crime scene area. Police located a bottle of cleaner with suspected bloodstains on it and documented that blood had been wiped off the wall behind the bathtub. RP 204, 349. Investigators also uncovered a bloody pair of jeans in the hamper. RP 190. A bullet casing was located in the pocket of the jeans. RP 191.

Forensic technician McAdam with the State Patrol Crime Lab presented a computer reconstruction of the homicide. RP 280-315, Pl. Ex. 43, 44. Prior to making the reconstruction, McAdam took numerous measurements inside the bathroom, including the location of the bullet hole from the shower curtain and wall. RP 283. To determine the trajectory of the bullet McAdam referenced four points from the crime scene: the hole in the wall, the hole in the shower curtain, and the entry and exit wound on Sergeant. RP 283-84. After compiling these numbers he was able to determine that the defendant fired the shot from the hallway. 313-315, 326.

Medical examiner Ramoso opined that based on marbling of the skin, mummification of the finger, and signs of decomposition such as skin slippage, and lack of rigormortis, the victim had been dead for approximately two to three days. RP 251. There were no signs of stippling or tattooing, indicating that the gunshot wound was inflicted at a distance of greater than 18 inches. RP 254-55. The gunshot wound was to the head, with the bullet traveling through the brain, then exiting, and death would have been almost instantaneous. RP 256-258.

McAdam, the manager of the Washington State Patrol Crime Lab, analyzed the trajectory of the bullets and the blood evidence in the bathroom where the homicide occurred. Based on the bloodstains and skin tissue material he was able to conclude that the victim was standing in front of the shower curtain at the time defendant shot her. RP 285.

Matt Noedel is a forensic scientist, formerly employed for 15 years with the Washington Sate Patrol Crime Lab. RP 403. During his years with the State Patrol his responsibilities included test-firing of firearms, comparing fired bullets and cartridge cases, trying to determine distance that firearms are away from a particular target and “virtually anything that has to do with a firearm would have come across my bench or one of my colleagues.” RP 404. Noedel belongs to numerous professional organizations, and holds the position of president elect of the Northwest Association of Forensic Scientists and the editor of Association of Firearm and Took Mark Examiners. RP 404-405

Noedel determined the trigger pull weight of the murder weapon to be seven and a half pounds. RP 445-46. Noedel presented a device to the jury that was made to simulate the trigger pull of seven and a half pounds without having to fire the actual weapon. RP 447. Noedel instructed the jurors that they were to pull just until they lifted the weight and cautioned them not to pull it all the way against the frame. RP 448-9.

Each juror was allowed to pull the trigger device. RP 450. The prosecutor made part of the record that when each of the jurors stepped up to do the trigger pull, none of them lifted the weights quickly and none of them lifted them further than Mr. Noedel testified to. RP 460.

Defendant took the stand in his own defense. Defendant stated that he really did not know what happened. RP 506. Defendant reported that he could not recall wiping down the bathroom, placing Ms. Sergent's body in the bathtub, or closing the shower curtain. RP 506. Defendant stated that he recalled wanting to pull the trigger. RP 507. Defense counsel then asked him, "When you say wanting to pull the trigger, what are you talking about? Are you talking about committing suicide?" RP 507. He answered, "Well, yes." RP 507. On cross-examination defendant admitted that he shot Ms. Sergent in the face but that it was not intentional. RP 510. When asked, "Did you shoot Ms. Sergent in the face, Mr. Hunter?" he answered, "If that's where it landed, yes, you know. I – let's say this: An accident occurred." RP 510.

Defendant admitted on cross that he was trained to shoot guns in the military and he was good enough at shooting that he was going to take up competition shooting. RP 513. Defendant remembered that he kept his gun in his briefcase and he that took the briefcase with him to the bathroom. RP 522. He believed that the safety was on so that it could not accidentally go off. RP 521. He believed that he probably showed her what was in the briefcase and took the gun out of the briefcase to show it to her. RP 522-23. Defendant stated that he wished he had pointed it at himself instead of shooting Ms. Sargent accidentally. RP 527. He reported that he really did not even remember pulling the trigger, “if the trigger was pulled.” RP 538. The prosecutor asked, “You told Mr. Whitehead you do recall wanting to pull the trigger, but you’re telling us that that was to yourself and not to Ms. Sargent?” RP 538. Defendant agreed. RP 538.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON FIRST AND SECOND DEGREE MANSLAUGHTER WHERE THERE WAS NO EVIDENCE OF NEGLIGENCE OR RECKLESSNESS.

