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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

EDWIN ESPEJO, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

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I. COUNTERSTATEMENT OF ISSUES

- (1) Is there sufficient evidence of a premeditated intent to kill under the following facts: The defendant is approached by police officers to investigate a domestic violence call. He is seated on a mattress and box springs at the time. One of the officers sees the outline of a gun in the defendant's left pocket. Defendant ignores requests by the officers to take his hands out of his pockets. He eventually removes the gun from his pocket and slides it under a pillow. He later picks up the gun with two fingers before dropping it onto a pillow or the mattress. He ignores the repeated pleas of the officers to not touch the gun and move toward them away from the gun. He repeatedly states he is not going back to jail and expresses his anger that the officers are in his home, even as they explain that they are investigating a domestic violence call. After the defendant takes off his shirt and gives indications that he is preparing to attack, the officers deploy a taser that is only marginally effective. The

defendant then grabs the gun and fires at the three officers standing in front of him in a confined area, continuing to fire until the seven-round clip runs out of ammunition.

- (2) Under the unchallenged findings of fact, was the trial court correct in concluding the actions of the officers were justified under the emergency doctrine and the community caretaking function of the police?
- (3) Will the courts suppress evidence of a defendant's assault on a law enforcement officer because the officer is alleged to have made an illegal search, seizure or arrest?

II. COUNTERSTATEMENT OF THE CASE

Edwin Espejo (hereinafter defendant) was found guilty by jury verdict on March 5, 2019 of three counts of Attempted Murder in the First Degree and one count of Unlawful Possession of a

Firearm in the Second Degree. CP 148. The victims of the attempted murder counts were Officers Matt Griffin, John D'Aquila and David Dillsworth of the Pasco Police Department. CP 69-70. Judgment and Sentence was entered on April 12, 2019. CP 148-159.

Defendant brought a motion to suppress evidence. CP 19-23. Following a hearing pursuant to CrR 3.3, the trial court entered the following findings of fact to which no error is assigned:

- (1) Pasco police officers responded to the defendant's home on September 16, 2017, to investigate allegations of ongoing domestic violence, specifically 'male-female physical domestic.'
- (2) Officer Griffin testified that situations involving domestic violence are most unpredictable and tensions can be volatile.
- (3) Officer Griffin was met on the street by four children who came running out and were frantic, yelling, screaming, and in panic saying, more than once, 'he is hitting her' and motioning with their fists, mostly with their hands, to show the woman was being hit in the face.
- (4) Based on the information he received from dispatch and from the people at the scene, Officer Griffin believed that there was an

emergency and that one or more persons inside the home needed aid or assistance.

- (5) A youth, approximately 12-15 years old, led Officer Griffin into the home and indicated that the assailant 'Edwin' was in the basement. Officer Griffin called for the Defendant to come up. He did not.
- (6) Officer Glass arrived and saw a bunch of children outside the home, frantic and running around. They were speaking rapidly. Officer Glass noted their behaviors as common ones seen in emergency situations.
- (7) Officer Glass and Officer Ramos met Officer Griffin at the stairs. A conversation ensued as to who would be "going lethal" and who would be "going less lethal" and who would be going "hands on." They proceeded down the stairs to the basement.
- (8) The basement room had a couple sets of bunk beds on the left side, and at the end of those a bed frame with a mattress and box spring and then on the right side a longer dresser. There was a washer and dryer as well.
- (9) Officer Griffin observed a younger male (about four to six years old) pacing back and forth who was crying loudly and who looked scared. Officer Griffin was able to get that child upstairs.
- (10) Officer Griffin then observed Edwin Espejo with two smaller children (about two to three years old) in his lap - one in each arm sitting on his lap on the bed at the far end from the stairs. The children were crying and upset.
- (11) The defendant told the officers he didn't want to go back to jail and tells the officers to get the

"f" out of his house. The defendant also cried out a couple of times.

- (12) Officer Griffin advises the defendant that it is not about the kids and let the kids go. The defendant said "let's get the kids out of here. I don't want them to see this."
- (13) After about one minute, the defendant released the two small children who went upstairs.
- (14) Officer Griffin then observed the defendant's hands in his pocket and could see the outline of a gun in the Defendant's pocket and he could see the barrel of the gun. This information was conveyed to the other officers and was perceived as a threat and significant concern which had to be resolved before any investigation regarding the domestic violence allegations could occur.
- (15) Officer Griffin believed he had a basis to detain the defendant to investigate the domestic violence allegations. The defendant was given multiple opportunities to come to Officer Griffin so he could be detained in handcuffs which would allow the officers to investigate the allegations of domestic violence. He refused to comply.
- (16) Up to this point, Officer Griffin and the other offices had no time to clear the basement and had not been able to check certain places and behind some walls. He had not heard anybody in the basement at that time and had not seen a woman in the areas visible to him.
- (17) Up to this point, Officer Griffin and the other officers had no time to locate the victim involved with the physical domestic violence allegations. He and the other officers had no time to do any investigation related to the

physical domestic violence allegations as they were trying to first secure the scene.

