

NO. 49343-8-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARLOS PEREZ CALDERON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Edmund Murphy

No. 15-1-00263-9

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**Brief of Respondent**

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

1. Did the trial court afford defendant a fair opportunity to argue accident or misfortune?
2. Did the trial court properly refuse defendant's request for jury instructions on the lesser included offense of manslaughter in the first degree?
3. Did the trial court properly refuse defendant's request for jury instructions on the lesser included offense of manslaughter in the second degree?
4. Did the trial court properly refuse defendant's request for jury instructions on self defense?
5. Did the trial court err when it permitted an amendment of the information on the trial date?
6. Did defendant demonstrate prosecutorial vindictiveness in the proceedings below?
7. Did the trial court properly conclude that defendant's statements to law enforcement were voluntary?
8. Does appellant's failure to assign error to the trial court's findings of fact render those findings of fact verities on appeal?

B. STATEMENT OF THE CASE.

1. Procedure
  - a. Facts pertaining to 3.5 hearing.

Appellant, Carlos Perez Calderon (hereinafter "defendant") was custodially interrogated by detectives following the shooting. Following a hearing regarding the admissibility of respondent's statements, the trial

court made the following finding regarding the voluntariness of defendant's statements:

The detectives' methods did not overcome the defendant's will. Throughout the investigation into Ms. Hughes' death, even beginning with the 911 call, the defendant consistently asserted that the gun "went off"; whether by accident or through some mechanical malfunction.

CP 189.<sup>1</sup>

b. Facts pertaining to the amendment of the information.

Defendant was alternatively charged by amended information with intentional murder in the second degree and felony murder in the second degree. CP 13-14. The amended information also added a firearm enhancement and a domestic violence aggravating factor to each alternative means. *Id.* The prior (original) information alleged only intentional murder in the second degree with a firearm enhancement and no aggravating factors. CP 1.

Amendment was allowed on June 21, 2016, the day trial proceedings commenced. 1 VRP 28. Defendant objected based on an allegation of prosecutorial vindictiveness. 1 VRP 27. Defendant's argument in support of that objection consisted of the following statement:

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<sup>1</sup> No error has been assigned to this finding of fact. It is a verity on appeal. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

Also, the only reason it is being added is because Mr. Calderon, Perez Calderon did not accept a plea offer. I think it goes to prosecutorial vindictiveness.

*Id.* Defendant acknowledged receiving notice of the amendment “in the last three weeks” prior to the trial date. 1 VRP 28. Defendant claimed no prejudice and did not seek a continuance as a consequence of the amended information. 1 VRP 26-28.

## 2. Facts

Melanie Cab, the nine year old daughter of the Ms. Hughes, the decedent, testified that her mother and defendant were in an argument and her mother told her to go to her room. Melanie heard defendant tell her mother to bend down a few times. 3 VRP 297. Her mother was crying. 3 VRP 298. A few minutes after, Melanie heard the gun go off. *Id.* The argument between her mother and defendant lasted for about 10 to 20 minutes from the time Melanie went to her room until the time of the gunshot. 3 VRP 308.

Ivan Montes was a friend of defendant. 3 VRP 236. Very shortly after the shooting he asked defendant exactly what happened. 3 VRP 240-41. Mr. Montes testified that defendant told him:

Carlos told me that, "We got into a fight. She got mad at me and she flipped the table. My gun was on the table. It went off. She's been shot." That was after I got the dogs out. So immediately after that, I asked him where the hell is the gun. Those were my exact words to him. I looked

around. He says he couldn't find it. He didn't know where it was.

3 VRP 41.

Defendant told Detective Punzalan that his Glock 19 pistol killed Ms. Hughes. 3 VRP 362. Defendant acknowledged the fact that the Glock pistol would not fire if it fell off the table and hit the floor. 4 VRP 444. Defendant also acknowledged that he knew that the Glock's trigger had to be pulled in order for the Glock to fire. *Id.* Defendant insisted that nothing caught on the Glock's trigger. *Id.* Defendant drew a diagram for the investigating detective that showed his position, Ms. Hughes' position, and the coffee table at the time the coffee table was flipped. Exhibit 80.<sup>2</sup> Defendant told the investigating detective that the firearm, a Glock 19,<sup>3</sup> was on the table when the victim flipped the table. 3 VRP 359. A Coke can and the Glock's holster were the other things that Defendant said were on the table. 4 VRP 384.