A trial court’s refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion. *State v.*

Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

An instruction on a lesser included offense is proper where: (1) each element of the lesser offense is a necessary element of the crime charged (legal prong), and (2) the evidence supports an inference that only the lesser crime was committed (factual prong). *State v. Fernandez-Medina*, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000).

In order to satisfy the factual component of the test there must be substantial evidence that affirmatively indicates that manslaughter was committed to the exclusion of first or second degree murder. *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000), citing *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)).

“It is not enough that the jury might simply disbelieve the State’s evidence. Instead, some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.” *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)(citing *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904, *review denied*, 109 Wn.2d 1016 (1987)).

The State agrees that the first prong of the test is satisfied and first and second-degree manslaughter is a lesser included offense of second-degree intentional murder. *Berlin*, 133 Wn.2d at 553. The question is whether the record supports the second prong. When determining if the

evidence is sufficient to support giving an instruction, a court views the evidence in the light most favorable to the party that requested the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. But the party requesting the instruction must point to evidence that affirmatively supports the instruction, and may not rely on the possibility that the jury would disbelieve the opposing party's evidence. *Fernandez-Medina*, 141 Wn.2d at 456; *State v. Ieremia*, 78 Wn. App. 746, 755, 899 P.2d 16 (1995). An inference that only the lesser offense was committed is justified “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Here, defendant was charged with second-degree intentional murder. The elements of murder in the second degree as charged here, include causing the death of another with the intent to kill. RCW 9A.32.050(1)(a). The elements of first-degree manslaughter are causing the death of another with recklessness. RCW 9A.32.060(1)(a). The elements of second-degree manslaughter are causing the death of another

with criminal negligence.⁴ RCW 9A.32.070. “Criminal negligence occurs when a reasonable person would realize the presence of a substantial risk of harm.” *State v. Hughes*, 106 Wn.2d 176, 190, 721 P.2d 902 (1986); RCW 9A.08.010(d).

Here, the facts of the case did not establish that a reckless or negligent act occurred at exclusion of an intentional act. While defendant claimed that it was an “accident” there was nothing in the record to support that the discharge of the gun was accidental. Defendant did not testify that there was a struggle with the gun, that the gun was faulty, or that he even pulled the trigger at all. As the trial court stated in its factual determination:

[E]ither there was intent or there wasn't intent. If there was intent, the State prevails with Murder in the Second Degree. If there wasn't intent, then excusable homicide is the result, but there's no scenario presented from either the defense or part of the State's evidence that supports reckless or negligent conduct to the extent that it would be a Manslaughter One or a Manslaughter Two.

RP 554-55.

⁴ Under RCW 9A.08.010(d) criminal negligence is defined as follows:

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man [or woman] would exercise in the same situation.

If the court were to conclude otherwise, than anytime that a person handles a gun and a killing occurs the court must instruct on manslaughter, whether or not there is any concrete evidence to support this.

The court in *Hernandez* was presented with facts almost identical to the case at bar and similarly rejected the giving of any manslaughter instructions. *State v. Hernandez*, 99 Wn. App. 312, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000). In *Hernandez* the defendant admitted to being present when his girlfriend was shot and killed but reported to police that the “shooting had been an accident.” 99 Wn. App. at 315. In a statement to police Hernandez reported that he “was sitting in front of the television while the victim was in the dining area and “[t]he gun went off, I, I’m sure. . . she, it hit a can. I immediately got up. I went towards her to grab the gun and she went into the kitchen. I grabbed the gun. She fell down. She hit the floor.” 99 Wn. App. at 316. Hernandez further reported that he did not hear the shot and thought that the victim just fell down and that “I immediately went to grab the gun from her. I could have grabbed it though, I, I, I was just, I don’t know . . .” 99 Wn. App. at 316. Based on this evidence the Court of Appeals agreed that none of the evidence showed that he committed first or second degree manslaughter and not second degree murder. 99 Wn. App. at 320.

