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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH CLAYTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. RESPONDENTS ISSUES PRESENTED..... 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 5

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SEVERANCE OF THE COUNTS CONTAINED WITHIN THE AMENDED INFORMATION. 5

 Standard of review. 7

 1. Strength of the State’s evidence on each count. 8

 2. The clarity of defense for each count..... 9

 3. The trial court instructed the jury to consider each count separately. 10

 4. Cross-admissibility of the evidence. 11

 B. THE DEFENDANT FAILS TO DEMONSTRATE THAT HIS RECORDED COMMUNICATION WITH THE OFFICERS WAS “PRIVATE” UNDER WASHINGTON’S PRIVACY ACT. IF ERROR, IT WAS HARMLESS. 14

 Standard of review. 15

 If error, it was harmless. 21

 C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT ON THE DEFENSE OF NECESSITY AS THE DEFENDANT FAILED TO PRODUCE ANY EVIDENCE, LET ALONE SUBSTANTIAL EVIDENCE, FOR SEVERAL ELEMENTS OF THE DEFENSE OF NECESSITY. 23

 Standard of review. 23

1. There was no evidence to establish the defendant reasonably believed he or another was under the unlawful and present threat of death or serious physical injury.....	27
2. The defendant recklessly placed himself in the position that he was forced to engage in criminal conduct.....	28
3. The defendant had reasonable alternatives.	29
4. Even accepting the defendant’s version as true, he did not take possession of the gun because of a threatened harm; rather, he took possession of the gun to escort a probable intoxicated person out of the house.	30
IV. CONCLUSION	31

TABLE OF AUTHORITIES

Washington Cases

<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	23
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995)	24
<i>State v. Bythrow</i> , 114 Wn.2d 713, 790 P.2d 154 (1990).....	passim
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	17
<i>State v. Clark</i> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	16, 20, 21
<i>State v. Cotton</i> , 75 Wn. App. 669, 879 P.2d 971 (1994)	10
<i>State v. Courtney</i> , 137 Wn. App. 376, 153 P.3d 238 (2007), <i>review denied</i> , 163 Wn.2d 1010 (2008).....	21, 22
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994)	7
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	10
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	24
<i>State v. Grisby</i> , 97 Wn.2d 493, 647 P.2d 6 (1982), <i>cert. denied</i> , 459 U.S. 1211 (1983).....	10
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	18
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972)	25
<i>State v. Jeffrey</i> , 77 Wn. App. 222, 889 P.2d 956 (1995)	25
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993)	7, 8, 11, 13
<i>State v. Kipp</i> , 179 Wn.2d 718, 317 P.3d 1029 (2014)	15, 16, 20, 21
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004).....	8
<i>State v. Modica</i> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	16

<i>State v. Niemczyk</i> , 31 Wn. App. 803, 644 P.2d 759 (1982).....	24
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	24, 25
<i>State v. Parker</i> , 127 Wn. App. 352, 110 P.3d 1152 (2005)	25, 29
<i>State v. Pete</i> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	23
<i>State v. Ramirez</i> , 46 Wn. App. 223, 730 P.2d 98 (1986).....	12
<i>State v. Roden</i> , 179 Wn.2d 893, 321 P.3d 1183 (2014).....	16
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	7, 8, 9
<i>State v. Standifer</i> , 48 Wn. App. 121, 737 P.2d 1308 (1987).....	13
<i>State v. Stockton</i> , 91 Wn. App. 35, 955 P.2d 805 (1998)	25
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d (1998).....	23
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 863 (1998).....	23
<i>State v. Watkins</i> , 53 Wn. App. 264, 766 P.2d 484 (1989)	13

Federal Cases

<i>United States v. Bailey</i> , 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980).....	30
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Statutes

RCW 9.41.040	11
RCW 9.73.030	15
RCW 9.73.090	16

Rules

CR 4.3	7
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I. RESPONDENTS ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied a motion to sever counts one and two (September 2016 incident – second degree assault, first degree unlawful possession of a firearm) from counts three and four (October 2016 incident – two counts of first degree unlawful possession of a firearm)?

2. Was the recorded conversation between the defendant and the police “private” under Washington’s privacy act, if the defendant’s statements were made in the presence of third parties, the defendant never expressed any subjective expectation of privacy in his statements to the police, and the defendant’s expectation of privacy was not objectively reasonable under the circumstances?

3. If the trial court erred in admitting a portion of the body cam footage of the defendant’s statements to the police in his home regarding several firearms located in the home, was the error harmless?

4. Did the trial court abuse its discretion when it denied the defendant’s request to instruct the jury on the defense of necessity?

