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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LESHAUN AYATTA ALEXANDER, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 15-1-04164-1

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly deny defendant's suppression motion based on the stop of defendant's vehicle when the officer saw the vehicle flee the scene of a shooting? (Defendant's assignment of error no. 1). 1

2. Did the trial court properly deny defendant's suppression motion based on the scope of the stop when the officer believed the vehicle was involved in the shooting, the duration of the stop was commensurate with the investigative needs of a violent gun crime, and a gun was seen inside the vehicle? (Defendant's assignment of error no. 2). 1

3. Did the trial court properly deny defendant's request for an additional self-defense instruction during deliberations when the original jury instructions already answered the jury's question? (Defendant's assignment of error no. 3)... 1

B. STATEMENT OF THE CASE..... 2

1. PROCEDURE..... 2

2. FACTS 3

C. ARGUMENT..... 9

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S SUPPRESSION MOTION BASED ON THE STOP OF THE SUSPECT VEHICLE WHEN THE OFFICER SAW THE VEHICLE FLEE THE SCENE OF A SHOOTING. 9

2.	THE TRIAL COURT PROPERLY DENIED DEFENDANT’S SUPPRESSION MOTION BASED ON THE SCOPE OF THE STOP BECAUSE THE OFFICER BELIEVED THE VEHICLE WAS INVOLVED IN THE SHOOTING, THE DURATION OF THE STOP WAS CONSISTENT WITH THE INVESTIGATIVE NEEDS OF A VIOLENT GUN CRIME, AND A GUN WAS SEEN INSIDE THE VEHICLE.....	14
3.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT’S REQUEST FOR AN ADDITIONAL SELF-DEFENSE INSTRUCTION DURING DELIBERATIONS WHEN THE ORIGINAL INSTRUCTIONS SUFFICIENTLY ADDRESSED THE JURY QUESTION.	19
D.	CONCLUSION.....	25

Table of Authorities

State Cases

<i>State v. Acrey</i> , 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003).....	9, 12, 14, 15
<i>State v. Belieu</i> , 112 Wn.2d 587, 599, 773 P.2d 46 (1989)	16, 17
<i>State v. Bliss</i> , 153 Wn. App. 197, 203, 222 P.3d 107 (2009)	10
<i>State v. Boorgaard</i> , 90 Wn.2d 733, 736, 585 P.2d 789 (1978)	20
<i>State v. Brown</i> , 132 Wn.2d 529, 612, 940 P.2d 546 (1997).....	20
<i>State v. Dye</i> , 178 Wn.2d 541, 548, 309 P.3d 1192 (2013)	20
<i>State v. Fuentes</i> , 183 Wn.2d 149, 158, 352 P.3d 152 (2015)	9
<i>State v. Gaines</i> , 122 Wn.2d 502, 508, 859 P.2d 36 (1993)	6, 10
<i>State v. Larson</i> , 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997).....	18
<i>State v. McCord</i> , 19 Wn. App. 250, 253, 576 P.2d 892 (1978)	15
<i>State v. Ng</i> , 110 Wn.2d 32, 42, 750 P.2d 632 (1988).....	20
<i>State v. Pressley</i> , 64 Wn. App. 591, 596, 825 P.2d 749 (1992)	10
<i>State v. Randall</i> , 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994).....	16
<i>State v. Sieler</i> , 95 Wn.2d 43, 46, 621 P.2d 1272 (1980)	15
<i>State v. Smith</i> , 115 Wn.2d 775, 785, 801 P.2d 975 (1990)	16, 17
<i>State v. Snapp</i> , 174 Wn.2d 177, 198, 275 P.3d 289 (2012)	12
<i>State v. Studebaker</i> , 67 Wn.2d 980, 987, 410 P.2d 913 (1966)	20, 23
<i>State v. Weyand</i> , 188 Wn.2d 804, 811, 399 P.3d 530 (2017)	9, 10, 11
<i>State v. Wheeler</i> , 43 Wn. App. 191, 195, 716 P.2d 902 (1986)	14

