No. 98116-7
COA No. 78310-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER ESCOBEDO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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A. IDENTITY OF PETITIONER

Francisco Escobedo asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Francisco Javier Escobedo*, No. 78310-6-I (December 23, 2019). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Under the United States and Washington Constitutions, a defendant has the right to present a defense, which includes the right to have the jury instructed on his theory of the case. A homicide is justifiable and a legal act where the shooter presents some evidence that he had a reasonable ground to believe that the person slain, or others acting in concert with that person, intends to commit a felony or to inflict death or great bodily harm, and there is imminent danger of such harm being accomplished or in the actual resistance of an attempt to commit a felony upon the shooter.

Mr. Escobedo presented evidence that he was in danger of being robbed and killed by people working with Ms. Gonzalez and he acted in resistance to this imminent threat. Despite finding that Mr. Escobedo had presented "some evidence" he acted in lawful self-defense, the trial court refused to instruct the jury that Mr. Escobedo was justified in shooting Ms. Gonzalez. Is a significant question of law under the United States and Washington Constitutions presented where the court's failure to instruct on justifiable homicide denied Mr. Escobedo his right to present a defense, thus entitling him to reversal of his conviction and remand for a new trial?

D. STATEMENT OF THE CASE

Francisco Escobedo was born and raised in San Diego, California and moved to Washington in 2005. 3/12/2018RP 3181. In 2005, he started working for Burger King and became the general manager of one of the stores in Kent. 2/21/2018RP 2787, 3/12/2018RP 3183. In 2006 he met the woman who would become his wife, and in 2008 they married. Mr. Escobedo has two young sons. 2/21/2018RP 2782. Mr. Escobedo and his wife separated on September 22, 2015. 2/21/2018RP 2781.

Mr. Escobedo frequently used methamphetamine from the age of 17 to 20 years old. 2/21/2018RP 2785. Mr. Escobedo stopped using once he met his wife, but he would relapse for a few months in the intervening years. 2/21/2018RP 2786.

Mr. Escobedo moved into a condominium in Auburn he rented in October 2015. 2/21/2018RP 2795, 2797. At that time, Mr. Escobedo began using methamphetamine more frequently. 2/21/2018RP 2802. Mr. Escobedo purchased his drugs from two men, Jairo Renteria-Ortiz, known as "Jairo," and Geraldo Rojas, also known as "Casper." 2/14/2108RP 2502; 2/21/2018RP 2789, 2798. On one occasion, Jairo asked Mr. Escobedo to hold a firearm for him. 2/21/2018RP 2819. Mr. Escobedo stored the firearm in his closet. 2/21/2018RP 2822.

In mid-November 2015, Teyanna Palms and her friend, Alize Gonzalez, were "hanging out" and ingesting drugs purchased from Jairo. 1/30/2018RP 1156-57. Ms. Palms was using marijuana and methamphetamine and Ms. Gonzalez was using methamphetamine as well as black tar heroin. 1/30/2018RP 1151-52. Ms. Gonzalez knew Jairo and purchased drugs from him. 1/30/2018RP 1155-56. The three drove around partying and ended up at Mr. Escobedo's home. 1/30/2018RP 1160. Over the next couple of days, Jairo would come

and go, but Ms. Palms and Ms. Gonzalez remained at Mr. Escobedo's. 1/30/2018RP 1168-69, 1176. Several additional people came to Mr. Escobedo's and partied, including Casper and his girlfriend. 1/30/2018RP 1175.

The next day Justin Cunningham arrived at Mr. Escobedo's. 1/30/2018RP 1179. Ms. Palms knew Mr. Cunningham and described him as a "big brother" to her. 1/30/2018RP 1166.

Ms. Gonzalez began to complain to the others because Jairo was supposed to bring her some heroin and had not. 1/30/2018RP 1196, 2/21/2018RP 2872-73. She asked Mr. Escobedo if he had heroin for her, but he told her he had none. 1/30/2018RP 1196.

At some point the party died down with only Mr. Cunningham, Ms. Palms, Ms. Gonzalez and Mr. Escobedo present. 1/30/2018RP 1204-05. Mr. Escobedo fell asleep in his bedroom, and Ms. Palms and Mr. Cunningham were asleep on a sofa in the living room. 1/30/2018RP 1205. When Mr. Escobedo awoke, he heard Ms. Gonzalez on her phone 1/30/2018RP 1205, 2/22/2018RP 2930-31. According to Mr. Escobedo, he overheard Ms. Gonzalez saying something about robbing, but he did not hear the entire conversation.

