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COURT OF APPEALS

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANKLIN-SCOTT DELA CRUZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

No. 04-1-01624-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it allowed the State to inquire about multiple firearms defendant possessed at the time of his arrest when defendant opened the door to the subject and when the court limited the use of such evidence with a proper instruction?

2. Was any error in admitting the challenged evidence harmless as the outcome of the trial was not materially affected by the admission?

B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2004, the State charged FRANKLIN-SCOTT KEAWE DELACRUZ, hereinafter “defendant,” with one count of murder in the second degree while armed with a firearm for the shooting death of Jerry Reyes. CP¹ 1-3. Defendant filed a notice that he intended to claim self-defense. CP 4. Defendant also filed several motions in limine, including exclusion of any evidence that defendant possessed two guns at the time of

¹ References to Clerk’s Papers will be to “CP.” The verbatim report of proceedings is not numbered contiguously between volumes. Pretrial volumes will be referenced as “RP (date) page,” and trial volumes will be referenced as “RP (Volume) page.” For example, the court considered defendant’s motions in limine at RP (05/31/05) 5-55, and the jury panel was sworn at RP IX 43.

his arrest. CP 13-35; RP (05/31/05) 12. As these guns were unrelated to the shooting, defendant argued that the evidence was not relevant, the admission would unfairly prejudice him, and it would tend to be used as propensity evidence. CP 13-35; RP (05/31/05) 13-14, 16-17. The court preliminarily granted defendant's motion to exclude evidence of the guns based on defendant's propensity argument; however, the court indicated that the State could re-raise the issue at trial if the evidence presented at trial provided a more specific purpose for admission. RP (05/31/05) 19-20.

Jury trial commenced on July 18, 2005. RP IV 49. On July 20, 2005, the State re-raised the issue of defendant's possession of firearms at the time of his arrest. RP VI 56-57. The State had presented testimony from TJ Kelderhouse, which implied defendant always carried a gun, and the State argued that the guns in defendant's possession at the time of his arrest corroborated that testimony. RP V 107-08; VI 56-57. Defendant objected, arguing that the guns were irrelevant to show defendant's intent and that they were still being offered to show propensity. RP VI 58-59. The court balanced the probative value of the evidence against its prejudicial effect and found that balancing test weighed in favor of exclusion; the court declined to change its initial ruling. RP VI 61.

On July 27, 2005, after defendant had testified on direct, the State renewed its motion to admit the evidence, because defendant had opened the door. RP X 69. Over defendant's objection, the court allowed the

State to question defendant about the guns he possessed at the time of his arrest. RP X 72.

On July 28, 2005, defendant made a motion to reconsider, or to give a limiting instruction. CP 76-79; RP XI 3-4. The court declined to reconsider, but did agree that defendant could propose a limiting instruction. RP XI 7. The court rejected defendant's proposed instruction, which focused on defendant's constitutional right to bear arms. CP 82; RP XIV 24. However, defendant drafted a general instruction after discussion with the court. RP XIV 25-26. Defendant's general instruction was ultimately given to the jury. CP 174 (Jury Instruction No. 6); RP XIV 25-26.

The jury began deliberations on August 4, 2005, and returned a guilty verdict on August 5, 2005. CP 196; RP XIV 104, RP XV 3. The jury also found that defendant was armed with a firearm during the commission of the crime. CP 199; RP XV 4.

Defendant was sentenced on October 7, 2005 for the murder; at the same time he was sentenced on an unrelated assault. RP (10/07/05) 3. The court imposed a high end, standard range sentence of 244 months, together with a firearm sentencing enhancement of 60 months, on the murder conviction. CP 213-23; RP (10/07/05) 21.

Defendant filed this timely notice of appeal. CP 209.

