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COURT OF APPEALS
DIVISION II

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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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION AND REVIEW OF MATERIAL FACTS

The practical real world implications of the trial court's ruling, and the State's position, is that anyone in the vicinity of a shooting and is the same race as a purported shooter may be seized by law enforcement without any other connection with a crime, and thus has no constitutional rights. There is no question that a shooting is a most serious incident and an issue with increasing concern in our society. However, the seriousness of such crimes does not void constitutional protections.

The record is clear, as *all* witnesses stated, that *both* observed shooters had left the scene by the time Officer Clark approached the area. The assertion that the shooting was "ongoing," as suggested by the State, is simply and plainly false. All 911 calls were absolutely consistent: each shooter shot a few rounds and then left the scene. One shooter left on foot, running west on 84th Street, *away* from the Shell Station. The second shooter left in a Chrysler Sebring, driving west on 84th. Both shooters left immediately after the shooting, and thus had left the scene nearly 5 minutes before the officer arrived. 4 RP 197:13-25, 198:10-17, 202:14-18, 4 RP 202:25-203:22, 209:8-12, 220:23-2, 221:10-222:6, 228:2-6, 5 RP 387:2-7, 5 RP 394:25-395:7.

The seizure of the Durango was based *only* upon its proximity to the shooting, minutes after the shooters fled, and that its occupants were African American, as were the shooters. 4 RP 230:4-12, 241:24-242:1. The Durango was NOT linked to the shootings by any witness and there was nothing distinctive about the occupants to link them to the purported

shooters, other than the color of their skin. 4 RP 237:11-13. Moreover, in was known by the officer that the shooters had already left the area where the Durango was observed.

The proximity of the Durango to the shooting isn't enough to establish a connection to the shooting. The Shell station is immediately adjacent to an all night casino, thus presence in the area does not create the link as there is casino traffic in that area all night long. 4 RP 201:13-3.

The seizure of the occupants of the Durango involved every possible element of an arrest: stop of the vehicle with emergency lights, multiple police patrol cars, extracting the occupants from the vehicle at gun point, handcuffing each occupant, searching each occupant, placing each occupant in the rear of separate patrol cars while handcuffed, and reading each occupant Miranda rights. 4 RP 206:23-207:2, 4 RP 209:15-20, 4 RP 209:19-211:9, 4 RP 211:13-20, 4 RP 231:11-23, 5 RP 369:4-25. Even the officer admitted there was nothing that distinguished the treatment of the occupants from an arrest. 4 RP 236:4-13.

While the officers claim that all actions were done for purposes of officer safety during the investigation, once each occupant was removed from the Durango, handcuffed, and searched – any safety concerns would have been alleviated. There has been no stated justification for then need to place them in the rear of patrol cars and read them their Miranda rights.

During deliberations, the question presented by the jury clearly

showed that the jury was struggling with the question of whether Mr. Alexander was required to be correct in his assessment of a perceived threat. The purported jury instruction in response, declined by the trial court, directly answered this concern.

II. ARGUMENT

A. THE SEIZURE OF MR. ALEXANDER WAS UNLAWFUL.

A permissible investigatory seizure *must* connect the particular person seized with the particular crime that the officers are investigating. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015); *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 suspicion must be individualized to the person being stopped. *State v. Weyand*, 188 Wn. 2d 804, 812, 399 P.3d 530 (2017).

In order to justify the stop of the Durango, the officer must connect the Durango or its occupants with the shooting. The *only* justification is its proximity to the scene nearly 5 minutes after the shooters left, and the color of the occupants' skin.

The State does not cite to any factually analogous cases wherein the stop of a vehicle, never reported as connected to a crime, leaving the scene of a shooting when the shooters were reported as having already

fled, was permissibly stopped. Rather, the State solely attempts to distinguish the current case from *Weyand*.

In *Weyand*, the defendant was stopped in a well known drug area and reacted furtively and nervously in response to the presence of the police. The Court said that the actions of the defendant, while suspicious, could not be connected to a specific crime as none had been reported. *Id.* at 812.