2/22/2018RP 2931-32. He also noticed his front door was open. 2/22/2018RP 2931, 2933.

Once Ms. Gonzalez ended the conversation, she became loud and began to argue with Mr. Escobedo. 1/30/2018RP 1205-06, 2/22/2108RP 2936. She threatened to have people come, rob Mr. Escobedo, kill him and take over his apartment. 2/22/2018RP 2938. According to Ms. Palms, Ms. Gonzalez struck Mr. Escobedo. 1/30/2018RP 1208. In response, Mr. Escobedo pulled out the gun he was holding for Jairo. 1/30/2018RP 1208. Mr. Escobedo related he drew the gun only after being threatened by Ms. Gonzalez and being attacked by her. 2/22/2018RP 2941. Mr. Escobedo was pointing the gun with the barrel facing down. 1/30/2018RP 1217, 2/22/2018RP 2941.

As Ms. Gonzalez became more physical with Mr. Escobedo, Ms. Palms said he pointed gun straight out. 1/30/2018RP 1218. Mr. Escobedo stated he raised the gun to his chest. 2/22/2018RP 2943. Ms. Palms said that as Ms. Gonzalez again advanced on Mr. Escobedo, he raised the gun and shot her one time. 1/30/2018RP 1218. Mr. Escobedo stated Ms. Gonzalez advanced on him and grabbed his hand holding the gun, and as he tried to push her away, the gun went off striking Ms.

Gonzalez. 2/22/2018RP 2944-45. Ms. Gonzalez died from the single gunshot to the throat which lacerated her cervical spine. 2/13/2018RP 2328, 2342.

Mr. Cunningham convinced Mr. Escobedo to leave the apartment. 1/30/2018RP 1244. Once Mr. Escobedo had left, Mr. Cunningham and Ms. Palms immediately fled the apartment. 1/30/2018RP 1248. Mr. Escobedo returned to his apartment and gathered up Ms. Gonzalez's body and dropped it off in an alley in Kent. 2/22/2018RP 2974, 2977.

Mr. Escobedo was charged with one count of second degree felony murder and unlawful possession of a firearm in the second degree. CP 285-86.

Mr. Escobedo denied intentionally shooting Ms. Gonzalez but testified that, although he was not afraid of her, he was afraid of the people she had called to come and rob and kill him. 2/22/2018RP 2950, 3/12/2018RP 3185. Mr. Escobedo sought to have the jury instructed on self-defense and justifiable homicide. CP 804-08. The State agreed Mr. Escobedo was entitled to the self-defense instruction but objected to the trial court instructing on justifiable homicide. 3/1/2018RP 3121-22.

The trial court refused to instruct on justifiable homicide, primarily due to the fact Mr. Escobedo denied intentionally shooting Ms. Rodriguez:

> I cannot accept that there was an intentional shooting. The only evidence that the shooting of Ms. Gonzalez was an intentional shooting arguably came from the testimony of Mr. Cunningham and, for lack of not recalling her last name, Tey Tay, where they testified Mr. Escobedo pushed Ms. Gonzalez away and shot her.
>
> Their testimony alone may raise *some slight evidence* towards an intentional shooting. But unlike in the Slaughter case where, if I recall correctly, Mr. Slaughter did not testify, Mr. Escobedo did testify and he unequivocally denied that he pulled the trigger. He unequivocally denied that he intentionally shot Ms. Gonzalez. And affirmatively testified that he did not know how the gun went off but for an accident. For example, she grabbed it and it accidentally went off.
>
> This evidence, these facts, in this Court's opinion, do not meet the requirement of what I understand justifiable homicide to be.
> . . .
> In this Court's opinion, given all of the evidence, there is no legitimate evidence of an intentional shooting that would support justifiable defense. I do not believe it is a legitimate defense based on the evidence. And as such, this Court is not going to present it to the jury for considerations.

3/14/2018RP 3665, 3668 (emphasis added).[1] Mr. Escobedo objected and excepted to the trial court's refusal to instruct on justifiable homicide. CP 846; 3/14/2018RP 3659.

[1] Ms. Palms' nickname is "Tey Tay." 1/30/2018RP 1147.