2. Facts

On March 15, 2004, at approximately 10:00 p.m., Jerry Reyes returned to his home, located on South "I" Street in Tacoma, Washington, to find an SUV parked on the street in front of his house. RP IV 101-02. Mr. Reyes asked Jessica Larsen, the woman sitting in the passenger seat and defendant's girlfriend, to move the car. RP IV 101-02. When Ms. Larsen, who is hearing impaired, did not immediately respond, Mr. Reyes got angry. RP IV 103; RP XII 15. Mr. Reyes parked his car, and he and Ms. Larsen started yelling at each other. RP IV 109. Defendant ran out of Rob MacDonald's house, which was next door to Mr. Reyes' house, and confronted Mr. Reyes. RP IV 110.

At some point, Mr. Reyes went to Mr. MacDonald's house to complain about the cars parked in the street. RP IV 116-17, 119-20, RP XI 133-34. After yelling at Mr. MacDonald, Mr. Reyes went back to the SUV and continued to argue with defendant and Ms. Larsen. RP IV 121. TJ Kelderhouse came out of Mr. MacDonald's house and went to move his car, which was parked in front of the SUV. RP V 81. Mr. Kelderhouse also owned the SUV defendant was driving that night. RP V 75.

Mr. Reyes, defendant, and Ms. Larsen continued to argue while Ms. Larsen sat in the passenger seat of the SUV. RP IV 121, RP V 82-83. Ms. Larsen was sitting sideways in the seat, with the door open and her feet on the running board of the car. RP V 82-83. Mr. Reyes either hit the

door or stumbled into it, which caused the door to close on Ms. Larsen's legs. RP V 96, RP XII 44.

After Mr. Reyes hit Ms. Larsen's legs with the door, he was pulled away from the car by his girlfriend. RP IV 123. Defendant ran around the SUV to the driver's side, opened the door, and reached under the seat for the gun Mr. Kelderhouse kept there. RP IV 59, RP V 45, 98, RP X 34, RP XI 139. Defendant then ran back around the front of the SUV; when he got to the sidewalk, he pointed the gun and fired seven shots at Mr. Reyes. RP IV 59, RP V 48-51, 98, RP VIII 16-17, RP XI 140-41. Four bullets hit Mr. Reyes; one in the side of his torso, one in the back of each arm, and one grazed the front of his leg. RP VII 36-52.

Defendant testified on his own behalf. According to defendant, while Mr. Reyes was still in his own car, he yelled at him to move the SUV. RP X 20. Defendant apologized to Mr. Reyes for being in his parking spot and agreed to move the SUV. RP X 21. Mr. Reyes parked his car, but before he got out, Mr. Reyes reached for something under the seat. RP X 23-24. Defendant testified that when Mr. Reyes jumped out of his car, he tucked something into his pants. RP X 52. Defendant testified that despite being very drunk, Mr. Reyes was able to run towards him. RP X 23-25. Defendant also stated that Mr. Reyes spit in Ms. Larsen's face when she attempted to intervene. RP X 25-26. Defendant attempted to move the SUV several times, but Mr. Reyes blocked his way. RP X 39.

Defendant testified that when he finally got to the driver's side of the SUV, he heard Ms. Larsen yelling for help. RP X 33. He saw Ms. Larsen lying across the front seats of the SUV, trying to get away from Mr. Reyes who was reaching over the top of the window in the door. RP X 33-34. Ms. Larsen testified that she was scared because Mr. Reyes was attempting to punch her; however, she acknowledged telling the police that Mr. Reyes never touched her. RP XII 43, 84. Ms. Larsen also testified that Mr. Reyes was so drunk he could barely walk towards her. RP XII 85.