<i>State v. Williams</i> , 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).....	15, 16, 18
<i>State v. Z.U.E.</i> , 183 Wn.2d 610, 618, 352 P.3d 796 (2015).....	10
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 394, 730 P.2d 45 (1986).....	6, 10
Federal and Other Jurisdictions	
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	9
Constitutional Provisions	
Article I, section 7, Washington State Constitution.....	9
Fourth Amendment, United States Constitution.....	9
Rules and Regulations	
CrR 3.6.....	2
CrR 6.15(f)(2)	20
Other Authorities	
WPIC 17.02.....	21, 23, 24
WPIC 17.04.....	20, 22, 23, 24

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

1. Did the trial court properly deny defendant's suppression motion based on the stop of defendant's vehicle when the officer saw the vehicle flee the scene of a shooting? (Defendant's assignment of error no. 1).
2. Did the trial court properly deny defendant's suppression motion based on the scope of the stop when the officer believed the vehicle was involved in the shooting, the duration of the stop was commensurate with the investigative needs of a violent gun crime, and a gun was seen inside the vehicle? (Defendant's assignment of error no. 2).
3. Did the trial court properly deny defendant's request for an additional self-defense instruction during deliberations when the original jury instructions already answered the jury's question? (Defendant's assignment of error no. 3).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On October 19, 2015, the State charged Lashaun Alexander, Jr. (hereinafter referred to as the “defendant”) and two co-defendants with several violent felony offenses stemming from a shooting at a gas station on October 16th. CP 1-4. On November 28, 2016, the State amended the charges to one count of assault in the first degree and unlawful possession of a firearm in the first degree. CP 115-16. The assault count included a firearm sentence enhancement allegation. *Id.*

Pretrial, defendant moved to suppress evidence as a result of the investigatory stop. CP 21-29. The court heard testimony and argument regarding suppression of the evidence, pursuant to CrR 3.6. RP 193.¹ Defendant claimed that the officer lacked reasonable grounds to believe the occupants of the car were involved in criminal activity and that the scope of the stop exceeded the scope of an investigatory stop. CP 21-29. The court denied defendant’s motion. CP 310-15. Written findings of fact and conclusions of law were entered on December 30, 2016. *Id.*

The case proceeded to trial. The State called nine witnesses, including an eye witness, the victim, and defendant’s friend who was “like

¹ The Verbatim Report of Proceedings are contained in 8 volumes and have consecutive pagination. They are referred to by page number.

a brother” to him. CP 254; RP 596. The defense’s sole witness was the defendant. CP 254. During deliberations, the jury submitted a question. CP 288. Defendant suggested the court respond by either instructing the jury to re-read its instructions or giving an additional self-defense instruction. CP 260-62; RP 878-79. The court denied defendant’s request for an additional instruction and told the jury to refer to previous instructions. CP288; RP 880. Defense counsel responded by saying, “In lieu of providing the proposed instruction, I am fine with that response.” RP 880.

On December 13, 2016, defendant was found guilty as charged of assault in the first degree, committed with a firearm, and unlawful possession of a firearm. CP 289-91. The court sentenced defendant to a total of 162 months in prison. CP 292-305. Defendant filed a timely appeal. CP 320-334.

2. FACTS

On October 16, 2015, at approximately 3:47 a.m., 911 began receiving numerous calls reporting a shooting at the Shell Gas Station at the intersection of Tacoma Mall Boulevard and South 84th Street. RP 359, 449-50, 523-24; CP 34. The callers described the shooters as two black males wearing dark clothing. RP 202, 363. One of the males was described as wearing a hooded jacket. RP 566-67. One of the males was seen running toward South 84th Street. RP 238, 246. The other was seen

leaving the scene in a Chrysler Sebring. RP 395. Officer Kevin Clark was dispatched to the scene immediately thereafter. RP 196-97.