- (18) Officer Griffin asked the defendant to show his hands several times. He testified that the first thing any officer will do is to have the person take their hands out of their pockets for everybody's safety. The defendant kept his hands in this pocket.
- (19) Shortly thereafter, the defendant slid his left hand out his left pocket and slid the gun underneath a pillow or a blanket. Officer Griffin observed that the gun had a gray barrel.
- (20) Officer Griffin notified the other officers about the gun and was yelling at the defendant to set the gun down. Officer Glass had a more limited view of the defendant as compared to Officer Griffin. With the information provided by Officer Griffin, Officer Glass drew his sidearm.
- (21) Officer Griffin advised the defendant, several times, to drop the gun. He was trying to deescalate the situation.
- (22) Officer Griffin urged the defendant to crawl to him and to think of his children. The defendant sobbed, asked if his children had left, and said he did not want his children to see what was going to happen and would repeat, "I am not going back to jail." These statements indicated to Officer Griffin that the defendant was not going to cooperate.
- (23) Officer D'Aquila had arrived at some point. He came forward when Officer Griffin said they had a chance at less lethal.
- (24) The defendant stood up, started taking his shirt off and was reeling his head like he was getting ready to fight.

- (25) Officer Griffin asked Officer D'Aquila to taze the defendant a couple of times and he did so. The defendant tried to turn so he could deflect the taser from landing on him; he then turned and lunged onto the bed and grabbed the gun.
- (26) Officer Griffin saw the gun fire from the defendant and that is when shots were fired back at the defendant.
- (27) Approximately three minutes passed between Officer Griffin's entry into the home and the first gun shot. In that time, the police did not have an opportunity to seek out the alleged victim of domestic violence or otherwise investigate. The police were in the process of securing the scene before they could commence an investigation.
- (28) Both Officer Griffin and Office Glass testified that the investigation into the domestic violence allegations had not been completed at the time of the shooting.
- (29) Requiring the police to leave the home to secure a search warrant given: (1) the presence of very young and vulnerable children; (2) that the victim of the alleged domestic violence had not been located and her welfare and status was unknown; and (3) that the defendant's instability, his possession of a gun, and lack of cooperation, would have placed the persons remaining in an about the home in jeopardy of significant injury or death.

CP 42-46. Based on the foregoing findings of fact, the trial court entered the following conclusions of law:

- (1) The police officers' belief that there was an emergency in the defendant's home was reasonable.
- (2) The police officers' belief that someone likely needed aid or assistance in the defendant's home was reasonable.
- (3) The police had no time or opportunity to investigate the domestic violence allegations while the defendant was not secured and while the home had not been secured.
- (4) The police had no opportunity to determine the status and location of the alleged victim as they had not been able to secure the basement and the home given the defendant's actions in the basement.
- (5) The defendant appeared to be suicidal. The defendant's possession of a gun, his behavior, his actions including his fight or flight stance at one point, his noncompliance, his words, his distress, and the presence of distress of the children, outside the home and the presence and distress of the young and vulnerable children in the home, provided reasonable, articulable suspicion of another emergency.
- (6) The attempts to seize the defendant, for purposes of detaining him to investigate the domestic violence allegations, was not a violation of his constitutional rights.
- (7) The police entry into and remaining in the home was justified under both the emergency doctrine and community caretaking exception to the Warrants Clause.

CP 46-47. Accordingly, the trial court denied the defendant's motion to suppress evidence and ruled that the evidence resulting

from the entry into the home and arrest of the defendant, including the gun, would be admissible at trial. CP 47.

At trial, Julian Ordaz testified that he is a cousin of the defendant. RP 543. He was the person who made the 911 call that brought the police to 910 South 10th in Pasco on September 16, 2017. RP 544. He was living upstairs in the house. RP 544. He had been half asleep when “the kids” came running upstairs saying, “Call the cops, call the cops.” RP 544. The children appeared to be scared. RP 544. The defendant’s son, 13-year-old Edwin Espejo, Jr., was particularly forceful in asking the police be called. “And then we went outside and I called the cops.” RP 544. He told the dispatcher that he could hear hitting, yelling and screaming. RP 551-52. The 911 call was played for the jury. RP 534.

Officer Matt Griffin testified that on September 16, 2017, he was the first officer to arrive in response to a call of a “physical domestic in progress” at 910 South 9th. RP 611. He explained the domestic violence call are considered high priority and often involve

highly volatile situations, and he responded with lights and siren.

