

NO. 39085-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

D'MARCUS GEORGE,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. SUMMARY

Appellant D'Marcus George was asleep in the back seat of his friend Freddy McGrew's car when they pulled into a gas station in Tacoma. When McGrew got out of the car to pay for gas, he was confronted by Rickie Millender. Millender was upset and "wanted to talk" about the murder of a mutual female friend.

McGrew's frightened girlfriend Tamrah Dickman woke up George, and he stumbled out of the car to be confronted by Millender's friend, Isaiah Clark. George didn't know Millender or Clark or the young white man who appeared to be with them.

When McGrew tried to get back in the car to leave, Millender assaulted him. George was retreating to the car and watching the McGrew/Millender conflict, when Clark struck George a powerful surprise blow to the back of the head, possibly with a weapon, and "dropped" him to the ground. George fell partway inside the car, and Clark grabbed George's arm and tried to drag him back out.

George had been previously shot at between 5-10 times in situations where his friend McGrew had angered or upset others. Terrified and faced with a much larger opponent who appeared enraged, intoxicated on drugs, and dragging him out of the car, George pulled a gun out of the back seat of the car and shot Clark four times, killing him.

The trial court's refusal to instruct the jury on the law of self-defense is the primary issue for this appeal. Several evidentiary issues are also raised that, standing alone, do not warrant reversal, but should be addressed for purposes of retrial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury on self-defense.

2. The trial court erred in excluding evidence relevant to self-defense, which denied appellant his opportunity to present a defense.

3. The trial court erred in excluding certain evidence as "hearsay," which denied appellant his opportunity to present a defense.

4. The trial court erred when it admitted evidence tending to show criminal propensity despite valid objections.

Issues Pertaining to Assignments of Error

1. Did the trial court err in holding George's fear of death or great bodily harm was unreasonable and therefore refusing to instruct the jury on the law of self defense?

2. The trial court repeatedly sustained the State's objections to testimony about George's fear that Clark, Millender, or the "white guy" were armed. The court sustained similar objections to Dickman's testimony about her fear. Because the reasonableness of George's fear

was central to his self-defense claim, did the trial court err in excluding this evidence?

3. Did the trial court err by excluding testimony about the statements of others as "hearsay" when they provided context for the shooting and were not being offered for the truth of the matter, but instead for their effect on those who heard them?

4. Over defense objection, the trial court admitted evidence that George had knowingly violated the law when he carried a gun as a minor, had been "involved" in other shootings, and had a prior booking photograph from which a montage was prepared. Was it error to admit this evidence of criminal propensity?

C. STATEMENT OF THE CASE

1. Defense Case

On the afternoon of June 21, 2004, in Tacoma, Tamrah Dickman's boyfriend Freddie McGrew picked her up from work in his two-door Cutlass. Exhibit 29, 30; 3RP 233, 1048-49.<sup>1</sup> They planned to drive to Dickman's house so she could change clothes before they went swimming. 3RP 1050-51.

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<sup>1</sup> There are sixteen volumes of proceedings referenced as follows: 1RP – 1/15/09; 2RP – 1/22/09; 3RP – ten volume, consecutively paginated set for the dates of 1/26/09, 1/27/09, 1/28/09, 1/29/09, 2/2/09, 2/3/09, 2/4/09, 2/5/09, 2/9/09, and 2/10/09 (a.m.); 4RP – 2/10/09 (p.m.) and 2/11/09; 5RP – 3/13/09.

Appellant D'Marcus George was asleep in the backseat when McGrew picked up Dickman. 3RP 1050-51. George and McGrew had been friends since they were 14 or 15 years old, and at the time were "best friends." 3RP 1172, 1174-75. George and McGrew had been out late the night before, and George had fallen asleep on the way to pick up Dickman. 3RP 1184-86.

After picking up Dickman, McGrew pulled into a Shell gas station. 3RP 211. Dickman noticed some people in a car leaving the station who were looking intently at McGrew's car. 3RP 1051-52. Dickman did not recognize them, but they nodded at her, so she nodded back. 3RP 1052.

The Shell station housed a minimart. 3RP 211. McGrew stopped at pump 3, the pump closest to the store entrance, and walked to the store to pay for gas. 3RP 221, 224, 1053, 1055. As he did, Dickman turned on the radio to listen to music, which came on "really loud." 3RP 1055-56. McGrew turned back and said something about the radio, then continued into the store. 3RP 1056. Dickman turned towards the back seat to apologize to George for waking him up, but she stopped when she realized George was still asleep. 3RP 1056.

Dickman then realized that one of the people she had seen leaving in the other car was leaning up against the storefront waiting for McGrew to come out. 3RP 1057. When McGrew came out of the store, Dickman

tried to get McGrew's attention to let him know he was being followed. 3RP 223-24, 231-32, 1057-58, 1114.<sup>2</sup> But the person Dickman saw waiting for McGrew – Rickie Millender – nonetheless intercepted McGrew and began to block his path. 3RP 1058-59. He followed McGrew, repeatedly bumped him, blocked him, and put an arm around McGrew's neck while McGrew tried to reach the pump. 3RP 63, 65, 1058-60. At one point, Dickman saw Millender feel around McGrew's stomach and waistband. 3RP 1060. Dickman heard Millender talking to McGrew, but the court excluded the content of the conversation at trial. 3RP 1059, 1078-79.

Millender acknowledged spotting McGrew's car pulling into the Shell station. 3RP 61, 77. He quickly pulled his car behind the station and parked out of sight, and then hurried back to the front to intercept McGrew. 3RP 62, 77-78. With Millender were his girlfriend, Krystal Smith, and his friend, Isaiah Clark. 3RP 61, 77.

Millender "wanted to talk" to McGrew. 3RP 61. His female "best friend" had been shot dead some unspecified time before. 3RP 60, 86. Another man had been convicted of her murder, but Millender suspected McGrew knew something more about what happened because he had been

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<sup>2</sup> The trial court excluded Dickman's actual words to McGrew pursuant to the State's "hearsay" objection. 3RP 1057.

present at the shooting. 3RP 60-61. Millender said that his friend “had just been brutally killed and I wanted to have some answers.” 3RP 86.

About the same time McGrew and Millender reached the gas pump, Dickman realized two more men were standing by the store – Clark and a “young white guy.” 3RP 1061, 1062, 1069-70.<sup>3</sup> Dickman said the two men were standing “right next to each other,” and she did not recognize either man. 3RP 1061, 111-18.

Dickman realized “the situation wasn’t getting any better.” 3RP 1062. She got out of the car, pulled the seat forward, and began shaking George and telling him to wake up. 3RP 1061-63. Dickman said she was “really scared...[she] was petrified,” when she woke George. 3RP 1063.

George recalled being shaken awake by Dickman, who was saying, “Wake up,[sic] Wake up.” 3RP 1186. George had never seen Dickman appear so frightened. 3RP 1186. Dickman got out of the car, and George pushed his way out from behind the front passenger seat, so that he was standing by her in the open passenger door. 3RP 1064, 1094, 1114-16, 1143-44, 1187-88.

