No. 96601-0

THE SUPREME COURT

FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LeSHAUN ALEXANDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 15-1-04164-1

AMENDED PETITION FOR SUPREME COURT DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

RULES AND REGULATIONS

I. IDENTITY OF PETITIONER

Petitioner is LeShaun Alexander, the Appellant and Defendant in *State v. Alexander*, Court of Appeals Div. II Cause Number 49924-0-II, Pierce County Superior Court Cause Number 15-1-04164-1.

II. COURT OF APPEALS DECISION

The Court of Appeals decision requested for review is *State v. Jones*, Court of Appeals Div. II Cause Number 49924-0-II, filed on October 30, 2018.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Court of Appeals decision finding that the stop of Mr. Alexander was lawful is in conflict with decisions of the Supreme Court, Courts of Appeal, or a significant question of law under the U.S. and Washington constitutions.

2. Whether the Court of Appeals decision finding that the scope of the stop of Mr. Alexander was constitutionally permissible is in conflict with decisions of the Supreme Court, Courts of Appeal, or a significant question of law under the U.S. and Washington constitutions.

3. Whether the Court of Appeals decision affirming the denial of a self-defense jury instruction is in conflict with decisions of the Supreme Court or Courts of Appeal.

IV. STATEMENT OF THE CASE

A. Procedural History.

Mr. Alexander went to trial two criminal charges: (1) Assault in the First Degree; and (2) Unlawful Possession of a Firearm in the First Degree.

Prior to trial, Mr. Alexander filed a motion to suppress evidence on two grounds: (1) That there were insufficient grounds to conduct an investigatory stop of the vehicle he was a passenger in; and (2) that, if the investigatory stop was permitted, the actual stop far exceeded the permissible bounds of an investigatory stop such that it was an arrest without probable cause. In November 2016, an evidentiary hearing was held regarding Mr. Alexander's motion. The Court denied Mr. Alexander's motions. CP 21-29.

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

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

CP 288.

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

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that

> he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 260-62.

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

On December 13, 2016, a jury found Mr. Alexander guilty of Assault in the First Degree, committed with a firearm, and Unlawful Possession of a Firearm First Degree. CP 289-91.

B. **Facts.**

The Seizure of Mr. Alexander.

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

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

At 03:51:23, dispatched notified officers via radio and computer of the reported shooting at Tacoma Mall Boulevard and 84th Street. 4 RP 196:20-197:9; 5 RP 359:7-10. At 03:52:07, Lakewood Police Officer Clark answered the dispatch call regarding the shooting. 4 RP 195:16-196:13; 5 RP 359:11-13. Officer Clark estimates that it took approximately two minutes to arrive to the area of the shooting. 5 RP 360:4-8.

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

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

Nonetheless, after observing a dark colored Durango with two black males inside leave the area of the Shell station, Officer Clark decided to pull over the Durango as it drove west on 84th Street. 4 RP 204:18-25. The only way that the occupants of the Durango match any description of the reported shooters is that they were black wearing dark clothing. 4 RP 206:8-16. Officer Clark pulled over the Durango solely because of close time frame to the shooting, proximity to the reported area of shooting and that the occupants were black with dark clothing. 4 RP 230:4-12, 241:24-242:1.

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

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

The occupants of the Durango, of which there were three, were ordered out of the car at gun point, immediately placed in handcuffs, frisked, and placed separately in the back of a patrol car. 4 RP 209:19-211:9. As the officers began to speak with each of three men, they read the men their Miranda rights. 4 RP 211:13-20.

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

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

The October 16, 2016 Incident.

The issues between the parties in the weeks immediately prior must be known, as Mr. Alexander was being hunted. Mr. Steven Brown and Mr. Atere Norman had made it known through social media that they were coming after Mr. Alexander. Two weeks before the October 16, 2015 incident, Mr. Brown and Mr. Norman arrived at Mr. Alexander's third story apartment, pushing themselves into the apartment with guns drawn. In order to get away from Norman, Mr. Alexander had to jump off

the third story balcony, at which point he ran and hid. 7 RP 691:11-697:2, 698:7-15.