RP 612.

As he arrived at the residence, four children came running out in a frantic state, screaming and crying. RP 612. The children were yelling, "He's hitting her, he's hitting her, he's hitting her." RP 612. As they were saying this, the children made a fist motion to the eye. RP 612. Officer Griffin immediately requested more units to assist him. RP 612. One of the children appeared to be a bit older, a boy perhaps 12 to 13 years of age. RP 613. Officer Griffin asked, "Who is hitting her?" RP 613. The boy replied, "They are in the house." RP 613. The officer found the front door to be locked, so he asked if there was another way to enter. RP 613. He was led to a side door and he followed the children into the house. RP 613. He encounter a middle-age man behind the door, but the boy said, "No, no. That's not him, that's not him." RP 614. Officer Griffin then said, "Okay. Take me to where he is at. Where are they at?" RP 614. The boy said, "Downstairs. They are downstairs." RP 614. The officer then followed the boy to the stairwell leading to the basement. RP 614. He waited at the top of the stairs for a backup unit to arrive. RP 614. He could hear crying

and whimpering coming from downstairs. RP 614. The boy said that the man's name was Edwin and he was in his early 30s. RP 614.

Officer Joshua Glass soon arrived. RP 614. Officer Griffin advised that he had his taser ready and asked Officer Glass to back him up with his firearm. RP 614. Officer Griffin then twice called out to "Edwin," announced that they were the Pasco Police Department, and asked that he immediately show himself. RP 615. A response came from downstairs of, "Get the f___ out of my house." RP 616.

The officers started down the stairs. RP 616. Officer Griffin could then see a child about six to eight years of age, walking back and forth, and appearing to be panicked. RP 616. Officer Griffin encouraged the child to come up the stairs, and the child then ran past the officer to the upstairs of the house. RP 616. As the officer proceeded down another step, he could see a mattress and box spring sitting on basement floor. RP 616. The defendant was sitting on the bed with a two younger children; he had an arm

wrapped around each child with his head in between them. RP 617.

Officer Griffin drew on his training as a negotiator for the SWAT team. RP 617. He said, "Hey, man. Edwin, it's not about the kids, man, it's not about the kids." RP 617. The defendant then released the two children and the officers directed them upstairs. RP 617.

The defendant and the officers were then in a tight, confined area. RP 617. As soon as the children were released and allowed to come toward the officers and upstairs, defendant put his hands in his pockets. RP 618. Officer Griffin immediately told him to get his hands out of his pockets. RP 618. He then saw a bulge with the outline of a gun in the defendant's left pocket. RP 618. Officer Griffin repeated, "Get your hands out of your pockets; get your hands out of your pockets." RP 618. Defendant then slowly removed his left hand from his left pocket, and as he did so he slid the gun under a pillow adjacent to a dresser on his left side. RP 618-19. The officer repeatedly told him to show his hands. RP

619. Defendant pulled his hands out and was not holding the gun at that point. RP 619.

Officer Griffin told defendant to stand up and crawl over to the officer. RP 619. Defendant refused and told the officer to come to him. RP 619. Defendant appeared angry and made noises like he was crying. RP 619. Defendant did not comply with the officer's commands and in fact said, "Get out of here. Get out of my house." RP 260. Officer Griffin explained they could not leave because they were investigating a physical domestic call. RP 620.

Defendant then reached over, grabbed the gun, and held it up by the handle with two fingers. RP 620-21. Officer Griffin repeatedly told him to drop the gun. RP 621. Defendant then dropped the gun and it landed on a pillow or the mattress. RP 621. Officer Griffin again told defendant to come toward him. RP 621.

Officer Griffin then changed his approach and talked to defendant "as a negotiator would talk to somebody over the phone":

And I just tried to talk to him, It's not about the kids, man. It's not about the kids. It's something not serious right now, man. Just think about your kids. Think about what they are going to go through and stuff.

RP 621. The technique did not prove successful, as defendant just continued crying, writhing and kneading his head without moving away from the gun. RP 621.