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<sup>3</sup> The primary parties in the case were all African American, and all the other male eyewitnesses were older men, so the “young white guy” references made by nearly every eyewitness plainly identified another person at the station, who never was clearly identified at trial. See 3RP 337-42, 370-71, 383-84, 421, 431-32, 441-42, 494, 1061-62, 1069-70, 1117-18, 1193, 1255.

Although they were close friends, George acknowledged that McGrew got into a lot of trouble with other people. 3RP 1175. George had been shot at between five and ten times for simply being with McGrew, starting when he was fifteen or sixteen. 3RP 1177-79, 1215-16, 1256-57. For this reason, George had begun intermittently carrying a gun at the age of perhaps sixteen. 3RP 1214-15, 1256.<sup>4</sup> George remained friends with McGrew – despite the danger – because McGrew “always stuck up for [him]. He was always there. He was – like, I guess, he did what a friend was supposed to do.” 3RP 1251-52.

George had left his gun in a pocket of his jacket in the back seat when he got out of the car. 3RP 1213-14, 1259. George kept the gun with “one in the chamber,” so it did not have to be cocked to fire. 3RP 1243-45, 1271-74. He tried to keep the gun’s safety on, but sometimes it came off on its own. 3RP 1244, 1271, 1273. George had, however, never used the gun before. 3RP 1271, 1305.

Although Dickman said she woke up George while McGrew was returning to the car, George said he was awake to see McGrew come out of the minimart and Millender follow McGrew. 3RP 1189-90, 1192-93. George thought, however, that by the time he had gotten out of McGrew’s car, McGrew was already pumping gas. 3RP 1193, 1195-96.

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<sup>4</sup> George was nineteen years old when the shooting occurred.

George saw both Clark and the “white guy” standing with their backs to the minimart, perhaps ten feet away. 3RP 1192-93, 1248. Like Dickman, George did not know any of the three men. 3RP 1196, 1211, 1252.

George saw Millender pat down McGrew around his stomach and waist, checking for a gun. 3RP 1198, 1209-10, 1264. At that point, George and Dickman agree George tried to walk towards the back of the car where Millender and McGrew were. 3RP 1064-66, 1197, 1209-10, 1264-65. Clark immediately walked a few steps towards George and “exchanged words with [George],”<sup>5</sup> so George stopped moving partway between Dickman and the back of the car. 3RP 1066, 1069, 1146, 1197-99, 1265, 1321. Meanwhile, Dickman noticed the “young white guy” standing next to Clark putting his hands behind his back “whenever something dramatic happened.” 3RP 1070.

George said he got “a bit scared” when Clark first came towards him. 3RP 1210. Aside from the additional presence of Millender and the “young white guy,” Clark was bigger than George, and his eyes were bloodshot red, as though he were high. 3RP 1210-11. It was undisputed

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<sup>5</sup> The content of this conversation was excluded by the court based on the State’s hearsay objection. 3RP 1198. See also 3RP 1059 (after second sustained hearsay objection, court instructed Dickman not to testify to others’ words). See Section C.3., below.

that Clark was much larger than George, “heavysset,” as described by one witness, “really big,” as described by another. 3RP 840-43, 886, 1028-29, 1066-67. Clark was 6’2”, and his weight after death was 207 pounds, but that was after significant fluid loss, and the examiner agreed he might have been about 229 or 275 pounds before death. 3RP 840-41, 886.<sup>6</sup>

George, by contrast, had a “small, medium build.” 3RP 1067. Although he was 6’1” or 6’2”, he only weighed 155 to 160 pounds at the time. CP 98 (bench warrant); 3RP 1067, 1211, 1246. Dickman was also very small – 5’1” or 5’2” and only 98 pounds. 3RP 1067, 1076, 1143.

George got more frightened when he realized what the Millender-McGrew conversation was about<sup>7</sup> and he could see by McGrew’s expression “that this was not a good situation.” 3RP 1211-12, 1263, 1319. Given the seriousness of the subject, George thought the situation was “going to exceed something bad.” 3RP 1263. Frightened for himself and his two friends, he remained roughly at the midpoint between Dickman

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<sup>6</sup> The transcript reflects 275 pounds, but the examiner’s report reflects 229 pounds. Exhibit 91 (page 4, also stamped “00259”); 3RP 886.

<sup>7</sup> This testimony happened after the trial court warned George about hearsay, so George did not testify about the content of the Millender-McGrew conversation. 3RP 1198. See also 3RP 1059 (Court instructing Dickman not to testify to others’ words). George was, however, probably referring to the fact that the conversation was about the murder of Millender’s female “best friend.” 3RP 60, 86.

standing in the car doorway and Millender arguing with McGrew at the back of the car. 3RP 1212.

McGrew finished pumping gas and headed for the driver's door. 3RP 1057-68, 1219-20. George was relieved, thinking, "finally, we get to leave." 3RP 1223. Millender, however, followed McGrew, put his arm around him, and "kind of turned him around." 3RP 1219-21. McGrew had managed to get about halfway into the driver's seat when Millender punched McGrew in the face. 3RP 1068, 1223. McGrew jumped out of the car again and some form of altercation began between him and Millender. Some witnesses indicated the altercation was verbal, one witness said it was a fistfight, and Dickman said McGrew chased Millender behind the Shell station. 3RP 293, 374-75, 487, 973, 990-92, 1068, 1071, 1073, 1086-88.

When Millender punched McGrew, George said he "got really scared," because he had not been in a situation that was "really close like that." 3RP 1223, 1255. He backed toward the still-open passenger door, trying to watch both the incident developing between Millender and McGrew, as well as Clark and the "white guy." 3RP 1280-85, 1287, 1322-23.

George said he was "really...frightened," "just wanted to leave," and "didn't want anything to happen" at that point. 3RP 1225-26.

George said he was frightened by all three men – Millender, Clark, and the “white guy.” 3RP 1254-55, 1324.

As George retreated, Clark came after him, this time moving very fast and aggressively. 3RP 1071, 1091. George sensed Clark's approach, but didn't realize how close Clark had come; he came in “really fast.” 3RP 1225, 1285-87, 1325. Clark surprised George by striking him “a powerful blow” on the back left side of his head, and George fell down and felt dizzy and “not very aware” after the blow. 3RP 1071-72, 1093-94, 1224, 1226-27, 1233, 1287-92, 1324-25, 1327. Given the strength of the blow, George thought Clark must have hit him “with something.” 3RP 1288.

George “was down,” thought he “was going to die,” and had “never been more frightened in his life.” 3RP 1234. George had landed partway inside the car, so he reached for the gun under his jacket. 3RP 1227, 1233-34, 1288-93, 1295-96. He hoped Clark – still over him and “right up on him” – would back away when he saw the gun, that the gun “would maybe stop the situation.” 3RP 1234, 1300-01, 1328, 1331.