Through social media, Mr. Norman warned Mr. Alexander that every time Mr. Norman saw Mr. Alexander, Mr. Alexander would face the same threat, Mr. Norman with a gun. 7 RP 698:24-699:3.

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

In early morning of October 16, 2015, Mr. Alexander, at the apartment at Crowne Apartments, decided to walk to the Shell station while waiting for his friends. 7 RP 704:5-24; 7 RP 705:4-706:8. Mr. Alexander had walked from the sidewalk on 84th Street up a gravel and dirt path up to the Shell Station parking lot. 7 RP 707:8-16.

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

Mr. Alexander was carrying the gun he had purchased. In seeing Mr. Norman and Mr. Norman's actions, and believing that he was about to be shot, Mr. Alexander pulled the gun from his pocket and shot at Mr. Norman. 7 RP 708:7-710:21. Mr. Alexander was backing up as he fired, as he was intending to protect himself and get away, not hunt down Mr. Norman. 7 RP 711:4-11, 775:13-776:2.

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

Mr. Alexander ran back to the apartments jumped in the back seat of a Durango, as his friends has arrived. 6 RP 605:3-6, 608:14-20; 7 RP 712:6-9. Mr. Alexander, out of breath, told Mr. Tolbert and Mr. Smith that he had shot at Mr. Norman after he saw Mr. Norman going for a gun. 6 RP 609:1-24; 7 RP 712:16-20.

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

incident. 7 RP 712:21-714:6, 769:25-770:11. They are pulled over shortly after leaving the Shell Station.

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

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

V. ARGUMENT

A. The Finding That the Seizure of Mr. Alexander Was Lawful Is In Conflict With Supreme Court and Courts of Appeal Decisions, and Is a Significant Issue Under the United States and Washington Constitutions.

The stop of Mr. Alexander was unlawful. The Court of Appeals decision otherwise is in conflict with decisions of the Supreme Court and Courts of Appeal. Further, the issue of warrantless seizure is significant under the United States and Washington constitutions, thus warranting review.

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

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

However, because article I, section 7 provides for broader privacy protections than the Fourth Amendment, ***the Washington state constitution requires a stronger*** showing by the State. *Z.U.E.,* 183 Wn.2d at 617-18; *Acrey*, 148 Wn.2d at 746-47; *State v. Hendrickson*, 129 Wn.2d 61, 69, 917 P.2d 563 (1996). The available facts must substantiate more than a mere generalized suspicion that the person detained is "up to no good"; the facts must *connect* the *particular person* to the particular *crime* that the officer seeks to investigate. *State v. Bliss*,

153 Wn. App. 197, 204, 222 P.3d 107 (2009) (*citing State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006)).

The Washington State Supreme Court, in *State v. Z.U.E.*, 183 Wn.2d 610, 617-18, 352 P.3d 796, 799-800 (2015), reiterated and clarified these tenets under the Washington state constitution. In order for an investigatory stop to be valid, the police must have available facts to connect a particular person to a particular crime.

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

The *only* facts that can be pointed to by Officer Clark that connect the Durango to the Shell station shooting are (1) occupants of Durango were black and in dark clothes; and (2) temporal proximity of the Durango to the Shell station, leaving the Shell station 5 minutes after the reports of the shots fired.

The totality of the circumstances renders the stop unlawful. The attempted connection of the Durango to the reported shooting *actually contradicts* the 911 caller reports. The 911 callers report specific information regarding the actions of the shooter in addition to general

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

Thus, not only was a dark colored Durango (or any Durango) not reported in connection with the shootings, but the presence of the Durango at the Shell station five minutes after the two shooters fled significantly distances and affirmatively disconnects the Durango as being connected with the reported crime. The facts relied upon by the officer only support the conclusion that the Durango was NOT involved in the shooting. The shooters fled, one on foot and one in a silver Chrysler west on 84th Street.