Officer Griffin continued to take the lead in speaking with defendant to minimize confusion. RP 622. Defendant clenched his fists, started to stand up, and removed his shirt, which Officer Griffin recognized as “pre-attack indicators.” RP 622-23. Officer John D’Aquila had entered the basement and was to the right-hand side of Officer Griffin. RP 622. Officer Griffin knew that Officer Glass could not see the gun from his vantage point, so he asked Officer D’Aquila to deploy his taser. RP 622. RP 622-23. Officer Griffin put his firearm to his side and prepared to take defendant into custody, knowing he would have five seconds to do so if the taser worked properly. RP 623. As the taser went off Officer Griffin went forward but could see it had not been totally effective. RP 623. Defendant fell to the right a little bit and reached over with his left hand and grabbed the gun. RP 623. Officer Griffin yelled, “Don’t grab it, don’t grab it, don’t grab it,” but defendant grabbed the gun and shots rang out. RP 624. Officer Griffin was 10 to 15 feet

away from defendant when defendant began shooting. RP 624. Officer Griffin was one of three officers in close proximity to each other, close enough that they would touch each other. RP 665-66. The other two were Officer D'Aquila and Officer Dillsworth. RP 673. Officer Griffin decided to fire his weapon when defendant grabbed his gun and brought it up toward he and his fellow officers; however, Officer Griffin's gun malfunctioned and did not fire. RP 665-66; 687-89. Two other officers were behind the three officers directly facing defendant; they did not return the gunfire.

As the shooting ended, Officer Griffin approached defendant. RP 627. He saw that the gun was still within defendant's reach, but "the gun was slide locked to the rear which means the gun was empty." RP 627. Officer Griffin confirmed there were no bullets left in the gun and secured it. RP 627. Officers immediately began rendering first aid to defendant. RP 627.

As Officer Griffin was leaving the basement, he saw there were at least two bullet holes in a washer and dryer. RP 672-73. He had not seen these bullet holes when he entered the basement.

The bullet holes were directly behind where he and Officers D'Aquila and Dillsworth had been standing. RP 673.

Officer John D'Aquila testified he arrived in a vehicle with Reserve Officer David Dillsworth. RP 738. As he entered the basement, Officer Ramos was next to Officer Griffin on his right side, and Officer Glass was to the right of Officer Ramos. RP 742. Defendant sound emotional, was breathing heavily, and said, "I'm not going to jail." RP 743. Officer D'Aquila was able to observe the silver handgun to the left of defendant. RP 744. He moved Officer Ramos to the side and took her position, since he was the more experienced officer. RP 744. At that point, he was 15 to 20 feet from the bed and within three feet of Officer Ramos. RP 745. Officer D'Aquila continued:

So I was the one who drew the taser. At the time for a brief second it looked as though he might have complied, but then he stood up, clenched both fists, started saying is not going back to jail, and that's when Officer Griffin was calling for the less lethal (taser) because I took those as pre-attack indicators.

There was only one way out of the basement. And the way he was acting I knew he was going to fight. And then he took off his shirt. And as he was taking off his shirt, I deployed the taser.

RP 746. The taser was marginally effective. RP 749. Defendant fell back to the bed and partially out of his view. RP 750. He heard Officer Griffin say something to the effect of don't go for the gun or he's going for the gun. RP 750. He then heard a bang and saw a muzzle flash in the corner coming from defendant's firearm.. RP 750. He could see defendant's torso and used his firearm to return fire at that target. RP 750. He stopped once he no longer heard firing from defendant's end. RP 750. Once it could be seen that the firearm was out of defendant's hand and was secured, he transitioned to life-saving measures. RP 751.

After medics arrived and took over the medical aid to defendant, Officer D'Aquila had a chance to debrief. RP 753. He saw bullet holes in the wall and ceiling directly behind where he had been standing; those bullet holes had not been there when he entered the basement. RP 753. After the sergeant asked the officers to check themselves for injuries, Officer D'Aquila noticed an entry and exit bullet hole in his pant leg that had not been there before. RP 753.

Officer David Dillsworth had been a reserve officer on September 16, 2017 but had recently become a full time officer at the time of the trial. RP 629. He responded to the call at 910 South 9th with Officer D'Aquila. RP 630. He heard Officer Griffin's voice coming from the basement yelling to put the gun down, so he and Officer D'Aquila went down the stairwell. RP 634. Officers Griffin, Ramos and Glass had arrived in the basement ahead of them. RP 632. Officer Griffin indicated he would take the verbal commands:

. . . so he started communicating with Edwin and pleading with him to come to us. And Edwin was indicating that he was going to grab the gun at that point.

. . . And so Officer Griffin was asking him; I would say pleading with him not to grab the gun. And he, Officer Griffin indicated that we do not want to hurt him while we were down there and just asking him to please come to us.

And at one point he asked him to get down and just crawl to us if that would be easier and give him different options. And they both just communicated back like that.

RP 635. Officer Dillsworth was standing right up against a wall partition that divided off the small area of the basement where they were located. RP 636. Defendant had varying degrees of

emotions from sadness to anger, and kept repeating that he didn't want to go back to jail, saying he was going to grab the gun, and telling the officers to get out of the house. RP 637. Officer Griffin kept telling him no to grab the gun and to think of his children. RP 637. "It seemed like he was considering it the whole time that we were talking, just trying to decide what he was going to do, I guess." RP 637.