Unfortunately, when George put the gun between himself and Clark, Clark “showed no fear” of the gun; instead there was “rage in his face.” 3RP 1235, 1296, 1332. Leaning down into the car, Clark had a hard grip on George's left forearm, and was trying to drag him back out of

the car, while the gun was in George's right hand. 3RP 1235-36, 1245, 1249-50, 1294-95, 1328-30, 1345-47, 1354. George "thought [he] was going to die," was "kind of helpless," and said that he didn't remember pulling the trigger the first time, so when he heard the first shot, he was "kind of shocked." 3RP 1237, 1295.

On the first shot, George said Clark's grip tightened, and it seemed like now he would yank George completely out of the car. 3RP 1237-38, 1294, 1300, 1303-04, 1334-35, 1348, 1355-56. Consequently, George did not think the first shot struck Clark. 3RP 1355. Clark's eyes were still open and bloodshot, and he still "showed no fear." 3RP 1238. George acknowledged that he did not know if Clark had a gun, but he thought he might. 3RP 1341-42.

A second shot came "kind of fast." 3RP 1302, 1332-33. George was "trying to defend himself so he didn't wind up in the hospital or dead," and he fired the gun again, aiming in the direction he was being pulled. 3RP 1238-39, 1299-1300, 1333, 1336-37. He kept firing until Clark let go of his arm. 3RP 1239, 1303-04, 1336-37. As the medical examiner would testify, four bullets struck Clark, injuring him fatally. 3RP 843-44, 879-80.

When Clark let go, George crawled back into McGrew's car and lay down on the back seat. 3RP 1239, 1340, 1348. George said "things

went kind of black,” and he could not remember McGrew or Dickman getting back in the car. 3RP 1239-41. When they were driving, George said he “balled up, like a little kid or something” and was unaware of time passing. 3RP 1240-42.

George said he could not clearly remember dropping Dickman off, but he remembered the expression on her face and remembered seeing blood on her shorts when she got out of the car, as well as blood on the passenger seat. 3RP 1241-42, 1275, 1277. George said he later took off his clothes and threw them away, and at some other point he threw the gun off the Puyallup River Bridge. 3RP 1243, 1275-76. George denied he did this to destroy evidence; instead, he did it because he “just wanted [the clothes] off,” and “just wanted everything that had to do with the situation off him.” 3RP 1277-78, 1345, 1353.

After the shooting, George feared for his own safety and the safety of his family, so he left Pierce County and went to live in Louisiana. 3RP 1246-47, 1249-50, 1314-16. Police in Virginia eventually arrested George in 2008, and he was brought back to Tacoma for trial. 3RP 952, 1250-51.

Dickman’s recollection of the incident after Clark struck and “dropped” George to the ground varied somewhat from George’s. According to Dickman, after George fell, Clark grabbed Dickman by both

arms and began to pull on her. 3RP 1071-73, 1094, 1106-07. Very frightened, Dickman braced her foot in the car and tried to keep from being hauled away. 3RP 1072-73, 1092, 1155, 1168. As Clark grabbed her, Dickman closed her eyes and began praying. 3RP 1072-73, 1094-95.<sup>8</sup>

Dickman could not say how long she stood there, braced in the doorway, although it “felt like a long time.” 3RP 1073. Then she heard very loud gunshots from nearby, and Clark’s grip tightened. 3RP 1073, 1095, 1154, 1164. Dickman kept her eyes closed and she eventually felt Clark’s grip loosen and fall away. 3RP 1195, 1102, 1108, 1121, 1124, 1154, 1164. Still without looking, she sat in the car, and it pulled away. 3RP 1073-74, 1102, 1121, 1154.

Similar to George, Dickman said she was stunned by the events and was not aware of when or how George and McGrew got back in the car. 3RP 1073-74, 1096, 1102, 1107-08. Soon, however, she noticed blood on her shirt. 3RP 1074. Dickman never found out if the blood was George’s or Clark’s. 3RP 1074. Dickman claimed she neither saw the gun nor saw it fired. 3RP 1074, 1103, 1119.<sup>9</sup>

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<sup>8</sup> George acknowledged he was dizzy from Clark’s blow, but he did not remember seeing any contact between Dickman and Clark. 3RP 1297-98.

<sup>9</sup> A detective interviewed Dickman about the shooting the next day, and she told essentially the same story, except that she did not mention Clark striking George. 3RP 1076, 1126-27. Over the course of several hours

Also testifying for the defense was David Moore. Moore, a service technician who had just serviced pump number 1, was considered by police to be the closest uninvolved witness to the shooting. 3RP 619, 657. Moore's white van was parked at pump 1 -- located directly behind pump 3, where McGrew's car was parked. 3RP 969. At the time McGrew's car arrived, Moore was sitting inside the cab of the van completing some paperwork. 3RP 969-70.

Moore noticed McGrew arrive with Dickman as his passenger. 3RP 969-70, 975, 988. Moore did not notice anyone in the back seat at the time, perhaps because George was sleeping. 3RP 975.

Moore noticed two men -- Millender and Clark -- come around the right side of his van, and Millender began talking with McGrew. 3RP 970, 976, 989-90. Moore could not hear what the men were saying, and he was not initially paying much attention to them. 3RP 970

Millender and McGrew began to argue. 3RP 971, 990. According to Moore, the argument soon became a fistfight, in which the pair went over the gas island into the area next to pump 4.<sup>10</sup> 3RP 973, 984, 991-94.

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before the police interview, Dickman had drunk about a cup of Hennessy mixed with milk, and she described her mind as still "boggled" by the events. 3RP 1075-76, 1127-28.

<sup>10</sup> There is occasionally some jumbling of which pump was which during testimony. Based on the testimony and diagrams in the case, McGrew's

Moore continued his paperwork, glancing up only periodically. 3RP 974, 993

The next time Moore looked up, he saw Clark come around to the passenger side of McGrew's car. 3RP 974, 994. Moore was not sure who opened the passenger side door, but he could see someone trying to get out of the back seat. 3RP 974. Clark "reached into the back seat," apparently reaching for the person trying to get out. 3RP 975-76, 978-79. Moore again looked down and continued his paperwork until two or three shots were fired, whereupon he looked up again. 3RP 975-76, 980, 994-95. He saw the man who had been reaching into the car back up two or three steps, fall to his knees, and then fall forward, face-down to the ground. 3RP 980-81, 995, 1007, 1032.