II. STATEMENT OF THE CASE

Joseph Clayton was convicted by a jury of three counts of first degree unlawful possession of a firearm.¹ CP 709-11. With an offender score of “12,” the defendant was sentenced to the low end of the standard range.

On October 7, 2016, around 7:00 p.m., Spokane Police officers responded to 2112 North Astor, to a dispute between the tenants and possible “shots fired.” RP² 311, 313, 327, 395-96, 401, 411. Upon arrival, officers had contact with the defendant, who invited the officers into the residence. RP 313-14, 413. The defendant agreed to be patted down since there may have been a weapon involved with the call. RP 414. Shortly thereafter, the defendant remarked that he did not have any guns, stating “you can search everything I own, there[‘s] no gun in here. You can even search my car.”³ RP 315, 398.

¹ The jury acquitted the defendant of second degree assault. CP 708.

² The transcripts filed by court reporters Mark Sanchez and Crystal Hicks, consisting of four, consecutively numbered volumes, will be referred to as simply as “RP.” The transcripts by court reporter Heather Gipson will be referred to by last name and date (“Gipson 2/16/17 RP”). The transcript by court reporter Terri Cochran will be simply referred to as “Cochran RP.”

³ The trial court conducted a CrR 3.5 hearing and admitted the defendant’s statements to the officers. CP 591-94. The defendant was also advised of his *Ferrier* warnings before the search. Cochran RP 17, 22-23; RP 57.

Subsequently, Officer Anthony Guzzo contacted Sandra Grape⁴ inside the home; Ms. Grape rummaged through a dresser in the living room, and removed a .44 magnum black powder firearm. RP 316-17, 329-30, 399. After the discovery of the first firearm, the defendant remarked there was an additional “fake” firearm in the dresser which was also recovered by an officer. RP 317-18, 324-25, 330, 400. The firearms were collected and placed onto police property. RP 320. During their investigation, officers observed a bullet hole, which went through a couch, continued through the living room wall, and ultimately struck a bedroom floor.⁵ RP 332, 334; Ex. 6, 7, 8.

Barbara Lawley was dating the defendant at the time of the incident. RP 342. Ms. Lawley had observed the defendant previously handle the two firearms found in the dresser by police, as he had purchased the two firearms from his brother. RP 343, 364-65, 367. On a previous occasion in September 2016, the defendant had shot a third, different firearm into the couch at the North Astor address, during an argument with Ms. Lawley. RP 344, 359, 377. The defendant shot the bullet within proximity to

⁴ Sandra Grape is the mother of Barbara Lawley, both were residents of the home at the time of the incident. RP 399.

⁵ Officer Caleb Howard was wearing a body cam when officers responded to the incident. RP 412-13. That video was played for the jury. RP 413.

Ms. Lawley's head, which scared her. RP 344-46, 367. These bullet holes were the same as those observed by the police. RP 345.

Washington State Patrol firearm and tool mark examiner, Glenn Davis, identified the two firearms taken from the residence as a .44 caliber Western Arms model 1860 Army replica revolver and a .44 caliber Navy Arms model 1858 New Army replica black powder revolver. RP 434-36. These weapons differ from contemporary firearms in that they use powder, a priming cap, and a ball or bullet; modern firearms use a cartridge and a bullet. RP 438-39. The black powder firearms can be as lethal as modern-day pistols. RP 439. The firearms collected at the residence were tested and it was determined that both were operational, functional, and a projectile could be fired from each weapon. RP 440, 444.

The defendant testified and admitted to paying for the two black powder pistols, but asserted that his mother, Ms. Grape, had purchased the weapons at an estate sale for her own collection. RP 475. The defendant claimed that he looked at the two weapons from afar, but he did not touch them. RP 476. After initially observing the firearms, the defendant claimed the weapons were "fake," that the weapons were subsequently placed in a dresser in the home, and he never saw them again. RP 475-76.

Regarding the September 2016 incident, the defendant alleged that a person named “Jeff,”⁶ whom he had previously met at a party, followed him to the North Astor residence on a hunch that “Jeff” knew one of the residents. RP 481. Inside the residence, the defendant claimed he heard a gunshot while he was in another part of the house. RP 482. Subsequently, the defendant asserted that, “Jeff,” who was in the living room, “just standing there,” had a pistol in his hand, “getting ready to drop it.” RP 483. “Jeff” remarked that he was “sorry” to the defendant. RP 483. Without thinking about the situation, the defendant ostensibly grabbed the gun away from “Jeff,” escorted him outside, gave the gun back to “Jeff,” and told him not to return to the home. RP 482-83.

