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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

SHAUN DIGGS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01184-4

BRIEF OF RESPONDENT

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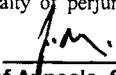
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 13, 2008, Port Orchard, WA 
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it refused to instruct the jury on self-defense and precluded the defendant from presenting that defense when the Defendant was not entitled to raise self-defense because he denied ever brandishing a firearm in any fashion and because he failed to show that his actions occurred in circumstances amounting to self-defense?

2. Whether the trial court abused its discretion in excluding evidence regarding the Defendant's past experiences growing up in Harlem and serving in the military when this evidence was only relevant to the extent it related to a claim of self-defense, and as addressed above, the trial court properly held that self-defense was not available as a defense in the present case?

3. Concession of Error. The State concedes that the facts below support only one count of unlawful display of a firearm and that the case should be remanded to the trial court with directions to dismiss one of the counts.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Shaun Diggs was charged by an amended information filed in Kitsap County Superior Court with two counts of assault in the second degree. CP 6-9. At trial, the Defendant proposed that the jury be instructed on the lesser included offense of unlawful display of a weapon. CP 15. The trial court instructed the jury on the lesser included offense, and the jury ultimately acquitted the Defendant of the two counts of assault in the second degree but found the defendant guilty of two counts of unlawful display of a weapon. CP 52-55, 58-61. This appeal followed.

B. FACTS

On August 21, 2007, Jacob Kreifels and his girlfriend, Nikki Cardell, went to a Pizza Hut restaurant for dinner. RP 175-76. Mr. Kreifels and Ms. Cardell did not drive to the restaurant, but were dropped off at the restaurant by a friend. RP 176. After eating, Mr. Kreifels called another friend, James Bolinsky, and Mr. Bolinsky said that he could pick up Mr. Kreifels and Ms. Cardell. RP 176.

Mr. Kreifels and Ms. Cardell waited outside, and several minutes later Mr. Bolinsky and Brandon Chapman arrived at the restaurant. RP 70-72, 177.

Mr. Bolinsky parked his car in the parking lot, and then Mr. Bolinsky, Chapman, Kreifels and Ms. Cardell stood in the parking lot having a conversation and smoking cigarettes. RP 72, 177. While they were smoking, Chelsea Parker walked out of the Pizza Hut. RP 73, 177. Mr. Kreifels knew Ms. Parker, as the two had been coworkers at the Pizza Hut. RP 175.

Ms. Parker asked to borrow Mr. Kreifels cigarette lighter. RP 73, 178. She then briefly spoke with Mr. Kreifels. RP 74-75, 178. Ms. Parker then said, "Oh, I didn't even see you there," and walked over to the Defendant who was sitting nearby in his car. RP 74-75, 179. Mr. Chapman overheard some of the conversation between Ms. Parker and the Defendant and stated that the Defendant "sounded pretty pissed off." RP 75. Mr. Kreifels then heard Ms. Parker say, "No, No. It's not like that. He's here with his girlfriend." RP 180.

As Mr. Kreifels and his friends finished their cigarettes they went to get into their car, and the Defendant, who was still sitting in his car nearby, stated, "Hey, you see this?" RP 183-85. Mr. Kreifels looked and saw that the Defendant was holding a handgun. RP 183-85. Mr. Chapman also looked and saw that the Defendant was holding a black semiautomatic handgun which he point up and then brought back down. RP 77.

The Defendant was looking at Mr. Kreifels and said, "This is my girl right here. You can't talk to my girl. You know how it is. New York all day, baby. New York all day." RP 184, 186. The Defendant sounded "pretty pissed." RP 76.

Both Mr. Kreifels and Mr. Chapman stated that they were scared. RP 77, 186. Mr. Chapman explained that after seeing the gun he tried not to look at the Defendant's face and "tried not to do anything." RP 97. When asked how fearful he was, Mr. Chapman explained, "I was fearful enough to think I was going to get shot." RP 97.