Moore realized a shooting was happening in front of him and decided to get out of and behind his van. 3RP 980, 995, 1029, 1037. Moore did not, however, hear any additional shots after he saw Clark fall. 3RP 980-81, 995-96, 1007, 1029, 1034. All the eyewitnesses agree that shortly after Clark fell, McGrew got back into the driver's seat of his car,

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car was parked at pump 3, the closest pump to the minimart entrance. Pump 4 was simply the other side of Pump 3, and no car was parked there. Pump 1 (where Moore was parked) was directly behind McGrew's car at pump 3, and pump 2 (where State witness Laura Devereaux was parked) was directly on the other side of pump 1. Exhibit 6, 9, 58; 3RP 244.

pulled out of the gas station with Dickman and George, and drove away.  
3RP 981, 996-97, 1017-18.<sup>11</sup>

2. State's Case<sup>12</sup>

a. *Additional Testimony by Millender*

Millender acknowledged parking behind the station and following and confronting McGrew. As McGrew attempted to pump gas, Millender told him, "I knew Raylene<sup>[13]</sup> real good...Talk to me." 3RP 63, 67. Millender claimed McGrew was jumpy, so he told McGrew, "Hey, we're not on that," meaning that he just wanted to talk. 3RP 63, 66. Millender said he saw a "very, very young...black guy" in the back seat of

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<sup>11</sup> Moore was somewhat impeached by his prior statements to police. 3RP 972, 999-1010, 1012-1038-45. In a prior statement, Moore had apparently said he went to the back of his van after the first shot, then came out to see the final shots and to see Clark back up from the car and fall. 3RP 1009-10, 1022-23, 1024-26, 1039-40. Moore still specified that Clark did not stop reaching inside the car for the person in the back seat until after all the shots had been fired. 3RP 1025, 1026, 1029-30, 1039-40, 1043.

<sup>12</sup> Most non-eyewitness testimony is not reviewed herein. A firearms examiner testified all the bullets and casings recovered from Clark's body and the scene either came from the same gun or else could have; 3RP 538-608 (firearms examiner); and a number of police officers testified about montages, the scene, and witness interviews, but could not provide any substantive information about the incident. 3RP 7-56, 202-09, 445-55, 455-63, 464-77, 531-38, 609-69, 670-821, 910-941, and 942-961 (police testimony).

<sup>13</sup> Monique Moseley, also referenced in the transcripts as Ranique Mosley and "Raylene," was Millender's murdered female friend. 3RP 60, 83, 703-04.

McGrew's car reaching under the seat, so he leaned into the car to say, "Hey, man, it's okay," before turning back to McGrew. 3RP 67.

When McGrew finished pumping gas, he tried to get back into his car. 3RP 67-68. Millender admitted blocking McGrew and telling him he "wasn't going anyplace until [Millender] got some answers." 3RP 67-68, 87. Millender also admitted he became angry and "took a swing" at McGrew, but claimed it missed or merely "grazed" McGrew. 3RP 68, 86-87. Almost immediately thereafter Millender claimed he heard gunshots. 3RP 68-69, 88.

Millender instantly fled the scene because he assumed the shots were aimed at him. 3RP 69, 87-88. When he returned a few minutes later, Millender claimed he saw George holding a gun and standing over Clark, although Millender acknowledged all the firing was over by that point. 3RP 70-72.

Millender ran up to Clark as soon as McGrew's car left, and then Millender and his girlfriend Krystal Smith began going through Clark's pockets to remove his drugs "so that [Clark] wouldn't get charged for having them at the hospital." 3RP 73-74. Millender then left the scene to alert Clark's family and to avoid talking to police. 3RP 74-75, 89. Millender later returned to the scene but "kept his distance" by sitting in his car across the street for several hours watching police complete their

investigation. 3RP 75-76, 89. Although Millender knew police were looking for him afterwards, he did not speak to them about the shooting until five years later, when they approached him while he was incarcerated at Shelton. 3RP 90, 92-93.

*b. The Medical Examiner.*

The Pierce County medical examiner found Clark had been struck by four bullets. 3RP 831, 836, 843, 860, 866-68. Three bullets entered within a short distance from each other on the top and the back of Clark's left shoulder. 3RP 844, 898.

One such entry site<sup>14</sup> was in the upper left back, where the shoulder and back come together. 3RP 844. Another bullet entered the left arm at the top of the shoulder and back. 3RP 851. A third bullet entered through the back of the left arm about a half-inch lower than the second bullet. 3RP 858-60. This bullet entered the arm, exited in the armpit, and immediately reentered, going into Clark's torso. 3RP 860. The latter two bullet wounds showed stippling – burned and unburned gunpowder – which indicated the gun was fired no more than three feet from Clark. 3RP 852, 854.

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<sup>14</sup> Although these were repeatedly referred to as the “first bullet,” “second bullet,” and so on, the medical examiner acknowledged there was no way to know in what order the wounds were inflicted. 3RP 878.

A fourth bullet entered the front of the chest on the right side. 3RP 866. The bullet exited and then immediately re-entered, going back into the abdomen. 3RP 866-68. All four bullets were fired in a downward direction (relative to Clark's body), but this fourth bullet entered at a different trajectory – almost straight down. 3RP 844, 867, 877-79. This could have been explained by Clark falling or leaning forward, for example. 3RP 879.

All the bullets would have caused life-threatening injuries, but the "second" bullet, which tore both lungs, was not survivable regardless of medical care. 3RP 851, 857, 865, 872-73. On the other hand, the wounds might not have immediately incapacitated Clark. 3RP 904. The wounds would have been “rapidly incapacitating,” as they would have caused lung collapse, but Clark might have survived the average time for such gunshot wounds – 5 minutes – and might have maintained body control during that whole time. 3RP 904-05.

*c. Monica Johnson.*

Gas station customer Monica Johnson walked past McGrew and Millender on her way into the store. 3RP 288. She confirmed McGrew was attempting to get back into his car and Millender was preventing him, although she didn't see physical contact between the two men. 3RP 288-89. Johnson recalled “they were really loud,” and so she asked “What's

going on?’ of Clark, who was at that moment standing off the sidewalk outside the minimart. 3RP 286, 290, 292, 318. Clark shrugged at her, and Johnson continued into the store. 3RP 292.

Johnson also confirmed Dickman had the passenger-side door open and was standing in the “V” of the open door with her back against the car. 3RP 291, 324. When Johnson walked by Clark, Clark was standing only about “two feet” from Dickman. 3RP 319-20, 324-25, 338. On the way into the minimart, Johnson also noticed the “young white guy” on the sidewalk outside the store. 3RP 337-42.

Johnson said the argument between Millender and McGrew got even louder when she was waiting inside the store to pay, and she looked up and saw George get out of the back of the car. 3RP 293-94. She claimed George then shot Clark several times without provocation. 3RP 295-96, 298.

After McGrew’s car pulled away, Johnson went to assist Clark and noticed Millender going through Clark’s pockets to remove money and drugs. 3RP 299-302. Johnson also claimed she knelt down next to Clark and, with Krystal Smith, tried to stop Clark’s bleeding with some towels, but no one else at the scene witnessed Johnson at Clark’s side. 3RP 299-301, 303, 332, 386-89, 391-92, 398-400, 434-36, 492-94, 496-98, 512-14.

*d. Daniel Brooks.*

Daniel Brooks filled a gas can at one of the pumps and went into the minimart to pay. 3RP 363-66, 368. On his way, he passed McGrew and Millender talking, and at the time, they did not appear upset. 3RP 368, 372-73, 440. Brooks also saw a young black woman, a young black man, and the “young white guy” all standing close to the entrance to the minimart. 3RP 421, 441-42.