At one point defendant started shifting from emotional and sad to more angry and aggressive. RP 638. He started to stand up and things started to escalate quickly. RP 638. Officer D'Agula fired the taser at that point. RP 638. The taser had only a brief, momentary effect. RP 639. The next thing the officer saw was the flash of a gun. RP 639. The defendant's gun was pointed directly toward the officers as he fired. RP 639. Officer Dillsworth returned fire. RP 639.

Sgt. Dave Allen arrived in the basement immediately after the shooting. RP 567. The area where the incident occurred is a long, narrow room with furniture and storage on the far side; a partition separates it from the rest of the basement. RP 567. It is

almost like a bowling alley. RP 568. At the far end, there are mattresses on the floor forming a bed. RP 568. When he arrived, the defendant was on the bed receiving first aid. RP 568. In addition to himself, there were six other officers in the basement. Officers Griffin, D'Aquila and Dillsworth were identified as those who had shot their firearms or attempted to fire shots. RP 569. There were bullet holes by the stairwell caused by bullets traveling from the direction of the mattress on the ground where defendant was situated. RP 569.

Sgt. Allen was asked if Officer Dillsworth was carrying a weapon issued by the Pasco Police Department. RP 593. He explained:

No. He was carrying a weapon that was authorized by Pasco police. The reserves have to purchase or supply their own firearm, but they have to meet our standards and be inspected by our firearms instructors. He has to qualify at the range on the same test as the regular officers do and score at the same level as the regular officers do.

RP 593.

The firearm used by defendant was test-fired on the firing range by Commander Randy Maynard. RP 1132-33. The actual

physical capacity of ammunition or bullets for that firearm was seven in the magazine. RP 1132.

Trevor Allen of the Washington State Patrol Crime Lab conducted a crime scene analysis and shooting incident reconstruction. RP 90. He was able to determine the number of bullets fired from the defendant's weapon. RP 914. The weapon was empty when it was recovered at the scene. RP 966. Cartridge cases recovered at the scene were Speer and Winchester brands. RP 957. It was possible to distinguish those fired by the officers from those originating from the defendant's gun, as the Pasco Police Department uses Speer brand ammunition. RP 933. A total of seven Winchester brand cartridge cases were recovered at the scene. RP 958, 959, 961, 963.

Two bullet holes were confirmed in the washer and dryer. RP 545. Confirmation was made by testing for copper and lead. RP 545. There were other impacts to wall above the washer and dryer, but they were not positively confirmed as bullet strikes. RP 981. There was a bullet strike in the patrician wall. RP 948. There was a fired bullet associated with an entrance defect to the north

side of the dresser. RP 966. The distance from the mattress to the bullet hole in the washer measured 19.6 feet. RP 970.

The State rested its case in chief on February 29, 2017. RP 1145. The defendant then made what he called a motion for a “directed verdict,” which was denied by the trial court. RP 1145-1166. Upon resuming with the jury, the trial court asked defense counsel, “[D]oes the Defense wish to present a case?” The defense proceeded to present testimony in its own behalf. RP 1169-82.

III. RESPONSE TO ARGUMENT

- (1) Defendant waived any challenge to the denial of his motion to dismiss at the close of the State’s case by presenting evidence on his own behalf. Even if his assignment of error is viewed as a challenge to the sufficiency of the evidence as a whole, it has no merit.**

Defendant’s first assignment of error reads: “The trial court erred when it failed to grant defendant’s motion to dismiss Counts 1, 2 and 3 of the information because the evidence of premeditation presented by the prosecutor was insufficient to support the charges.” Brief of Appellant, at 4. However, defendants waive a

challenge to the sufficiency of the evidence at the close of the State's case if they introduce evidence on their own behalf. *State v. Allen*, 116 Wn. App. 454, 465 n. 6, 66 P.3d 653 (2003). Here, defendant did in fact present substantive evidence after the denial of his "halftime" motion. RP 1169-82.

Even if defendant's first assignment of error were viewed as a challenge to the sufficiency of the evidence presented during the entire trial, it would have no merit. A person commits the crime of first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). To convict of an attempt, the State must prove both intent to commit the crime and a substantial step toward its commission. RCW 9A.28.020(1); *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Thus, a person commits first degree attempted murder when, with premeditated intent to cause the death of another, he/she takes a substantial step toward the commission of the act. *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000). Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime. *Id.*

The State bears the burden of proving every element of the crime charged beyond a reasonable doubt. *Price*, 103 Wn. App. at 852; *State v. Billups*, 62 Wn. App. 122, 126, 813 P.2d 149 (1991). On review, an appellate court views the evidence in a light most to the prosecution to determine whether any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *Price*, 103 Wn. App. at 852; *Billups*, 62 Wn. App. at 126. Whether conduct constitutes a substantial step is a question of fact. *Id.*