At the end of the State’s case, the court read a stipulation by the defendant that he had previously been convicted of a serious offense. RP 459-60.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SEVERANCE OF THE COUNTS CONTAINED WITHIN THE AMENDED INFORMATION.

The defendant was charged by amended information with second degree assault and first degree unlawful possession of a firearm for the

⁶ “Jeff’s” last name is unknown and was not identified at the time of trial.

September 2016 incident and two counts of first degree unlawful possession of a firearm for the October 2016 incident. CP 77-79. The defendant asserts the trial court abused its discretion when it did not sever counts one and two (September 2016 incident) from counts three and four (October 2016 incident). At the time of the defendant's motion for severance, the trial court orally ruled:

[THE COURT]: I would note, though, as I would agree with [the deputy prosecutor], there is one incident, though, where officers respond to a shooting, a possible shooting, and they're investigating that shooting, contacting all these people and then they find these firearms.

Would the Court separate them just because you have different defenses on both of them? It's one trial. The Court would favor them going to trial and not severing them based on same witnesses, same officers that responded. It was one, as Mr. Nagy described it, one fluid. They show up. They investigate. They find firearms.

The fact that there's some holes in [the State's case], you can point that out to the jury that the description of the firearm from the one on September 7th versus October 7th. Those are big holes in the State's case that the jury may hear, hear from the witnesses.

At this point, based on reading all the reports attached to both your briefs, the Court does find that it is under judicial economy, same witnesses, same evidence that will be coming in, and so the Court's not going to separate them. There's lots of crimes that have different elements that happened simultaneously that get set for trial because the witnesses are all there. So the Court's going to deny the Motion to Sever.

Gipson 2/16/17 RP 18-19.

Standard of review.

Washington law does not favor separate trials. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). A denial of a severance motion of offenses is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 536-37, 852 P.2d 1064 (1993).

Multiple offenses may be joined when they are “of the same or similar character, even if not part of a single scheme or plan.” CR 4.3(a)(1). Joining multiple offenses may prejudice a defendant “if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). A defendant seeking severance has the burden of demonstrating that trying the counts together would be manifestly prejudicial and outweigh any concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

To determine whether joinder results in prejudice to a defendant, a trial court must consider “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.” *Russell*, 125 Wn.2d

at 63. Further, any residual prejudice must be weighed against the need for judicial economy. *Kalakosky*, 121 Wn.2d at 539.

1. Strength of the State's evidence on each count.

A court looks to whether the strength of the State's case on each count was similar. *See Russell*, 125 Wn.2d at 63. "When one case is remarkably stronger than the other, severance is proper." *State v. MacDonald*, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

Here, the State presented similar evidence on each unlawful possession of a firearm charge and no one single count was noticeably stronger than any other. There was testimony that the defendant had purchased and handled the two black powder guns recovered by law enforcement. The two black powder guns were in the living room of the house the day police arrived at the residence. The State pursued a constructive possession theory at the time of trial for these two weapons. *See RP 554* (State's closing argument). The defendant testified he never touched or handled these black powder guns and that he had no knowledge they were real pistols.

Regarding the September 2016 incident, Ms. Lawley testified that the defendant had previously shot a different firearm, which caused a hole in the couch and living room wall, during an argument. In relation to that

circumstance, the defendant alleged that he took control of a gun from another person, after the other person accidentally shot that gun in the home.

The strength of all three counts depended on who the jury believed and the weight it gave to the particular testimony of the two primary witnesses, Ms. Lawley and the defendant. Being that the evidence remained relatively equal for all charges, this factor did not favor severance.

2. The clarity of defense for each count.

The second factor, clarity of defenses, requires review of whether the defendant's defenses to each count was prejudiced by the joinder of offenses. *Russell*, 125 Wn.2d at 64. Prejudice may result where a defendant may become embarrassed or confounded in presenting separate defenses. *Bythrow*, 114 Wn.2d at 718. Here, the defendant's defenses were straightforward. Regarding the September 2016 incident, the defendant claimed that Ms. Lawley was not credible concerning her version of that incident, and that he had no option other than to momentarily handle the weapon. *See* RP 564, 566, 569-72 (defense counsel's closing argument). In relation to the October 2016 event, the defendant denied that he ever possessed the two black powder guns found in the dresser or knew they were operable and functional firearms. *See* RP 475-76.

These defenses were straightforward, not antagonistic,⁷ nor were they likely to confuse the jury. The jury was likely able to compartmentalize the evidence and defenses of these two clearly separate events. This factor did not favor severance.

