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STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

vs.

LESHAUN ALEXANDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 15-1-04164-1

BRIEF OF APPELLANT

Spencer D. Freeman
WSBA #25069

FREEMAN LAW FIRM, INC.
Attorneys for Appellant
1107 ½ Tacoma Ave S
Tacoma, WA 98402
(253) 383-4500

ORIGINAL

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I. INTRODUCTION

This case involves an unconstitutional stop of LeShaun Alexander and wrongful denial of a jury instruction requested by Mr. Alexander.

The officer stopped a Dodge Durango, of which Mr. Alexander was a passenger, in the area of a reported shooting. The Durango was observed in the area approximately five minutes after the reported shoot and at a time that all reports indicate that one shooter fled on foot and the other in a Chrysler Sebring. A Dodge Durgano was NOT associated with any reports of the shooting and none of the shooters were reported as remaining at the scene.

While police may have good instincts, they are not permitted to act on instinct alone. They must have articulable facts which support a particularized suspicion that the seized person has been or is engaged in criminal activity. Such is significantly lacking here.

Further, the stop of the Durango far surpassed that of an investigatory stop, but rather has clearly an arrest in every physical way possible. In fact, the seizing officer testified that the *only* thing he could have done differently from an arrest would be to say the words "you are under arrest." Thus, the seizure was an arrest and done without required probable cause.

Finally, Mr. Alexander, charged with assault in the first degree, asserted self-defense at trial for shooting at Atere Norman. There was evidence presented at trial that Mr. Alexander's perception of the need for self defense was mistaken. Even though the jury specifically presented a

question on this issue during deliberations, the Court declined Mr. Alexander's request to instruction the jury that actual imminent threat of danger need not have been present.

On these grounds, Mr. Alexander requests that his conviction be overturned.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Alexander's motion to suppress evidence as the result of an unconstitutional seizure of Mr. Alexander on October 16, 2015.
2. The trial court erred when it denied Mr. Alexander's motion to suppress evidence as the result of a seizure of Mr. Alexander that exceeded that permitted by a *Terry* stop and without probable cause for an arrest.
3. The trial court erred when it refused to provide the jury with a specific pattern self defense instruction when twice requested to do so by Mr. Alexander.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether an officer had constitutionally sufficient grounds to stop a vehicle in which Mr. Alexander was a passenger on October 16, 2015.

(Assignment of Error No. 1)

2. Whether the officers' seizure of Mr. Alexander on October 16, 2015 extended beyond constitutionally permissible constructs of an investigatory *Terry* stop to become an arrest without probable cause.

(Assignment of Error No. 2)

3. Whether Washington Pattern Jury Instruction 17.04 "Lawful Force – Actual Danger Not Necessary" should have been provided to the jury when uncontroverted evidence that the complaining witness has been hunting Mr. Alexander for several weeks, the jury presented a question during deliberations of whether appearance of the complaining witness could support need for self defense, and evidence was presented by the State that supported a potential determination that Mr. Alexander's perception of the threat was mistaken. (Assignment of Error No. 3)

IV. STATEMENT OF THE CASE

A. Procedural History

On October 19, 2015, by way of an information, LeShaun Alexander was charged in Pierce County Superior Court with three criminal charges: (1) Drive-by Shooting; (2) Assault in the First Degree; and (3) Unlawful Possession of a Firearm in the First Degree. Each charge arose from the same incident on October 16, 2015. Each of these charges were accompanied by aggravators for acts done in benefit of criminal street gangs. CP 1-2.

After Mr. Alexander filed motions to dismiss the Drive-by Shooting and all aggravators based upon gang allegations for insufficiency of evidence, the State dismissed the charge and the aggravators. CP 65-69, 81-86. On November 28, 2016, the State filed an Amended Information charging Mr. Alexander with two criminal charges: (1) Assault in the First Degree; and (2) Unlawful Possession of a Firearm in the First Degree. Each of these charges contained allegations of sentencing enhancement for committing the crime while armed with a firearm. CP 115-116. Mr. Alexander went to trial in front of a jury on these two charges.

Prior to trial, Mr. Alexander filed a motion to suppress evidence on two grounds: (1) That there were insufficient grounds to conduct an investigatory stop of the vehicle his was a passenger in; and (2) that, if the investigatory stop was permitted, the actual stop far exceeded the

permissible bounds of an investigatory stop such that it was an arrest without probable cause. On November __, 2016, an evidentiary hearing was held regarding Mr. Alexander's motion. The Court denied Mr. Alexander's motions. CP 21-29.