There were no specific and articulable facts which established a reasonable suspicion that the occupants of the Durango were involved with the reported shooting. This is especially true given that all reports have all participants in the shooting fleeing the scene in manner not associated with a Durango.

Therefore, the investigatory stop was unlawful and all evidence discovered as a result of the stop should have been suppressed, including Mr. Alexander's identification, the gun recovered, the jacket, and any statements of Mr. Alexander. It is respectfully requested that review be granted of the Court of Appeals decision that the stop of Mr. Alexander was lawful.

B. **The Finding That the Seizure of Mr. Alexander Did Not Exceed an Investigatory Stop, and Not An Arrest Without Probably Cause, Is In Conflict with Supreme Court and Courts of Appeal Decisions, and Is a Significant Issue Under the United States and Washington Constitutions.**

The seizure of Mr. Alexander, from the onset, was an arrest and exceeded the legally permissible scope of an investigatory stop. The Court of Appeals decision otherwise is in conflict with decisions of the Supreme Court and Courts of Appeal. Further, the issue of the scope of an investigatory stop is significant under the United States and Washington constitutions, thus warranting review.

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

In assessing the scope of the intrusion, the following three factors are considered: (1) the purpose of the stop; (2) the amount of physical intrusion upon the person's liberty; and (3) the length of time the person

is detained. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

Generally, handcuffing an individual is not within the scope of an investigative stop. However, in appropriate cases handcuffing may be "'reasonable, as a corollary of the lawful stop.'" *State v. Wakeley*, 29 Wn. App. 238, 243 n.1, 628 P.2d 835 (quoting *United States v. Purry*, 178 U.S. App. D.C. 139, 545 F.2d 217, 220 (D.C. Cir. 1976)), *review denied*, 95 Wn.2d 1032 (1981).

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

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

There must be some observable articulable distinction between an arrest and an investigatory stop, otherwise the stop exceeds that of being investigatory and is an arrest. In the instant case, there is no observable distinction – as admitted by Officer Clark. Multiple officers initiating their emergency lights to initiate a traffic stop of the Durango; multiple officers approach the vehicle and order the occupants out at direct gun point; the occupants are immediately handcuffed; officers do a search of the vehicle; each occupant in placed in the rear of a patrol car while handcuffed; and the occupants are each read their Miranda rights.

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

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

granted of the Court of Appeals' decision to find the stop a permissive investigatory stop.

C. The Finding That the Denial of Jury Instruction WPIC 17.04 Was Proper Is In Conflict With Supreme Court and Courts of Appeal Decisions.

The trial court should have granted defense request to instruct the jury consistent with WPIC 17.04. The Court of Appeals decision otherwise is in conflict with decisions of the Supreme Court and Courts of Appeal.

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

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

CP 288.

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

question was if Mr. Alexander was mistaken as to the threat, was self defense permitted.

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

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

CP 260-62.

The Court declined to provide the instruction, stating only: "I am not able to answer this question for you. Please review to instructions 13, 11, 15." CP 288. The Court's denial of WPIC 17.04 was in error.

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

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

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

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

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

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

The State's entire case and presentation of evidence centered upon the assertion that Mr. Norman did not do anything that presented a danger

or threat to Mr. Alexander on October 16, 2015. Thus, evidence of Mr. Alexander being mistaken in his belief or perception of danger was not only presented at trial, but was a focal point of the State's case at trial.

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

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

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

As the response to the jury question failed to properly instruct the jury, Mr. Alexander requested them to be instructed, and the jury clearly

requested clarification regarding the law on this issue, the trial court committed error in not providing WPIC 17.04. The Court of Appeals ruling that the trial court's denial was proper is in conflict with decisions of the Supreme Court and Courts of Appeal, thus warranting review of this issue.