As defendant acknowledges at page 11 of his brief, the trial court relied heavily on *Price*, 103 Wn. App. 845. Contrary to defendant's arguments, that reliance was well placed. The defendant in *Price* was convicted of multiple crimes. Among the issues on appeal was the sufficiency of the evidence to support convictions of the attempted first degree murders of Aleta Nakano (Count I) and Larry Hooper (Count II) occurring on Deschutes Parkway. See *Price*, 105 Wn. App. at 850. The facts underlying those counts were that Nakano was driving a pickup truck with Hooper as a passenger when she observed Price committing a theft; she followed Price's vehicle until it stopped in a gravel parking

area on Deschutes Parkway; she pulled behind Price's stopped vehicle, hoping to get the license number; Price then exited the driver's side holding a gun, pointed it at the windshield of Nakano's vehicle, and fired one shot that lodged in the passenger headrest. *See Price*, 103 Wn. App. at 849. The court stated: "The evidence in this case sufficiently supports the finding of attempted first degree murder." *Price*, 103 Wn. App. at 853. This was true even though the only opportunity for deliberation was the amount of time it took to arm himself with the handgun, exit the vehicle and fire toward the victims. Similarly, the defendant in our case armed himself with a handgun and fired toward multiple victims. RP 623-24.

Defendant focuses his argument on premeditation. Premeditation is "the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, however short" or "the deliberate formation of and reflection upon the intent to take a human life." *State v. Gibson*, 47 Wn. App. 309, 311, 734 P.2d 32 (1987). Premeditation may be shown by direct or circumstantial evidence. *Id.*

The standards for reviewing evidentiary sufficiency to support premeditation were established by the Washington Supreme Court in the landmark case of *State v. Ollens*, 107 Wn.2d 848, 733 P.2d 984 (1987). A year earlier the same court held in *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986) that manual strangulation taking three to five minutes was insufficient to show premeditation, causing some to suppose the premeditation requirement was greater than previously thought. The court set the record straight in *Ollens*. The defendant in *Ollens* was charged with the stabbing murder of a taxicab driver. The medical examiner testified that the victim died of four knife wounds and resulting blood loss. There were numerous defensive wounds, indicating the perpetrator and the victim struggled. Ollens told a friend he had killed the victim when the victim made a move as if to reach for a weapon, and “[Ollens] cut the man because he felt it was either the man’s life or his.” See *Ollens*, , 107 Wn.2d at 849-50. The court found this was sufficient to create a jury question on premeditation. First, the court in *Bingham* had dealt with manual strangulation, which involves one continuous act; in the case at hand, there were multiple stab wounds and slashes. This indicated that Ollens did

deliberate on his already formed intent to kill. *Ollens*, 107 Wn.2d at 853. Second, a knife was used in the stabbing. Procurement of a weapon can show premeditation. *Id.* Third, the victim was struck from behind. *Id.* Fourth, the jury could find the existence of a motive (robbery) and therefore “it would not be left to speculate or surmise only as to the existence of premeditation.” *Id.*

Similar circumstances show premeditation here. First, it was necessary for defendant to arm himself with a firearm in order to commit the crime. The evidence showed defendant took considerable time deciding what to do with the firearm. First, he slid it out of his pocket and placed it under a pillow. RP 618-19. Later, he picked it up by two fingers before again setting it down. RP 620-21. Finally, he grabbed the gun and opened fire on the officers. RP 623-24. Throughout the encounter, he ignored the officers’ pleas with him to move forward away from the gun. RP 619, RP 635. This is a much stronger case than *Ollens*, as our defendant not only armed himself with a weapon but spent considerable time deliberating what action to take with it. *See also State v. Giffing*, 45 Wn. App. 369, 375, 725 P.2d 445 (1986) (procurement of weapon is evidence of premeditation).

Second, the crime involved not a single act but firing seven shots until he ran out of ammunition. The subsequent gunshots showed that defendant deliberated on his already formed intent to kill, just as did the subsequent stabs and slashes in *Ollens*.

Finally, defendant's own statements show he had motives. He did not want to go back to jail, and he was angry with the officers for being in his home. RP 616, 620, 637, 746. As in *Ollens*, the existence of a motive is further evidence of premeditation.