While Brooks was standing in line waiting to pay, he looked out the windows and noticed McGrew’s face had become tense, as though the conversation had become unpleasant. 3RP 374, 395, 431. After paying, Brooks walked out of the store and bent down to pick up his gas can where he had left it on the sidewalk, when he saw movement by the pumps, as though Millender “had swung at [McGrew] or something.” 3RP 375, 408.

Then Brooks saw the passenger door open, and a man in the back seat pushed a female passenger out of his way to get out of the car; the man “had to struggle to get out.” 3RP 375-76, 382, 396, 426. He heard a female voice shouting, “Don’t shoot him, [sic] Don’t shoot him.”<sup>15</sup> 3RP 376, 411. Brooks, a former Vietnam veteran, “learned [he] could still do the old military tuck and roll” as he flung himself behind his vehicle, a

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<sup>15</sup> No other witnesses reported any warnings being said by anyone.

truck parked at the minimart. 3RP 377, 412. He took a quick glance up over the truck and claimed he saw the same person who had been arguing with McGrew coming around the back of the car at a dead run toward the passenger door, and then the first shot was fired. 3RP 378.

Brooks said the gun “didn’t have much stopping power,” as the running person kept going to the passenger door, “trying to get to the shooter.” 3RP 379, 381-83, 396. He didn’t know if the victim actually reached or touched George or Dickman, as he wasn’t looking at the time; Brooks had ducked back behind the truck and remained there until he heard male and female voices saying, “Get in the car,” whereupon he looked through the truck’s cab windows to see McGrew’s car pull out of the station. 3RP 381, 383, 385, 414-15. Brooks came out from behind the truck as McGrew’s car was pulling away, and he wrote down the car’s license plate number. 3RP 385, 417-18.

Brooks was absolutely certain that the person shot was the same one who had been talking to McGrew, and also that he had actually seen this person – presumably Millender – move into that position to get shot on the passenger side of the car. 3RP 378-80, 419-20.

*e. Laura Devereaux*

Laura Devereaux was parked at pump 2, on the opposite side of the gas island and one pump down from McGrew’s car, and adjacent to

Moore's van at pump 1. 3RP 482-83. Devereaux noticed four black men and a black woman around McGrew's car. 3RP 484. Two of the men were on the driver's side, and two on the passenger's side. 3RP 484. She testified a woman was at the rear of the car, and based on her clothing and behavior, this was Millender's girlfriend Krystal Smith.<sup>16</sup> 3RP 485-86. The two men on the driver's side of the car were having a loud argument and "looked like they were about to start a fistfight." 3RP 489.

Suddenly, the same men came across the island into the empty space by pump 4, on the opposite side of the island from McGrew's car at pump 3; this was directly behind Devereaux's car, which unlike the other cars at the incident, was pointed south. 3RP 482-83, 487-88. One man threw up his hands and said, "Do you want to do this here?" 3RP 487. Shortly afterward, there was a "pop," and both men threw themselves to the ground. 3RP 487, 507. Devereaux testified that both the men seemed surprised by the shot. 3RP 492. Then Devereaux heard more pops, and she ran behind her vehicle and did not come out until McGrew's car pulled away. 4RP 487, 490-91, 525.

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<sup>16</sup> Devereaux identified the woman as the same woman who stayed behind to assist Clark, and also as wearing a patterned halter top, which the onscene detective said Krystal Smith was wearing. 3RP 496, 529-30, 617.

After McGrew's car pulled out, Devereaux got some towels and gave them to the people helping Clark – apparently Millender and Smith – to help them stop the bleeding. 3RP 494-96, 529-30. Devereaux watched Millender and Smith going through Clark's pockets and warned them not to move Clark to do so, but Smith looked up at Devereaux and said, "Fuck you," so Devereaux backed away. 3RP 496-97, 514-15, 527.

*f. Brett Beal.*

Gas station clerk Brett Beal remembered taking McGrew's \$6 for gas, a transaction also caught on the store's video surveillance.<sup>17</sup> 3RP 211-12, 224. Beal was not paying attention to what was going on outside and never saw any interaction either between Millender and McGrew or between Clark and George. 3RP 224, 226, 240.

When he heard the first shot, Beal thought it was a car backfiring, so he looked outside. 3RP 223. When Beal saw shots coming "from" McGrew's vehicle, he grabbed the phone and ducked behind the counter while dialing 911. 3RP 223, 226

Beal did not get up again until all the shots were fired, whereupon he saw McGrew jump into the driver's seat. 3RP 228. As McGrew's car

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<sup>17</sup> At the time of the shooting, the gas station had no surveillance pointed towards the cars or pumps. 3RP 212, 250.

pulled away, Beal gave its license plate number to the 911 operator. 3RP 223-24, 226-27, 230.

Beal saw Clark lying on the ground about the same time he saw the car driving away. 3RP 228-29, 259. Shortly thereafter, Beal gave some towels to Devereaux, who took them to Clark to try to stop the bleeding. 3RP 230.

Although Beal once referred to shots coming “from” McGrew’s car, he never saw the gun that fired the shots, and he believed McGrew – the car’s driver and the person he saw jump into the driver’s seat – was “definitely” the shooter. 3RP 223, 228, 230-31, 241-42. Beal, moreover, did not remember ever seeing the passenger door of McGrew’s car open. 3RP 256.

*g. Statement by Krystal Smith*

Millender’s girlfriend Krystal Smith did not appear at trial, but an officer testified as to her statement on the day of the shooting. Smith was nervous and evasive with officers. 3RP 617-18, 625, 650-52, 663, 735, 945, 955. She told officers she wanted to leave, and only remained because they ordered her to do so. 3RP 618-19, 652-53. The officer who interviewed her reported that her answers did not match up to those of other witnesses. 3RP 945.

Smith claimed she had been with her boyfriend, “Kevin Hall,” shortly before the shooting, but police could not find “Hall” in their database. 3RP 946, 955. Although other witnesses told police Smith seemed to know another person at the scene – apparently Millender – Smith claimed to officers she only heard that person talking on a cell phone. 3RP 946-47. When confronted with these inconsistencies, Smith refused to talk further. 3RP 947.

An officer drove Smith to several locations after the shooting, looking for “Kevin Hall” without success. 3RP 947. The officer eventually dropped Smith off at an apartment complex.. 3RP 947-48. Thereafter, Smith could not be found. 3RP 737, 951-52.

3. Other relevant facts.

The State charged George with first degree murder, or, in the alternative, second degree felony murder based on first or second degree assault. CP 5-6. The parties agreed second degree intentional murder and manslaughter were appropriate lesser-included offenses, and the jury was so instructed. CP 40-45; 3RP 1368.

George’s attorney proposed self-defense instructions. CP 13-23. The State objected and argued the court should find George’s fear “unreasonable.” 3RP 1366-67, 1369-70. The court agreed and refused to

instruct the jury on self-defense. 3RP 1377-84. In its oral findings,<sup>18</sup> the court found that although George was “abjectly fearful,” such fear was unreasonable. 3RP 1379-81. The court specifically found the medical examiner’s testimony proved Clark was shot “in the back” and “in a downward direction,” so therefore Clark must have been retreating or on his knees, even though no eyewitness claimed Clark ever turned away from George. 3RP 1383. The court held “the fatal lethal force to Mr. Clark was not justified under these circumstances.” 3RP 1383-84.