Defendant’s version of events in this case was similarly murky and other than using the word “accident,” defendant offered nothing to the court or jury to support his assertion. In general, defendant claimed that

he did not remember how the event occurred at all. RP 506-07. Like the defendant in *Hernandez*, he did not offer to the jury how the gun went off, instead claiming that he did not remember pulling the trigger, “if the trigger was pulled.” RP 538. Other than admitting that he took the gun out of the briefcase to show Ms. Sergent, defendant could not explain how his gun shot Ms. Sergent in the head, between the eyes. RP 510. Instead his only consistent claim was the unsubstantiated legal conclusion that “An accident occurred,” without any factual assertion of a negligent or reckless act.” RP 510.

Given this evidence, the trial court did not abuse its discretion in concluding that this evidence did not support the giving of manslaughter instructions. Instead, like the court in *Hernandez, supra*, concluded, if the jury believes defendant’s account, that the shooting was an accident, it would establish a “complete excusable homicide defense.” 99 Wn. App. at 320. Here, defendant did not attempt to argue that there was evidence in the State’s case in chief which would support the giving of the lesser included instruction. Instead, defendant’s entire argument rested on his testimony that it was all just an accident. Based on this argument, the trial court invited a justifiable homicide instruction. The giving of this instruction would have been appropriate and is consistent with the Supreme Court’s most recent look at excusable homicide:

Excusable homicide is the defense that by its plain language is intended to apply to accidental killings, while justifiable homicide by its plain language applies to killings in self-

defense. While a defendant may take actions in self-defense that lead to an accidental homicide, one cannot actually kill by accident and claim that the homicide was justifiable. The proper defense for an accidental homicide is to argue that the homicide was excusable.

State v. Brightman, 155 Wn.2d 506, 525, 122 P.3d 150 (2005) (citing RCW 9A.16.050).⁵

In the instant case, the trial court gave defendant an opportunity to argue his theory of the case with excusable homicide instructions and he declined the giving of such instructions. Because there were no facts to support a showing that the death occurred as a result of a reckless or negligent act, the trial court did not abuse its discretion when it refused to instruct on the lesser included offenses of first and second degree manslaughter.

While the defense does not rely on *State v. Guillot* in support of its argument, the State feels it is worth mentioning and distinguishing factually. See *State v. Guillot*, 106 Wn. App. 355, 22 P.3d 1266, review denied, 145 Wn.2d 1004 (2001). In *Guillot* the defendant was charged and convicted of first degree murder. 106 Wn. App. at 358. The trial court declined to instruct the jury on the lesser included of manslaughter. 106 Wn. App. at 366. The Court of Appeals reversed, finding that where

⁵ § 9A.16.030. Homicide -- When excusable

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

defendant claimed the shooting was accidental, and “admitted that he was showing Sullivan the gun, demonstrating how to use it, and pointing it at her when he shot her,” lesser included instructions were appropriate. 106 Wn. App. at 368.

Here, unlike *Guillot*, defendant did not admit to doing anything with the gun, other than bringing it into the bathroom. He did not admit demonstrating how the gun was used, pointing the gun at Ms. Sargent, or any other fact that would lead a jury to conclude that the discharge of the firearm was accidental.

Defense cites to *Fernandez-Medina, supra*, in support of its argument; however, *Fernandez-Medina* presents a completely different set of circumstances. In *Fernandez-Medina*, the defendant requested an instruction on a lesser included offense based on the evidence the State presented at trial, which was in conflict with his defense of alibi at trial. 141 Wn.2d at 456-57. For this reason, the trial court refused to give the instruction and the Court of Appeals agreed. The Supreme Court reversed, holding that a defendant is entitled to argue two defenses, even where such defenses are in conflict with one another. *Id.* at 458, 462.

Because defendant did not present evidence of reckless or negligent behavior at the time of the homicide, he was limited to excusable homicide instructions. Having declined the giving of these instructions, he may not claim error on appeal.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING USE OF THE DEMONSTRATIVE EXHIBIT TO EXPLAIN TO THE JURY THE CONCEPT OF TRIGGER PULL.