3. The trial court instructed the jury to consider each count separately.

In the present case, the court instructed the jury: “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 687 (trial court’s instruction number 6); RP 536. Courts have repeatedly approved and relied on essentially the same instruction in upholding decisions denying severance. *Bythrow*, 114 Wn.2d at 723; *State v. Cotton*, 75 Wn. App. 669, 688, 879 P.2d 971 (1994).

The defendant speculates that the jury used evidence from one incident to convict on the other. *See* Appellant’s Br. at 12. The defendant fails to establish that the jury misunderstood the instructions or failed to follow them. Absent evidence to the contrary, a jury is presumed to follow the court’s instructions. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192

⁷ Even if the defenses were mutually antagonistic, such a circumstance will not support a motion for severance unless the defendant demonstrates prejudice. *State v. Grisby*, 97 Wn.2d 493, 508, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983).

(2013). Because the trial court properly instructed the jury, this factor did not favor severance.

4. Cross-admissibility of the evidence.

As to cross-admissibility, the defendant argues the evidence of the September 2016 incident would not have been admissible concerning the October 2016 incident. However, this factor is not dispositive as to whether joinder was appropriate in this case.

To establish first degree unlawful possession of a firearm for each instance under counts two, three, and four of the amended information, the State had to establish: (1) the defendant knowingly owned a firearm or knowingly had a firearm in his or her possession or control, (2) the defendant was previously convicted, adjudicated guilty as a juvenile, or found not guilty by reason of insanity of a serious offense, and (3) the ownership or possession or control occurred in the state of Washington. RCW 9.41.040(1)(a); CP 698 (instruction); RP 539.

Even assuming that the evidence was not cross-admissible, this fact alone does not require a court to sever the counts as a matter of law in the absence of specific prejudice. *Kalakosky*, 121 Wn.2d at 537; *Bythrow*, 114 Wn.2d at 720. The primary concern is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of the other crime. *Bythrow*,

114 Wn.2d 721. When, as here, the issues are relatively simple and the trial lasts only a couple of days, generally it is reasonable to expect that the jury will compartmentalize the evidence. *Id.* If so, there may be no prejudicial effect from joinder even when the evidence would not have been admissible in separate trials. *Id.*

To the extent that the defendant relies on *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986), to argue the trial court abused its discretion in denying his motion to sever because the evidence on the separate counts was not cross-admissible, that case is inapposite to the facts of the present case. In *Ramirez*, the defendant faced two counts of indecent liberties with two different, minor victims, and the State sought to admit each offense against the other to show intent and absence of mistake or accident. *Id.* The court held that severance was required because the two offenses were not admissible against each other and the State argued that the evidence of one offense made it more likely that the other offense occurred. *Id.* at 228. The court held that despite an acquittal on one count of indecent liberties, the jury may have used the evidence presented to prove that count to infer a criminal disposition on the part of the defendant in deciding a second and unrelated count of indecent liberties. Therefore, the trial court's denial of Ramirez's severance motion was not harmless. *Id.*

Ramirez is no longer controlling authority. As our high court later observed in *Kalakosky*, the fact that separate counts would not be cross-admissible in different trials does not constitute a sufficient ground to sever as a matter of law. 121 Wn.2d at 538. *Kalakosky* involved five counts of rape against five different victims of various ages. Noting that the method of committing the five crimes may not have been sufficiently similar to allow cross-admissibility of the evidence, the *Kalakosky* court concluded that the strength of the evidence on each count, the instructions to the jury to decide each count separately, and the fact that the individual crimes were not difficult to compartmentalize supported the trial court's determination that the potential prejudice did not outweigh concerns for judicial economy. *Id.* at 539; *cf.*, *State v. Standifer*, 48 Wn. App. 121, 127, n. 2, 737 P.2d 1308 (1987) ("we decline to follow the analysis implicit in *State v. Ramirez*"); *State v. Watkins*, 53 Wn. App. 264, 272, 766 P.2d 484 (1989) ("[w]ithout explanation or analysis, the court in *Ramirez* ... required a new trial in circumstances where there were no events actually prejudicing the defendant").

In the present case, the crimes occurred within one month of each other at the same location, involved a relatively few, simple facts for each count, and the events were testified to by the same witnesses, with the same evidence; namely, Lawley, the defendant, the officers, and the defendant's

stipulation that he was convicted of a serious offense, which would have been admissible in both trials. The evidence was presented to the jury in two days. In addition, the defendant's defenses were not inconsistent or conflicting. Prejudice was lacking because the jury was unlikely to confuse which particular evidence corresponded with each count. *See Bythrow*, 114 Wn.2d at 721. Under these circumstances, the fact that the evidence of one crime may not have been admissible against the other is not dispositive and did not weigh in favor of severance of the counts in the amended information as the defendant has not established any prejudice. The trial court did not abuse its discretion and this claim is without merit.