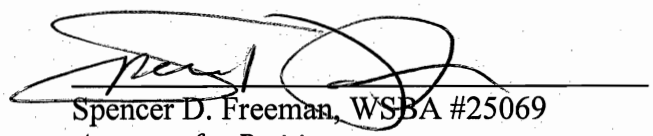
VI. CONCLUSION

The Court of Appeals decision affirming that the stop was lawful is in conflict with decisions of the Supreme Court and Courts of Appeal. Moreover, warrantless seizures are a significant constitutional issue. Therefore, discretionary review is warranted on this issue.

The Court of Appeals decision affirming the scope of the stop is in conflict with decisions of the Supreme Court and Courts of Appeal. Moreover, the permissible scope of investigatory seizures are a significant constitutional issue. Therefore, discretionary review is warranted on this issue.

The Court of Appeals decision that denial of WPIC 17.04 was proper is in conflict with decisions of the Supreme Court and Courts of Appeal. Therefore, discretionary review is warranted on this issue.

DATED this 19th day of December, 2018.



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

October 30, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LESHAUN AYATTA ALEXANDER, JR., Appellant.	No. 49924-0-II UNPUBLISHED OPINION

LEE, A.C.J. — Leshaun Ayatta Alexander, Jr. appeals his convictions for first degree assault and first degree unlawful possession of a firearm. He argues that (1) the trial court should have suppressed evidence found inside of a vehicle in which he was a passenger because the responding officer did not have a sufficient factual basis to justify an investigatory *Terry*[1] stop, (2) the officer's actions exceeded the permissible scope of a *Terry* stop, and (3) the trial court abused its discretion in failing to provide the jury with an additional self-defense instruction during jury deliberations. In a statement of additional grounds (SAG), Alexander asks this court to review whether specific and articulable facts supported the officer's investigative *Terry* stop of the vehicle in which he was a passenger. We affirm.

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

FACTS

A. THE INCIDENT

In the early morning hours of October 16, 2015, 911 began receiving reports of a shooting at a Tacoma gas station located on the northwest corner of Tacoma Mall Boulevard and South 84th Street. The first caller, C.D.,[2] reported at 3:50 AM that he had heard six to seven gun shots and saw people running toward a movie theater located south of the gas station across South 84th Street.

At approximately 3:52 AM, N.B. called 911 and reported that she had witnessed the shooting as she drove down South 84th Street. N.B. saw a black male shooting at another black male, who was running toward a casino located north of the gas station. N.B. described the shooter as possibly in his 20s, 5 feet 6 inches tall, thin, with dreadlocks, and wearing black pants and a hood over his head. N.B. reported that after the shooting, the shooter headed in the westbound direction of South 84th Street.

Officer Kevin Clark of the Lakewood Police Department responded to dispatch at 3:52 AM. and headed in the direction of the gas station. En route, Officer Clark received updates from the dispatch center through his radio. At 3:53 AM, a third caller, M.T., reported seeing two black males shooting at each other at the gas station. M.T. stated that one male was wearing a grey hoodie and dark pants and the other male was wearing all black. The male in the grey hoodie fled toward South 84th Street, while the male in all black fled toward the casino, possibly got inside a Chrysler Sebring, and then drove in the direction of the male fleeing on South 84th Street.

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[2] Each of the callers provided their name and personal phone number during the call. We refer to the callers by their initials in order to protect their privacy.

Between 3:53 AM and 3:54 AM, the final caller, N.G., reported seeing a black male shooting at another black male at the gas station. One of the parties appeared to be running westbound on South 84th Street, while the other party did not appear to be going anywhere. N.G. described the shooter as 26 to 28 years old, 6 foot 2 inches tall, of medium build, and wearing a grey sweater.