The defendant assigns error to the trial court's allowance of an illustrative model for trigger pull. At the outset, it is important to qualify what the nature of the evidence was, and what the State sought to demonstrate with the model. The model the ballistics expert created did *not* purport to be an exact replica of the murder weapon. RP 363. It also was *not* a model made to recreate how the murder weapon was fired. RP 363, 364, 386-87. Instead, the model was made to demonstrate to the jury the concept of trigger pull and the number of pounds of force needed to activate the trigger of the weapon in this case. RP 363-64. Because the model and weight mechanisms were substantially similar to the trigger pull analysis done in the lab, the model was admissible for illustrative purposes to help explain to the jury the concept of trigger pull. Any inconsistencies between the trigger pull mechanism and the demonstrations in the lab, went to weight and not admissibility.

The trial court has broad discretion to decide whether to permit demonstrations and experiments in the jury's presence. *State v. Roby*, 43 Wn.2d 652, 655, 263 P.2d 273 (1953).

The use of demonstrative evidence is encouraged when it accurately illustrates facts sought to be proved. *Jenkins v. Snohomish County PUD No.1*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986).

Demonstrative evidence is admissible if the experiment was conducted under substantially similar conditions as the event at issue. *Jenkins*, 105 Wn.2d at 107. Determining whether the similarity is sufficient within the trial court's discretion and the decision will not be disturbed on appeal absent an abuse of discretion. *Id.*; see also *DiPangrazio v. Salamonsen*, 64 Wn.2d 720, 727, 393 P.2d 936 (1964); *State v. Stockmyer*, 83 Wn. App. 77, 85, 920 P.2d 1201 (1996). If the similarity is sufficient to justify admission, any lack of similarity goes to the weight of the evidence. *Id.*; see also *State v. Rogers*, 70 Wn. App. 626, 633, 855 P.2d 294 (1993).

Additionally, the evidence sought to be admitted must be relevant. “The ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and to enable them more intelligently to consider the issues presented.” *Jenkins*, 105 Wn.2d at 107 (quoting *Sewell v. MacRae*, 52 Wn.2d 103, 107, 323 P.2d 236 (1958)). If the evidence is more prejudicial than probative then the court should refuse its admission. *Id.*

In Washington Practice, the practical nature of demonstrative models is summarized as follows:

Models have been commonly used to illustrate evidence for many years. Their admission in evidence is largely within the discretion of the trial court. No prior notice to the opposite party is necessary. The proponent should provide foundation evidence that a model is appropriate for its demonstration purposes, but the degree of appropriateness will often be pertinent only to the weight of the model as evidence.

The foundation requirements may vary, depending on the purpose of the model. If the model is offered not as a replica of something else, but merely to illustrate a point, the model need not be an exact duplicate of the original.

5 Karl B. Tegland, Washington Practice, *Evidence* § 402.30, at 365 (5th ed. (2007)).

Use of the demonstrative exhibit, and permission of the court to allow the jurors to examine the exhibit in court, was a prudent decision on the part of the trial court. Contrary to defendant's assertion the model accurately illustrated the fact sought to be proved: the mechanics of trigger pull and how much weight is involved in the trigger pull of the weapon in this case. RP 363, CP 120 (FOF 4). As Matt Noedel explained, weight as it is felt in trigger pull is much different than "simply lifting a seven pound bag of sugar with your finger." RP 363. The court also found:

While the concept of "trigger pull" may be a matter of common sense, in that one has to pull a trigger to fire a gun, the concept of "trigger pull" put into context, especially with an amount that has been quantified, is difficult to describe orally. Giving the jury a number that is designed to quantify trigger pull for a particular firearm is just a number without any real meaning. Thus, it is reasonable to demonstrate trigger pull to the jury because the amount of force necessary to pull a trigger is a concept that is not one within the common understanding of each juror.

CP 120 (FOF 2).