During deliberations, the jury presented the Court with the following question:

Based on previous events where lethal force was threatened by an individual, can solely the presence of the same individual be perceived as an immediate threat justifying lethal force as a proactive act of self defense.

CP 288.

Based upon the question and the evidence presented at trial, as explained in Section IV.B., Mr. Alexander requested that the Court provide the jury with WPIC 17.04, which states:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 260-62.

The Court declined Mr. Alexander's request to provide the jury with WIPC 17.04. Id. Rather, the Court merely told the jury: "I am not able to answer this question for you. Please review to instructions 13, 11, 15." CP 288.

On December 13, 2016, a jury found Mr. Alexander guilty of

Assault in the First Degree, committed with a firearm, and Unlawful Possession of a Firearm First Degree. CP 289-91. Mr. Alexander was thereafter sentenced on December 30, 2015 to a total of 162 months. CP 292-305.

B. Facts

The Seizure of Mr. Alexander.

At 03:50:17 in the early morning of October 16, 2015, a 911 caller reported gun shots fired in the parking lot of Shell gas station on corner of Tacoma Mall Boulevard and 84th Street. 4 RP 190:22-24. In the few minutes after that, several similar calls were made to 911, reporting two black males shooting at each other. 4 RP 191:11-25. One black male, wearing a grey hooded sweatshirt, ran on foot from the Shell station to the casino immediately next door where he got into a silver Chrysler Sebring and then drove away, west on 84th Street. The other black male ran away also west on 84th Street, away from the Shell station. 4 RP 197:13-25, 198:10-17, 202:14-18, 209:8-12, 220:23-2, 221:10-222:6, 228:2-6; 5 RP 394:25-395:7.

The Sebring was stopped west of the Shell Station, at 84th and 34th, two minutes after the shooting. 5 RP 401:5-402:18.

At 03:51:23, dispatched notified officers via radio and computer of the reported shooting at Tacoma Mall Boulevard and 84th Street. 4 RP 196:20-197:9; 5 RP 359:7-10. At 03:52:07, Lakewood Police Officer Clark answered the dispatch call regarding the shooting. 4 RP 195:16-196:13; 5 RP 359:11-13. Officer Clark estimates that it took

approximately two minutes to arrive to the area of the shooting. 5 RP 360:4-8.

At 03:55:42, more than five minutes after the reported shots fired, Lakewood Police Officer Clark radioed dispatch that he required assistance in the stop of a dark colored Durango he observed coming out of the Shell Station onto 84th Street.. 4 RP 202:25-203:22.

All reports were consistent: one shooter fled on foot running west on 84th Street and the other in a silver Chrysler Sebring west on 84th - each away from the Shell Station. 4 RP 197:13-25, 198:10-17, 202:14-18, 209:8-12, 220:23-2, 221:10-222:6, 228:2-6. *None* of the reports implicated a Durango. 4 RP 237:11-13. *None* of the reports indicated that any party involved in the shooting would have been present at the Shell station three to five minutes later, or even a few moments after the shooting – all involved parties fled west on 84th Street. (Officer Clark admits that 3-4 minutes pass from the shooting until he sees the Durango. 5 RP 387:2-7.) *It was clear that all parties had fled immediately after the shooting.*

Nonetheless, after observing a dark colored Durango with two black males inside leave the area of the Shell station, Officer Clark decided to pull over the Durango as it drove west on 84th Street. 4 RP 204:18-25. The only way that the occupants of the Durango match any description of the reported shooters is that they were black wearing dark clothing. 4 RP 206:8-16. The only reason that Officer Clark pulled over the Durango was his assessment of a close time frame to the shooting,

proximity to the reported area of shooting and that the occupants were black with dark clothing. 4 RP 230:4-12, 241:24-242:1. However, neither was on foot or in a Chrysler Sebring.

Noteworthy is that the Shell station is immediately adjacent to Chips Casino, which is open throughout the night and has patrons all night. 4 RP 201:13-3. Any assertion that this area is void of traffic at any hour of the night or morning is wrong and misleading.

Officer Clark initiated his lights and sirens immediately as he got behind the Durango. 4 RP 206:23-207:2. The stop of the Durango occurred at Crowne Point Apartments, west of the Shell station on 84th Street. 4 RP 207:15-19. In response to the overhead lights, the Durango pulled over in the parking lot of Crowne Point. Officer Clark held the Durango at gun point until other officers arrived to assist him. 5 RP 369:4-25. The officers as a group then conducted a "high risk felony stop" which meant approaching the Durango with their guns drawn. 4 RP 209:15-20.