Mr. Escobedo was convicted by the jury of the second degree felony murder. CP 878. Mr. Escobedo waived his right to a jury trial on the unlawful possession count and the matter was tried to the bench. CP 880; 3/20/2018RP 26-27. The court subsequently found Mr. Escobedo guilty as charged of second degree unlawful possession of a firearm. 3/20/2018RP 77-83.

On appeal, the Court of Appeals agreed that Mr. Escobedo had presented some evidence to justify the giving of the instruction but ruled that the evidence ultimately did not support the instruction because the evidence did not support Mr. Escobedo's killing of Ms. Gonzalez. Decision at 9-10.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Mr. Escobedo's right to due process and right to present a defense were violated by the trial court's refusal to instruct on justifiable homicide.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the

requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

The standard for self-defense is well settled. "A defendant is entitled to an instruction on justifiable homicide when he has raised credible evidence establishing that the killing occurred in

circumstances that meet the requirements of RCW 9A.16.050."[2] *State v. Lewis*, 141 Wn.App. 367, 397, 166 P.3d 786, 801 (2007). A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. *State v. Janes,* 121 Wn.2d 220, 238-39, 850 P.2d 495, 22 A.L.R.5th 921 (1993); *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). A finding of actual imminent harm is unnecessary. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant. *Janes*, 121 Wn.2d at 238-39; *Allery,* 101 Wn.2d at 594; *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

A trial court must instruct on self-defense where the defendant produces *some evidence* tending to prove that the circumstances amounted to self-defense. *State v. Walker*, 136 Wn.2d 767, 772, 966

[2] RCW 9A.16.050 states that "[h]omicide is also justifiable when committed either:

(1) In the lawful defense of the slayer, ... when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer ... and there is imminent danger of that design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer."

P.2d 883 (1998). A trial court may refuse to give a self-defense instruction only where no credible evidence supports the claim. *McCullum,* 98 Wn.2d at 488. The evidence may come from whatever source tends to show that the defendant is entitled to the instruction. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016); *McCullum,* 98 Wn.2d at 488.

The Court of Appeals agreed with the trial court that Mr. Escobedo presented some evidence that Ms. Gonzalez and/or others might rob or kill him. Decision at 9. But the Court found the evidence did not support an objectively reasonable belief that warranted killing Ms. Gonzalez. *Id.*

In order to provide some evidence to support the instruction, Mr. Escobedo was required to show he reasonably believed Ms. Gonzalez and/or the people she invited to Mr. Escobedo's apartment or Ms. Palms or Mr. Cunningham intended to rob and possibly kill him. RCW 9A.16.050. Mr. Escobedo testified he awoke to Ms. Gonzalez talking on speakerphone and giving out his security code for the parking lot gate. 2/21/2018RP 2757. He also noted the front door, which had been closed, was now open. 2/21/2018RP 2755. Mr. Escobedo overheard that someone was coming over to his apartment.

2/21/2018RP 2758. This was followed by Ms. Gonzalez threatening that she could bring people to Mr. Escobedo's apartment, to rob and kill him and take over his apartment. 2/21/2018RP 2766. Ms. Palms confirmed that Ms. Gonzalez had phoned others and invited them over and Mr. Escobedo had overheard this. 1/30/2018RP 1205.

Despite refusing to instruct the jury, in assessing the evidence to determine if there was sufficient evidence to instruct on justifiable homicide, the trial court found there was "some evidence." 3/14/2018RP 3665. The court should have stopped there and instructed the jury. Yet the trial court decided there was not sufficient evidence, relying on Mr. Escobedo's denial that he intentionally shot Ms. Gonzalez. 3/14/2018RP 3665. In so doing, the trial court ignored the black letter law that the evidence in support of the instruction could come from any source. *See State v. Brightman*, 155 Wn.2d 506, 520, 122 P.3d 150 (2005) ("A defendant is entitled to an instruction on justifiable homicide when he or she has raised some credible evidence, from whatever source, to establish that the killing occurred in circumstances that meet the requirements of RCW 9A.16.050).

The Court of Appeals decision ignores this ruling by the trial court that Mr. Escobedo presented some evidence in support of the

instruction, instead finding only that the evidence failed to provide sufficient basis for killing Ms. Gonzalez. Decision at 10. The decision ignores the fact that Mr. Escobedo met the burden imposed upon him by providing some evidence to support his fear of being robbed or killed by Ms. Gonzalez and/or her confederates, facts not disputed by the trial court or the Court of Appeals.