In the current case, the dispute is not whether a crime was reported, but whether the Durango could be sufficiently linked to the crime. In order for an investigatory stop to be permissible, there must be an articulable connection between the Durango and the shooting. In this case, not only is the connection lacking, but asserting such connection directly contradicts the civilian reports known to the officer at the time of the stop – the perpetrators had already left the area the Durango was observed.

The *only* connection between the Durango and the shooting is its proximity to the area where the shooting occurred nearly 5 minutes *after* the shooting. Moreover, and quite importantly, both individuals involved in the shooting were reported, consistently, as having fled the shooting west on 84th Street immediately after the shooting took place. This

means that the shooters had fled the area nearly five minutes before the Durango is observed by the officer.

The State's assertion that there is a connection between the Durango and the shooting rests solely upon its proximity to the Shell station. There is no report that a Durango is associated with the shooting. Further, the attempted connection contradicts the reports that the perpetrators had fled the scene early five minutes before the Durango is observed. Not only is a connection lacking, but it contradicts the known reports of the crime.

The propriety of an investigatory stop is based upon the totality of the circumstances. *State v. Snapp*, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). In the instant case, the totality of the circumstances must include the fact that the shooters were known to have already left the scene. Absent an actual articulable, and rational, connection between the Durango and the shooting, the stop of the Durango was unconstitutional.

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

During an investigatory stop, 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. *State v. Wheeler*,

43 Wn. App. 191, 195-96, 716 P.2d 902 (1986), aff'd, 108 Wn.2d 230, 737 P.2d 1005 (1987). 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).

In the instant case, the Durango was stopped by multiple officers in patrol cars via emergency lights, with multiple officers drawing their guns towards the occupants, ordering them out and onto the ground. The occupants, including Mr. Alexander, after extraction from the Durango were handcuffed, searched, placed in the back of patrol cars (still handcuffed), and read their Miranda rights. These acts occurred in a direct and unbroken sequence, before the discovery of shell casings at the Shell station, and before a gun was seen in the Durango.

While the case law supports the officers' ability to handcuff and search the Durango occupants, for purposes of officer safety, the officers in this case went much further. (In the context of an investigatory detention "[d]rawn guns and handcuffs, generally, are permissible only when the police have a legitimate fear of danger." *State v. Wheeler*, 43 Wash. App. 191, 197, 716 P.2d 902, 905 (1986).) Upon extraction, handcuff, and search of the Durango occupants, the officers' safety concerns were sufficiently addressed.

At that point, there was no further concern that they presented any sort of danger. Nonetheless, the officers placed them in the back of

patrol cars and read them their rights. The officers' actions, in totality, were the exact same as an arrest. There simply is no argument otherwise.

So, the question is whether officers can use force totally and completely consistent with an arrest, in every possible way, during an investigatory stop. 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.

There is no bright line standard for determining the degree of invasive force which may convert an investigatory stop into an arrest. The standard is most frequently stated to be a function of the officers' reasonable fears for their own safety. This fear is reasonable if it is based on "particular facts" from which reasonable inferences of danger may be drawn. *State v. Belieu*, 112 Wn.2d 587, 599, 773 P.2d 46, 52 (1989), citing *Sibron v. New York*, 392 U.S. 40, 64, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1986).

The investigative methods must be the least intrusive means reasonably available. The force used should bear some reasonable proportionate relationship to the threat apprehended by the officers. *Belieu*, 112 Wn.2d at 599. In the instant matter, once Alexander was extracted from the Durango at gun point, handcuffed and searched, any fear of threat that the officers had was extinguished. Placing Alexander in the rear of a patrol car (handcuffed) and read his Miranda rights went far beyond necessary methods to ensure officer safety, and thus exceeded

an investigatory stop. Mr. Alexander was, therefore, placed under arrest immediately upon stop – without probable cause.