The stop of the Durango involved multiple patrol cars, four to five, from several law enforcement agencies. 4 RP 231:11-23. The stop, directed by Office Clark, was conducted in a loud aggressive manner at gun point, with all officers having drawn their weapons. 4 RP 231:20-233:4.

The occupants of the Durango, of which there were three, were ordered out of the car at gun point, immediately placed in handcuffs, frisked, and placed separately in the back of a patrol car. 4 RP 209:19-

211:9. As the officers began to speak with each of three men, they read the men their Miranda rights. 4 RP 211:13-20.

The only actions the officers could have taken, beyond those done, to effectuate an arrest would have been to say “You are under arrest.” 4 RP 236:4-13.

Mr. Alexander was a rear-seated passenger in the Durango. 4 RP 201:12-16. As a result of this stop, pursuant to a subsequent search warrant for the Durango, detectives found a black jacket, 5 RP 464:2-9, ID of Alexander in pocket of the jacket, 5 RP 465:19-466:18, a .32 caliber Beretta Tomcat with empty magazine found under rear passenger seat of Durango where Alexander was sitting, 5 RP 471:4-473:2, 5 RP 747:13-21. Mr. Alexander also gave a statement to detectives on video.

The October 16, 2016 Incident.

In order to understand the occurrence in the early morning hours of October 16, 2015, the issues between the parties in the weeks immediately prior must be known.

Mr. Alexander, 18 years old at the time, had been dating Faith Brown, until several weeks prior to October 2016. 6 RP 522:4-10; 7 RP 689:2-4, 689:23-690:11. Ms. Brown’s brother, Steven Brown was upset with Mr. Alexander over the ending of his relationship with Ms. Brown. 7 RP 690:12-17. Mr. Brown was best friends, or “brothers,” with Atere Norman. 7 RP 690:18-691:1.

Mr. Brown and Mr. Norman had made it known through social media that they were coming after Mr. Alexander. Approximately two

weeks before the October 16, 2015 incident, Mr. Brown and Mr. Norman arrived at Mr. Alexander's third story apartment. Mr. Brown and Mr. Norman push themselves into the apartment. Mr. Norman had a gun drawn and chased Mr. Alexander at gun point to the rear of the apartment. In order to get away from Norman, Mr. Alexander had to jump off the third story balcony, at which point he ran and hid. 7 RP 691:11-697:2, 698:7-15.

Following the incident at Mr. Alexander's apartment, Mr. Brown and Mr. Norman bragged over social media about chasing Mr. Alexander at gun point off his balcony. 7 RP 697:3-13. Further, through social media, Mr. Norman warned Mr. Alexander that every time Mr. Norman saw Mr. Alexander, Mr. Alexander would face the same threat, Mr. Norman with a gun. 7 RP 698:24-699:3.

Four or five days after Mr. Alexander was force at gun point to jump from his third story balcony, Mr. Norman and Mr. Brown came back to Mr. Alexander's apartment. Mr. Alexander's roommate was able to get them to leave. 7 RP 699:4-21.

In response to the continuing threats, Mr. Alexander bought a gun. 7 RP 699:23-700:6. Mr. Alexander chose to not report the threats to the police out of fear of retaliation. 7 RP 700:13-18. Mr. Alexander also moved out of his apartment and stayed with a friend at the Crowne Apartments on 84th Street, in order to hide from Mr. Norman and Mr. Brown. 7 RP 703:17-704:1.

On the evening of October 15, 2015 and early morning of October

16, 2015, Mr. Alexander was out with friends, Amancio Tolbert and Randy Smith, starting at a club and ending up at the Chips Casino on Tacoma Mall Blvd near 84th Street. Mr. Alexander left Mr. Tolbert and Mr. Smith to go to the nearby apartment (Crowne Apartments) he was staying.

Mr. Alexander arrived at the apartment at Crowne Apartments shortly after 2:00 am. After hanging out by himself for awhile, Mr. Alexander called Mr. Tolbert to pick up a cigar and come over. 7 RP 704:5-24. Mr. Tolbert did not timely arrive, so Mr. Alexander decided to walk to the nearby Shell Station on his own to buy a cigar. 7 RP 705:4-706:8.

Mr. Tolbert and Mr. Smith stayed at the casino until around 4 am, at which time they stopped at the Shell Station next door. 6 RP 598:21-18, 599:19-600:13; 7 RP 700:23-703:14. Mr. Alexander, having waited for nearly an hour, had already left the apartment to walk to the Shell Station and did not know that Tolbert and Smith were headed to the Shell Station. 7 RP 710:8-15.