This Court should accept review to address the standard required to obtain a justifiable homicide instruction where the defendant has presented some evidence in support of his subjective and objectively reasonable belief. This Court should then reverse Mr. Escobedo's conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Escobedo asks this Court to grant review and reverse his conviction.

DATED this 22nd day of January 2020.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX

FILED
12/23/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANCISCO JAVIER ESCOBEDO, Appellant.	DIVISION ONE No. 78310-6-I UNPUBLISHED OPINION FILED: December 23, 2019

DWYER, J. — Francisco Escobedo was charged with murder in the second degree and unlawful possession of a firearm in the second degree. A jury found him guilty on the first count; he waived his right to a jury trial on the second count and was found guilty by the trial court. He appeals both convictions. As to the first count, he contends that the trial court abused its discretion by not giving a jury instruction on justifiable homicide. As to the second count, he avers that an out-of-state conviction that served as the predicate offense for the charge of unlawful firearm possession is not comparable to any Washington felony. Finally, in a statement of additional grounds, he assigns error to an evidentiary ruling at his murder trial.[1] Finding no error, we affirm.

[1] In his opening brief, Escobedo challenged the imposition of a filing fee and a deoxyribonucleic acid (DNA) test collection fee. However, in his reply brief, he concedes that the filing fee was never imposed and that he has no basis to challenge the DNA fee, thus abandoning the claims.

I

Francisco Escobedo hosted Alize Gonzalez, Teyanna Palms, and Justin Cunningham at his apartment in Auburn on the night of November 9, 2015. They smoked methamphetamine. Gonzalez was also smoking heroin. Upon the exhaustion of her heroin supply, and her failure to reach her dealer in the early hours of November 10, Gonzalez became upset with Escobedo and began arguing with him.

Gonzalez made a phone call to some unknown individuals, inviting them to rob Escobedo's apartment. After the call she told Escobedo that the people she had invited over could kill him. Gonzalez did not make any subsequent phone calls. Escobedo then insisted that he would take the three of them home, but Gonzalez refused to leave. After further argument between Escobedo and Gonzalez, she indicated that she would leave, at which point Escobedo said, "No, you ain't going nowhere." When Escobedo again told Gonzalez she could not leave, she pushed him. Escobedo immediately produced a semi-automatic handgun from his pants pocket and racked the gun's slide.

This prompted Gonzalez, who was about seven inches shorter and 80 pounds lighter than Escobedo, to call him a "bitch" for threatening her with a gun. She approached Escobedo and attempted to strike his face. It is not clear whether she succeeded in doing so before Escobedo raised his weapon, pointed the barrel at Gonzalez from mere inches away, and pulled the trigger. Gonzalez was killed instantly; the force of the projectile not only severed her spinal cord but threw her head back against a wall before her body collapsed to the floor.

Escobedo stood over Gonzalez's lifeless body, repeating a phrase to the effect of "see what you made me do," as Cunningham entered the room. Cunningham attempted to talk Escobedo out of his anger and told him to dispose of the firearm, but Escobedo, undeterred and unaware that Gonzalez had perished, mused that Gonzalez would "snitch" if he left. Eventually, Cunningham convinced Escobedo to leave. Cunningham and Palms then fled the apartment, leaving Gonzalez's body inside.

Later, Escobedo returned to his apartment and, around 3:00 a.m., moved Gonzalez's body into the trunk of his vehicle for a drive to Kent, where he discarded the body in a residential alleyway. Later that day, around 2:00 p.m., Palms telephoned Auburn police to report the killing. Gonzalez's body was discovered by passersby around 4:00 p.m. After speaking with Palms, police obtained a warrant and searched Escobedo's apartment. Escobedo was arrested the following morning upon arriving to work his shift at a Burger King restaurant. He was charged with murder in the second degree.

The information was subsequently amended to add a charge of unlawful possession of a firearm in the second degree based on Escobedo's 2004 felony conviction in California. Escobedo had then pled guilty to "unlawful taking or driving of a vehicle," proscribed by California Vehicle Code § 10851(a). The trial court ruled that this offense was comparable to the Washington felony of taking of a motor vehicle without permission in the second degree, as set out in RCW 9A.56.075. Escobedo waived his right to a jury trial on this count. The court

found beyond a reasonable doubt that the California conviction was Escobedo's, rendering his possession of a firearm unlawful, and entered a finding of guilt.