The defense objected to the court’s decision and argued the court was improperly weighing the evidence rather than putting itself in George’s position and taking the evidence in the light most favorable to him. 3RP 1384-85. The defense moreover objected to the findings and pointed out that the bullets entered in the top of Clark’s shoulder and back, a circumstance that might be explained by Clark leaning into the car to assault George. 3RP 1384.

The court reiterated its decision and did not instruct on self defense. 3RP 1384, 1385. During closing argument, the court also sustained the State objection to George’s attorney arguing self defense. 4RP 70. In rebuttal, the prosecutor argued, “[T]here are no instructions in

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<sup>18</sup> No written findings exist as to the self-defense issue.

here about self-defense. Self-defense is not an issue in this case.” 4RP 88, 90.

The jury acquitted George of first degree murder and was unable to agree on a verdict on intentional second degree murder. CP 59-60. It found George guilty of both second degree felony murder and first degree manslaughter. CP 61-62. By special verdict, the jury found George was armed with a firearm at the time of the crime. CP 63-64.

Post-trial, George filed a motion to arrest judgment based on the failure to instruct the jury on self-defense. CP 65-67. The court declined to hear the motion at sentencing because it was not properly noted. 5RP 2-3. The motion was not subsequently noted or heard.

At sentencing, the court told George, “if it happened the way you said, the ballistic evidence would be different.” 5RP 19. The court reiterated its belief that George shot Clark “in the back,” and sentenced George to the top of the standard range – 220 months, plus an additional 60 months for the firearm enhancement. CP 73, 75-76. 5RP 4, 19-20.<sup>19</sup> George appeals. CP 84.

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<sup>19</sup> George had an offender score of zero, as his only two prior offenses were misdemeanors. CP 73.

D. ARGUMENT

1. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LAW OF SELF DEFENSE.

All that is required of a defendant requesting self defense instructions is “some evidence” that, if believed by the jury, show the defendant's actions were based on a reasonable apprehension of great bodily harm and imminent threat. See, e.g., State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A trial court may refuse self defense instructions only where “no credible evidence” supports the claim. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In making the determination, all the evidence must be taken in the light most favorable to the defense. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

Here, George produced ample evidence both: 1) that he subjectively feared he faced death or serious bodily harm; and 2) that under all the circumstances, such a belief was reasonable. As such, it was error for the trial court to refuse self-defense instructions.

a. The Question of Whether George’s Fear was “Reasonable” is Reviewed De Novo.

The test for whether a defendant has met his burden incorporates both subjective and objective components. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective component requires the court to

stand in the defendant's shoes and view the defendant's actions in light of all the facts and circumstances known to the defendant. Walker, 136 Wn.2d at 772; Janes, 121 Wn.2d at 238. The objective component requires the court to determine what a reasonably prudent person would have done in the defendant's situation. Walker, 136 Wn.2d at 772-73.

The standard of review of a trial court's refusal to instruct a jury on self-defense depends on the basis for the court's decision. Walker, 136 Wn.2d at 771-72. If the trial court refused to give self-defense instructions because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm – an issue of fact – the standard of review is abuse of discretion. Id. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted – an issue of law – the standard of review is de novo. Id.

Here, as the trial court noted, George testified repeatedly and unambiguously to his subjective fear. 3RP 1210, 1223, 1225-26, 1234, 1237, 1238, 1247, 1307, 1308, 1318, 1323, 1324, 1328, 1332, 1336, 1341, 1342, 1358. For example, George testified he believed that if Clark pulled him out of the car, he would either end up in the hospital or dead. 3RP 1336. Although the court did not use the exact terms, it correctly found

George produced evidence of “abject fear” of imminent death or great bodily harm. 3RP 1379-80.

The trial court, however, did not instruct on self defense because it found George’s fear unreasonable under Walker. 3RP 1377, 1379-83.

The issue is therefore reviewed de novo. Walker, 136 Wn.2d at 771-72.

b. Taken in the Light Most Favorable to Him, George Produced Sufficient Evidence that His Fear was Reasonable.

As noted, all evidence must be taken in the light most favorable to George. Callahan, 87 Wn. App. at 933. George is, moreover, entitled to the benefit of all of the evidence, whatever its source. State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

George and the other witnesses testified that Clark was 229-275 pounds, while George was 155-160 pounds. 3RP 840-43, 886, 1028-29, 1066-67, 1211, 1246. George thought Clark was on drugs, and this observation is corroborated by the fact that multiple witnesses watched Millender and Krystal Smith going through Clark’s pockets to remove money and drugs after the shooting. 12RP 73-74, 299-302, 496-97, 514-15, 527, 1210. Moreover, George testified he thought, given how strong the blow to his head was, that Clark was armed, in that he must have hit him “with something.” 3RP 1288.

Also, the circumstances of the situation implicate the possibility of deadly force. As Millender testified, his “best friend” had “just been brutally murdered and [he] wanted to have some answers.” 3RP 60, 86. Confronting someone at a gas station about a female friend’s murder – not to mention having your friend keep the target’s friends away – suggests a situation fraught with potentially deadly violence.

Moreover, Millender was plainly the antagonist here, while both McGrew and George were simply trying to leave. Clark, for his part, assaulted George from behind and “dropped” him while George was retreating, apparently only attacking George because Millender had attacked McGrew. 3RP 1071-72, 1093-94, 1224, 1287-88.

Moreover, a third man – the “young white guy” – appeared to be with Millender and Clark. 3RP 1061, 1069-70, 1192-93, 1255. Thus, George knew a third man, also possibly armed, was available to join in the fight.

The trial court found State v. Walker controlling, but Walker is distinguishable. In Walker, the defendant knew the victim, Roger Shepardson, personally and had socialized with him. 136 Wn.2d at 768-69. Walker’s wife had admitted carrying on an affair with Shepardson, and after her admission, she told Walker she would not see Shepardson again. Id. at 769. A few days later, Walker was drinking beer with friends

when he noticed his wife had vanished. 136 Wn.2d at 769. He went in search of her and found her outside, talking with Shepardson, who was their neighbor. Id. The two men had a verbal altercation, with Walker telling Shepardson to leave them alone. Id. Meanwhile, Shepardson shoved Walker, head-butted him, and taunted him, telling him that “if Defendant was a man, he would do something about [the affair].” Id. Walker and his wife returned to their house. Id.

Once inside, Walker’s wife told him that she would talk to Shepardson whenever she felt like it. 136 Wn.2d at 769. Walker grabbed a large hunting knife, put it in his back pocket, and went back outside. Id. at 770. He maintained that he had no intention of fighting, only arguing further, but he took the knife because Shepardson was bigger, and Walker had back injuries that limited his movements. Id. In Walker’s words, “I thought he would kill me if I got in a fight with him.” Id.