B. THE DEFENDANT FAILS TO DEMONSTRATE THAT HIS RECORDED COMMUNICATION WITH THE OFFICERS WAS "PRIVATE" UNDER WASHINGTON'S PRIVACY ACT. IF ERROR, IT WAS HARMLESS.

At the time of the officers' contact with the residents in the North Astor address on October 7, 2016, officers were wearing department issued body cams which captured both audio and visual recordings of the incident. The officers did not advise the defendant they were recording the event. The defendant alleges the trial court erred when it denied the motion to suppress the entirety of a police officer's body cam⁸ footage. At the time of motion

⁸ The DVD body cam footage reviewed by the trial was admitted at the CrR 3.5 hearing as P-1 (RP 24-25 (motion)), and at trial as P-9 (RP 413 (trial)). Only Officer Howard's redacted body cam was played for the jury at the time of trial.

and after reviewing⁹ the body cam footage, the trial court allowed the footage up to the point of the defendant's arrest and suppressed the footage after the defendant's arrest in the home as discussed below.

Standard of review.

In *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014), the trial court ruled on a motion to suppress a recording between the defendant and his brother-in-law, as recorded by his brother-in-law. The question presented to the trial court was whether the recording was of a "private conversation" within the meaning of RCW 9.73.030(1)(b). *Id.* at 722-24.

The facts were not contested. Our Supreme Court held:

Where ... the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.

Id. at 727.

RCW 9.73.030(1)(b) provides that it is "unlawful for any individual ... or the state of Washington, its agencies, and political subdivisions" to record any "[p]rivate conversation ... without first obtaining the consent of all the persons engaged in the conversation." "Whether a conversation is

RP 388-89, 391, 412-13. The DVD has been designated for this Court's consideration.

⁹ See Cochran RP 15-28.

private is a question of fact but may be decided as a question of law where ... the facts are not meaningfully in dispute.” *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008). The parties did not dispute the facts; thus, the Court reviews this issue de novo. *Id.* Here, the parties do not dispute the facts.

“A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *Kipp*, 179 Wn.2d at 729. A court presumes that conversations between two parties are intended to be private.¹⁰ *State v. Roden*, 179 Wn.2d 893, 900, 321 P.3d 1183 (2014). Chapter 9.73 RCW does not define the term “private.” However, the Supreme Court has previously found that “private” means “belonging to one’s self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.” *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384

¹⁰ As far as the defendant’s implication that RCW 9.73.090 required suppression of the body cam video, that argument is not supported by the statute itself, as each subsection of that statute is situation specific. RCW 9.73.090(1)(a) deals with recording incoming telephone calls to emergency centers, such as police and fire. RCW 9.73.090(1)(b) addresses when an inmate can be recorded before a first appearance or when an arrested person is questioned by a police officer. RCW 9.73.090(1)(c) contends with officers in the field who have made a traffic stop and who have the capability of making an audio/visual recording of a conversation with a detainee.

(1996) (alterations in original). The nonexclusive factors to be considered are: (1) the subject matter of the communication, (2) the location of the participants, (3) the potential presence of third parties, (4) the role of the interloper, (5) whether the parties “manifest a subjective intention that it be private,” and (6) whether any subjective intention of privacy is reasonable. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).

In the trial court’s written memorandum opinion, later adopted by that court in its findings of fact and conclusions of law, the court found:

At least four officers responded to the home and were allowed in by Joseph Clayton. Body camera video shows the officers entering the home, advising Mr. Clayton why they were there. Mr. Clayton was told to take a seat in the living room, and he complied after retrieving a cell phone and a drink container. At least two officers remained in the living room while the investigation was conducted. One officer spoke with Mr. Clayton, another with Ms. Grape, and I could view one officer in the kitchen. I counted at least six civilians in the home and a dog, all moving freely about the home. Mr. Clayton is seen and heard talking on the phone, answering calls, petting the dog, and speaking with officers. Mr. Clayton apparently gives consent for a search of his car and basement area for weapons. He consistently denies that there is a gun in the home.

Eventually officers locate what appears to be a pistol in a drawer of a dresser; Ms. Grape reveals the location of another pistol; Mr. Clayton insists they are “replica” firearms and not capable of firing. The video shows the officers puzzling over the “weapons” found and examining them, trying to determine if indeed they are firearms. At a point the officers conclude that at least one of the firearms is a true firearm. Questions are then posed to Mr. Clayton regarding the source of the firearms, whether they were true

firearms. Mr. Clayton is admonished about having a firearm in his possession as a felon. Mr. Clayton is subsequently cuffed and transported to jail. At no time during this encounter was Mr. Clayton informed that he was being recorded.