The other bases for distinguishing between a stop and an arrest are measured from the perspective of the person under "investigation." These are stated alternatively as the point at which the suspect's movement is completely restricted, or the point at which an innocent person would reasonably believe that person was under arrest. *Id.*

In the instant matter, the placement of Alexander into the rear of a patrol car and advisement of his Miranda rights, after being handcuffed at gun point and searched, completely restricted his movements. Unequivocally, an innocent person would reasonably believe that they were under arrest when placed handcuffed in the rear of a patrol car and read rights. Thus, under the second bases for determining with a stop exceeded an investigatory stop and was an arrest, Mr. Alexander was immediately placed under arrest.

Under applicable case law, given the report of a shooting, the State may be able to justify the "felony stop," extracting Alexander at gun point, handcuffing and searching him. However, the officers' actions did not stop there. The officers then placed Alexander in the rear of a patrol car and read him Miranda rights.

The State does not even attempt to justify placing Alexander in the rear of a patrol car and advising him of Miranda rights. These actions clearly exceed permissible scope of investigatory stop and cannot be justified by officer safety (satisfied by handcuffs and search). The officers

clearly exceeded the scope of an investigatory stop and placed Mr. Alexander under arrest immediately upon seizure. Absent probable cause for the arrest, the stop was impermissible.

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.

The State alleges that WPIC 17.02, provided to the jury, sufficiently answers this question. It does not. The jury question clearly established a struggle with the concept that actual danger may have been absent when Alexander first faced Norman outside of the Shell station. WPIC 17.02 failed to address this issue.

WPIC 17.04 does, 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 trial court clearly understood and stated that WPIC 17.04 may

answer, and therefore be applicable to, the jury question. RP 880. The State also recognized that the jury required some response to their question beyond “reread your instructions.” RP 879. It is clear that based upon the jury question, the instructions provided to the jury were inadequate, needed to be supplemented, and WPIC 17.04 provided appropriate guidance.

Even if the standard of review is abuse of discretion, the trial court abused its discretion in refusing the instruction. Further, it is well established that 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).

Based upon the question presented by the jury, it is clear that the initial instructions did not sufficiently convey the law of self defense or make the legal standard manifestly apparent. Two key concepts were not made clear to the jury in the initial instructions: (1) that a person can act in self defense based upon a *good faith belief* and reasonable grounds; and (2) actual danger is not necessary for use of force to be lawful. In order to ensure that the jury was properly instructed on the law of self-defense, when presented with this specific question by the jury, it was imperative that the trial court present WPIC 17.04. The trial court failed to do so.

In fact, by refusing the instruction, the trial court conveyed to the jury that actual danger must be present in order to act in self defense, rather than just a good faith belief, and upon reasonable grounds, that a danger was present. Thus, the trial court's failure to present WPIC 17.04 to the jury in response to the question conveyed the opposite of the actual law.

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).

III. CONCLUSION

The State has failed to sufficiently connect the Durango with the shooting such that a stop of the Durango was constitutionally permissible. The proximity to the area of the shooting simply is not enough, and the State has presented no case law to support such a contention. Moreover, the connection of the Durango actually conflicted with the statements of the civilian witnesses.

Regarding the scope of the "investigatory stop," the State may be able to justify the actions of the police officers in the extraction at gun point, handcuff, and search of Mr. Alexander. The State remains absolutely silent on the remaining actions of the officers, which are undisputed. After handcuff and search, the officers immediately placed Mr. Alexander in the rear of a patrol car and read him Miranda rights. These actions are not justified in the scope of an investigatory stop, and

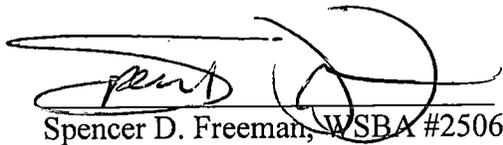
clearly establish that the officers immediately placed Mr. Alexander under arrest, without probable cause.

Therefore, 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.

Based upon the question of the jury during deliberations, it became clear that the jury required further instructions on the law of self defense. WPIC 17.04 provided such instructions, and the trial court failed to provide it as requested. A review of jury instructions on self defense requires heightened scrutiny. Under such review, it is clear reversible error for the trial court to decline WPIC 17.04.

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 12th day of February, 2018.


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