Mr. Kreifels and Mr. Chapman and their friends then got into their car and left the parking lot. RP 78-79, 186. The Defendant pulled out at the same time, and Mr. Kreifels took down the license plate number of the Defendant's car and called 911. RP 78-79, 187-88. The 911 operator asked them to return to the Pizza Hut to contact the police, so Mr. Chapman's group returned to the restaurant. RP 79, 188.

Police Officers stopped the Defendant's car a short time later. RP 120-21. Deputy Lee Watson of the Kitsap County Sheriff's Office arrived and took custody of the Defendant. RP 117, 122. Before Deputy Watson asked the Defendant any questions and before Deputy Watson told the Defendant why he was being arrested, the Defendant stated that he had a

concealed weapons permit and that the permit was in his pocket. RP 122-23. Deputy Watson advised the Defendant of his Miranda rights, and the Defendant agreed to waive his rights. RP 125.

The Defendant told Deputy Watson that he had gone to the Pizza Hut to pick up his girlfriend and that when he arrived she was sitting with three guys and then one of the guys hugged his girlfriend. RP 127. The Defendant seemed unhappy that the other person was hugged his girlfriend. RP 127. The Defendant said that his girlfriend told the person who hugged her, "Don't. He has a gun." RP 127. The three guys then got into a car and drove away. RP 127. During this initial conversation with Deputy Watson, the Defendant did not say that he ever felt threatened by anyone in the Pizza Hut parking lot. RP 128.

Deputy Watson then spoke with another deputy who had interviewed several witnesses and had been told that the Defendant brandished a weapon. RP 129. Deputy Watson then explained this accusation to the Defendant, and the Defendant denied it and said he did not ever show anyone a gun. RP 129.

Deputy Watson then transported the Defendant from the scene. RP 130. During the drive the Defendant kept telling Deputy Watson that he was a good guy and that he wouldn't do that kind of thing. RP 130. Later, the

Defendant said that the three guys looked at him crazy, and the Defendant asked Deputy Watson what he was supposed to do. RP 130-31. Prior to this comment the Defendant had not said anything about anybody at the Pizza Hut giving him a hard time. RP 131. The Defendant never told Deputy Watson that he had said anything to the people in the Pizza Hut parking lot and the Defendant never claimed that these people had said anything to him. RP 146. The Defendant also made no mention of a holster and never claimed to have used a holster in any way. RP 146.

Deputy Watson also collected several items of physical evidence that were found in the Defendant's car. RP 131. A "Glock 17" 9mm handgun was recovered from under the front passenger seat of the Defendant's car. RP 112-13, 134. A sports-type jacket or letterman jacket that had the words "New York" on it. RP 132-33. This jacket was recovered from the back seat of the Defendant's car. RP 132.

Prior to MR. Diggs testifying at trial, the State raised some questions regarding the admissibility of some of the Defendant's proposed testimony. RP 241, 242. The State noted that in his opening statement, defense counsel had mentioned some of the Defendant's experiences in New York City and in the military, and the State believed these topics were inadmissible. RP 242.

Defense counsel later made an offer of proof explaining that the Defendant's testimony would be that he grew up in a rough neighborhood in New York on the southern edge of Harlem and that the school he attended had a significant gang problem. RP 327-28. After high school, the Defendant joined the military and served in two wars. RP 328. Although he never had to fire his firearm at the enemy, he did have to stand guard in a position where "if you see something you don't recognize you shoot it and ask questions later." RP 328. Defense counsel argued that this evidence was admissible with respect to the subjective prong of the self-defense analysis. RP 328. Defense counsel further stated that the Defendant would testify that he was startled by Mr. Kreifels and then "patted his holster" to demonstrate that he was willing to defend himself. RP 329.

The State first acknowledged that the Defendant was entitled to talk about his perceptions of anything that happened in the parking lot that day. RP 330. The State argued, however, that based on the offer of proof, the Defendant was not asserting that he ever displayed a firearm or used any force; rather, he was claiming that he only pointed to an empty holster. RP 330. The State further explained that if the jury believed the Defendant and found that all he did was tap a holster, then there was no assault or unlawful display of a weapon. RP 330.