In the portions of the video I saw, Mr. Clayton was not Mirandized; however, the reports indicate that upon being placed into cuffs he was informed of his rights.

CP 612-13 (memorandum) (internal footnotes omitted).

Ultimately, the trial court entered findings of fact and conclusions of law after the suppression hearing.¹¹ The court found that Robin Clayton wanted his brother, the defendant, removed from the home at 2112 North Astor, due to safety concerns for his mother. CP 232 (Findings of fact 1, 2). Four officers arrived at the home, activated their body cameras, and were allowed entry by Robin Clayton. CP 233 (Finding of fact 4). At least six people were inside the home and moved about freely while the officers conducted their investigation. CP 233 (Finding of fact 8). The officers advised the defendant why they were at the home and directed him to take a seat in a chair. CP 233 (Findings of fact 5, 6). While remaining seated, the defendant was permitted to engage in conversations on his phone, answered telephone calls, petted the dog, and spoke with the officers. CP 233 (Finding of fact 9). Officers also spoke with others in the home. CP 233 (Finding of

¹¹ Unchallenged findings of fact following a suppression hearing are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

fact 7). The defendant consented to a search of his car and the basement area in the residence. CP 233 (Finding of fact 10). The defendant initially maintained there was no firearm in the home. CP 233 (Finding of fact 11). After the officer's initial attempts to locate a firearm inside the home and the defendant's car failed, officers subsequently located several firearms in a dresser in the living room. CP 233 (Findings of fact 12, 13). Officers determined at least one gun was real. CP 233 (Finding of fact 16). Officers did not inform the defendant he was being recorded. CP 233 (Findings of fact 19).

Thereafter, officers began to question the defendant regarding the two black powder pistols and eventually developed probable cause to arrest. CP 233 (Findings of fact 17, 18). None of the communications captured by the body cam were private. CP 234 (Conclusion of law 5). Notwithstanding, the trial court determined that once officers determined at least one gun was operable, the officers had probable cause to arrest and were required to comply with RCW 9.73.090. CP 234 (Conclusions of law 1, 2, 3). The court suppressed the recording after the defendant's arrest. CP 234 (Conclusion of law 4). However, the court found that any derivative evidence was admissible. CP 234 (Conclusion of law 6).

The protections of the privacy act apply only to private communications. *Clark*, 129 Wn.2d at 224. Normally, a private home is afforded maximum privacy protection. *Kipp*, 179 Wn.2d at 731. However, that a conversation takes place with the public is sufficient to find that a conversation is not private, even if the conversation takes place inside a private home. *Clark*, 129 Wn.2d at 226. “[T]he presence of one or more third parties ... means that the conversations were not private in any ordinary or usual meaning of that word.” *Id.* at 228. In *Clark*, our Supreme Court concluded that brief conversations on public streets between strangers, concerning routine illegal drug transactions, and which sometimes occurred in front of third persons, were not private. *Id.* at 228.

In the present case, the defendant did not manifest any expectation of privacy in his conversations with the police, which occurred in front of multiple, other tenants, as captured on the body cam video. For example, when officers entered the residence, several people were in the kitchen and three or four individuals were in the living room, including the defendant. RP 414.

Even if the defendant had expressed a subjective expectation of privacy in his comments to the police, his expectation would not have been objectively reasonable because other family members and tenants were freely roaming about and were within proximity to the defendant at the time

of his statements to the police. Because the defendant's conversation with the police took place within earshot and in the presence of third parties, the conversations cannot be said to be "private in any ordinary or usual meaning of the word," even though the communications took place inside a home. *See, Clark* 129 Wn.2d at 228.

The body cam recording did not violate the privacy act because the defendant's communication was not private. Accordingly, the trial court did not err in denying the defendant's motion to suppress the video recording up to the point of his arrest.

If error, it was harmless.

Even if this Court determines the trial court may have committed error in admitting evidence of the recording up to the point of arrest, it was harmless, given the additional evidence of guilt as discussed above. Admission of evidence in violation of the Privacy Act is a statutory, not a constitutional, violation. *State v. Courtney*, 137 Wn. App. 376, 383, 153 P.3d 238, 242 (2007), *review denied*, 163 Wn.2d 1010 (2008). Consequently, the error is not prejudicial unless the erroneously admitted evidence materially affected the outcome of the trial. *Kipp*, 179 Wn.2d at 733 n. 8; *Courtney*, 137 Wn. App. at 383.