The model was the closest thing to what experts do in the laboratory to establish trigger pull pressure, and the weight system used

was the same as what he used in the lab. RP 364, 366, 386-87. Defense counsel was adequately able to explore the weight the evidence should carry during cross-examination. RP 450-456.

Similar experiments and demonstrations in the courtroom have been used for years. See *State v. Brooks*, 16 Wn. App. 535, 557 P.2d 362 (1976) (upholding the admission of a ballistic expert's experiment with a rifle and potatoes to demonstrate the approximate distance the weapon was fired from where defendant used a potato over the muzzle of the gun); *State v. Mitchell*, 56 Wn. App. 610, 613, 784 P.2d 568 (1990) (permitting jurors to hear a police siren during trial, even though the conditions were not the same as the time of the incident, was permissible as illustrative evidence); *Williams v. Bethany Volunteer Fire Dep't*, 307 N.C. 430, 298 S.Ed.2d 352 (1983) (upheld the jury observing the fire truck approach with its lights flashing and siren sounding, as illustrative evidence).

The use of weapons as exhibits in the courtroom also presents concerns for the judge, bailiffs, and jurors alike. As the court noted in its findings, the actual weapon in this case was not available for any kind of use to the jurors during deliberations, as it was presented to the jury with a zip tie through the barrel and breech for safety and security purposes. CP 121 (FOF 7). Also, any invitation to have jurors experiment with exhibits while in the jury room may be ill-advised. See e.g. CP 120-21 ("It also eliminates the potential for confusion during deliberations, where jurors might otherwise attempt to quantify trigger pull without knowing if their

actions are accurate.”). Instead, it is better to have the jurors use the demonstrative exhibit in the controlled setting of the courtroom, where defense counsel could make objections to misuse of the exhibit.

It is difficult to understand how a defendant may raise an objection to a controlled courtroom demonstration when it is clear that the State could have admitted the firearm as an exhibit, kept it unlocked, and allowed the jury to experiment with the weapon itself. It has long been held that jurors may conduct their own demonstrations and experiments with exhibits in the jury room. *See State v. Balisok*, 123 Wn.2d 114, 866, P.2d 631 (1994) (juror reenactment of struggle with defendant’s jacket and pistol upheld as permissible juror conduct even though jurors were not defendant’s exact proportions because jurors are expected to utilize “their common sense and the normal avenues of deductive reasoning.”); *State v. Baker*, 67 Wash. 595, 122 P. 335 (1912) (not misconduct on the part of the jury where the issue was the intoxicating character of the liquors, for the jurors to smell and taste the contents of samples which had been received in evidence and taken to the jury room); *see also People v. Agado*, 964 P.2d 565, 567 (Colo. App. 1998) (allowing the jury to examine and experiment with trigger pull of gun during deliberations, to evaluate defendant’s testimony).

Nor should the defendant complain simply because the jury has to touch or handle the model to understand the illustrative nature of the evidence. Courts routinely call on jurors to use their sense of sight and

sound to receive evidence. But use of other senses, including smell and touch is also permissible. The principle the expert was trying to convey to the jury is virtually impossible without a demonstrative aid. Unlike the common physics of lifting a ten pound bag of sugar or carrying a child, the mechanics involved in trigger pull is not as easily translatable into common, every day experiences.

Assuming *arguendo* that the trial court erred in admitting the illustrative evidence, any error was harmless. An evidentiary error which is not of constitutional magnitude, such as erroneous admission of evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Halstien*, 122 Wash. 2d 109, 127, 857 P.2d 270 (1993). Improper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); *Delaware v. VanArsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Here, there is no reasonable probability that the illustrative exhibit on trigger pull materially affected the outcome of the trial. The defendant did not object to the admission of the murder weapon, nor did the defendant object to Noedel's testimony regarding trigger pull. Even without admission of the illustrative model, the jury would have had access to the murder weapon and to testimony about the physics of trigger pull, including the uncontroverted evidence that the trigger pull pressure in

this case was seven-and-a-half pounds. Given the cumulative nature of this evidence, any error in admission was harmless.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests that this court affirm the convictions.