In addition, the State argued that the Defendant's experiences in New York or the military had no bearing on the Defendant's decision to commit this lawful act of tapping a holster. RP 330. Rather, the proposed evidence seemed to be designed to elicit sympathy and was not relevant. RP 330-31.

The court then asked how the Defendant's conduct as described in the offer amounted to self defense, noting that if the jury believed the Defendant's version they would be unable to convict of either offense and when the Defendant did not appear to be stating that he did anything that would constitute a crime. RP 331. The court further asked defense counsel if pointing to a holster would meet the elements of either charge. RP 332. Defense counsel responded that, "it probably doesn't." RP 332.

The trial court also asked how the Defendant's life experiences were probative with respect to the actions in the Pizza Hut parking lot, and defense counsel stated that the Defendant's life experiences had made him "hypervigilant." RP 332-33. The State pointed out that the offer of proof was that the Defendant used no force and that in spite of his life experiences he used no force and did not display a weapon and committed no assault. RP 334. Rather his testimony was that he only tapped a holster and committed no assault – not even in self-defense. RP 334. The Defendant's experiences in New York and the military, therefore, were not relevant. RP 334. The State also pointed out that it would be arguing to the jury that if the

Defendant did not show the actual firearm to anyone then the Defendant was not guilty of any crime. RP 335-36.

After a recess, the trial court gave its oral ruling regarding self-defense and the Defendant's proposed testimony, noting that it would address whether self-defense applied and whether the proposed evidence regarding the Defendant's background was admissible. RP 337, 341-42. The trial then gave the following ruling regarding the Defendant's offer of proof.

I think that under this version of the facts that there is no prima facie case for self-defense. And that's because the defendant does not commit under this version of the facts an act that needs to be justified by the defense. There is no self-defense under that version of the facts.

I would also hold, when looking at the issue of self defense, that even if this was a fact pattern where the defendant acknowledged that he in some way, shape, or form brandished the weapon, that looking at the facts and construing them under the offer of proof most favorably to the defendant and – assuming the facts as proffered by the defendant most favorably construed to him, that a reasonable person with the defendant's personal history, that's the subjective part of the test having to do with participation in the military and his upbringing, would not have believed that they were about to be injured in the fact pattern that's presented here at the Pizza Hut.

So I think that there simply isn't a prima facie case here for self defense, and the personal history information about the upbringing and participation in the military services can't come in as relevant to the issue, because there isn't a prima facie case.

Now, assuming that there's no self-defense, the next question is whether or not this information, historical information is sufficiently relevant to come into the case

otherwise.

And it's my conclusion that it's not. This type of evidence tends to focus the jury's attention on a sympathetic response to what was going on in the defendant's life in some fairly remote times in the past, but doesn't help us to understand the events at issue as they are explained by the defendant. I don't think it has any probative value with respect to what he said he actually did. And for that reason I'm going to simply rule that the personal history information is not relevant under the defendant's theory of the case as well.

RP 342-44

Defense counsel then stated that he understood the court's ruling, but asked whether he could introduce some background information (such as where the defendant was born and the fact that he had been in the military) without going into the background information in detail. RP 344. The State said it had no objection to this evidence as long as it did not go into the "dangerous circumstances" the defendant may have been exposed to, and the court allowed the defense to go into this limited type of background information. RP 344-45.

When the Defendant took the stand he initially testified about his background, including the fact that he grew up in Harlem, that he joined the Navy after high school, served in combat, and was honorably discharged, and that he currently worked at a car dealership. RP 347-49.