Defendant testified that he was walking toward driver's side of the SUV to get in the car when he heard Ms. Larsen yell, followed by a loud bang. RP X 33. When defendant opened the driver's door, he saw Ms. Larsen leaning back, trying to get away from Mr. Reyes. RP X 33-34. Defendant did not know what Mr. Reyes had done to Ms. Larsen that caused her to lean away from him. RP X 34. Defendant, wanting to get Mr. Reyes away from Ms. Larsen, was looking for anything in the car that he could grab, and grabbed Mr. Kelderhouse's gun from under the seat. RP X 34. Defendant ran back around the car with the gun in his hand. RP X 34. Defendant testified that Mr. Reyes said, "now you're playing my game, man," and reached into his pants to pull out a weapon. RP X 34-35. Ms. Larsen also testified that when defendant pulled out the gun, Mr. Reyes ran up to defendant and started, "jumping up and down like he was going to pull a gun out." RP XII 56-57. No other witness saw Mr. Reyes

reach for a gun; witnesses for both the State and the defense testified that when defendant pulled out the gun, Mr. Reyes was several feet away from both defendant and Ms. Larsen, and that Mr. Reyes tried to turn away from defendant. RP IV 60-61, 125-126; V 50-51, 100-01; XI 162-164; XIII 127-28, 130.

After shooting Mr. Reyes, defendant ran back to the SUV and drove away. RP IV 61, 129, RP V 52, 102, RP X 35, RP XII 63. As they were leaving the scene, Ms. Larsen told defendant that he “did not have to do that;” she demanded that defendant let her out of the car a few blocks down the street. RP XII 65, 83.

Defendant testified that he was scared of Mr. Reyes because he had heard from Mr. Reyes’ brother that Mr. Reyes was always in and out of prison and jail. RP X 36-37. Specifically, defendant said he knew Mr. Reyes had been in prison for rape, beating someone with a pipe, and for domestic violence from beating up his girlfriends. RP X 38. David Reyes testified that he never spoke to either defendant or Ms. Larsen about his brother. RP XIV 7.

After defendant drove away, several neighbors called 911. RP IV 61, RP V 52, RP IX 126. Paramedics arrived and transported Mr. Reyes to the hospital, where he died at 1:48 a.m. the following morning. RP XI 25, 30. Mr. Reyes was struck by four bullets. RP VII 36. The shots to his leg and arms were non-life threatening, but the shot to his torso was fatal. RP VII 36-47. The bullet wound in Mr. Reyes torso traveled from the left

to the right, and from the back to the front. RP VII 36-41. Mr. Reyes had a BAC of .08 at the time of his death; this result could have been affected by several blood transfusions which may have diluted his blood. RP VII 55, RP XI 16, RP XII 156-57.

Defendant was arrested outside of an apartment complex in Lakewood, Washington, on May 21, 2004. RP VI 65. At the time of his arrest, defendant was carrying the murder weapon in a backpack. RP VI 72-76, RP VIII 116, 121-22. Defendant also had a gun in his back pocket and a third gun in his backpack. RP 74-78.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO INQUIRE ABOUT MULTIPLE FIREARMS DEFENDANT POSSESSED AT THE TIME OF HIS ARREST WHEN DEFENDANT OPENED THE DOOR TO THIS INFORMATION.

The question of admissibility of rebuttal evidence is within the discretion of the trial court, and that court's judgment will not be reversed absent an abuse of discretion. State v. Copeland, 130 Wn.2d 244, 288, 922 P.2d 1304 (1996). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable reasons or grounds." State v. Stensen, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

A defendant may be vigorously cross examined in the same manner as any other witness if he voluntarily asserts his right to testify.

State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968). The scope of cross examination is within the discretion of the trial court and may be conducted so as to explain, qualify and rebut the defendant's direct testimony, including examination on issues he or she introduced to the jury. Etheridge, 74 Wn.2d at 113. Once a witness has testified as to a general subject on direct examination, the cross-examination may develop and explore various phases of that subject. Etheridge, 74 Wn.2d at 113. A defendant's own testimony can open the door to the introduction of otherwise inadmissible evidence. See State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982). The Supreme Court explained what it means to “open the door”:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The Rules of Evidence do not supersede this “open door” doctrine. Brush, 32 Wn. App. at 451.