Here, there is no reasonable probability that the outcome of the defendant's trial would have been different if the officer's body cam recording had been excluded. Much, if not all, of the content of the video and audio recording had been previously admitted through the testimony of various witnesses. The defendant neither suggests nor points to anything on the recording which was not admitted by other means during trial or how the recording materially affected the jury's verdicts. The jury certainly had the opportunity to assess the weight of all the evidence and the credibility of witness testimony, independent of any potentially cumulative body cam footage admitted by the court. Under these circumstances, it is not reasonably probable that, had the entirety of the body cam recording been suppressed, the jury would have found the defendant not guilty.

Indeed, in *Courtney*, where this Court concluded that the failure to strictly comply with the statutory requirements rendered the recordings inadmissible, the court ultimately held that the trial court's error in admitting them was harmless. After a review of the entire record, the court was convinced that even had the recordings been excluded, the jurors could have reached no other rational conclusion than that the defendants were guilty as charged. 137 Wn. App. at 384.

Here, if this Court finds the entire body cam footage should have been suppressed, any error was harmless.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT ON THE DEFENSE OF NECESSITY AS THE DEFENDANT FAILED TO PRODUCE ANY EVIDENCE, LET ALONE SUBSTANTIAL EVIDENCE, FOR SEVERAL ELEMENTS OF THE DEFENSE OF NECESSITY.

The defendant argues the trial court erred when it refused to instruct the jury on the defense of necessity regarding first degree unlawful possession of a firearm under count two (October 2016 incident).

Standard of review.

The standard of review on this issue depends on whether the trial court's refusal to give the jury instruction was based on law or fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 863 (1998). An appellate court reviews a denial of a jury instruction for abuse of discretion if based on a factual dispute, but de novo if based on a ruling of law. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated otherwise, an abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

A defendant is entitled to have the court instruct the jury on his or her theory of the case if evidence supports the particular instruction.¹² *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). Failure to do so is reversible error. *Id.* at 849. In evaluating a defendant’s evidence in support of an instruction, the trial court must view it in the light most favorable to him or her. *Id.* Regarding whether a judge should instruct on an affirmative defense, the Supreme Court has stated:

“The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].” In short, the defendant has the burden of production and, if met, the burden of persuading the jury by a preponderance of the evidence that she has met the four required elements.

Id. (citation omitted) (alterations in original).

Necessity is an affirmative defense. *State v. Niemczyk*, 31 Wn. App. 803, 807, 644 P.2d 759 (1982) (necessity is an affirmative defense and should not be considered by the jury unless the defendant has submitted substantial evidence to support it); *see State v. O’Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015) (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

¹² A defendant is not entitled to an instruction that is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

defense); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972) (substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed”). A defendant may assert the affirmative defense of necessity to the charge of unlawful possession of a firearm. See *State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); *State v. Stockton*, 91 Wn. App. 35, 44, 955 P.2d 805 (1998). In determining whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must view the evidence in the light most favorable to the defendant. *O’Dell*, 183 Wn.2d at 687-88.

To establish a necessity defense for unlawful possession of a firearm, there must be substantial evidence that:

(1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Parker, 127 Wn. App. 352, 354-55, 110 P.3d 1152 (2005); see CP 784 (defendant’s proposed instruction number 5).

Here, the defense requested a necessity instruction regarding Count Two (September 2016 unlawful possession of a firearm charge). After argument, the trial court ruled:

I have had the opportunity to take a look at the Washington Pattern Instructions and some of the footnotes. I do have *State v. Jeffreys* here. I will first indicate that the necessity defense would be available under the circumstances if, in fact, it fits the factors. So while I had originally asked the question about forces of nature, I was off target with regards to that question after reading the case law.

So it is available if it fits the circumstances. In reading what those are, you can apply those if the following facts are present: One, the defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury. The facts would support the defendant could have believed that under the circumstances. So these - what was testified to here at trial would fit that.

The second factor is the defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct. I'm going to come back to that in just a second.

Third factor is the defendant had no legal – or excuse me, had no reasonable legal alternative.

And the fourth factor is that, there was a direct and causal relationship between the criminal action and the avoidance of the threatened harm. And, again, I think the facts that I have would substantiate that fourth factor. In other words, as testified to by the defendant, the gun was fired, he came downstairs to see that gun, took it, and escorted the individual who was using it out the door, gave it back to him and sent him on his way.