DATED: November 18, 2008

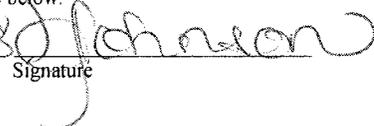
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

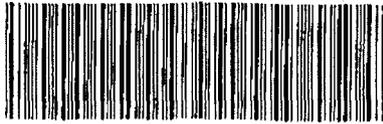
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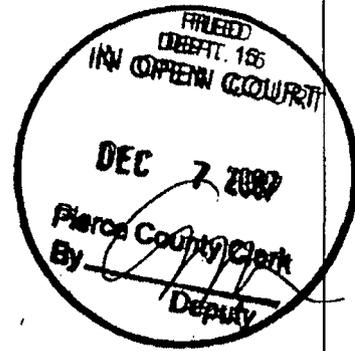
APPENDIX “A”

Order Regarding Use of Trigger Pull Device at Trial

ADDRESS



00-1-00354-6 28779069 ORRE 12-07-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KENNETH MILES HUNTER,

Defendant.

CAUSE NO. 00-1-00354-6

ORDER REGARDING USE OF TRIGGER PULL DEVICE AT TRIAL

Beginning on October 29, 2007, this matter came on for trial, the Honorable Thomas J. Felnagle, presiding. The State was represented by Deputy Prosecuting Attorneys John M. Neeb and Thomas C. Roberts, and the defendant was present and represented by his attorney, Richard Whitehead.

During trial, the court heard a motion relating to the State's use of a "trigger pull" device as a demonstrative exhibit the jury would use during the testimony of an expert witness, Matthew Noedel. The court heard testimony from Mr. Noedel that included a demonstration of the trigger pull device. The court personally tried the device at several different weights and pulled the trigger of the weapon used to kill the victim in this case.

Having heard the arguments of counsel and being duly advised in the law, the court hereby makes the following findings of fact relating to the trigger pull device:

1. This is a charge of intentional murder, with a stated defense of accident. The amount of force necessary to pull the trigger on the weapon used to kill the victim is relevant evidence. As such, the information relating to "trigger pull" of the weapon is admissible evidence.

2. While the concept of "trigger pull" may be a matter of common sense, in that one has to pull a trigger to fire a gun, the concept of "trigger pull" put into context, especially with an amount that has been quantified, is difficult to describe orally. Giving the jury a number that is designed to quantify trigger pull for a particular firearm is just a number without any real meaning. Thus, it is reasonable to demonstrate trigger pull to the jury because the amount of force necessary to pull a trigger is a concept that is not one within the common understanding of each juror.

3. The issue for the court here is whether the specific trigger pull device the State intends to use during Mr. Noedel's testimony is a reasonable demonstration of the concept of trigger pull without being confusing, misleading, or unduly prejudicial.

4. The court has heard the testimony of Mr. Noedel, has tried the trigger pull device at several different weights, and has pulled the actual trigger of the weapon. The trigger pull device in question here is a reasonably good representation of the pulling of a trigger, and it can be used to demonstrate the amount of effort needed to pull the amount of weight measured as the specific trigger pull of this weapon.

5. While the device does not re-create the dynamics of what it feels like to pull the actual trigger of the gun, that aspect would be missing whether or not the trigger pull device is used by each juror.

6. By using the trigger pull device, each juror will understand the amount of effort necessary to pull a trigger with 7 ½ pounds of trigger pull. This will accurately convey the concept of trigger pull and the specific amount in this case. It also eliminates the potential for confusion

during deliberations, where jurors might otherwise attempt to quantify trigger pull without knowing if their actions are accurate.

7. Moreover, each juror can experience that in a controlled and safe setting, without pulling the trigger of the actual weapon. The weapon has been admitted and will be submitted to the jury, but it is secured with a zip tie through the barrel and breech, the magazine removed, and the firearm itself zip tied to the box containing it. (These measures are being taken for safety and security purposes.)

8. The use of the trigger pull device by each juror, in open court after a verbal explanation and an actual demonstration by Mr. Noedel during his testimony, is the best way to give meaning to the concept of "trigger pull."

9. To the extent there are limitations on what this trigger pull device demonstrates, or differences between the use of this trigger pull device as compared to pulling the actual trigger of the gun, those limitations and differences can be fully explored during testimony.