In the present case, the trial court appropriately exercised its discretion in allowing the State to question defendant about the guns he possessed at the time of his arrest because defendant opened the door to this inquiry. During direct examination, defendant testified that he shot into the ground in front of Mr. Reyes' legs, but the gun fired so fast that it "just started kicking up automatically." RP X 35. On cross examination, the State attempted to clarify defendant's testimony about how, if he was aiming at the ground in front of Mr. Reyes, the bullets actually hit Mr. Reyes in his torso. RP X 65. Defendant testified that he, "shot towards his legs, but the gun fired off so fast and the kick was - - it was kicking up hard, and from when I pulled the trigger, the gun just repeated started shooting, and it started raising up on me. I - - I mean, I never shot the gun before. I don't shoot guns very often." RP X 65. Defendant then admitted to owning a .40 caliber handgun that was not on him that evening. RP X 66. Defendant also testified that he had only fired a gun two times before: a revolver that belonged to a friend and a shotgun. RP X 67. Finally, defendant testified that he has never owned nor possessed any other guns. RP 67.

Following this testimony, the State moved to admit evidence of the guns defendant possessed at the time of his arrest. RP X 69. The State argued that defendant had opened the door to questions about guns he possessed because defendant testified that he was not familiar with guns, and did not possess or fire them very often. RP X 69. Defendant

objected, arguing that his testimony did not open the door and that the evidence was still unfairly prejudicial. RP X 69-70.

On appeal, defendant argues he did not open the door to the State's rebuttal evidence when he testified that he was unfamiliar with the gun he used to shoot Mr. Reyes, that he did not fire guns often, and that he did not have any other guns on him the night of the shooting. See Appellant's Brief at 47. Defendant also claims that the evidence was not relevant, was unfairly prejudicial, and was used to show propensity. See Appellant's Brief at 48-51.

The court properly exercised its discretion when it held that defendant's testimony opened the door to allow the State to rebut his inference that the shots to Mr. Reyes' torso was an accident due to his unfamiliarity with guns. Defendant's testimony went beyond describing an unfamiliarity with Mr. Kelderhouse's gun, it implied a lack of knowledge about guns in general. Defendant's testimony called into question his general familiarity with guns, and the court properly allowed the State to explore that issue. The court set out the reasons for its ruling, in detail, on the record:

You know, there comes a point where it just becomes unfair. It becomes an unfair picture that the defense is trying to present to the jury, and we have crossed that line. The Court has gone as far as it's going to go with trying to adhere to the idea that we stick to the events involved. Here, we've got Mr. Dela Cruz saying, you know, I just kind of found this gun in the car; I didn't have a gun of my own at all; I'm unfamiliar with guns; I rarely fire guns; the

gun just kind of went off; I wasn't familiar with it; it bucked up; I don't own guns.

And, then, in addition to that, he volunteers, in direct, he didn't turn himself in because Mr. Kelderhouse said the cops were going to kill him on sight, showing us that Mr. Dela Cruz is somebody that is peace-loving and it's only the police, it's only Mr. Reyes, it's only everybody else in the world that's causing all these problems for him, this peace-loving individual.

You can't keep doing that. You can't go over and over again that you have no familiarity with guns, that the gun kind of went off accidentally, that I was trying to shoot him in the leg. All of that, in combination, gives the State the opportunity to say, this isn't the way this all happened.

...

He is on trial, and he has to live with what he's been conveying to the jury, and what he's been conveying to the jury is a clear indication that he doesn't have anything to do with guns and he's unfamiliar with that and this was a terrible accident, and it's not facts. It's not the case in the real world. I am going to allow the State to inquire.

RP X 70-71.

The following day, defendant brought a motion for the court to reconsider its ruling. RP XI 3. The court refused the motion to reconsider, but granted defendant's request for a limiting jury instruction. RP XI 7. In denying the motion to reconsider, the court, again, explained its reasoning:

All right. I don't think this has anything whatsoever to do with the constitutional right to bear arms. Nobody's disputing that. What it has to do with is the specific testimony proffered by Mr. Dela Cruz, and in two areas,

primarily. One is - - and this is absolutely central to the case - - he talks about his lack of familiarity with firearms. His presentation to the Court and to the jury was that, I had the gun in my hand, and I shot at his legs, and I was so unfamiliar with the gun that it bucked. What is left in the minds of the jury is that it just kept going off, and that's fine. He's free to testify in that regard, but when there is evidence that he's not unfamiliar with guns, that he's imminently familiar with guns, the jury is entitled to know that and the State is entitled to present evidence contrary to the direct testimony of Mr. Dela Cruz.