At the jury trial on the count of murder in the second degree, Escobedo testified in his own defense. He insisted that he was never afraid of the unarmed, 19-year-old Gonzalez but, rather, that he was afraid that the individuals she purportedly invited over might rob or kill him. As he stated during his direct examination:

> Q. [By defense counsel]: Why did you draw that gun?
> A. [Defendant]: I drew it because I was scared somebody was going to rob me.
> Q. Were you scared that Alize herself was going to rob you?
> A. No.
> Q. Who was it that you were afraid was going to rob you?
> A. The other people that were on the other side of the phone call.
> Q. The other people—no one eventually showed up, as it turned out?
> A. No.
> Q. Are you afraid that Alize herself was going to kill you?
> A. No.
> Q. Are you afraid that she's going to seriously injure you?
> A. No.
> Q. Are you afraid that someone might seriously injure you?
> A. Yes.
> Q. And that's the people coming up the stairs?
> A. Yes.

Escobedo also insisted that he did not intend to shoot Gonzalez—rather, he claimed that he pointed the weapon toward the door in anticipation of a robbery and that it discharged when he pushed Gonzalez's hand away and her hand touched the trigger:

> Q. [By defense counsel] Are you trying to pull that arm back, the arm with the gun that she's grabbing?
> A. [Defendant] Yes.
> Q. So are you just pulling back with your arm or also pulling your body to one side or the other?

A. I'm pushing her off. At the same time when I felt my hand coming forward, I tried pulling it back too.
Q. Just pulling your hand back, or are you also leaning back or twisting or anything like that?
A. I'm not really sure how to describe that. I know I'm pushing her off. At the same time the hand is going forward, but at the same time I'm pushing her off and trying to pull the gun back.
Q. You can sit down, Mr. Escobedo. Thank you. So you intentionally shoot her through the neck?
A. No.
Q. Do you intentionally shoot next to her to try to scare her off?
A. No.
Q. The gun goes off?
A. Yes.
Q. She falls to the ground?
A. Yes.
Q. Do you think she's dead right at that moment?
A. Not at the moment.
Q. Why?
A. I wasn't sure if she got hit or not.
Q. How can you not be sure that she got hit?
A. Because I wasn't pointing the gun at her.

The State requested the following jury instruction regarding the definition of murder in the second degree:

> A person commits the crime of murder in the second degree when he commits or attempts to commit Assault in the Second Degree and in the course of and in furtherance of such crime he or she causes the death of a person other than one of the participants.

This proposed instruction was identical to that which was given to the jury.

The State's proposed instructions defining assault included a self-defense definition, acknowledging that there was some evidence Escobedo drew the weapon in fear. These instructions, when given by the trial court to the jury, read as follows:

> An assault is an intentional shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting would offend an ordinary person who is not unduly sensitive.

Instruction 17.

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Instruction 19.

> It is a defense to Assault in the Second Degree, when the assault with a deadly weapon was committed in the manner defined in instruction 19, that the force used, attempted or offered to be used was lawful as defined in this instruction.
>
> The use of, attempt to use or offer to use force upon or toward the person of another is lawful when used, attempted or offered, by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using or offering to use 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, attempted, or offered to be 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.

Instruction 20.

> As it pertains to instructions 19 and 20, 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.
>
> 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.
>
> 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. 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."

Instruction 21.

The court declined to give Escobedo's proposed justifiable homicide instruction, stating:

> In this Court's opinion, given all of the evidence, there is no legitimate evidence of an intentional shooting that would support [a] justifiable [homicide] defense. I do not believe it is a legitimate defense based on the evidence. And as such, this Court is not going to present it to the jury for consideration.

The jury found Escobedo guilty of murder in the second degree, and the court imposed a term of 270 months of confinement to be followed by 36 months of community custody. Escobedo appeals.

II

Escobedo first contends that the trial court erred when it declined to give a jury instruction on the defense of justifiable homicide. This decision, he avers, was an abuse of discretion that compromised his ability to present his theory of the case, thus denying him a fair trial. To the contrary, because a justifiable homicide instruction was not supported by the evidence and because Escobedo was not actually prevented from arguing his theory of the case under the instructions given, there was no abuse of discretion and no error.