While defendant does not expressly argue otherwise, it should be noted that *Price* stands for the proposition that firing a gun toward a confined area may support conviction for the attempted first degree murder of all persons in the confined area; it is not necessary to associate a specific bullet as being intended for a particular victim. *Price*, 103 Wn. App. at 852-54. (In *Price*, the defendant was convicted of two counts of attempted first degree murder even though he only fired one shot at the pickup cab occupied by two people.) Moreover, "[t]he act of deliberately firing a gun toward an intended victim clearly is strongly corroborative of

an attempt to commit first degree murder.” *Price*, 103 Wn. App. at 853. Intent to kill a specific person is not required. *Id.* If anything, the charges against defendant were lenient as he could have been charged with the attempted first degree murder of all of the officers in the group instead of just those immediately in front of him.

(b) There was no basis to suppress evidence as the actions of the officers were justified under the emergency doctrine or the community caretaking function of the police. Moreover, regardless of any claim of warrantless entry or arrest, evidence of an assault on law enforcement officers is not subject to the exclusionary rule.

Defendant does not assign error to the findings of fact set forth in the Counterstatement of the Case. Unchallenged findings of fact following a CrR 3.6 suppression hearing are accepted as verities on appeal, and will not be reviewed by the appellate court. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Accordingly, the court’s review in this case “is limited to a de novo determination of whether the trial court derived proper conclusions of law from those unchallenged findings.” *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (citing *Hill*, 123 Wn.2d at 647). The trial court was clearly correct in finding the actions of the

officers were justified under the emergency doctrine and the community caretaking function of the police.

Police officers owe duties to the public to render aid to individuals in danger. When officers act to protect or preserve life, avoid serious injury or protect property in danger of damage, they act under their general or community caretaking role, not in their evidence gathering role. *State v. Schultz*, 170 Wn.2d 746, 753-54, 248 P.3d 484 (2011) (acknowledging that the emergency aid exception to a warrantless entry is consistent with Const. art. I, § 7); *State v. Hos*, 154 Wn. App. 238, 247, 225 P.3d 389 (2010) (expressly holding that community caretaking is an exception to the warrant requirement of Const. art. 1, § 7). The court in *Schultz* further “recognize[d] that domestic violence presents unique challenges to law enforcement and courts,” and stated “that the likelihood of domestic violence may be considered by courts when evaluating whether the requirements of the emergency aid exception to the warrant requirement have been satisfied.” *Schultz*, 170 Wn.2d at 750. Therefore, there is no requirement for a showing of probable cause for a crime.

. . . An emergency situation [] can justify a warrantless search. 2 W. LaFare, *Search & Seizure* § 5.4(c) (2nd ed. 1987). For example, when premises contain persons in imminent danger of death or harm; objects likely to burn, explode or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat, police may search those premises without first obtaining a warrant. Utter, J., *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. Puget Sound L.Rev. 411, 538-39 (1988); see *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982) (medical emergency); *State v. Downey*, 53 Wn. App. 543, 544-45, 768 P.2d 502 (1989) (overpowering ether odor); *State v. McAlpin*, 36 Wn. App. 707, 716, 677 P.2d 185 (1984) (search for missing gun); see also *State v. Bakke*, 44 Wn. App. 830, 833-34, 837-38, 723 P.2d 534 (1986) (burglary in progress); *State v. Nichols*, 20 Wn. App. 462, 465-66, 581 P.2d 1371 (1978) (fight in progress); *State v. Sanders*, 8 Wn. App. 306, 310-11, 506 P.2d 892 (1973) (entry in response to emergency call and officer's observation of suspicious activity).

State v. Lund, 54 Wn. App. 18, 20-21, 771 P.2d 770 (1989).

State and federal courts have upheld the constitutionality of warrantless entries in domestic violence cases under both the emergency aid and community caretaking exceptions:

Domestic violence presents unique challenges for law enforcement. Domestic violence situations can be volatile and quickly escalate into significant injury. Domestic violence often, if not usually, occurs within

the privacy of a home. Our legislature has recognized that the risk of repeated and escalating acts of violence is greater in the domestic violence context. RW 10.99.040(2)(a). The Legislature has sought to provide maximum protection to a victim of domestic violence through a policy of early intervention. RCW 10.99.010. The Court of Appeals has recognized that “[p]olice officers responding to a domestic violence reports have a duty to ensure the present and continued safety and well-being of the occupants.” *Raines*, 55 Wn. App. at 465.

Schultz, 170 Wn.2d at 755-56.

In *United States v. Black*, 482 F.3d 1035, 1039-40 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 612 (2007), the court found the warrantless entry into an apartment was justified under the emergency exception to ensure the wellbeing of the potential victim. She had called 911 to report she had been beaten that morning by her ex-boyfriend who was in possession of a gun and informed that she would be returning to retrieve her clothing. *Black*, 482 F.3d at 1039. When police arrived, the woman was nowhere to be found. *Id.* They entered and observed a gun for which they then obtained a warrant. *Id.*

In *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001), the court held warrantless entry into the home was justified under

the emergency aid exception to contact a domestic violence victim even after the aggressor had been handcuffed and placed in the patrol car. When the victim opened the door, she was shaking and had blood on her lip. The officer told her to stay put while he walked inside. The court held that the deputy and sergeant entered with the purpose of protecting the woman and other potential victims, to keep the parties separate, and to ensure an orderly investigation. *Johnson*, 104 Wn. App. at 413.