The Defendant testified that he did not know Mr. Kreifels, Mr. Chapman, Mr. Bolinsky or Ms. Cardell before the incident. RP 349-50. Mr. Diggs explained that while he was sitting in the parking lot of the Pizza Hut, Ms. Parker came out of the restaurant and was talking to Mr. Kreifels. RP 350-51. Ms. Parker smoked a cigarette and sat on a rail for about ten minutes. RP 351. Eventually she noticed that Diggs was there and ran over to his car, leaned in the window, and put some money on the middle console. RP 351-53. Ms. Parker then talked to Diggs for about ten minutes and during this time was leaning into the car with her elbows on the window. RP 353.

The Defendant stated that Mr. Kreifels looked at him funny and that he then asked Ms. Parker why Mr. Kreifels was looking at him. Ms Parker then told him that Mr. Kreifels had been fired for “using the N word.” RP 359.

The Defendant claimed that Mr. Kreifels later said “what the fuck” while standing near to his car. RP 355. Defense counsel asked the Defendant if Mr. Kreifels seemed angry at this point, and the Defendant responded, “I don’t – didn’t care, but did draw my attention.” RP 356. The Defendant explained that he saw the other two guys as well, and that one guy got into the driver’s seat. RP 356. The Defendant then grabbed his holster that had been latched on the door. RP 356. He claimed the gun, however, wasn’t in

the holster. RP 357. The Defendant grabbed the holster and pulled it up in his right hand and waved it, and that all of the other people could have seen him do this. RP 357-58, 385. When asked how long he waived the holster, the Defendant stated that, "It was just I picked it up, everybody looked at me, and I put it back down." RP 360.

The Defendant stated that Mr. Kreifels then looked at Ms. Parker, and the Defendant responded by saying, "Don't talk to her like that. Don't talk to my girl like that." RP 359. He also said, "This is my girl." RP 360. The Defendant denied saying "New York all day." RP 360. The Defendant claimed that Mr. Kreifels responded by saying, "I don't give a fuck. This is my girl right here. Let's get out of here." RP 360. Mr. Kreifels and his friends then got in their car and left. RP 360-61.

On cross examination the Defendant denied that he ever told Deputy Watson that he saw anyone else hug Ms. Parker. RP 370. The Defendant did state that he saw Ms. Parker talking to Mr. Kreifels and that Mr. Kreifels looked at the Defendant and said something to Ms. Parker and that she then turned around and came over to him. RP 371-72. The Defendant conceded that Ms. Parker did not appear to be upset by anything that Mr. Kreifels was saying to her and acknowledged that Mr. Kreifels was probably just pointing out to Ms. Parker that it appeared someone was waiting for her. RP 372. The Defendant also admitted that he never told Deputy Watson anything about

having or waving the holster. RP 388-89.

The Defendant's girlfriend, Chelsea Parker, a defense witness, stated that the Defendant never showed a firearm to anyone in the parking lot. RP 317. Ms. Parker stated she never saw a firearm, but only saw a holster. RP 322-23

At the conclusion of the testimony the trial court discussed jury instructions with the parties. RP 404. The court noted that, consistent with its earlier ruling, it would not be giving self-defense jury instructions since there had been no prima facie showing of self-defense. RP 404. The jury ultimately acquitted the Defendant of the two counts of assault in the second degree but found him guilty of two counts of unlawful display of a weapon. This appeal followed.

III. ARGUMENT

- A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE AND IN PRECLUDING THE DEFENDANT FROM PRESENTING THAT DEFENSE BECAUSE THE DEFENDANT WAS NOT ENTITLED TO RAISE SELF DEFENSE BECAUSE HE DENIED EVER BRANDISHING A FIREARM IN ANY FASHION AND BECAUSE HE FAILED TO SHOW THAT HIS ACTIONS OCCURRED IN CIRCUMSTANCES AMOUNTING TO SELF-DEFENSE.**

The Defendant argues that the trial court abused its discretion in failing to give the jury instructions on self-defense and in precluding the Defendant from asserting this defense. App's Br. at 10-11, 20. This claim is without merit because the trial court did not abuse its discretion as the Defendant failed to show that he was entitled to self-defense instructions.