RP XI 4-5.

The court allowed defendant to present his theory of the case and argue that defendant shot Mr. Reyes in self-defense, but also allowed the State to introduce evidence from which the jury could conclude that defendant had misrepresented his familiarity with guns. Because defendant made his familiarity with guns, including his past possession of firearms, an issue, the State was entitled to ask questions exploring defendant's actual knowledge and prior possession. In fact, after the State questioned defendant about the unrelated guns, defendant admitted that he was familiar with firearms. RP X 78.

The fact that defendant possessed multiple guns at the time of his arrest was relevant because he testified that he was unfamiliar with guns and did not possess any. The fact that defendant possessed multiple guns at the time of his arrest was relevant and probative to rebut defendant's testimony that he never possessed a gun. A jury could reasonably infer that a person unfamiliar with guns would not be carrying around three of

them. If the jury questioned defendant's testimony regarding his unfamiliarity with guns, it might also question his testimony claiming the shooting was an accident. The jury could infer that defendant had sufficient exposure to firearms that his explanation for why the bullets hit Mr. Reyes instead of the ground was not credible.

The court properly exercised its discretion in allowing the State to introduce evidence to rebut defendant's testimony after he opened the door to inquire about his knowledge and possession of guns.

2. ANY ERROR THE COURT MADE IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT DEFENDANT POSSESSED MULTIPLE GUNS AT THE TIME OF HIS ARREST WAS HARMLESS.

An appellate court will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Where the error is from violation of an evidentiary rule, "the error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. at 871. "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Id.

- a. Defendant's testimony indicates he was not justified in using deadly force because he had no reasonable belief that Mr. Reyes intended to commit a felony or that he or Ms. Larsen was in imminent danger of death or great personal injury.

Under RCW 9A.16.050(1), homicide is justifiable when committed “in the lawful defense of the slayer . . . or of any other person in his 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.” To justify killing in self-defense, the slayer must believe that he or someone else is about to suffer death or great personal injury. State v. Ferguson, 131 Wn. App. 855, 860-61, 129 P.3d 856 (2006), RCW 9A.16.050(1). Simple assault or an ordinary battery cannot justify taking a human life. Ferguson, 131 Wn. App. 861. The State bears the burden of disproving self-defense. State v. Bradley, 141 Wn.2d 731, 740, 10 P.3d 358 (2000).

One of the elements of self-defense is the person relying on the self-defense claim must have had a reasonable apprehension of great bodily harm. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (emphasis in original). A determination of whether a defendant has shown a reasonable apprehension of harm requires a mixed subjective and objective analysis. Id. at 772. The imminent threat of great bodily harm

does not actually have to be present, so long as a reasonable person in the defendant's situation could have believed that such threat was present. Id.

In Walker, the defendant was actually receiving a beating at the hands of his neighbor. 136 Wn.2d at 770. Walker pulled a knife and stabbed his neighbor five times in the chest and trunk area. Id. at 778. Supreme Court upheld a trial court's decision not to instruct the jury on self-defense because, "any reasonable person standing in defendant's shoes would have perceived that only 'an ordinary battery is all that was intended,' in which case the use of deadly force was unjustified. Id. at 779 (Citing State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997)). Unlike the trial court in Walker, here the court instructed the jury in self-defense, even though the altercation between defendant and Mr. Reyes was merely a yelling match and had not escalated to the level of a battery.