Officer Clark responded to the call at 3:52 a.m. RP 196; CP 34. He responded from a short distance away just outside of the police station. RP 196. While Officer Clark had limited information regarding the shooting, he knew or observed (1) that he was responding to a possible ongoing shooting [RP 207]; (2) that he received additional 911 reports while he was *en route* to the scene, including one of more shots fired [RP 220-21; CP 35]; (3) that he observed the Durango fleeing from the scene of the shooting [RP 204]; (4) that he saw black males inside of the Durango fitting the description of the suspects [RP 204-06]; and (5) that he did not see any other vehicles near the scene besides the Durango [RP 205]. It took Officer Clark less than two minutes to arrive at the Shell Station. RP 245.

After observing the Durango, Officer Clark activated his lights and siren, performed a U-turn, and pursued the Durango until it reached Crown Pointe Apartments, a few blocks west of Shell. RP 207-08. At 3:55:42 a.m., Officer Clark reported that he was pulling over the Durango at Crown Pointe apartments. RP 203-04, 226; CP 36.

Other officers arrived at approximately 3:57 a.m. CP 37. They conducted a high-risk traffic stop, with firearms at a low-ready position.

RP 209, 233; CP 37. The officers acted with an eye to safety and called the driver and passengers out one at a time. RP 209. The occupant in the rear passenger-side seat was subsequently identified as the defendant. RP 210. Each occupant was handcuffed, advised of their *Miranda*² rights, and placed in a separate patrol car. RP 211. Defendant was detained by 3:59 a.m. CP 37. The occupants of the Durango left the passenger side door open. RP 215-16. Officer Clark looked down and saw a firearm beneath the front passenger seat. *Id.* Officers had the Durango towed back to the station for a search warrant. CP 39.

As indicated in the record, Officer Clark went to the patrol car to speak with defendant. CP 45. Defendant waived his *Miranda* rights. *Id.* Defendant explained that he was a convicted felon, so he was not allowed to carry or be around firearms. *Id.* Defendant claimed he did not know the firearm was in the car. *Id.* Defendant said that he had been at the casino for the last couple hours with the other occupants of the Durango and had not been involved in the shooting at the Shell Station. *Id.*

Officer Clark heard conflicting stories from other occupants of the Durango. *Id.* The driver told the officer that he picked up defendant on 84th St. S. before he got pulled over. CP 46. Officer Clark had watched

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the Durango come out of the Shell Station and onto 84th St. S without ever stopping to pick up anyone. *Id.*

Meanwhile, other officers went to the Shell Station and spoke with the employee there. CP 37. Officers observed .32 caliber shell casings in the parking lot; the employee told the officers that a black SUV was involved. CP 37-38. Officers watched video surveillance tapes from the Shell Station. CP 40. The tow truck arrived at 4:34 a.m. CP 39. Defendant was transported to the police station at 4:57 a.m. CP 40.

The trial court found that the stop of the Durango was lawful and reasonable based on a number of facts, including: the nature of the investigation, that Officer Clark approached the Shell Station as 911 calls were still coming in with the shooting possibly in progress, and that Officer Clark observed no other potentially involved parties *en route* to the Shell Station. CP 310-315 (CoL I).³

At trial, defendant admitted that he shot at the victim “three or four” times. RP 710-11. The victim was identified as Atere Norman. CP 115-16. Defendant relied on self defense and claimed that he only shot at

³ (CoL #) refers to the trial court’s Conclusions of Law and the corresponding conclusion number. (FoF #) refers to the trial court’s Findings of Fact and the corresponding finding number. Findings of fact erroneously labeled as conclusions of law are reviewed as findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Likewise, conclusions of law erroneously labeled as findings of fact are reviewed as conclusions of law. *State v. Gaines*, 122 Wn.2d 502, 508, 859 P.2d 36 (1993).