What is giving this Court pause is the factor with regards to number two and three. The defendant recklessly placed himself in that situation, and it is quite possible he did by inviting this individual, he knew nothing about, home to his residence. But whether it rises to that level or not, I am more concerned about, then, number three, that the defendant had no reasonable legal alternative. And under the facts as testified to, based upon what he saw, I do believe that he potentially could have taken other alternative actions, such as calling the police to get a gentleman who fired a gun out of his home.

And, therefore, under these circumstances, I do not believe that the necessity defense is applicable under the circumstances. So I am not going to be giving that instruction as requested by the defense.

RP 521-22.

1. There was no evidence to establish the defendant reasonably believed he or another was under the unlawful and present threat of death or serious physical injury.

The defendant never alleged, nor was there any other evidence, that he or any other resident in the home was under the present threat of death or serious physical injury at the time “Jeff” allegedly fired the gun. The defendant’s testimony established, if anything, that “Jeff’s” firing of the gun was accidental, that “Jeff” realized his mistake, “Jeff” appeared to be dropping the weapon, “Jeff” provided no resistance to the defendant taking the weapon, and, within a short time, the defendant returned the weapon to “Jeff” once they were outside.

In contrast to the defendant's claim on appeal, there is nothing in the record to support that he had to take possession of the firearm to avoid being "shot."¹³ To the contrary, there was no confrontation between the two men and the situation did not escalate once "Jeff" allegedly fired the gun. No direct or implied threat was made against the defendant or anyone else in the home. The shooting of the gun, at most, was accidental, and "Jeff" apologized. This is a far cry from the defendant's unsupported claim that he was about to be shot. This factor does not support giving the instruction.

2. The defendant recklessly placed himself in the position that he was forced to engage in criminal conduct.

The defendant was in a bar drinking and playing pool. RP 481. The defendant asserted he had previously met "Jeff" at some parties and several bars. RP 481. "Jeff" believed he knew one of the tenants at the residence, and accompanied the defendant back to the house. RP 481. At the house, the defendant allegedly was checking on one of his housemates when he left "Jeff" alone and heard a gunshot. The defendant, perhaps intoxicated, certainly had the alternative of leaving "Jeff" at the bar before returning home and he could have instructed "Jeff" that he did not have permission to go into the home.

¹³ See Appellant's Br. at 19.

3. The defendant had reasonable alternatives.

The defendant failed to present any evidence that he had no reasonable alternative, other than to possess the firearm. To show that a defendant had no reasonable legal alternative, he must show that “he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefits of the alternative.” *Parker*, 127 Wn. App. at 355. Because “Jeff” apologized, appeared to be dropping the weapon, provided no resistance to the defendant taking the firearm away, and he returned the weapon to “Jeff” outside, the defendant failed to show he had no reasonable alternative to possession of the firearm. Assuming there was a threat, the defendant could have called the police. He failed to present any evidence that the police would not have arrived in a timely manner. He could have called one of his roommates, who perhaps could have taken possession of the alleged weapon. Instead, the defendant chose the only alternative which required him to illegally possess the alleged firearm. The trial court’s ruling was correct and this factor does not support giving the instruction.

4. Even accepting the defendant's version as true, he did not take possession of the gun because of a threatened harm; rather, he took possession of the gun to escort a probable intoxicated person out of the house.

As discussed above, there was not a direct causal relationship between the defendant's possession of the firearm and avoidance of the threatened harm (i.e., being shot by "Jeff"). Accepting the defendant's claim as true, there was no express or implied threat of any harm against the defendant or any of his roommates other than an accidental discharge of a firearm by "Jeff," who was most likely intoxicated. By all accounts, "Jeff" had realized his mistake and there was *no* evidence he would have fired the gun a second time. The defendant failed to present any affirmative evidence to the contrary.

Regarding all four factors, the defendant failed to provide any evidence, let alone substantial evidence, to demonstrate the four elements of the necessity defense. Where an affirmative defense, including necessity, consists of several elements and evidence supporting one element of the defense is lacking, there is no right to present the defense. *United States v. Bailey*, 444 U.S. 394, 415-16, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Given that there was no evidence supporting a necessity defense, the trial court's refusal to instruct on the defense was not an abuse of discretion and did not violate the defendant's right to present a defense. There was no error.

IV. CONCLUSION

For the reasons stated herein, this Court should affirm the defendant's three convictions for first degree unlawful possession of a firearm.

Dated this 8 day of May, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH CLAYTON,

Appellant.

NO. 35884-4 -III

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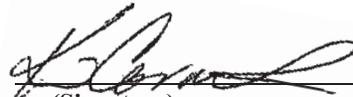
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Derek Reid

derek@robertsfreebourn.com; lauren@robersfreebourn.com

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