Officer Clark arrived in the vicinity of the gas station at approximately 3:54 AM. As he approached, Officer Clark saw a black Dodge Durango leave the southern entrance of the gas station parking lot and head westbound on South 84th Street. Officer Clark observed two black males wearing dark clothing seated in the front seat of the Durango and another male in the back seat. Aside from the Durango, Officer Clark did not see anything else in the gas station parking lot. At that point, Officer Clark had information that two black males wearing dark clothing had been shooting at each other in the gas station parking lot. One of the males may have fled the scene in a grey Chrysler Sebring, while the other may have headed south in the direction of 84th Street. Officer Clark did not have any information that both males had left the scene and were no longer at the gas station.

Officer Clark decided to initiate a traffic stop and at 3:55 AM, radioed to dispatch that he was stopping the Durango. Other officers arrived and helped conduct a "high-risk traffic stop." 4 Verbatim Report of Proceedings (VRP) (Dec. 5, 2016) at 209. The occupants of the Durango were ordered to exit, frisked for weapons, handcuffed, read their *Miranda*[3] rights, and placed in the backseat of a patrol car. Officer Clark then returned to the Durango and observed a firearm underneath the front passenger seat of the Durango.

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

Alexander was identified as the backseat passenger of the Durango. After the investigation revealed other evidence linking Alexander to the shooting, the State charged Alexander with one count of first degree assault[4] and first degree unlawful possession of a firearm.[5] The State also charged Alexander with a firearm sentencing enhancement for the first degree assault charge.

B. MOTION TO SUPPRESS

Alexander filed a pretrial CrR 3.6 motion to suppress the evidence found as a result of the stop of the Durango.[6] Alexander argued that Officer Clark did not have reasonable suspicion to justify the stop of the Durango because there were no articulable facts connecting the Durango to the shooting. Alexander also argued that even if the stop was valid, Officer Clark's actions exceeded the permissive scope of a *Terry*[7] stop.

At the suppression hearing, Officer Clark testified to the facts discussed above. The trial court ruled that Officer Clark's stop of the Durango was a lawful *Terry* stop to further investigate the shooting.

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[4] A person is guilty of first degree assault if "with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon." RCW 9A.36.011(1)(a).

[5] A person is guilty of unlawful possession of a firearm if after having previously been convicted of a serious offense, that person "owns, has in his or her possession, or has in his or her control any firearm." RCW 9.41.040(1)(a).

[6] CrR 3.6 allows a criminal defendant to file a motion to suppress physical, oral, or identification evidence prior to trial.

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

C. RELEVANT PORTIONS OF TRIAL

1. Testimony Related to Self-Defense

At trial, Alexander asserted self-defense as an affirmative defense to the first degree assault charge. Alexander testified and admitted that he shot at a man named Atere Norman when Alexander saw Norman at the gas station on October 16. According to Alexander, Norman had repeatedly threatened his life in the weeks leading up to the shooting. Alexander shot at Norman because he believed, based on their history, that Norman was going to shoot him.

2. Jury Instructions on Self-Defense

The trial court provided the jury three self-defense instructions that Alexander had requested. The instructions provided:

Instruction No. 13

> It is a defense to a charge of Assault in the First Degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

Clerk's Papers (CP) at 278.

Instruction No. 14

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP at 279

Instruction No. 15

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.
>
> The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

CP at 280.

After the jury began deliberating, they submitted a question to the trial court. The jury asked:

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

CP at 288.

In response to this question, Alexander proposed that the trial court either instruct the jury to read the jury instructions they had been provided or to provide the jury a supplemental instruction. Alexander proposed the following supplemental instruction:

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

CP at 261.

The trial court denied Alexander's request to submit the additional instruction. The trial court found that if it were to submit Alexander's proposed instruction in response to the jury's question, then the jury might believe it to be the answer to their question. Instead, the trial court instructed the jury "I am not able to answer this question for you. Please review to instructions 13, 14, 15." CP at 288.

The jury found Alexander guilty on all charges. Alexander appeals.