Dodge Durango was at Shell Station *before* the shooting.¹ At 03:45, Mr. Tolbert, its driver, walked out of the shell station and got in the Durango which was parked right in front. Randy Smith was a passenger in the Durango, the only passenger at the time. 5 RP 497:5-8; 6 RP 519:5-9, 598:14-20. Atere Norman walked into the Shell Station, also to buy a

¹ 5 cameras at the Shell Station produced 5 difference views of the scene, labeled Channel 1, 4, 7, 8, and 13. 5 RP 411:24-412:19; 416:16-22.

Swisher, just as Mr. Tolbert was leaving. 6 RP 601:15-25, 655:11-20.

After getting the cigar, Mr. Tolbert and Mr. Smith left the Shell Station to go to Mr. Alexander's at the Crowne Apartments on 84th. 6 RP 602:22-604:17. Mr. Tolbert drove the Durango out of the parking lot at 3:46:44, turning out of the northern entrance right (south) on Tacoma Mall Blvd and then left on 84th St heading west. 5 RP 498:19-500:12; 6 RP 604:23-605:1.

Just a few seconds after the Durango drove past the Shell Station westbound on 84th, Mr. Alexander appeared from a path that leads up an embankment from 84th to the far side of the Shell Station parking lot near a bank of pay phone, calmly walking. Mr. Alexander had walked from the sidewalk on 84th Street up a gravel and dirt path up to the Shell Station parking lot. 7 RP 707:8-16. Mr. Alexander appeared to be looking at his phone and continued to walk calmly towards the Shell Station. Mr. Alexander had been attempting to call Mr. Tolbert, who had just left the Shell Station. 7 RP 706:2-25.

The pathway was estimated by one officer to be 150 yards from 84th to convenience store, per Clark. 5 RP 390:3-11. It took one officer 10 seconds to run the beginning of the pathway up the hill (not including the sidewalk) to the end of the dirt path and beginning area of gravel (well before the parking lot). The officer's test run did not include another 25 feet to the parking lot, where Mr. Alexander is first seen on Shell Station video. 6 RP 520:10-511:17, 531:14-533:11, 540:13-15, 543:4-9. The length of the pathway to the parking lot was estimated by the Detective

that ran it to be 50 yards in total. 6 RP 534:11-17.²

The Durango disappeared on video on 84th Street just past entrance of Shell Station at 03:47:29. 6 RP 547:12-548:14. This distance for the Durango to travel from the point it disappeared to the front of the pathway would have taken 7 seconds, reaching the pathway at 03:47:36. 6 RP 547:12-549:4. Mr. Alexander appears from the pathway coming into the parking lot at 03:47:41. 6 RP 542:1-9. It is not possible for Mr. Alexander to have been in the Durango before the shooting. 6 RP 549:2-19.

As Mr. Alexander walked across the parking lot towards the front entrance of the Shell Station, Mr. Norman exited the Shell Station at 03:47:46. 5 RP 501:19-23; 6 RP 519:10-14; 7 RP 707:19-708:2. Mr. Norman looked at Mr. Alexander and said, aggressively, "You know what time it is," while beginning to lift up his shirt. 7 RP 708:3-11, 763:1-19, 777:1-15. Mr. Alexander believed that Mr. Norman was reaching for a gun and was going to try to kill him. 7 RP 708:12-709:6.

Mr. Alexander was carrying the gun he had purchased. In seeing Mr. Norman and Mr. Norman's actions, and believing that he was about to be shot, Mr. Alexander pulled the gun from his pocket and shot at Mr. Norman. 7 RP 708:7-710:21. Mr. Alexander was backing up as he fired, as he was intending to protect himself and get away, not hunt down Mr.

² The details of the path are important as the State opined at trial that Mr. Alexander was a passenger in the Durango *at the time the Durango was first at the Shell Station*. This assertion was disproven at trial based upon the timing, the length of the path, and Mr. Alexander's clear calm demeanor as he exited the path into the parking lot.

Norman. 7 RP 711:4-11, 775:13-776:2.

After firing, Mr. Alexander turned and ran back down the pathway and ran down 84th Street. 6 RP 562:14-21; 7 RP 711:17-21. As Mr. Alexander Mr. Norman exchanged fire, Mr. Norman jogged towards the casino away from Mr. Alexander. 5 RP 503:5-11. Then, he turns back and fires back at Mr. Alexander as Mr. Alexander was running away from him. 6 RP 545:1-14, 562:14-563:15.