Defendant told the investigating detective that he did not know how the shooting happened and that the gun was not in his hand:

Q. A lot of possibilities in this case. He was consistent that he didn't know how it happened?

A. Yes.

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<sup>2</sup> Admitted at 3 VRP 360.

<sup>3</sup> 3 VRP 362.

Q. The only thing we know for sure is it went off and she died as a result?

A. Correct.

Q. He said the gun was not in his hand, right?

A. Yes.

4 VRP 389. Defendant said that the gun was next to him on the couch when it went off. 4 VRP 445-46. Defendant did not know how the gun got from the table to the couch. 4 VRP 446.

The Glock 19 pistol used to kill Ms. Hughes<sup>4</sup> had no defects. 4 VRP 538. It operated in the manner in which it was designed and manufactured. *Id.* The only way that gun would fire is if the trigger safety was deactivated and the trigger was pulled. 4 VRP 536; 5 VRP 558-61. That trigger of that pistol required an eight pound trigger pull—a pull that approximates the pull required to pick up a gallon of milk with one finger. 5 VRP 565-66.

The wound path of the bullet that killed Ms. Hughes went into her body from right to left and down. 4 VRP 475. It was consistent with Ms.

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<sup>4</sup> Exhibit 50 is a photograph of the Glock 19 pistol serial number AGL956, taken at the scene of the murder. 3 VRP 220 – 21. Exhibit 62, the Glock pistol, admitted without objection, has that same serial number. 4 VRP 523. Exhibit 101, a photograph of the same pistol, displays the pistol that the firearms expert examined. 4 VRP 537-538. A cartridge casing (exhibit 72) was found roughly two and a half feet from the victim's feet. 4 VRP 412-13. Exhibits 104 and 105 are comparison photographs of a test shell casing and a shell casing from the scene. 5 VRP 555. Both the test shell casings were fired in the same firearm. 5 VRP 557. Defendant admitted that Ms. Hughes was shot with his Glock firearm. 3 VRP 362.

Hughes bent over and facing the shooter. 4 VRP 489. The bullet lacerated Ms. Hughes spinal column. 4 VRP 476. Ms. Hughes was almost immediately incapacitated. 4 VRP 488. She would have collapsed. *Id.* Exhibit 33, a photograph taken at the scene of the murder, demonstrate that Ms. Hughes collapsed near a dining table, a considerable distance away from any couch and any coffee table. 3 VRP 241-44. Exhibit 33.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY REFUSED  
DEFENDANT'S PROPOSED MANSLAUGHTER  
LESSER INCLUDED OFFENSE INSTRUCTIONS.

Murder in the second degree, alternatively charged as intentional murder and felony murder, satisfies the legal prong of *Workman* test and implicates its factual prong. *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

The facts of *State v. Hernandez*, 99 Wn. App. 312, 319, 997 P.2d 923 (1999) are close in relevant particulars to the facts of this case. In *Hernandez*, the defendant sought manslaughter lesser included jury instructions based upon his statements to a friend and to an investigating officer. *Hernandez*, 99 Wn. App. at 319. However, those statements “d[id] not contain any admissions that Hernandez acted in a manner that caused Valadez's death. Consequently, neither statement amounts to

affirmative evidence that he committed first or second degree manslaughter and not second degree murder.” *Id.* at 320. In this case, like *Hernandez*, defendant presents no evidence in support of reckless causation or criminally negligent causation. Appellant’s Brief at 12. What defendant does cite,<sup>5</sup> establishes only (a) the nature of Detective Punzalan’s inquiry, and (b) defendant’s consistently maintained assertions that he did not hold the firearm and did not know how the shooting happened.

Q: You keep asking him questions and ask him possibilities that may have happened?

A: Certainly.

Q: Part of your possibility is it could have inadvertently gone off if it was in your hand when she flipped the table.

A. Right

Q. When he was turning or something?

A. Grabbed it inadvertently as the table was coming towards him. A lot of possibilities.

4 VRP 388-89. This exchange adduces nothing more than Det. Punzalan’s side of his interrogation of defendant. It does not indicate that defendant adopted any “question” or “possibility” posed by Det. Punzalan. Quite the contrary:

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<sup>5</sup> Appellant’s Brief at 12.