ANALYSIS

A. OFFICER CLARK CONDUCTED A VALID INVESTIGATORY STOP

Alexander argues that the trial court erred when it concluded that Officer Clark had lawful authority to stop the Durango because there were no particular, articulable facts linking the Durango to the shooting. Alexander also argues that even if Officer Clark had reasonable suspicion to stop the Durango, Officer Clark's actions exceeded the scope of an investigative stop. We disagree.

1. Standard of Review

"In reviewing the denial of a motion to suppress, we review the trial court's conclusions of law de novo and its findings of fact used to support those conclusions for substantial evidence." *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). However, "we will review only those facts to which error has been assigned." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). If the defendant does not challenge the findings of fact, then we consider them verities on appeal. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). We review conclusions of law from

an order denying a motion to suppress de novo. *State v. Mecham*, 186 Wn.2d 128, 137, 380 P.3d 414 (2016).

2. Reasonable Suspicion Supported the Stop

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution demand that an officer have a warrant before seizing an individual unless an exception to the warrant requirement applies. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). One such exception allows an officer to conduct a brief investigative stop known as a *Terry* stop. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). A *Terry* stop is permissible if the "officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). Article I, section 7 of our state Constitution provides broader protections than the Fourth Amendment and generally requires that the available facts "substantiate more than a mere generalized suspicion that the person detained is 'up to no good.' " *Z.U.E.*, 183 Wn.2d at 618 (quoting *Bliss*, 153 Wn. App. at 204, 222). "[T]he facts must connect the particular person to the *particular crime* that the officer seeks to investigate." *Id.* (emphasis in original).

"When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer." *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Among the factors to consider when evaluating whether the stop was proper are the officer's training and experience, the location of the stop, and the conduct of the detainee. *Acrey*, 148 Wn.2d at 747. To an extent, reasonableness of the stop depends on the seriousness of

the suspected criminal conduct. *State v. McCord*, 19 Wn. App. 250, 253, 576 P.2d 892, *review denied*, 90 Wn.2d 1013 (1978).

Alexander argues that Officer Clark did not have specific and articulable facts connecting the Durango to the shooting because the witnesses reported that one shooter had fled the scene on foot, while the other had fled in a Chrysler Sebring. However, the final caller, N.G., reported that one of the shooters did not appear to be going anywhere.[8] Officer Clark arrived in the vicinity of the gas station as this final report was being relayed by dispatch, and he observed one vehicle at the scene, the Durango. The occupants of the Durango matched the limited physical description given by the various witnesses to the shooting. Given that Officer Clark was responding to an active shooting situation in which one of the shooters was reportedly still at the scene, Officer Clark had a reasonable suspicion that the only vehicle at the scene had been involved in the shooting. Based on the totality of the circumstances, Officer Clark had a sufficient factual basis to formulate a reasonable suspicion to stop the Durango.

3. Scope of the *Terry* Stop

Alexander argues that even if Officer Clark had a reasonable suspicion to stop the Durango, the detention of its occupants exceeded the permissive scope of a valid investigatory stop and any evidence resulting from the stop must be excluded. We disagree.

Whether an officer has exceeded the scope of a *Terry* stop is a fact specific inquiry. *State v. Wheeler*, 43 Wn. App. 191, 195, 716 P.2d 902 (1986), *aff'd* 108 Wn.2d 230 (1987). The stop must last no longer than necessary and employ the least intrusive means available to verify or

[8] Alexander does not challenge any of the trial court's findings of facts in its CrR 3.6 order, including this finding. Therefore, it is a verity on appeal. *See Bliss*, 153 Wn. App. at 203.

dispel the reasonable suspicion. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). Where the criminal conduct endangers life or personal safety, a greater intrusion is allowed. *McCord*, 19 Wn. App. at 253. An officer must release the individual if the initial results of the stop dispel the officer's suspicions, but results that confirm the suspicions, or arouse further suspicions, permit an extended seizure. *Acrey*, 148 Wn.2d at 747. Where officers believe that the suspect is armed, they may employ measures beyond a typical *Terry* stop, "such as handcuffing, secluding, and drawing guns." *State v. Mitchell*, 80 Wn. App. 143, 145, 906 P.2d 1013 (1995), *review denied*, 129 Wn.2d 1019 (1996); *see e.g.*, *State v. Smith*, 67 Wn. App. 81, 88, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51 (1993).