Shepardson was still standing in the street outside. 136 Wn.2d at 770. He shouted, “Let’s do it,” and attacked Walker with his fists, eventually driving Walker back against a car. Id.

Once trapped against the car Walker claimed he feared for his life so he drew the knife and stabbed Shepardson. Id. at 770-71. The trial court denied self-defense instructions, and the Court of Appeals affirmed, finding: “A simple assault, viewed objectively, does not justify one’s use

of deadly force in defense. In essence, Walker took a knife to a fistfight.”

136 Wn.2d at 776.

The Supreme Court disagreed with this portion of the analysis:

In making this ruling, the appellate court makes no reference to what a reasonable person may have perceived in Defendant's situation - it merely states a person may not use deadly force to defend against a fistfight. The Court of Appeals' statement regarding the fistfight implies no defendant could ever reasonably fear great bodily harm as a result of a beating with the naked hands. This implication omits the subjective aspect of the inquiry, thereby conflicting with Walden.<sup>20</sup>

136 Wn.2d at 776 (emphasis in original). The Supreme Court nonetheless affirmed, finding:

Shepardson and Defendant had one or two verbal altercations prior to the night of the fight, and during one of those altercations Shepardson threatened to “kick the shit out of” Defendant. Defendant, however, never heard Shepardson make any death threats against him in contrast to the facts of Painter.<sup>21</sup> Shepardson was never portrayed as being a violent person or having a history of injuring or killing people. Prior to engaging in the fistfight, Defendant had no reasonable ground to fear that Shepardson would inflict great bodily harm on Defendant.

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<sup>20</sup> State v. Walden, 131 Wn.2d 469, 474-75, 932 P.2d 1237 (1997) (finding in part that deadly force might be justified against an unarmed assailant).

<sup>21</sup> State v. Painter, 27 Wn. App. 708, 709, 713, 620 P.2d 1001 (1980) (in part holding that disabled woman might be justified in shooting stepson, who was unarmed but very threatening under the circumstances), review denied, 95 Wn.2d 1008 (1981).

Defendant went into the street to argue with Shepardson, and the argument turned into a simple fistfight, even taking into account Defendant's subjective perceptions. Any reasonable person standing in Defendant's shoes would have perceived that only "an ordinary battery is all that [wa]s intended," in which case the use of deadly force was unjustified.

136 Wn.2d at 778, 779.

The situation here is distinguishable from Walker. George knew the initial confrontation was not about an affair, but about a young woman's murder. 3RP 60, 86, 1211-12, 1263, 1323. Unlike Walker, George did not know Clark and indeed, had never seen him before. 3RP 1211. Unlike Walker, George did not initiate any portion of the altercation with either Millender or Clark, but instead was attacked upon retreating. 3RP 1071-72, 1093-94, 1223-24, 1287-88.

George also did not actively arm himself before interacting with Clark, but only grabbed for the gun after Clark had already struck him hard in the head from behind, apparently "with something," and knocked George down. 3RP 1071-72, 1224, 1234-35, 1287-88, 1293. The "young white guy" was apparently available to assist Clark and Millender. 3RP 1061, 1069-70, 1192-93, 1255. While Walker was somewhat smaller than Shepardson, George was significantly smaller than Clark, and Clark appeared under the influence of drugs, thus adding another element of reasonable apprehension on George's part. 3RP 840-43, 886, 1028-29,

1066-67, 1210-11, 1246. Finally, George believed that someone in the conflict was likely armed, in part because of the strength of Clark's blow to George's head and in part due to the reason for the confrontation. 3RP 1177-79, 1288. All these facts distinguish George's case from Walker.

Here, the trial court weighed the evidence and reached the conclusion that the forensic evidence refuted George's version of events. 4RP 1383-84. This was wrong for at least two reasons. First, as the defense attorney argued, the downward trajectory of all the bullets – as well as their mostly grouped location on the top and back of Clark's shoulder – might be explained by Clark leaning down to reach into the back seat of a low, two-door car to grab George's arm. 3RP 1384.

Second, weighing the evidence is simply inappropriate in this situation – all evidence must be taken in the light most favorable to the defendant. Callahan, 87 Wn. App. at 933. Here, by making a determination that the weight of the evidence did not support George's story, the trial court violated the primary rule for giving self-defense instructions – that is, assume that the jury might believe a defendant's story. See, e.g., McCullum, 98 Wn.2d at 488 (“[a]lthough it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue”).

When a trial court fails to give self-defense instructions where they are warranted, reversal is required. See, e.g., Callahan, 87 Wn.2d at 928. The Court should reverse and remand for a new trial, at which the jury should be instructed on self-defense.

2. THE TRIAL COURT ERRED BY SUSTAINING SPURIOUS “SPECULATION,” “RELEVANCE,” AND UNSPECIFIED OBJECTIONS TO EVIDENCE RELEVANT TO THE QUESTION OF WHETHER GEORGE’S FEAR WAS REASONABLE.

Due process requires that a criminal defendant be afforded “a meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). Thus, both the state and federal constitutions guarantee a criminal defendant the right to present evidence in his own defense. U.S. Const. amend. VI, XIV; Const. art. I, § 22. This right is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

A defendant’s subjective belief that an attacker is armed is certainly relevant, competent evidence to a claim of self defense. See, e.g., McCullum, 98 Wn.2d at 489 (a defendant need not be in actual danger, but may act on a good faith belief); United States v. Keiser, 57 F.3d 847, 851-52 (9<sup>th</sup> Cir.) (defendant in self-defense case entitled to act

on mistaken belief that victim was armed), cert. denied, 516 U.S. 1029 (1995). Not only does the belief potentially make the defendant's fear of death or great bodily injury more objectively reasonable, but a defendant's subjective mental state is, in and of itself, part of what a trier must determine in a self defense case. Walden, 131 Wn.2d at 474 (both subjective and objective prongs must be met in a self-defense case).

At one point, George testified that Clark "showed no fear" when he saw George's gun, "like he had one of his own." 3RP 1235. The Court sustained the State's objection, and struck this portion of George's testimony as "speculation." 3RP 1235.

Next, when George tried to testify, "What they came there for was really serious" – an apparent reference to the discussion between Millender and McGrew about the death of Millender's friend – the Court again sustained the State's "speculation" objection. 3RP 1324.

Third, when George was asked on redirect whether he thought another gun was present besides his, he replied, "I didn't see one. I knew somebody had something." 3RP 1339. Again, the State's speculation objection was sustained. 3RP 1339. The defense attorney tried again, asking, "Did you feel as though anyone was armed?" 3RP 1339. The State again objected, arguing, "[I]t is irrelevant and speculative what he was feeling." 3RP 1339. The court sustained the objection. 3RP 1339.

George, who had been shot at many times on Tacoma's streets, was not permitted to explain that he believed Clark and/or Millender had a gun. The court determined – and in fact the jury heard – that it was “irrelevant” that George believed the attackers had a weapon. 3RP 1339.

In a case where the defendant is attempting to raise self-defense, this conclusion is mind-boggling. The evidence excluded goes directly to the only question George tried to put before the jury – whether George reasonably believed his life was in danger.