In the present case, the court gave the following instruction on self-defense:

Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company when:

- 1) the defendant reasonably believed that the person killed intended to commit a felony or to inflict death or great personal injury;
- 2) The defendant reasonably believed that there was imminent danger of such harm being accomplished; and
- 3) The defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the

defendant, standing in his shoes at the time of the incident, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

CP 178 (Jury Instruction No. 10). The court further instructed, “[a] person is justified in using deadly force in self-defense only if the person reasonably believes he or another person in his presence is in imminent danger of death or great personal injury.” CP 185 (Jury Instruction No. 17); see also, State v. Read, 147 Wn.2d 238, 243-44, 53 P.3d 26(2002).

i. Defendant’s testimony fails to show that he had a subjective reasonable belief that Mr. Reyes intended to commit a felony or to inflict death or great personal injury.

The subjective aspect requires the jury to place itself in the defendant’s position and consider the defendant's acts in light of all the facts and circumstances known to the defendant. State v. Walker, 136 Wn.2d at 772. Here, the defendant’s own testimony fails to show that he had a reasonable belief that Mr. Reyes intended to commit a felony or to inflict death or great personal injury on either Ms. Larsen or himself that would justify deadly force.

Defendant testified that when Mr. Reyes exited his own car, he reached into his pants like he was “tucking something in there.” RP X 51-52. He did not testify that he thought this was a gun. Mr. Reyes was belligerent and threatened to beat defendant up; however Mr. Reyes never attempted to punch defendant. RP X 23. He saw Ms. Larsen leaning

away from Mr. Reyes, who was reaching over the top of the window. RP X 33-34. He did not see a weapon in Mr. Reyes' hands, nor did he see any injury to Ms. Larsen. RP X 34. At that point, defendant grabbed Mr. Kelderhouse's gun from under the driver's seat and armed himself with deadly force. RP X 34. Defendant testified that his desire was only to scare Mr. Reyes away from Ms. Larsen. RP X 58. Thus at the point defendant chambered a round into the gun he did not perceive any serious threat to himself or Ms. Larsen. It was not until after defendant approached with a gun that Mr. Reyes made any statement that could have been perceived as a serious threat when he said, "now you're playing my game, man." RP X 34. However, Mr. Reyes still did not produce any type of weapon. Despite testifying that he figured Mr. Reyes could kill him with whatever weapon he had on him, defendant never saw a weapon. RP X 64-65. Defendant did not kill Mr. Reyes in order to protect himself or Ms. Larsen from death or great personal injury because defendant testified that the shots to Mr. Reyes were an accident. RP X 35, 64-65.

Assuming defendant's testimony was entirely credible, it does not establish he had any reasonable apprehension of harm to justify using deadly force. Defendant never saw Mr. Reyes with a weapon. Mr. Reyes was angry and belligerent, but each time defendant saw his hands, they were empty. Mr. Reyes may have threatened to assault defendant, but he did not threaten to kill or shoot him. Mr. Reyes never assaulted defendant or attempted to assault him. According to defendant's testimony, the only

intentional physical contact Mr. Reyes had with either defendant or Ms. Larsen was when he spat in Ms. Larsen's face. Defendant admitted that spitting on Ms. Larsen was merely "disrespectful," not injurious. RP 45. Clearly, Mr. Reyes actions did not give defendant any reason to believe that his or Ms. Larsen's lives were in imminent danger.

Defendant also testified that he was afraid of Mr. Reyes because he knew Mr. Reyes had been in prison for rape, for beating someone with a pipe, and for beating up his girlfriends. RP X 36-38. Defendant's knowledge of Mr. Reyes' criminal history was not sufficient to create a reasonable belief that Mr. Reyes intended to commit a felony, kill, or inflict great personal harm. Defendant did not testify that he thought Mr. Reyes was attempting to rape Ms. Larsen. Mr. Reyes never punched at defendant, nor did he have a pipe or other bludgeoning instrument with which to assault defendant or Ms. Larsen. Defendant also had no information that Mr. Reyes ever beat up a woman who was not his girlfriend. Defendant testified that Mr. Reyes' criminal history made him afraid of Mr. Reyes. RP X 36. Being afraid of a person is not the same as having a reasonable belief that the person intended to commit a felony or cause death or great personal injury.

ii. Defendant's theory of self-defense also fails under the subjective analysis.