Q. A lot of possibilities in this case. He was consistent that he didn't know how it happened?

A. Yes.

Q. The only thing we know for sure is it went off and she died as a result?

A. Correct.

Q. He said the gun was not in his hand, right?

A. Yes.

4 VRP 389.

“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).

This Court “must view the supporting evidence in the light most favorable to the party that requested the instruction. But the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” (internal quotation omitted) *State v. Hunter*, 152 Wn. App. 30, 216 P.3d 421 (2009) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000)). “[W]hen substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense, the factual

component of the test for entitlement to an inferior degree offense instruction is satisfied.” *State v. Fernandez-Medina*, 141 Wn.2d at 461.

In *Hunter*, this Court held that a defendant’s “testimony that the shooting was an accident raised the inference that *Hunter* was guilty only of manslaughter and not murder.” *Hunter*, 152 Wn. App. at 47. But in *Hunter*, the “accident” manslaughter inference was developed from the defendant’s testimony that the shooting was an accident and that he unintentionally shot his victim in the face with a pistol. *Id.* at 38, 46. In this case, unlike *Hunter*, defendant’s statements, if believed, preclude his criminal agency in Ms. Hughes’ death and proclaim his ignorance of the cause of that death. Defendant’s argument in support of manslaughter lesser included offenses relies solely upon defendant’s statements. (Appellant’s Brief at 11-14).

The remainder of the evidence presented by the State provides no support for either negligent causation or reckless causation. Defendant and Ms. Hughes were arguing. 3 VRP 297-98. After Melanie Cab left the room, defendant told Ms. Hughes to bend down. *Id.* at 297. Ms. Hughes was crying. 3 VRP 298. Ms. Hughes was shot in the chest and her wound path was consistent with the shooter standing facing Ms. Hughes and she was bent over toward the shooter. 4 VRP 489. Ms. Hughes was shot with defendant’s pistol. 3 VRP 362. The weapon used to kill Ms. Hughes

could only be fired with an eight pound trigger pull, with the shooter's finger on the trigger. 4 VRP 561. Ms. Hughes did not shoot herself.<sup>6</sup> Defendant lied about how the shooting happened.<sup>7</sup>

The holding in *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000) applies to this case:

“A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability.” *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). In short, there was no evidence that affirmatively established that Perez-Cervantes acted recklessly or with criminal negligence in plunging the blade of his knife into Thomas. Whatever Perez-Cervantes' subjective intent, his objective intent to kill was manifested by the evidence admitted at trial. His requested instructions rested on the theory that the jury might disbelieve some of the evidence indicating his intent to kill, and find, by default, that he must have acted with recklessness or criminal negligence. This is not enough. See *State v. Berlin*, 133 Wn.2d at 546, 947 P.2d 700. The trial court properly refused to give Perez-Cervantes' requested instruction.

*Id.* 141 Wn.2d at 481-82. In this case there is evidence that affirmatively establishes accident, but the evidence presented at trial leaves no room for either negligent or reckless causation. The trial court properly refused to give defendant's requested lesser offense instructions.

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<sup>6</sup> The wound was a distant range wound, meaning that it was inflicted from more than approximately two feet. 4 VRP 485.

<sup>7</sup> The victim collapsed away from where she would have collapsed had she flipped the 18 inch high (4 VRP 435) coffee table (*See* Exhibit 33); the flipped gun discharge story is inconsistent with the defect-free state of the firearm (4 VRP 538); and Ms. Hughes' wound path (downward) is inconsistent with a pistol shot upward from the couch (4 VRP 445-46 (couch); 4 VRP 475 (downward path)).

In the course of his argument that he was entitled to manslaughter lesser included jury instructions, defendant asserts that the trial court erred because it did “not allow Mr. Perez-Calderon to argue his theory that Ms. Hughes’ death was accidental where there was clear evidence that he possibly killed her by grabbing the gun during his attempt to shield himself from the chalice / ACU top / coffee table during their struggle.” Appellant’s Brief at 10. This statement is incorrect: The trial court instructed the jury on the State’s burden of disproving accident or misfortune beyond a reasonable doubt. Jury Instruction 18; CP 108.

Defendant’s counsel argued accident to the jury:

All the evidence here is entirely consistent with a plausible explanation of an accident. He cared for these people. He tried to help these people. He tried to keep her alive. He called 911. All of his actions are entirely inconsistent with the person who, within a 45 minute time, was intending to kill a person who they are suggesting he, for whatever reason, was involved in an argument.