After leaving the Shell Station, Tolbert and Smith drove to the Crowne Apartments to meet Mr. Alexander. Shortly after Mr. Tolbert and Mr. Smith parked at the Crowne Apartments, Mr. Alexander jumped in the back seat of the Durango. 6 RP 605:3-6, 608:14-20; 7 RP 712:6-9. Mr. Alexander, out of breath, told Mr. Tolbert and Mr. Smith that he had shot at Mr. Norman after he saw Mr. Norman going for a gun. 6 RP 609:1-24; 7 RP 712:16-20.

Almost immediately Mr. Alexander got into the Durango, they drove back to the Shell Station at Mr. Alexander's request. 6 RP 614:24-615:16, 616:22-617:2. After arriving back at the Shell Station, Mr. Smith recalls Tolbert understands that Mr. Alexander wants a Swisher, but he already bought one, so they turn around in the parking lot and leave. 6 RP 617:19-618:11. Mr. Alexander recalls that they went back to the Shell Station to attempt to find his apartment key that he lost during the incident. 7 RP 712:21-714:6, 769:25-770:11. They are pulled over shortly after leaving the Shell Station.

Mr. Norman fled the scene in his Chrysler Sebring, driving west on

84th Street. He was stopped several minutes after the reported shooting, nearly a mile west of the Shell Station on 84th Street. A gun was found on Norman's car was fully loaded. After the shooting, he had re-loaded to chase down Alexander. 6 RP 539:21-540:6.

At trial, Mr. Norman refused to answer questions about the incident at the Shell Station (including whether he pulled his shirt up prior to the shooting), as well as questions regarding his issues with Mr. Alexander or his prior pursuit of Mr. Alexander. 6 RP 655:24-25, 656:15-20, 657:3-8, 657:16-19, 659:20-21, 660:5-6, 661:18-21, 662:9-11, 662:19-23, 663:5-7.

V. ARGUMENT

A. THE SEIZURE OF MR. ALEXANDER WAS UNLAWFUL.

Warrantless seizures are presumed unreasonable, and the State bears the burden of establishing that the seizure falls within one of the carefully drawn exceptions to the warrant requirement. One such exception is a brief investigatory detention of a person, known as a *Terry* stop. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). For a *Terry* stop to be permissible, the State must show that the officer had a "reasonable suspicion" that the detained person was, or was about to be, involved in a crime. *Acrey*, 148 Wn.2d at 747.

In a challenge to the validity of a *Terry* stop, article I, section 7 generally tracks the Fourth Amendment analysis. *State v. Z.U.E.*, 183 Wn.2d 610, 617-18, 352 P.3d 796, 799-800 (2015). The reasonable suspicion standard, under either constitutional analysis, requires that the suspicion be grounded in “specific and articulable facts.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

However, because article I, section 7 provides for broader privacy protections than the Fourth Amendment, *the Washington state constitution requires a stronger* showing by the State. *Z.U.E.*, 183 Wn.2d at 617-18; *Acrey*, 148 Wn.2d at 746-47; *State v. Hendrickson*, 129 Wn.2d 61, 69, 917 P.2d 563 (1996). The available facts must substantiate more than a mere generalized suspicion that the person detained is “up to no good”; the facts must *connect* the *particular person* to the *particular crime* that the officer seeks to investigate. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009) (*citing State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006)).

The Washington State Supreme Court, in *State v. Z.U.E.*, 183 Wn.2d 610, 617-18, 352 P.3d 796, 799-800 (2015), reiterated and clarified these tenants under the Washington state constitution. In order

for an investigatory stop to be valid, the police must have available facts to connect a particular person to a particular crime.

In the instant case, Lakewood Police Officer Clark must have had facts sufficient to connect the occupants of the Durango with the report of gun shots fired at the Shell station. While it is true that the severity of the crime affects the reasonableness analysis of a *Terry* stop, a report of gun shots *does not* render the Fourth Amendment and article 1 section 7 of the Washington State Constitution inapplicable or entirely moot. The officer must still have facts sufficient to connect the occupants of the Durango to the reported shooting.

The *only* facts that can be pointed to by Officer Clark that connect the Durango to the Shell station shooting are (1) occupants of Durango were black, as the men observed in the shooting were black, in dark clothes (without any further description of height, weight, specifics of type of clothing); and (2) temporal proximity of the Durango to the Shell station, as it was observed leaving the Shell station approximately 5 minutes after the reports of the shots fired.