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). 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 ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).¹

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense, i.e., the statutory elements that defendant reasonably believed he or she was about to be injured. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999), citing *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); RCW 9A.16.020; WPIC 17.02.

In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant. *Walker*, 136 Wn.2d at 772, citing *Janes*, 121 Wn.2d at 238. The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done. *Walker*, 136 Wn.2d at 772.

¹ With respect to a trial court's failure to give a self-defense instruction, the Washington Supreme Court has stated that the standard for review that applies depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *Walker*, 136 Wn.2d at 771-72. The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The Washington Supreme Court has stated that the importance of the objective portion of the inquiry cannot be underestimated. *Walker*, 136 Wn.2d at 772. Absent the reference point of a reasonably prudent person, a defendant's subjective beliefs would always justify the use of force. *Walker*, 136 Wn.2d at 772, *citing Janes*, 121 Wn.2d at 239. "Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not...." *Walker*, 136 Wn.2d at 772-73, *quoting Janes*, 121 Wn.2d at 240; *see also State v. Hill*, 76 Wn.2d 557, 566, 458 P.2d 171 (1969) (If defendant were the sole judge as to the existence of the peril of great bodily harm confronting him and the amount of force necessary to protect himself against it, then "there would be no limit to the amount of force which a person could use in defending himself against such alleged peril."). The objective part of the standard "keeps self-defense firmly rooted in the narrow concept of necessity." *Walker*, 136 Wn.2d at 773; *Janes*, 121 Wn.2d at 240.

With both subjective and objective aspects taken into account, the trial judge must determine whether the defendant produced any evidence to support his claimed good faith belief that force was necessary and that this belief, viewed objectively, was reasonable. *Walker*, 136 Wn.2d at 773; *State v. Bell*, 60 Wn. App. 561, 567, 805 P.2d 815 (1991). If the trial court finds no reasonable person in the defendant's shoes could have perceived a threat of

harm, then the court does not have to instruct the jury on self-defense. *Walker*, 136 Wn.2d at 773; *Bell*, 60 Wn. App. at 567-68; *see also State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979) (If any one of the elements of self-defense is not supported by the evidence, the self-defense theory is not available to a defendant, and the defendant cannot present the theory to a jury).

Furthermore, under Washington law a Defendant is not entitled to a self-defense instruction when he or she denies the underlying act that was the basis for all charged offense. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000), *citing State v. Gogolin*, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986). Thus, a defendant asserting self-defense is ordinarily required to admit an assault occurred. *State v. Pottorff*, 138 Wn. App. 343, 348, 156 P.3d 955 (2007), *citing State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d 683 (1986). Similarly, one cannot deny striking someone and then claim to have struck that person in self-defense. *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); *Barragan*, 102 Wn. App. at 762.

The charge at issue in the present case is unlawful display of a weapon pursuant to RCW 9.41.270. Under that statute, it is unlawful for any person to exhibit or display a firearm or “other weapon apparently capable of producing bodily harm” in a manner, under circumstances, and at a time and

place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons. RCW 9.41.270.

In the present case the Defendant testified that he never displayed a firearm. Rather, he claimed that he merely tapped a holster. There is nothing in the record that suggests (and the Defendant has never claimed) that a holster is a “weapon apparently capable of producing bodily harm.”² Thus, as the Defendant denied the underlying act that was a basis for the charge (displaying a firearm) he was not entitled to a self-defense instruction. The trial court, therefore, did not err in denying the Defendant’s proposed self-defense instruction.

In addition, the Washington Supreme Court has also held that “a ‘victim’ faced with only words is not entitled to respond with force.” *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). The *Riley* Court went on to note that,

² It is closing the State made it perfectly clear that there was nothing at all unlawful about displaying a holster. Specifically, the State argued,

And finally you get to the testimony of the defendant, Mr. Diggs. Now the state wants to make something absolutely clear. You can walk up and down the streets of Kitsap County all day long waving this piece of plastic at someone. You can do it with impunity. It’s not a crime. You’re not assaulting anyone if you wave this holster at anyone.