10. Considering the totality of the circumstances, the probative value of using the trigger pull device substantially outweighs the potential to be confusing, misleading, or prejudicial. *To the extent there is any prejudice, the trigger pull device is not unduly prejudicial, and any actual slight prejudice can be minimized or eliminated through further explanatory testimony.*

From the above findings of fact, the court hereby enters the following orders:

IT IS HEREBY ORDERED that, during Mr. Noedel's testimony, the State shall have Mr. Noedel verbally explain how each juror should operate the trigger pull device, including the speed of the pull and the distance of the pull; further, that Mr. Noedel shall demonstrate the proper use of the device as or just after he explains how it is to be used.

IT IS FURTHER ORDERED that each juror shall try the trigger pull device during the testimony of Matt Noedel; provided, that each juror shall be limited to one pull on the trigger pull device.

IT IS FURTHER ORDERED that there shall be no instruction given by Mr. Noedel to any individual juror or any communication with any individual juror.

IT IS FURTHER ORDERED that Mr. Noedel shall observe each juror operate the trigger pull device.

FINALLY, IT IS HEREBY ORDERED that the State shall submit photographs of the trigger pull device, including where it was set up in the courtroom during its use and showing how it was actually used.

The court's oral ruling on this motion was given in open court in the presence of the defendant on November 7, 2007. *THE DEFENDANT RECEIVED ALL OBJECTIONS/ARGUMENTS*
This order was signed in open court this 7 day of December, 2007. *MADE AT TRIAL.*

Thomas J. Felnagle
JUDGE THOMAS J. FELNAGLE

Presented by:

John M. Neeb
JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322

~~Approved as to form:~~ *Copy RECEIVED:*
Richard Whitehead
RICHARD WHITEHEAD
Attorney for Defendant
WSB # 7896

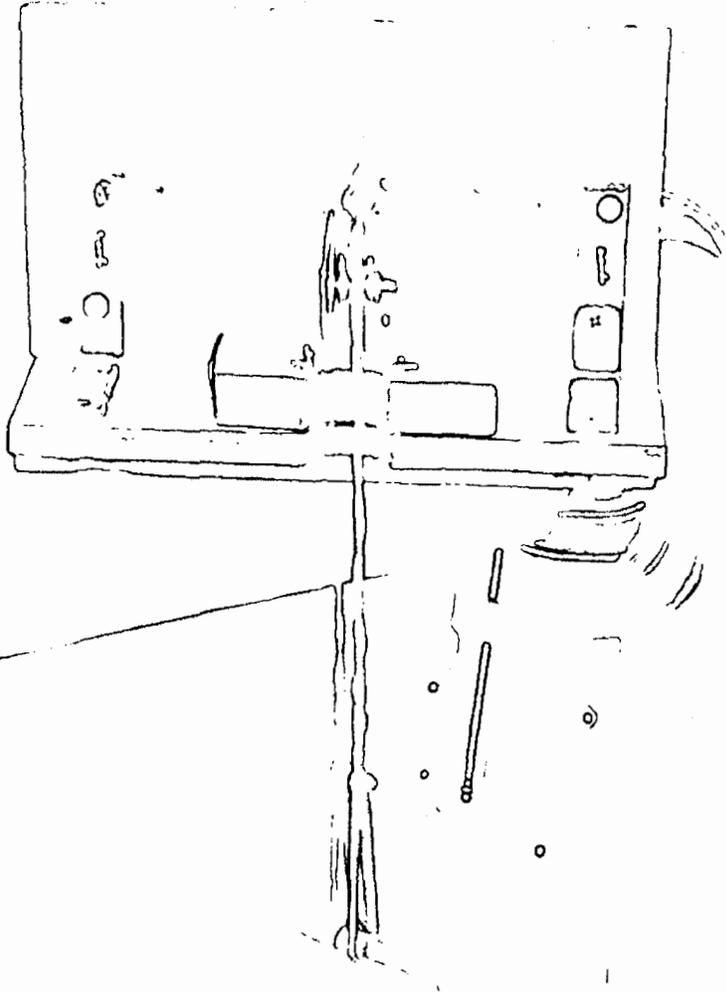
FILED
DEPT. 15
IN OPEN COURT
DEC 7 2007
Pierce County Clerk
By *[Signature]*
Deputy