"Jury instructions satisfy the defendant's Sixth Amendment right to a fair trial if, taken as a whole, they accurately inform the jury of the relevant law and permit each party to argue their theory of the case." State v. Henderson, 192 Wn.2d 508, 512, 430 P.3d 637 (2018). A trial court's refusal to issue a requested

instruction, when based on the evidence in the case, is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). If any element of such an instruction is not supported by the evidence, the defendant cannot present the theory to the jury. State v. Griffith, 91 Wn.2d 572, 575, 589 P.2d 799 (1979).

A defendant is entitled to an instruction on justifiable homicide only when evidence is introduced that the killing occurred in circumstances amounting to a justifiable homicide. State v. Brightman, 155 Wn.2d 506, 520, 122 P.3d 150 (2005). Washington law defines justifiable homicide, when committed in resistance to an attempted felony, as follows:

> Homicide is . . . justifiable when committed . . . :
>
> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer.

RCW 9A.16.050.

Under either subsection, a justifiable homicide instruction "requires a jury to find that the defendant reasonably believed the person slain (or others who the defendant reasonably believed were acting in concert with the person slain)

intended to commit a felony or to inflict death or great personal injury."

Henderson, 192 Wn.2d at 513. As the Supreme Court stated in Brightman:

> RCW 9A.16.050(1) contemplates justifiable homicide where the defendant reasonably fears the person slain is *about to* commit a felony upon the slayer or inflict death or great personal injury, and there is *imminent* danger that the felony or injury will be accomplished. See [RCW] 9A.16.050(1). In contrast, RCW 9A.16.050(2) considers a homicide justifiable where the defendant acted in *actual resistance* against an attempt to commit a felony on the slayer. . . . Thus, RCW 9A.16.050(2) addresses situations in which a felony or attempted felony is already in progress.

155 Wn.2d at 520-21.

As to the imminent danger requirement of RCW 9A.16.050(1), "[i]mminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993) (citation omitted).

There is some evidence in the record supporting Escobedo's fear that Gonzalez had solicited others who might rob or kill him—Gonzalez told him as much. In Escobedo's own testimony he claimed that he saw his apartment door open and heard Gonzalez giving an apartment entry code to Escobedo's would-be attackers. Escobedo testified that he was not fearful of Gonzalez herself but only of the people she purportedly solicited to rob his apartment. Escobedo also testified to being wary of Gonzalez's gang connections. Although Escobedo testified that the shooting was accidental, undercutting the notion of an intentional killing in self-defense, Palms and Cunningham both testified that Escobedo deliberately aimed the gun at Gonzalez and fired.

However, even viewed in the light most favorable to Escobedo, this evidence does not support the notion that Escobedo held an objectively reasonable belief that there was an imminent danger of a felony assault that necessitated intentionally *killing* Gonzalez. Escobedo repeatedly testified that he was not afraid of Gonzalez but of her friends. She was not armed, she was much smaller than Escobedo, and she was not on the phone with the would-be attackers when her final argument with Escobedo took place. Even if a scheme existed, there is simply no evidence that killing Gonzalez was necessary to prevent her from carrying it out. Escobedo, in fact, never argued as such—his theory of the case was always that the shooting was not intentional.

Thus, the trial court's ruling was based on tenable reasoning—the instruction sought was not warranted by the evidence adduced. The self-defense instruction that was given adequately and properly informed the jury of the applicable law regarding when assault is justifiable as a matter of self-defense.

The instructions given allowed Escobedo to argue his theory of the case. In his closing argument, Escobedo's attorney stated that "even actually if he pointed the gun, he is entitled to do that in self-defense" because of Gonzalez's threats, and that "if somebody is going to kill you, you're allowed to do that." His attorney also reiterated Escobedo's contention that the gun discharged accidentally due to Gonzalez making contact with him. Had the jury believed that Escobedo acted in fear for his life, and that Gonzalez's sudden movement caused the gun to discharge, it could not have convicted him under the

instructions given. The trial court did not err by declining to give a justifiable homicide instruction.

III

Escobedo next contends that the predicate offense for his conviction of unlawful possession of a firearm, his 2004 felony conviction in California for the unlawful taking of a motor vehicle, was not comparable to the Washington felony of taking a motor vehicle without permission. This is so, he asserts, because California's statute has a broader definition of the crime than does Washington's. Because the California statute in fact defines the crime more narrowly than Washington's comparable statute, Escobedo's argument fails.