No one is suggesting that the defendant would be guilty of anything if all you thought was that at some point in time he showed those three young people this piece of plastic. And he told you that’s the worst thing that he did. If you believe his testimony he is not guilty of anything.

RP 437-38.

If words alone, and in particular insulting words alone, could justify the "victim" in using force in response and preclude the speaker from self-defense, principles of self-defense would be distorted. The right of self-defense would be rendered essentially meaningless because even if the "victim" responded with deadly force, the speaker could not lawfully defend with force and would instead be faced with the risk of suffering injury or a criminal conviction.

In addition, such a rule would effectively permit violence by a "victim" of mere words, contrary to the underpinnings of the initial aggressor doctrine. As noted, the initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. However, mere words alone do not give rise to reasonable apprehension of great bodily harm.

Riley, 137 Wn.2d at 911-12. The Court also cited with approval the decisions of numerous other courts have held that one may not use force in self-defense from verbal assaults. *Riley*, 137 Wn.2d at 912-13, citing, inter alia, *People v. Mayes*, 262 Cal.App.2d 195, 197, 68 Cal.Rptr. 476 (1968) (no provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery); *State v. Bogie*, 125 Vt. 414, 417, 217 A.2d 51 (1966) (court properly instructed that provocation by mere words will not justify a physical attack); *State v. Harris*, 717 S.W.2d 233, 236 (Mo.Ct.App.1986) (insulting or inflammatory language is not sufficient provocation to justify an assault against the speaker); *State v. Blank*, 352 N.W.2d 91, 92 (Minn.Ct.App.1984)

(provocative statements alone do not constitute a defense to assault). The *Riley* Court specifically stated that it “agreed with the conclusions of these courts.” *Riley*, 137 Wn.2d at 913.

In the present case the Defendant’s only description of the events was that Mr. Kreifels looked at him and said, “What the fuck.” RP 355. The Defendant never described any threatening words or any threatening actions. The Defendant never claimed that Mr. Kreifels had a weapon of any kind and described no attempt to inflict injury. The Defendant did not even describe Mr. Kreifels’ tone of voice as angry. Rather, when asked whether Mr. Kreifels was angry, the Defendant only stated, “I don’t – didn’t care, but did draw my attention.” RP 356. Finally, the Defendant never claimed that he feared for his safety or was afraid that he was about to be injured.

The Defendant, therefore, failed to describe a threat or an attempt to inflict injury. Rather, the Defendant by his own description was faced with only words (which he failed to even describe as angry words), and under Washington law (as outlined in *Riley*) a person faced with only words is not entitled to respond with force. Even if the court had concluded that due to the Defendant’s hypervigilance he might have subjectively believed that force was necessary, the Defendant still failed to show that the facts, when viewed objectively, demonstrated that a reasonable person in the Defendant's shoes could have perceived a threat of harm. The trial court, therefore, was not

required to instruct the jury on self-defense, and the trial court did not abuse its discretion in holding that the self-defense theory was not available to the defendant and that the defendant could not present the theory to the jury. *Walker*, 136 Wn.2d at 773; *Bell*, 60 Wn. App. at 567-68; *Griffith*, 91 Wn.2d at 575.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE REGARDING THE DEFENDANT'S PAST EXPERIENCES GROWING UP IN HARLEM AND IN THE MILITARY BECAUSE THIS EVIDENCE WAS ONLY RELEVANT TO THE EXTENT IT RELATED TO A CLAIM OF SELF DEFENSE, AND AS ADDRESSED ABOVE, THE TRIAL COURT PROPERLY HELD THAT SELF DEFENSE WAS NOT AVAILABLE AS A DEFENSE IN THE PRESENT CASE.