Atere because he was scared for his life. RP 710. Defendant said that he knew Atere through a girl he used to date, Faith Brown. RP 690. When defendant's relationship with Faith ended, Faith's brother, Steven Brown, became upset. RP 689-90. Atere and Steven were close friends. RP 690-91.

Defendant claimed that prior to this incident, Atere and Steven came to defendant's apartment with a gun. RP 691, 695-96. When defendant saw the gun and Atere's face, he jumped off his third story balcony and ran away. RP 694-96. In the days following that incident, defendant said that Atere and Steven posted on Facebook about how defendant jumped off his balcony and warned defendant that it would happen again the next time they saw him. RP 697-99. Approximately four days later, Steven and Atere returned to defendant's apartment, but even though defendant was inside, they left without a problem. RP 699.

The day after Steven and Atere's second visit, defendant purchased a .32 caliber Beretta Tomcat. RP 700, 718, 764. He bought it from his mother's ex-boyfriend. RP 725. At trial, defendant claimed that he "totally forgot" he was ineligible to possess a firearm due to a prior burglary conviction. RP 726.

On the night of the shooting, defendant claimed that he did not know Atere would be at the gas station. RP 709-10. Defendant said that he

walked to the Shell Station merely to purchase a cigar in order to smoke marijuana. RP 704-05. However, defendant and Atere happened to be in the exact same location at the exact same time. RP 707. Atere was walking out of Shell just as defendant was walking in. *Id.* Defendant said that when Atere saw defendant, Atere “lifted up his shirt and said, ‘You know what time it is?’” RP 708. It was at that point that defendant pulled out his gun and began shooting. RP 710.

Pursuant to the execution of the search warrant for the Durango, detectives found a hooded jacket in the rear seat where defendant had been sitting that matched the jacket the shooter was wearing in the video footage from the Shell Station. RP 464-67. Inside the jacket pocket, detectives found defendant’s ID card and a small bag of marijuana. RP 466. Detectives also found a .32 caliber Beretta Tomcat with an empty magazine under the rear passenger seat, the same gun used in the shooting. RP 439, 443, 471.

One of the passengers in the Durango, Randy Smith, testified that defendant was “like a brother” to him. RP 596. Randy testified that on the night of the shooting, defendant got in the Durango and said, “I got off on Atere.” RP 608-09. Randy knew defendant’s statement to mean that defendant shot Atere. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S SUPPRESSION MOTION BASED ON THE STOP OF THE SUSPECT VEHICLE WHEN THE OFFICER SAW THE VEHICLE FLEE THE SCENE OF A SHOOTING.

“A police officer may conduct an investigative stop based upon less evidence than is needed for probable cause to make an arrest.” *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, generally require that an officer may not seize a person without a warrant. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). However, under the *Terry*⁴ exception, an officer may detain a person without a warrant if the officer has “reasonable suspicion that the person is or is about to be engaged in criminal activity.” *Id.*

A reasonable suspicion is considered in light of the “totality of the circumstances known to the officer.” *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). This includes, for example, the purpose of the stop, the conduct of the person detained, the amount of physical intrusion on the suspect’s liberty, the officer’s training and experience, and the location of the stop. *Id.* “The available facts must substantiate more than a mere generalized suspicion that the person detained is ‘up to no good’; the

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

facts must connect the particular person to the particular crime that the officer seeks to investigate.” *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). “While ‘the circumstances must be more consistent with criminal than innocent conduct, reasonableness is measured not by exactitudes, but by probabilities.’” *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

Where, as here, defendant does not challenge any of the trial court’s findings of fact, the appellate court considers them verities on appeal. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Conclusions of law are reviewed *de novo*. *Id.* An appellate court reviews a trial court’s denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court’s conclusions of law. *Id.* Findings of fact erroneously labeled as conclusions of law are reviewed as findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Likewise, conclusions of law erroneously labeled as findings of fact are reviewed as conclusions of law. *State v. Gaines*, 122 Wn.2d 502, 508, 859 P.2d 36 (1993).