Pursuant to Washington law, a person commits unlawful possession of a firearm in the second degree

> if the person does not qualify . . . for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:
>
> (i) After having previously been convicted . . . in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section.

RCW 9.41.040(2)(a).

Typically, in reviewing an out of state conviction, the trial court conducts a comparability analysis in which "[o]ut-of-state convictions are classified according to the comparable offense definitions and sentences provided in Washington law." State v. Stevens, 137 Wn. App. 460, 465, 153 P.3d 903 (2007) (citing RCW 9.94A.525(3)). The comparability analysis for the predicate "serious

offense" element for unlawful possession of a firearm is the same comparability analysis as is used for classifying prior out-of-state convictions in determining a defendant's offender score at sentencing. RCW 9.94A.525(3); see Stevens, 137 Wn. App. at 465 (unlawful possession of a firearm); see also State v. Arndt, 179 Wn. App. 373, 378-79, 320 P.3d 104 (2014) (offender score).

The principal inquiry for determining the comparability of an out-of-state conviction is whether the defendant could have been convicted under a Washington statute for the same conduct. State v. Thiefault, 160 Wn.2d 409, 414-15, 158 P.3d 580 (2007) (classifying out-of-state convictions for purposes of persistent offender sentencing). A comparability analysis covers (1) "legal comparability," and (2) "factual comparability." Arndt, 179 Wn. App. at 378-79. For "legal comparability," the court compares the elements of the out-of-state crime to those of the relevant Washington crime to determine if they are "substantially similar." Thiefault, 160 Wn.2d at 415. Only if legal comparability is not established do we reach the question of factual comparability. See Arndt, 179 Wn. App. at 379.

"If the foreign conviction is identical to or narrower than the Washington statute and thus contains all the most serious elements of the Washington statute, then the foreign conviction counts toward the offender score as if it were the Washington offense." State v. Olsen, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014). "If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense

would have violated the comparable Washington statute." Thiefault, 160 Wn.2d at 415.

A statute is narrower than another if it contains an additional essential element that the other statute does not. See In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005) (holding Washington robbery statute to be narrower than federal statute because former required specific intent to steal while latter did not). At the time of Escobedo's 2004 conviction, California Vehicle Code § 10851(a) stated:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in the state prison for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in the county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both.

At that time Washington's RCW 9A.56.075 stated:

> (1) A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.
>
> (2) Taking a motor vehicle without permission in the second degree is a class C felony.

Thus, California's statute required that the perpetrator intend to deprive the owner of "title to or possession of the vehicle," while Washington's did not.

"[T]he [Washington] statute simply requires that the defendant (1) intentionally take the vehicle of another (2) without permission." State v. Walters, 162 Wn. App. 74, 86, 255 P.3d 835 (2011) (citing RCW 9A.56.075(1)).

Escobedo avers that California defines the offense more broadly because, under its statute, the defendant may act with intent "either to permanently or temporarily deprive" the owner of title to or possession of the vehicle, while Washington does not require any such intent. This argument is meritless. The existence of an additional element in the California statute, however qualified that element may be, renders the California statute narrower than Washington's. The State of California was required to prove beyond a reasonable doubt that Escobedo (1) drove or took a vehicle (2) without consent of the owner and (3) with intent to deprive. Were Escobedo to have been charged in Washington, only the first two elements needed to be proved.

The California statute is narrower and, thus, is legally comparable to the Washington statute. Therefore, we need not reach the question of factual comparability of the offenses. Arndt, 179 Wn. App. at 378-79. The California conviction was a sufficient predicate felony to support Escobedo's conviction of unlawful possession of a firearm in the second degree.

IV

In a statement of additional grounds, Escobedo faults the trial court's decision to allow questioning as to his familiarity with gang culture. That decision constituted reversible error, Escobedo avers, because this evidence was not

relevant and because it constituted character evidence forbidden by ER 404(b). However, Escobedo opened the door to such evidence with his own testimony.