The Defendant next claims that the trial court improperly excluded his proposed testimony about his background that would have shown that he was hypervigilant “in support of his theory of self defense.” App.’s Br. at ii, 17-19. This claim is without merit because the proposed evidence was only relevant to the Defendant’s self defense claim, which the trial court properly ruled that the Defendant was precluded from raising since he denied ever displaying the firearm. In addition, the trial court did allow the Defendant to present some background information to the jury, including where he grew up and that he had served in the military. The trial court only excluded the

Defendant from outlining evidence regarding the dangerous circumstances he had faced earlier in his life, as that information was not relevant to any issue before the jury.

As the Defendant acknowledges, a trial court's evidentiary rulings are reviewed for an abuse of discretion. App.'s Br. at 16; *see also State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). An appellate court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The Defendant argues that the trial court improperly prevented him from presenting evidence regarding his background that was relevant to subjective element of a self-defense claim. App.'s Br. at 17.³ The trial court,

³ The Defendant also cites *State v. Avendano-Lopez*, 79 Wn.App. 706, 720-21, 904 P.2d 324(1995) for the claim that a defendant's background information is "admissible to let the jury know the defendant." App.'s Br. at 17. The *Avendano-Lopez* decision, however, does not stand for this proposition and does not in any way support the notion that a defendant has

however, had already properly determined that self defense was not an issue in the case as the defense had explained in its offer of proof that the Defendant would be denying that he ever displayed a firearm. As self-defense was not an issue, evidence regarding the Defendant's background was not relevant.

The Defendant's brief seems to imply that the trial court prohibited the Defendant from mentioning anything about his background and that he was unable to describe that he had grown up in New York or that he had served in the military. See App.'s Br at 16-19. This, however, is inaccurate. The State had no objection to this evidence as long as it did not go into the "dangerous circumstances" the defendant may have been exposed to, and the court allowed the defense to go into this limited type of background information. RP 344-45. The Defendant then testified about his background, including the fact that he grew up in Harlem, that he joined the Navy after high school, served in combat, and was honorably discharged, and that he currently worked at a car dealership. RP 347-49.

a right to always bring in whatever information he chooses about his background. That specific holding in *Avendano-Lopez* was that a prosecutor was not permitted to inquire about a defendant's immigration status (which was irrelevant) merely because the defendant had testified about some of his general background information. See, *Avendano-Lopez*, 79 Wn.App at 720-21. Nothing in the opinion suggests that a defendant may bring in background information on any subject he chooses just so that a jury "may get to know him."

For all of the above reasons, the trial court did not abuse its discretion in excluding evidence the “dangerous circumstances” the Defendant had experienced in his past as such evidence was not relevant given the trial court’s proper ruling that self-defense was not available in the present case as outlined above.

C. CONCESSION OF ERROR. THE STATE CONCEDES THAT THE FACTS BELOW SUPPORT ONLY ONE COUNT OF UNLAWFUL DISPLAY OF A FIREARM AND THAT THE CASE SHOULD BE REMANDED TO THE TRIAL COURT WITH DIRECTIONS TO DISMISS ONE OF THE COUNTS.

The Defendant next claims that his convictions for two counts of unlawful display of a weapon was improper since the unit of prosecution is based on the act of displaying the firearm, not the number of people who see the display. App.’s Br. at 25-27. The state concedes that the facts below support only one count of unlawful display of a firearm and that the case should be remanded to the trial court with directions to dismiss one of the counts.

When a defendant is convicted of violating one statute multiple times, the proper inquiry for double jeopardy purposes is what “unit of prosecution” the Legislature intended as the punishable act. *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998) The two unlawful display charges in this case

were based on a single act of display witnessed by two victims. The State concedes that the unit of prosecution for unlawful display of a weapon is the defendant's act of displaying a weapon, not the number of people who witnessed the act. Thus, this court should remand for vacation of one of the counts of unlawful display of a weapon and for resentencing on the remaining count.

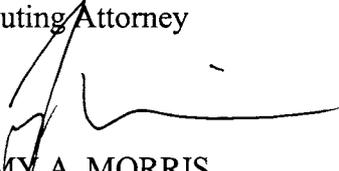
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED November 13, 2008.

Respectfully submitted,

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