Here, Officer Clark responded to a scene in which two individuals had reportedly fired several shots at one another. In the three minutes it took Officer Clark to arrive on scene, dispatch continued to receive reports of a shooter firing. And the last witness reported that one of the shooters appeared to remain at the scene. Thus, Officer Clark had a reasonable basis to believe one of the suspects was armed and, therefore, could employ measures beyond a typical *Terry* stop, including handcuffing and secluding the suspects. *See Mitchell*, 80 Wn. App. at 145-46. Because Officer Clark's actions did not exceed the permissible scope of a valid investigatory stop, the trial court did not err in denying Alexander's motion to suppress the evidence later found in the Durango.

B. ADDITIONAL JURY INSTRUCTION ON SELF DEFENSE

Alexander argues that the trial court failed to properly instruct the jury on self-defense when it declined to provide his additional jury instruction during deliberation. We disagree.

Whether to provide further instruction to the jury after it has begun deliberations is within the trial court's discretion. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion."[9] *In re Parentage of T.W.J.*, 193 Wn. App. 1, 6, 367 P.3d 607 (2016) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds. *Kreidler v. Cascade Nat'l. Ins. Co.*, 179 Wn. App. 851, 861, 321 P.3d 281 (2014). A trial court's decision is manifestly unreasonable if it falls " 'outside the range of acceptable choices, given the facts and the applicable legal standard.' " *Id.* (quoting *In re Marriage of Fiorito*, 112 Wn. App. 657, 664, 50 P.3d 298 (2002)).

Here, the jury submitted a question to the trial court after it began deliberations. In response, Alexander asked the trial court to either instruct the jury to read the jury instructions that they had been provided, or to provide his proposed supplemental instruction. The trial court instructed the jury to read the provided instructions on self-defense. Thus, the trial court granted Alexander the relief he requested and Alexander may not assign error on this basis. *See* RAP 3.1.

C. STATEMENT OF ADDITIONAL GROUNDS

Alexander asks this court to review whether Officer Clark's reasonable suspicion justifying a *Terry* stop of the Durango was based on specific and articulable facts connecting the Durango to the shooting. As discussed above, based on the totality of the circumstances, Officer Clark had a

[9] Alexander contends that the applicable standard of review is de novo based on case law addressing challenges to jury instructions. Because he assigns error to the trial court's failure to provide the jury an instruction after the jury began deliberating, the appropriate standard of review is abuse of discretion. *Ng*, 110 Wn.2d at 42.

reasonable basis to suspect that the Durango was involved in the shooting and his stop did not exceed the permissible scope of a *Terry* stop. *Supra*, section A.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, A.C.J.

Lee, A.C.J.

I concur:

Bjorgen, J.

Bjorgen, J.

MELNICK, J. — (concurrence) I generally agree with the majority opinion, but write separately to emphasize that even if the firearm had been suppressed, there is overwhelming evidence of Leshaun Ayatta Alexander, Jr.'s guilt.

The test for constitutional harmless error is that the court must be able to believe any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Barry*, 183 Wn.2d 297, 302–03, 352 P.3d 161 (2015). If overwhelming evidence of the defendant's guilt exists, untainted by error, it is harmless. *Barry*, 183 Wn.2d at 303. The State has the burden of demonstrating harmlessness. *Barry*, 183 Wn.2d at 303.

Here, the record contains overwhelming evidence of Alexander's guilt, even if the firearm had not been admitted into evidence.

Melnick, J.

FREEMAN LAW FIRM, INC.

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