The decision to admit or exclude evidence is within the sound discretion of the trial court; such a decision should not be reversed absent a manifest abuse of that discretion. State v. Iverson, 126 Wn. App. 329, 336, 108 P.3d 799 (2005). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Powell, 126 Wn.2d at 258. A court's decision is manifestly unreasonable if it adopts a view "'that no reasonable person would take,'" given the facts and applicable legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)). It is based on untenable grounds or reasons if the court applies the wrong standard or relies on unsupported facts. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant when it has any tendency to make the existence of any consequential fact more probable or less probable than it would be without the evidence. ER 401. Facts that tend to establish a party's theory or disprove or rebut an opponent's theory or evidence are relevant. Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976). Yet ER 404(b) categorically bars the admission of evidence of prior misconduct or actions "for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

> Exceptions to this rule exist.
>
> Evidence of prior misconduct may be admissible if a party has "opened the door" to the subject. . . . Using the *open door* refers to the practice of using evidence that would otherwise be *inadmissible* to contradict evidence that probably should *not* have been admitted when offered by the opposing party. The latter practice has been aptly called "fighting fire with fire."
>
> . . . .
>
> The prosecution has often been allowed to cross-examine the defendant about other crimes or misconduct, or has been allowed to prove them by extrinsic evidence, on the theory that the defendant's testimony or other evidence "opened the door" to evidence offered by the State.

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 404.31 (6th ed. 2018).

Put more simply, "'[t]he long-standing rule in this state is that a criminal defendant who places his character in issue by testifying as to his own past good behavior, may be cross-examined as to specific acts of misconduct unrelated to the crime charged.'" State v. Warren, 134 Wn. App. 44, 64-65, 138 P.3d 1081 (2006) (quoting State v. Brush, 32 Wn. App. 445, 448, 648 P.2d 897 (1982)), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008).

Such was the case here. Escobedo's purported wariness of street gangs and drug culture, and his association of Gonzalez, Cunningham, and Gonzalez's would-be accomplices with these phenomena was a significant component of his theory of the case. He alluded to this several times during his direct examination: Cunningham was a "to-go-to guy" for a drug dealer who would "take care of" people who owed money to the dealer and gave Escobedo a "weird vibe," Escobedo owed money to that drug dealer, and Gonzalez was connected to a gang and in contact with said dealer.

The State sought to rebut the notion that Escobedo was fearful of gang members by eliciting testimony about his past in the Logan Heights gang both in San Diego and in Washington. Overruling Escobedo's objection to eliciting this testimony, the trial court stated:

> Mr. Escobedo is claiming self-defense, which does put in issue his subjective mindset, if you will, on the date in question in terms of whether or not he was sufficiently in fear, if you will, to explain or justify pulling out a semi-automatic handgun. Recognizing that there is a theory that even though he did that, Ms. Gonzalez grabbed the gun, therefore, it went off accidentally.
>
> In listening to Mr. Escobedo's testimony as it relates to the issue of fear, his testimony suggests that Ms. Gonzalez may have been a member of a gang. She certainly was an addict and was using drugs, as were all of the people on the night or early morning in question.
>
> There was some testimony, and I'm not going to address it specifically, but generally speaking, suggesting that Mr. Cunningham had a reputation, the reputation being for gangs. Talking about Jairo being a drug dealer. Casper involved in drugs. Ms. Gonzalez getting on the phone and calling people to come over and rob Mr. Escobedo.
>
> Same type of person, if you will: Gang related, drug dealers, people of the community, people who have a tendency towards violence. And that he wakes up and he's afraid.
>
> I concur that Mr. Escobedo's testimony certainly suggests that he has minimal, if really any, involvement in gangs. Doesn't know much about them, if you will. And as a result, I do believe the door has opened to some very limited things.

Subsequently, on Escobedo's cross-examination, the State elicited testimony as to Escobedo's own membership in San Diego's Logan Heights gang. This included testimony that Escobedo considered fellow associates to be his "family," that he was familiar with street gangs' violent methods of dispute resolution, that he recruited younger members of his community into the gang, and that the reason for his departure from the gang was not his distaste for the lifestyle but his drug addiction.

From the record, it is clear that the trial court's reasoning for allowing this evidence—that Escobedo had opened the door to its admission—was tenable. Escobedo's testimony indicated discomfort with gangs and drug dealers, and the State sought to rebut the notion put forth that he was innocent of or naïve about gangs. Allowing this evidence was not an abuse of discretion. Thus, there was no error.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78310-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Ian Ith, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ian.ith@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: January 22, 2020
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