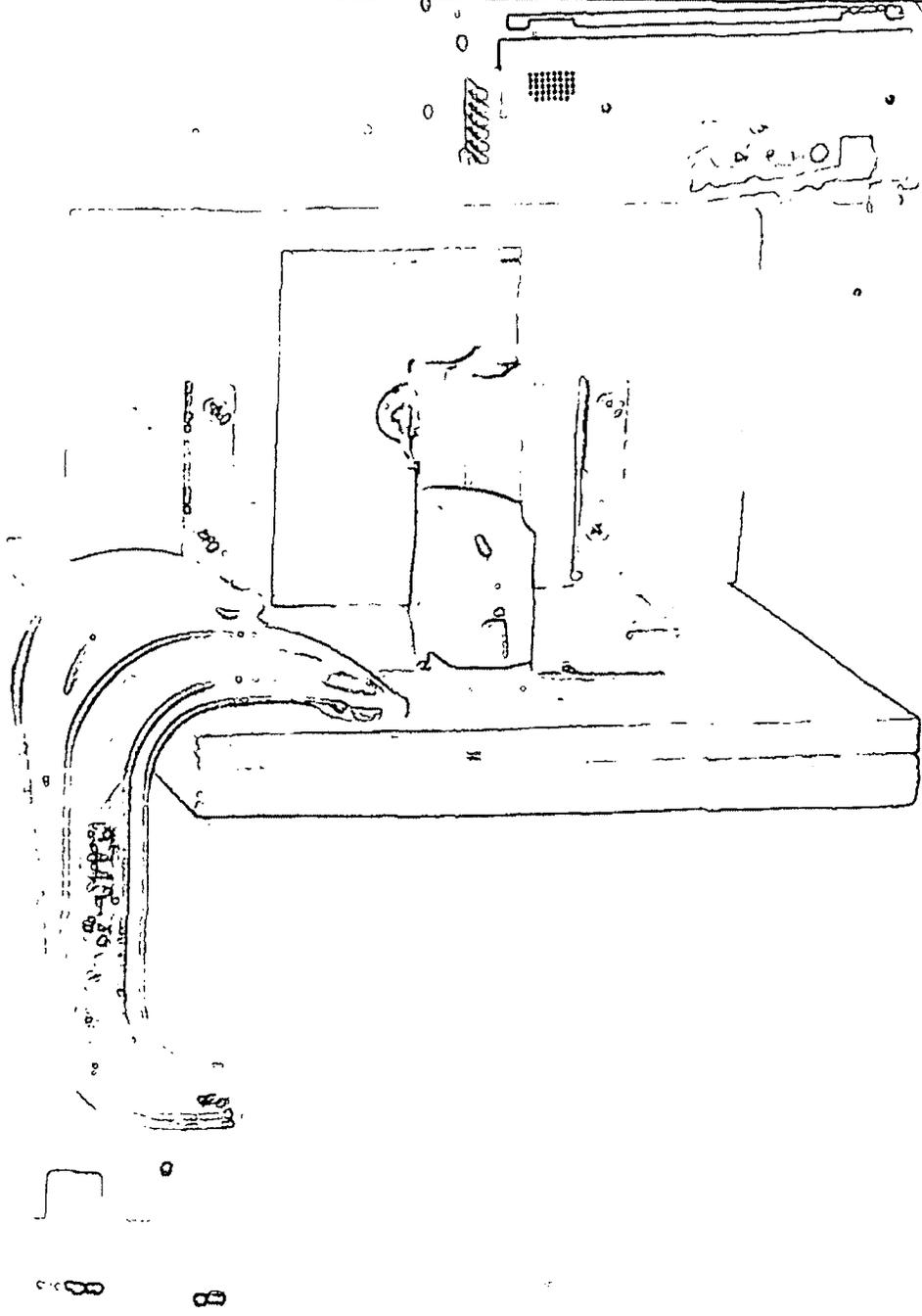
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