5 VRP 647-48.

2. THE TRIAL COURT PROPERLY REFUSED DEFENDANT’S PROPOSED SELF DEFENSE INSTRUCTIONS.
  - a. The trial court properly the denied improper self defense jury instructions presented by defendant.

Defendant proposed a self defense jury instruction based on WPIC 17.02. CP 58. Such an instruction is improper when the defendant is

charged with felony murder predicated upon assault in the second degree with a deadly weapon. CP 13-14. *State v. Ferguson*, 131 Wn. App. 855, 856-59, 129 P.3d 856 (2006). The trial court did not err in rejecting defendant's self defense instruction. It is not error to refuse instructions which are incorrect in any material particular. *State v. Camp*, 67 Wn.2d 363, 407 P.2d 824 (1965); *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

- b. The evidence presented at trial was insufficient to warrant a self defense instruction.

Defendant suggests the following circumstances justify killing another human being: (1) an escalating argument between the killer and the victim; (2) the victim threw things at the killer;<sup>8</sup> (3) the victim swatted/hit the killer with an item of clothing; and (4) the victim flipped a coffee table towards the killer at close proximity. Appellant's Brief at 15. While such behavior may be irritating, even taken in the light most favorable to defendant, it provides no justification for homicide. More importantly, there is no evidence in the record that this irritating conduct

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<sup>8</sup> The evidence of "throwing things" is limited to two items. One item was a metal "ring thing" thrown before Melanie Cab was sent to her room. 3 VRP 288, 307. This item was thrown at least "15 or 10 minutes" or "10 or 20 minutes" before the shot was fired. 3 VRP 298, 308. The other item was a glass chalice, which defendant claimed struck him. 3 VRP 357-58. A broken wine glass was admitted as Exhibit 63. 4 VRP 426-27.

generated a reasonable belief in defendant that the use of deadly force was necessary under the circumstances. *State v. Brightman*, 155 Wn.2d 506, 518-19, 122 P.3d 150 (2005). Defendant consistently maintained that he did not use deadly force. 4 VRP 389.

In *State v. Gogolin*, 45 Wn. App. 640, 727 P.2d 683 (1986) the victim testified that the defendant “grabbed her from behind, threatened to kill her and then struck her several times on the back of the head, apparently with the revolver she later saw him holding.” *Gogolin*, 45 Wn. App. at 641. A police officer testified that the defendant told him that

he and his ex-wife had begun pushing each other during an argument and that [the defendant] pushed [the victim] a bit too hard and she fell backward down the stairway. At trial, however, [the defendant] denied telling the officer that he pushed [the victim] and caused her to fall.

*Id.* at 642. At trial, the defendant testified that the victim

came completely unglued[,] came at me swinging, and I was trying to get away from her.” He raised his hands and “more or less tried to push her off.” He did not know if he actually touched her, but she fell backward down the stairs, striking her head on the steel railing of the stairway.

*Id.* In *Gogolin*, a self defense instruction was properly refused because

[i]n short, rather than testifying that he feared for his own safety and that he pushed Nancy down the stairs in self-defense, Robert claimed that she fell accidentally. The trial court properly refused to instruct the jury on self-defense in the absence of any evidence to support it.

*Id.* at 643-44. In this case, like *Gogolin*, the defendant's theory was that the victim did aggressive things, but that he took no aggressive action toward her in response. In this case, like *Gogolin*, defendant's request for a self defense instruction was properly denied.

Self-defense and accident are not necessarily inconsistent, but a self defense instruction must be supported by sufficient evidence of self defense.<sup>9</sup> *State v. Callahan*, 87 Wn. App. 925, 929-33, 943 P.2d 676 (1997) is a case where sufficient evidence was presented to show that the defendant *intentionally* displayed a weapon in an act of self defense, but *accidentally* discharged the weapon while engaged in self defense. *State v. Callahan*, 87 Wn. App. at 931-32. In this case, the evidence of accident was sufficient, given defendant's table-flipping-gun-discharging story, but there was no evidence of self defense.