Leaving a location where no known crime has been reported has been deemed insufficient for a *Terry* stop. *State v. Weyand*, 188 Wn.2d 804, 817, 399 P.3d 530 (2017). *Weyand* is distinguishable from this case

because Officer Clark saw the Durango fleeing the scene of a violent criminal incident immediately after shots were fired. The certainty that a crime had been committed, not to mention the seriousness and dangerousness of that crime, sets this case apart from *Weyand*. RP 207. Additional 911 reports of shots fired came in as the officer was approaching the scene. RP 220-21; CP 35. The officer observed a car fleeing the scene of the shooting at a time where no other cars were seen in the area. RP 204-05. Additionally, the officer saw individuals matching the description of the suspects reported to 911 by reliable witnesses. RP 204-06. The officers here had far more information connecting the Durango to the shooting than the officers in *Weyand* had connecting the defendant to suspected drug activity. 188 Wn.2d at 809. Thus, unlike in *Weyand*, the investigatory stop of defendant's vehicle here was lawful.

Defendant argues that because the 911 callers reported seeing one of the participants fleeing in a Chrysler Sebring, the Officer's decision to pull over the Durango was unlawful. *Id.* Defendant also argues that because Chips Casino is a 24 hour establishment, the fact that the Durango was the only car near the scene is "a completely neutral fact." *Id.* at 20. These arguments are not well taken. The officer was responding to an ongoing shooting, received additional 911 reports *en route* to the scene, including one stating that one suspect fled in a Chrysler Sebring and the

other on foot, and then observed firsthand the Durango fleeing from the scene of the shooting. Under these circumstances Officer Clark had sufficiently specific and articulable facts connecting the occupants of the Durango to the shooting at the Shell Station. RP 204, 207, 220-21, 238, 246, 359; CP 35.

The propriety of an investigative stop is based on the “totality of the circumstances.” *State v. Snapp*, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). This includes the purpose and location of the stop. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). Here, the purpose of the stop was related to a shooting incident reported to 911 by multiple people. CP 310-315 (FoF I). There were no contradictions in the 911 reports. CP 310-315 (FoF II-V). Callers saw a possible shooter run toward South 84th Street and another run the other direction toward the casino and get into a Chrysler Sebring. *Id.* While none of the callers reported seeing a black Dodge Durango, such a report was not necessary because the officer saw the vehicle fleeing in the same direction as one of the shooters immediately after or during the shooting. Such an observation constitutes specific and articulable facts justifying the stop.

Officer Clark was responding to a possible ongoing shooting. RP 207. Officer Clark approached the Shell Station “as 911 calls were still coming in with the shooting still possibly in progress.” RP 220-21; CP 35.

When Officer Clark arrived at the Shell Station, he witnessed the Durango pulling out of Shell and onto South 84th Street, consistent with the reports that the shooter fled toward South 84th Street. CP 310-15 (FoF II, III, IV, V, VII). Officer Clark saw individuals in the Durango who matched the descriptions of the suspects. RP 201-06; CP 310-15 (FoF VII). He arrived within minutes of shots being fired. RP 198, 201-03. No other vehicles were seen near the Shell Station besides the Durango. RP 205; CP 310-15 (FoF VII).

Even though other vehicles may have been expected near a 24 hour establishment, the fact that the Durango was the only one is not rendered “completely neutral.” Rather, the fact that no other vehicle but the Durango was seen in the immediate vicinity of the Shell Station significantly narrowed the range of potential suspects.