Perhaps these facts could be sufficient if the totality of the circumstances were completely ignored. However, they cannot be. The attempted connection of the Durango to the reported shooting *actually contradicts* the 911 caller reports. The 911 callers report specific

information regarding the actions of the shooter in addition to general descriptions of the shooters. The callers explicitly, clearly, and consistent with each other report that one shooter fled the scene on foot westbound on 84th street and the other fled in a silver Chrysler Sebring, also west on 84th. These reports of the fleeing shooters should be viewed as credibility as the reports of the shots being fired.

Thus, not only was a dark colored Durango (or any Durango) not reported in connection with the shootings, but the presence of the Durango at the Shell station five minutes after the two shooters fled significantly distances and affirmatively disconnects the Durango as being connected with the reported crime. Thus, it cannot be subject to an investigatory stop.

In this particular case, the officer simply cannot point to any facts that connect the occupants of the Durango or the Durango to the report of shots fired at the Shell station. The facts relied upon by the officer only support the conclusion that the Durango was NOT involved in the shooting. The shooters fled, one on foot and one in a silver Chrysler west on 84th Street. As such, the presence of the Durango at the Shell station five minutes later contradicts any conclusion that the occupants were involved with the shooting.

Further, the Shell Station is immediately adjacent to Chips Casino, an all night gambling establishment. The nature of the all night casino renders the fact that this vehicle was in the area at 4 a.m. to be a completely neutral fact, as it would be anticipated there would be vehicles in the area. In fact, that the Shell station is open at this time of night is evidence that even the Shell station anticipates vehicles in the area at this time.

There were no specific and articulable facts which established a reasonable suspicion that the occupants of the Durango were involved with the reported shooting. Officer Clark had an instinct that the Durango was connected to the shooting. While his instinct was tangentially correct, as a passenger (Alexander) got into the Durango after the shooting (though the Durango had no other connection to the shooting), this instinct is not enough under the constitution without articulable facts connecting the Durango to the crime. This is especially true given that all reports have all participants in the shooting fleeing the scene in manner not associated with a Durango.

Therefore, the investigatory stop was unlawful and all evidence discovered as a result of the stop should have been suppressed, including Mr. Alexander's identification, the gun recovered, the jacket, and any statements of Mr. Alexander. It is respectfully requested that decision of the trial court to deny suppression of this evidence be overturned.

B. THE SEIZURE OF MR. ALEXANDER EXCEEDED AN INVESTIGATORY STOP AND WAS AN ARREST WITHOUT PROBABLE CAUSE.

Even if the stop of the Durango were deemed a valid investigatory stop, the analysis does not end there. The scope of a investigatory stop must be limited in scope and fall short of an arrest.

The permissive scope of a valid investigatory stop depends on the facts of the specific case. *State v. Wheeler*, 43 Wn. App. 191, 195, 716 P.2d 902 (1986), aff'd, 108 Wn.2d 230, 737 P.2d 1005 (1987). An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Wheeler*, 43 Wn. App. at 195-96 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Wheeler*, 43 Wn. App. at 195-96 (citing *Royer*, 460 U.S. at 500).

In assessing the scope of the intrusion, the following three factors are considered: (1) the purpose of the stop; (2) the amount of physical intrusion upon the person's liberty; and (3) the length of time the person is detained. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

Generally, handcuffing an individual is not within the scope of an investigatory stop. However, in appropriate cases handcuffing may be "reasonable, as a corollary of the lawful stop." *State v. Wakeley*, 29 Wn. App. 238, 243 n.1, 628 P.2d 835 (quoting *United States v. Purry*, 178

U.S. App. D.C. 139, 545 F.2d 217, 220 (D.C. Cir. 1976)), *review denied*, 95 Wn.2d 1032 (1981).

If the police action exceeds the proper scope of a valid investigative stop, it can be justified only if supported by probable cause to arrest. *Wheeler*, 43 Wn. App. at 196 (citing *Williams*, 102 Wn.2d at 741).

The lawfulness of an arrest depends on the existence of probable cause. U.S. CONST. amend. IV; WASH. STATE CONST. art. I, § 7; *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 849, 43 P.3d 43 (citing *State v. Green*, 70 Wn.2d 955, 958, 425 P.2d 913, *cert. denied*, 389 U.S. 1023, 19 L. Ed. 2d 670, 88 S. Ct. 598 (1967)), *review denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002). Probable cause for a warrantless arrest exists where the facts and circumstances within the arresting officer's knowledge are sufficient to permit a reasonable person to believe that an offense is being committed. *Jacques v. Sharp*, 83 Wn. App. 532, 536, 922 P.2d 145 (1996) (citing *Gurno v. Town of LaConner*, 65 Wn. App. 218, 223, 828 P.2d 49, *review denied*, 119 Wn.2d 1019, 838 P.2d 691 (1992)).