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<sup>9</sup> See *State v. Alferez*, 37 Wn. App. 508, 511, 681 P.2d 859 (1984) (Self defense instruction was unwarranted where defendant testified that he was not in fear when he pulled his gun out, and the gun's discharge was accidental); *State v. Safford*, 24 Wn. App. 783, 791, 604 P.2d 980 (1979), abrogated on other grounds by *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004) (Defendant's testimony that the knifing was caused by the victim coming towards him, holding his bicycle in front of him, and tripping, was insufficient to warrant a self defense instruction.)

3. DEFENDANT HAS NOT DEMONSTRATED  
PROSECUTORIAL VINDICTIVENESS.

The State moved to amend the charges before trial commenced. 1  
VRP 27-28. There is no presumption of vindictiveness in a pretrial  
setting. *United States v. Goodwin*, 457 U.S. 368, 375-76, 102 S. Ct. 2485,  
73 L. Ed. 2d 74 (1982); *State v. Bonisisio*, 92 Wn. App. 783, 791, 964  
P.2d 1222 (1998).

A defendant in a pretrial setting bears the burden of proving  
either (1) actual vindictiveness, or (2) a realistic likelihood  
of vindictiveness which will give rise to a presumption of  
vindictiveness. Once the defendant makes the required  
showing, the prosecution must justify its decision with  
legitimate, articulable, objective reasons for its actions.

(internal quotations and citations omitted) *State v. Bonisisio*, 92 Wn. App.  
at 791. Defendant never requested a hearing on the issue of prosecutorial  
vindictiveness and presented no evidence of vindictiveness. The trial  
court did not err in overruling his objection to the State's motion to  
amend. In *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S. Ct. 663, 54  
L. Ed. 2d 604 (1978) the Court held "that the course of conduct engaged in  
by the prosecutor in this case, which no more than openly presented the  
defendant with the unpleasant alternatives of forgoing trial or facing  
charges on which he was plainly subject to prosecution, did not violate the  
Due Process Clause of the Fourteenth Amendment."

4. DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT WERE VOLUNTARY.

The detectives' methods did not overcome the defendant's will. Throughout the investigation into Ms. Hughes' death, even beginning with the 911 call, the defendant consistently asserted that the gun "went off"; whether by accident or through some mechanical malfunction.

CP 189. No assignment of error was made to this finding of fact.

Appellant's Brief at at 1-2. "When no error is assigned respecting the trial court's findings of fact, they become the established facts of the case."

*Seattle v. Muldrew*, 69 Wn.2d 877, 878, 420 P.2d 702 (1966) (citing *Seattle v. Reel*, 69 Wn.2d 227, 229, 418 P.2d 237 (1966)).

Defendant argues Due Process coercion based upon (1) failure to inquire as to whether English was defendant's first language;<sup>10</sup> (2) telling defendant that his failure to give a statement would cause Ms. Hughes' children to submit to a forensic interview;<sup>11</sup> (3) interrogating defendant for several hours; and (4) interviewing detective repeatedly used the "F-word." Appellant's Brief at 17.

"The constitutional test, then, is whether under all the circumstances the information given to the sheriff was given voluntarily." *State v. Self*, 59 Wn.2d 62, 73 366 P.2d 193 (1961). The due process

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<sup>10</sup> Defendant answered the interrogating detective's questions. 2 VRP 133. Defendant never said that he didn't understand a question. *Id.*

<sup>11</sup> A forensic interview of Ms. Hughes' children was actually conducted. 2 VRP 62.

voluntariness test examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession. *Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

In this case, the duration of the interrogation and the use of the “F-word” overbore nothing. As the unchallenged finding of fact states: “Throughout the investigation into Ms. Hughes’ death, even beginning with the 911 call, the defendant consistently asserted that the gun “went off”; whether by accident or through some mechanical malfunction.” CP 189.

D. CONCLUSION.

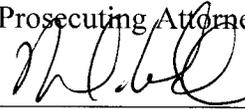
The evidence presented in this case did not warrant instructing the jury on either manslaughter or self defense. The record in this case is

devoid of vindictiveness. Defendant's steadfast will was not overborne.

This Court should affirm the judgment below.

DATED: May 23, 2017

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

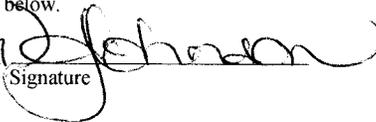


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Mark von Wahlde  
Deputy Prosecuting Attorney  
WSB # 18373

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.

5/23/17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 23, 2017 - 3:18 PM**

**Transmittal Information**

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