While the Officer had limited information that one of the parties may have left in a Chrysler Sebring, he did not have information that both parties were gone and no longer on the property of the Shell Station. *Id.* The court noted that this was not a “random stop.” RP 289. “They weren’t stopped at the Lakewood Mall. They weren’t stopped out in Tillicum. They were stopped right near the scene of the shooting.” RP 288-89. Considering all of the facts known to the Officer at the time he stopped the Durango, the Officer had sufficiently specific and articulable facts

connecting the occupants of the Durango to the shooting. Accordingly, the investigative stop was lawful.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S SUPPRESSION MOTION BASED ON THE SCOPE OF THE STOP BECAUSE THE OFFICER BELIEVED THE VEHICLE WAS INVOLVED IN THE SHOOTING, THE DURATION OF THE STOP WAS CONSISTENT WITH THE INVESTIGATIVE NEEDS OF A VIOLENT GUN CRIME, AND A GUN WAS SEEN INSIDE THE VEHICLE.

After the trial court correctly concluded that the investigatory stop was lawful, it further concluded that the scope of the stop was lawful as well. RP 289-90. The permissive scope of a valid investigatory stop depends on the specific facts of the case. *State v. Wheeler*, 43 Wn. App. 191, 195, 716 P.2d 902 (1986). A lawful investigative stop is limited in scope and duration to fulfilling the purpose of the stop. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). The stop must be temporary and last no longer than is necessary to effectuate its purpose, and the investigative methods used should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. *Wheeler*, 43 Wn. App. at 195-96.

When an officer's initial suspicions are confirmed or further aroused, the scope of the stop may be extended and its duration may be prolonged. *Acrey*, 148 Wn.2d at 747. A police officer may briefly detain

an individual if the officer has a “well-founded suspicion based on objective facts that [the individual] is connected to actual or potential criminal activity.” *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). Police officers “may protect themselves by conducting a search for concealed weapons whenever [the officer] has reason to believe that the suspect is armed and dangerous.” *Acrey*, 148 Wn.2d at 747.

The reasonableness of an officer’s intrusion depends to some degree on the seriousness of the apprehended criminal conduct. *State v. McCord*, 19 Wn. App. 250, 253, 576 P.2d 892 (1978). “An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not.” *Id.* Relevant factors in determining the valid scope of an investigatory stop include: (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect’s liberty, and (3) the length of time the suspect is detained. *See State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

Here Officer Clark knew from firsthand observation that the Durango was involved in the shooting; hence, the suspects were likely armed. RP 204, 207, 359, 449-50, 523-24. The officers followed felony stop procedures due to the high risk of the stop. RP 209, 233, 370. Upon a brief scan of the Durango, officers discovered there was a gun underneath the front passenger seat. RP 373. While the stop was being conducted,

shell casings were also located at the scene of the shooting. CP 37-38. The length of the stop was appropriate to the seriousness and complexity of the crime and the number of suspects involved.

A violent felony crime provides an officer with more leeway to act than does a gross misdemeanor. *State v. Randall*, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994). The 911 reports in this case were of a shooting, a violent crime posing a significant threat to the safety of the officers and the public. Given the high risk associated with the stop, the subsequent actions of the Officer should be evaluated in context.

The Officer here used the least intrusive means possible to effectuate the purpose of the stop given the severity of the crime he was pursuing. During a valid investigative stop, the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984). However, the scope of an investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).

Police officers may draw their guns and use felony stop procedures when detaining persons suspected of criminal activity if the specific information known by the officers reasonably makes them fear for their own safety. *State v. Belieu*, 112 Wn.2d 587, 599, 773 P.2d 46 (1989).

Such information includes facts about the crime that would support the inference that the suspected persons were armed. *Id.* at 597-98.

Here, the officers had specific information that the crime was a shooting at the Shell Station, thus supporting the inference that at least one of the suspects was armed. RP 359, 449-50, 523-24. Accordingly, the high-risk felony stop procedure used by the officers was justified for officer safety reasons.