The objective analysis of whether a defendant has shown a reasonable apprehension of harm requires the jury to determine what a reasonable person in the defendant's situation would have done. Walker, 136 Wn.2d at 772. The importance of the objective portion of the inquiry cannot be underestimated. Id. The record shows that defendant's belief that Mr. Reyes intended to inflict death or great personal harm also fails under the objective test.

As argued above, Mr. Reyes never displayed a weapon and never threatened to kill defendant. Mr. Reyes also did not hit defendant, and never actually laid a hand on Ms. Larsen. While defendant claimed he had no choice, objectively the jury could have concluded otherwise. A jury could conclude that a reasonable person, just wanting to get out of the situation, would have driven away rather than pull a gun.

Witnesses for both the State and the defense testified that Mr. Reyes was several feet away from both defendant and Ms. Larsen, and he attempted to turn away from defendant when defendant pulled out the gun. RP IV 60-61, 125-126; V 50-51, 100-01; XI 162-164; XIII 127-28, 130. The bullets entered Mr. Reyes' body from the rear left side, and they traveled through his body from back to front. RP VII 56. Because Mr. Reyes was shot as he was turning away from the gun, it was reasonable for

the jury to infer that Mr. Reyes was running away, and neither defendant nor Ms. Larsen were in imminent danger.

Even if Mr. Reyes had not turned to run away, a jury could determine that a reasonable person, confronted with a drunken, belligerent, and unarmed assailant who was threatening, at most, a fist fight, would not have felt the need for deadly force to extricate himself from the position. A reasonable person standing at the driver's side door of the SUV would have driven away from the scene with less effort and confrontation. Also, a reasonable person who just wanted to scare an assailant would not have wasted time ensuring there was a bullet ready to fire in the gun. Finally, if defendant was actually trying to scare Mr. Reyes, the jury could infer that defendant was not really afraid that Mr. Reyes intended to kill him because a reasonable person confronted with an assailant who he believed intended to kill him, would not shoot merely to scare the assailant.

- b. Defendant's behavior after the shooting and the fact that witnesses close to him were afraid to speak to authorities were inconsistent with defendant's theory of self-defense.

While the foregoing argument assumes the truth of defendant's testimony, there was considerable evidence to cast doubt on defendant's credibility. A jury could conclude that defendant's behavior following the shooting was inconsistent with his claim of self-defense.

Defendant told Mr. Kelderhouse a couple of days after the shooting that he had used Mr. Kelderhouse's gun the night of the shooting because it, "wasn't as nice as the one he had," and it was, "easier to replace." RP V 107. This indicates a thought process other than, "looking for anything [he] could . . . grab that was in the car." RP X 34. Defendant also told Mr. Kelderhouse that Mr. Reyes had, "got what was coming to him for hurting Jessica." RP V 106-07. These comments are inconsistent with defendant's testimony that shooting Mr. Reyes was "accidental." The night before defendant's arrest, defendant asked Mr. Kelderhouse if he was a snitch, and said that if the cops showed up, defendant would shoot Mr. Kelderhouse and have a shootout with the cops. RP V 108. If defendant had been acting in self-defense, he would had no reason to fear what witnesses would say to the police.

The jury could also conclude that Ms. Larsen's corroboration testimony was less than credible. While Ms. Larsen corroborated defendant's self-defense theory, she had been reluctant to speak to police and refused to give a statement because she feared repercussions from defendant. RP XII 94. A few weeks after the shooting, she told Detective Vold that she would not give a statement because, "if Frankie [defendant] found out that I was talking to you, I would be dead in a day." RP XIII 81. She also told Detective Lewis that she would not testify in court because, "saying stuff like that can get you killed." RP XIII 112-13. Ms. Larsen told the detectives that she would only give a statement after

defendant was arrested. RP XIII 81. If Ms. Larsen's trial testimony was truthful, she would have had no reason to fear defendant's retaliation for relaying this information to the police.