An anonymous allegation of domestic violence will support a search under the emergency doctrine. *State v. Menz*, 75 Wn. App. 351, 880 P.2d 48 (1994). The victim's denial does not control. *State v. Jacobs*, 101 Wn. App. 80, 89 n.3, 2 P.3d 974 (2000) (search justified although victim recanted allegation when officers arrived); *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989) (entry justified under emergency exception although the victim denied any problem and told responding officers that the suspected abuser was not in the home).

Although in this case a resident child brought the officer into the home, this case is not about the consent of one resident when

opposed by the resistance of another resident. The lawful basis is simply the emergency.

No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other cotenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See 4 LaFare § 8.3(d), at 161 (“[E]ven when . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other. . . . [W]here the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant’s objections”).

Georgia v. Randolph, 547 U.S. 103, 118-19, 126 S. Ct. 1515, 1525-26, 164 L. Ed. 2d 208 (2006).

When the State seeks justification under the emergency doctrine, the State must show: (1) the officer subjectively believed an emergency existed; (2) a reasonable person in the same circumstances would have thought an emergency existed; and (3)

there is some basis to associate the emergency with the place entered or searched. *Lynd*, 54 Wn. App. at 21.

The foregoing authorities clearly supports the trial court's conclusions that the officer's actions were justified under the emergency doctrine and the community caretaking function of the police. The trial court was certainly correct in denying the motion to suppress evidence.

Moreover, regardless of any warrantless entry or arrest, evidence of an assault on law enforcement officers is not subject to the exclusionary rule. The courts will not suppress evidence of the defendant's assault on a law enforcement officer simply because the officer is alleged to have made an illegal search, seizure or arrest. *State v. Mierz*, 127 Wn.2d 460, 473-74, 901 P.2d 286 (1995); *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

In *Mierz*, the defendant was charged with unlawful possession of wildlife and two counts of assault on law enforcement officers. He ordered his dogs to attack Wildlife agents when they entered to confiscate coyotes, which he unlawfully possessed. As an agent arrested him for obstructing, the defendant bit the agent

on the hand. He argued on appeal that the evidence used to convict him of assault should have been excluded under the exclusionary rule. The Washington Supreme Court disagreed:

Officers would be subject to attack if their allegedly unlawful entry into property or improper arrest forecloses admission of evidence of assaults upon them. In *State v. Aydelotte*, 35 Wn. App. 125, 132, 665 P.2d 443 (1983), the Court of Appeals held that ***an assault on police officers following an illegal entry is outside the scope of the exclusionary rule, because it is sufficiently distinguishable from any initial police illegality “to be purged of the primary taint”*** (quoting *Wong Song v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963)). The court agreed that excluding such evidence would allow one whose home has been illegally entered to “respond with unlimited force and, under the exclusionary rule . . . be effectively immunized from criminal responsibility.” *Aydelotte*, 35 Wn. App. at 132 (quoting *State v. Burger*, 55 Or. App. 72, 76, 639 P.2d 706 (1982)).

Mierz, 127 Wn.2d at 473-74 (emphasis added).

The *Mierz* opinion follows *State v. Hoffman*. There co-defendants killed one officer and shot another when officers entered onto private property to arrest them. *Hoffman*, 116 Wn.2d at 61-63. While the arrest warrants were valid, the Washington Supreme Court opinion states: “An officer, even if effecting an

arrest without probable cause . . . is entitled to be protected by the law from assault.” *Id.* at 100. See also *United States v. Martinez*, 465 F.2d 79, 82 (2nd Cir. 1972); *United States v. Beyer*, 426 F.2d 773, 774 (2nd Cir. 1970); *United States v. Simon*, 409 F.2d 474, 477 (7th Cir. 1969) (a different rule “would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. . . . law enforcement officers . . . should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests”).

The same rationale applies here. Even if the conduct of the offices was improper, there would be no basis to suppress evidence of the attempted murders of the officers.

IV. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that the convictions of Edwin Espejo in Franklin County Superior Court Cause No. 17-1-50604-11 be affirmed.

DATED: June 30, 2020.

Respectfully submitted:

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED June 30, 2020, Pasco, WA
M. M. Breakley
Original filed at the Court of Appeals, 500
N. Cedar Street, Spokane, WA 99201

FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE

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