Similarly, police officers are permitted to handcuff suspects and place them in separate patrol cars during the course of a valid investigatory stop. *See State v. Belieu*, 112 Wn.2d 587, 596, 773 P.2d 46 (1989) (full felony stop which included handcuffing); *State v. Smith*, 115 Wn.2d 775, 787, 801 P.2d 975 (1990) (suspect detained in patrol car without handcuffs while officers searched the car and environs for evidence and other suspects). “There is no bright line standard for determining the degree of invasive force which may convert an investigative stop into an arrest ... [although t]he force used should bear some reasonable proportionate relationship to the threat apprehended by the officers.” *Belieu*, 112 Wn.2d at 599. Given the high safety risk associated with potentially armed suspects, the officers were justified in handcuffing the occupants of the Durango, advising them of their *Miranda*

rights, and placing them in separate patrol cars while they secured the scene.

Defendant claims that the officers performed a “search of the vehicle.” Brief of Appellant at 23. “Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect’s vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.” *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). Given the fact that the officer observed a firearm under the front passenger seat, securing the vehicle and having it towed back to the station for a search warrant was consistent with appropriate criminal investigative procedure and therefore reasonable. RP 373.

There is no bright line rule for how long is too long for an investigative stop. *See State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). The record indicates that defendant’s vehicle was initially pulled over at 3:55 a.m. CP 36. The occupants were directed to exit the Durango, and defendant was detained in the patrol car by 3:59 a.m. CP 37. Officer Clark’s interview with defendant lasted a “couple minutes, max.” RP 376. Officers secured the scene and the defendant was identified at 4:21 a.m. CP 39. The tow truck arrived at 4:34 a.m. CP 39. Defendant was

transported to the police station at 4:57 a.m. CP 40. In light of the fact that there were multiple suspects detained and that the detainees were involved in a shooting and therefore armed with weapons, the amount of physical intrusion did not go beyond that of a valid investigatory stop.

There is no indication that the length of time was excessive, and defendant does not argue that point. Considering the severity of the crime, the number of officers and suspects involved, and the potential for danger to the public, the length of the investigative stop was appropriate to confirm officer's suspicions that the Durango was involved in the shooting.

In considering all of the circumstances surrounding the stop of the Durango, the officers were justified in the extent of the stop. All of the steps the officers took as part of the investigatory stop were reasonable in light of the possibility that the individuals in the car were armed with a firearm and had been involved in the shooting at the Shell Station.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S REQUEST FOR AN ADDITIONAL SELF-DEFENSE INSTRUCTION DURING DELIBERATIONS WHEN THE ORIGINAL INSTRUCTIONS SUFFICIENTLY ADDRESSED THE JURY QUESTION.

When a jury is deliberating, a trial court has discretion to determine whether to give further instructions upon request. *State v.*

Brown, 132 Wn.2d 529, 612, 940 P.2d 546 (1997); *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988); *State v. Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966). Thus, where, as here, the additional instruction was requested during deliberations, the correct standard of review is abuse of discretion. *See Id.* A trial court's discretionary decision will not be reversed unless that decision is "manifestly unreasonable or based on untenable grounds or reasons." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

CrR 6.15(f)(2) provides:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

"The purpose of this rule is to prevent judicial interference in the deliberative process." *State v. Boorgaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). During deliberations, courts must use caution when considering whether to give additional instructions.

- a. The trial court did not abuse its discretion when it denied defendant's request for an additional self-defense instruction while the jury was deliberating.

During initial discussions about jury instructions, defendant proposed but withdrew the same instruction he requested during deliberations. WPIC 17.04 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.

RP 792. Defendant withdrew that instruction, stating “I am inclined to actually agree with the State ... It’s probably not applicable, so I won’t offer it.” RP 792. The court agreed and withdrew the instruction. RP 792-93. The court stated that WPIC 17.02, included in the instructions, “let’s you argue everything.” RP 792. Defendant agreed. RP 792-93.