There must be some observable articulable distinction between an arrest and an investigatory stop, otherwise the stop exceeds that of being investigatory and is an arrest. In the instant case, there is no observable distinction – as admitted by Officer Clark. Multiple officers initiating their emergency lights to initiate a traffic stop of the Durango; multiple officers approach the vehicle and order the occupants out at direct gun

point; the occupants are immediately handcuffed; officers do a search of the vehicle; each occupant is placed in the rear of a patrol car while handcuffed; and the occupants are each read their Miranda rights.

The officers may be able to justify their use of force (guns drawn) and possibly handcuffs for officer safety after a reported shooting. However, there is no explanation for the further intrusion and seizure by placing each occupant into the rear of a patrol car and reading them their Miranda rights. This clearly establishes that the occupants of the Durango were under arrest, thus exceeding the scope of an investigatory stop. There is, quite simply, *nothing* else that the officers could have done to extend this “investigatory stop” into an arrest – as all acts of a forcible arrest were present.

Looking at the totality of the circumstances, the stop of the Durango exceeded that of an investigatory stop, and was an arrest. Absent probable cause, the stop of the Durango was unlawful and all evidence discovered as a result of the stop should have been suppressed, including Mr. Alexander’s identification, the gun recovered, the jacket, and any statements of Mr. Alexander. It is respectfully requested that decision of the trial court to deny suppression of this evidence be overturned.

C. THE TRIAL COURT ERRED IN FAILING TO PROVIDE WPIC 17.04 TO THE JURY.

During jury deliberations, the jury presented the court with the following question:

Based on previous events where lethal force was threatened by an individual, can solely the presence of the same individual be perceived as an immediate threat justifying lethal force as a proactive act of self defense.

CP 288.

It is clear that point that the jury was struggling with the application of the law if Mr. Norman did not take an affirmative action on October 16, 2015 towards threatening Mr. Alexander. Throughout the trial, the State had asserted that Mr. Norman made no such action, supporting such theory with timing on the videos of when Mr. Norman exited the Shell Station store and when the shooting began. (The cameras at the Shell Station did not provide an angle of Mr. Alexander's view of Mr. Norman as he exited the store.) The clear implication of the jury's question was if Mr. Alexander was mistaken as to the threat, was self defense permitted.

Thus, Mr. Alexander requested that the jury be instructed with WPIC 17.04, stating:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 260-62.

The Court declined to provide the instruction, stating only: "I am not able to answer this question for you. Please review to instructions 13,

11, 15.” CP 288. The Court’s denial of WPIC 17.04 was in error.

A defendant is entitled to a jury instruction if substantial evidence supports it. *State v. O’Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015).

Jury instructions are reviewed de novo. A challenged jury instruction is evaluated “in the context of the instructions as a whole.” *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). Jury instructions are sufficient when they allow the parties to argue their theories of the case, they are not misleading, and they *properly inform the jury of the applicable law* when read as a whole. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012); *State v. Rodriguez*, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004) (quoting *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000)).

However, self-defense instructions are subject to heightened appellate scrutiny: “Jury instructions must more than adequately convey the law of self-defense.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Jury instructions on self-defense must make the “relevant legal standard manifestly apparent” to the average juror. *McCreven*, 170 Wn. App. at 462 (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

The trial court should view the evidence in the light most favorable to the defendant when determining whether substantial evidence supports a jury instruction on an affirmative defense. *O’Dell*, 183 Wn.2d at 687-88; *State v. Hanson*, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990).

The trial court failed to do that here.

“A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim.” *LeFaber*, 128 Wn.2d at 899 (citing *Janes*, 121 Wn.2d at 238-39). Given this subjective component, the jury need not find *actual* imminent harm. *Id.* (citing *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980)).

Failure to properly instruct the jury on self-defense, when warranted by the facts and requested by the defense, constitutes reversible error. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

The State's entire case and presentation of evidence centered upon the assertion that Mr. Norman did not do anything that presented a danger or threat to Mr. Alexander on October 16, 2015. Thus, evidence of Mr. Alexander being mistaken in his belief or perception of danger was not only presented at trial, but was a focal point of the State's case at trial.

The jury's question makes two things clear: (1) They did not objectively find that Mr. Norman, on the early morning of October 16, 2015, engaged in any act that threatened Mr. Alexander before Mr. Alexander shot at Mr. Norman; and (2) The instructions provided by the Court did not adequately explain the full and complete state of the law in order for the jury to address its clear concern that Mr. Alexander may have reasonably believed he was in danger based upon the actions of Mr. Norman in the prior weeks.