- c. The overwhelming evidence presented at trial suggests that defendant did not act in self-defense at the time he shot Mr. Reyes.

Defendant's claim of defective gun was inconsistent with physical evidence introduced at trial. Defendant claimed that he aimed at the ground and the gun just started firing. RP X 35, 65. Seven empty shell casings were found at the scene. RP VIII 15-17. Brenda Lawrence, a Washington State Patrol Forensic Specialist, test fired the gun and determined that it required six-and-three-quarters to seven pounds of pressure to pull the trigger in single action mode. RP VIII 119. This evidence indicates that defendant purposely pulled the trigger seven separate times. Except for the bullet wound to his leg, all the bullets hit Mr. Reyes in the back or side. RP VII 36-47. The wound to Mr. Reyes leg was consistent with Mr. Reyes being hit by that bullet when he was already lying on the ground, which would indicate that it was the last shot that hit him. RP XIII 23. This evidence is consistent with the shots being aimed at Mr. Reyes' body whether he was upright or on the ground.

The overwhelming weight of the evidence shows that defendant did not have had a reasonable belief that that Mr. Reyes intended to inflict imminent death or great personal injury either Ms. Larsen or himself.

- d. Any prejudice defendant suffered as a result of the admission of the guns was minimal because the court gave a limiting instruction and the evidence was cumulative of evidence presented at trial.

The court minimized any unfair prejudice to defendant by giving a limiting instruction to the jury. CP 174. A jury is presumed to have followed the court's instructions. State v. Greiff, 141 Wn.2d 910, 923, 10 P.3d 390 (2000); State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

The court instructed the jury as follows:

Evidence has been introduced in this case on the subject of defendant's possession of firearms on May 21, 2004, for the limited purpose of defendant's state of mind on March 15, 2004. You must not consider this evidence for any other purpose.

CP 174. This instruction clearly limited the jury to considerations about defendant's state of mind at the time of the shooting. The jury was not allowed to consider the fact that defendant had firearms at the time of his arrest as evidence that defendant had a propensity for violence or that he was not acting in self-defense.

Finally, the jury had information from other sources that defendant carried guns, making the evidence of guns he carried at the time of his arrest cumulative. Mr. Kelderhouse testified that defendant had a gun on his person the night of the shooting, but chose to use Mr. Kelderhouse's gun. RP V 107-08. The jury also knew that defendant threatened to shoot

Mr. Kelderhouse and that defendant planned on having a shoot out with police. RP V 108. Ms. Larsen testified that she had seen defendant carry a gun before, but that he was, “trying not to carry a gun.” RP XII 108. While Ms. Larsen initially denied that defendant routinely carried a gun, she later stated that it, “isn’t for me to say.” RP XII 109. Ms. Larsen also admitted that defendant knew about guns. RP XII 110-11. After the defense rested, Alicia Dougherty-Randall testified as a State rebuttal witness that she saw defendant every day in March of 2004 and that he had a gun every day, including the night of the shooting. RP XIII 119. As the jury could reasonably infer from the other sources that defendant regularly possessed guns, the fact that he was arrested while carrying three firearms was cumulative and did not affect the outcome of the trial.

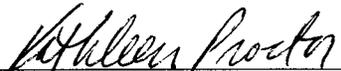
While defendant claims that he was prejudiced by the admission of the evidence, he makes no argument that the outcome of the trial would have been different if the State had not been permitted to introduce evidence that defendant possessed three handguns at the time he was arrested. See Appellant’s Brief at 52. The evidence overwhelmingly supports the jury’s determination that defendant did not act in self-defense. It is unlikely, given the evidence presented, that the jury’s disbelief of defendant’s theory of self-defense hinged on the fact that defendant was carrying three guns at the time he was arrested.

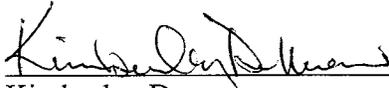
D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm defendant's conviction.

DATED: AUGUST 10, 2006

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Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

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