WPIC 17.02 provides that use of force is lawful if the person “reasonably believes he is about to be injured” and the “force is not more than necessary.” Additionally, WPIC 17.02 states that the person may use such force as a reasonable person would under the same or similar circumstances “taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.” CP 268. The trial court finalized the jury instructions, read them to the jury, and both sides gave their closing arguments. RP 807-09, 840.

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. The question was about immediacy of a threat that might warrant a use of force in self defense. It did not concern appearances.

Defendant argued that there were two potential responses to the question:

[O]ne being instruct them to read the jury instructions they have been provided ... The other is I prepared a supplemental proposed jury instruction based on WPIC 17.04.

RP 878; CP 260-62. In response, the State explained that introducing the new instruction would not be appropriate because the State would have wanted to address the instruction in its closing argument. RP 879. As explained above, the WPIC 17.04 instruction was discussed during initial conversations about jury instructions, and defense counsel decided not to offer it. RP 792. In responding to the jury question, however, the State said that something more than simply saying “reread your instructions” would be helpful. RP 879. Accepting the State’s concern about closing argument, the court also explained:

The other concern, Mr. Freeman, I have is if I were to send in a new instruction now, they’re going to think this is the answer to the question, and it may or may not be. I’m going to decline to give the new instruction.

RP 880.

The court ultimately decided to instruct the jury as follows: “I am not able to answer this question for you. Please review to instructions 13,

11, 15.” CP 288. Instruction 13 contained WPIC 17.02, *see above*, which the court, and defense counsel, agreed was sufficient for both sides to argue their theories. CP 268; RP 792-93.

The parties presented the court with three choices: (1) instruct the jury to re-read the instructions as a whole, (2) direct the jury’s attention to the pertinent self-defense instructions that had been provided, or (3) give an additional WPIC 17.04 instruction. RP 878. The trial court’s decision to choose one option and not the other was reasonable. Defendant incorrectly asserts that the standard of review here is *de novo*. Brief of Appellant at 25. The granting of a motion to further instruct a jury after it has retired to deliberate is within the sound discretion of the trial court. *Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966). The correct standard of review is abuse of discretion. *See Id.* Given this discretion, the trial court’s decision to choose one of three options is not an abuse of discretion, especially where the defense proposed an additional instruction which had previously been withdrawn as not applicable.

- b. The additional self-defense instruction would not have answered the jury’s question, but the current instruction sufficiently answered it.

Even if the trial court had given the additional instruction, it would not have answered the jury’s question. The jury asked whether the “sole

presence” of an individual that had previously threatened defendant can be enough to establish an immediate threat justifying lethal force. CP 288. WPIC 17.04 does not answer that question.

WPIC 17.04 merely explains that a person may act on appearances if he believes “in good faith and on reasonable grounds” that he is in danger of injury. WPIC 17.04 does not say whether the presence of an individual who had previously threatened defendant is sufficient to justify the defendant’s actions. Furthermore, the second part of WPIC 17.04 explains what happens when a person is mistaken as to the threat. The jury’s question did not ask if defendant was mistaken, so the instruction is irrelevant.

The current jury instruction, WPIC 17.02, sufficiently answered the question. CP 268. Significantly, WPIC 17.02 states that:

... [T]he person using the force may employ such force and means as a reasonably prudent person would under the same or similar conditions as they appeared to the person, *taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.*

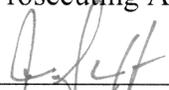
(Emphasis added). WPIC 17.02 sufficiently answered the question of whether the appearance of person who had previously threatened defendant is enough to justify lethal force. Thus, it was not error for the court to deny the WPIC 17.04 instruction.

D. CONCLUSION.

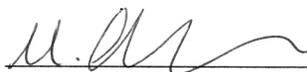
For the foregoing reasons, the State respectfully requests the Court affirm defendant's convictions.

DATED: Thursday, December 28, 2017

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Pierce County
Prosecuting Attorney



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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.

12/28/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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