The jury was not informed that if Mr. Alexander had a subjective

reasonable belief that Mr. Norman presented a danger of imminent harm, that the existence of actual threat of harm was not necessary for Mr. Alexander to legally defend himself. They should have been.

The evidence supported the use of instruction WPIC 17.04 as the State continually argued that Mr. Alexander was wrong that Mr. Norman presented a threat. Mr. Alexander asked for WPIC 17.04 to be provided to the jury. The jury asked for clarification on this exact issue, if Mr. Norman did not actually present a threat but Mr. Alexander reasonably believed that he did – and the trial court should have provided this instruction.

As the response to the jury question failed to properly instruct the jury, Mr. Alexander requested them to be instructed, and the jury clearly requested clarification regarding the law on this issue, the trial court committed error in not providing WPIC 17.04. Thus, the conviction of Mr. Alexander should be reversed and remanded for a new trial.

VI. CONCLUSION

Mr. Alexander's trial on the charges of Assault First Degree and Unlawful Possession of a Firearm contained three major errors by the trial court. First, as the result of the constitutional stop of the Durango the trial court should have suppressed all evidence obtained from the seizure of the Durango on October 16, 2015, including Mr. Alexander's identity, the .32 caliber gun, Mr. Alexander's jacket, and all statement of Mr. Alexander. The stop was unconstitutional because any attempt to connect the Durango

to the reported shooting actually contradicted the credible civilian reports of the shooting.

Second, should the stop be found to be a constitutionally permissible investigatory stop, the stop of Mr. Alexander far exceeded an investigatory stop such that it was actually an arrest. As Officer Clark testified, the only thing that they could have done further to effectuate an arrest would have been to say the words, "You are under arrest." Since the stop clearly rose to the level of an actual arrest, the officers must have had probable cause for such arrest. Probable cause of an arrest was clearly lacking, and thus the stop was unconstitutional. Therefore, all evidence obtained as a result of the seizure of the Durango should have been suppressed by the trial court.

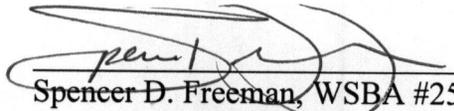
It is respectfully requested that the conviction of Mr. Alexander be overturned and the matter remanded back to the trial court with a finding that all evidence obtained from the seizure of the Durango be suppressed.

Third, in response to a question from the jury during deliberations, Mr. Alexander requested that the trial court provide the jury with WPIC 17.04, which instructs the jury that upon reasonable subjective belief of imminent harm of a defendant asserting self defense, actual threat of harm does not need to be present to warrant legal actions of self defense. As evidence was presented at trial that Mr. Alexander may have been mistaken regarding actual threat of harm, his reasonable subjective believe of such threat was sufficient to warrant such instruction and it was clear that the jury was requesting clarification regarding the state of the law on

this exact issue.

Accordingly, it is respectfully requested that Mr. Alexander's conviction be overturned and the matter be remanded to the trial court with instruction to present WPIC 17.04 to a jury.

DATED this 18th day of September, 2017.


Spencer D. Freeman, WSBA #25069
Attorney for Appellant

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COURT OF APPEALS
DIVISION II
2017 SEP 18 PM 3:53
STATE OF WASHINGTON
BY AP
DEPUTY

PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

LESHAUN AYATTA ALEXANDER, JR.,,

Defendant.

Case No.: 15-1-04164-1

DECLARATION OF SERVICE

I, Jeffrey L. Cully, do hereby declare and state as follows:

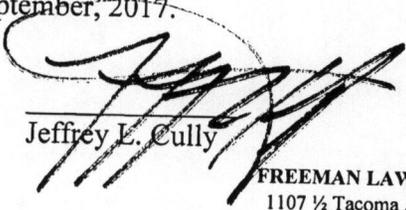
1. I am the in house investigator for the Freeman Law Firm, Inc. Unless otherwise stated, I have personal knowledge of the facts contained herein this declaration and, if called and sworn as a witness, could and would testify competently thereto.

2. On September 18, 2017, I personally hand delivered the following documents to the Pierce County Prosecutor's Office:

- Brief of Appellant
- Declaration of Service

I declare under the penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 18th day of September, 2017.


Jeffrey L. Cully

DECLARATION OF SERVICE - 1

FREEMAN LAW FIRM, INC.
1107 1/2 Tacoma Avenue South
Tacoma, WA 98042
(253) 383-4500 - (253) 383-4501 (fax)