There might have been any number of reasons George believed Clark or Millender had a weapon – the confidence of the attackers; the unprovoked nature of the assaults; Millender's checking of McGrew to see if he had a weapon; Dickman's observation that “the young white guy” kept putting his hands behind his back; or the recent shooting death of Millender's female friend, which was the reason Millender instigated the conflict. There might have been other, additional reasons foreclosed by the court's sustained objections to the subject matter. But it was neither speculative nor irrelevant for George to speak to his beliefs.

In addition to George's testimony about his fear of a weapon, Dickman testified that she was “really scared...panicking” during the incident. 3RP 1071. But when Dickman attempted to testify as to why she was scared, the court upheld the State's unspecified objection. 3RP

1071. A short time later in Dickman's direct testimony, the court also upheld a "relevance" objection to the question, "[W]hat was going through your mind as you saw [Clark] approaching the vehicle?" 3RP 1091-92.

In a self-defense case, a witness's reasons for her fear are admissible and relevant, because they can show that the defendant's similar fear was a reasonable one. Compare State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000) (in self defense case, lay witnesses' personal experiences of situation were permissible evidence, although questions as to whether there was "any reason" for defendant to defend himself went too far by eliciting improper lay opinion testimony), remanded and eventually affirmed on other grounds, 147 Wn.2d 238, 53 P.3d 26 (2002)

The exclusion of George's and Dickman's testimony as to their fear was error that deprived George of his right to present a defense. This Court should reverse based upon the failure to instruct on self-defense, see Section D.1., supra, but should also rule on this evidentiary error so that it does not recur on retrial.

3. THE TRIAL COURT ERRED WHEN IT EXCLUDED AS "HEARSAY" STATEMENTS MADE BY THE PARTICIPANTS IMMEDIATELY BEFORE THE SHOOTING.

Both Dickman and George attempted to testify repeatedly about statements made by the participants just prior to the shooting. 3RP 1057,

1059, 1198. Specifically, Dickman attempted to testify about telling McGrew someone was following him and also to the words Millender said when he first approached McGrew. 3RP 1057, 1059. And George attempted to testify to the words Clark said to him as he first approached George – words that caused George to stop moving towards Millender and McGrew. 3RP 1197-99.

The trial court not only sustained the State’s “hearsay” objections to these, but also instructed the witnesses, “That is hearsay. You can’t testify as to what somebody else said.” 3RP 1059, 1198. Dickman and George took these advisements to heart, not testifying about the content of Millender and McGrew’s conversation, and testifying only that George and Clark “exchanged words” when George tried to go to the back of the car. 3RP 1063, 1066-67, 1078-79, 1211-12, 1263, 1265.

None of the excluded evidence was hearsay. Dickman tried to warn McGrew that there was someone “following him,” and she heard Millender tell McGrew, “Let’s walk around the corner.” 3RP 1057, 1059. These statements are plainly not statements offered for the truth of the matter asserted, but instead only to give context for the incident. ER 801(c). It is unknown what Clark said to George that made him stop walking towards McGrew, but it is difficult to see how the content of that statement could be for the truth of the matter asserted, rather than for its

effect on George. Moreover, the court's broad ruling excluded the content of the conversation between Millender and McGrew about "Raylene's" death, which was unlikely to be for the truth of the matter asserted.

This testimony was erroneously excluded and, as in the preceding section, the exclusion of the evidence deprived George of his constitutional right to present a complete defense. See Crane v. Kentucky, 476 U.S. at 690. George's convictions should be reversed due to the failure of the trial court to instruct on self-defense, but this Court should rule on this evidentiary issue, in order to prevent its recurrence.

4. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE TENDING TO SHOW CRIMINAL PROPENSITY.

a. The Trial Court Erred When it Permitted the State to Cross-Examine George About His Admitted Carrying of a Weapon as a Minor and Characterize That as Having "Made a Choice to Break the Law."

During direct testimony, George acknowledged carrying a gun for self-protection since he was about sixteen years old. 3RP 1216-17. During cross-examination, the prosecutor pointed out that a minor carrying a gun was not legal, and George agreed. 3RP 1258. The prosecutor then asked, "So you, also, made a choice to break the law at that point in time; is that correct?" 3RP 1258. The defense "relevance" objection was overruled, and George answered "yes." 3RP 1258.

George had, as noted, already admitted to the actual carrying of the weapon from an early age. 3RP 1216-17, 1258. The prosecutor's question could therefore only be designed to bring out a single additional "fact" – that George was a person who would choose to break the law. This is even evident from the question: "So you, also, chose to break the law at that point...?" 3RP 1258 (emphases added).

The first sentence of ER 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Criminal propensity evidence is thus inadmissible under Washington law. See, i.e., State v. Torres, 151 Wn. App. 378, 212 P.3d 573; State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The only exception is the rubric of ER 404(b) itself, which was obviously not followed here. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1999) (before admitting prior bad acts under ER 404(b), a court must: (1) identify the purpose for which they would be introduced; (2) determine they are relevant to prove an element of the crime; and (3) weigh their probative value against their prejudicial effect).

Even when prior bad acts are admitted, they are not actually admitted to show propensity, but only for some other valid purpose, i.e., motive, opportunity, intent, preparation, plan, knowledge, identity, or

absence of mistake or accident. See ER 404(b). No such purpose is evident here with reference to George's knowledge that he was breaking the law at 16 when he carried a gun.

The defense objection should therefore have been sustained. The court's failure to sustain the objection moreover informed the jury that they should consider the evidence for its most obvious purpose – to show that George was the type of person who chose to break the law. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020 (1991). (jurors are naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended). As propensity evidence is not admissible, this court should prohibit such questioning upon retrial.

b. The Trial Court Erred When it Permitted Over Objection Cross-Examination of George About the Other Shootings He Had "Been Involved With."

During direct testimony, George explained that he had been shot at multiple times because he had been in the presence of McGrew. 3EP 1177-79, 1215-16. Essentially, McGrew would anger or upset people, and those people would shoot at McGrew, thereby endangering George when he spent time with his friend. 3RP 1175, 1177-79, 1215-16, 1256-57. During cross-examination, the prosecutor asked George:

So this whole scenario at the station is very different from, like, the shootings you've been involved with in the past, isn't it?"

3RP 1267.

George's attorney immediately objected, and, outside the presence of the jury, argued that the prosecutor's question implicated 404(b) concerns by implying George was an actual actor in a prior shooting, which he had not been. 3RP 1267-69. The trial court overruled the objection, finding:

involved or experienced can be used interchangeably. It doesn't necessarily mean that he, himself, shot his gun off in the past. He had testified on Thursday that he had been involved in multiple shootings...[H]e opened the door on this multiple shooting in his past history; and I think that Counsel is, certainly, entitled to explore it....

3RP 1269-70. After the jury returned, the court overruled the objection in their presence, although the prosecutor did nonetheless reword the question when re-asking it. 3RP 1270-71.

In fact, "involved" and "experienced" have significantly different meanings. Here, both words were used as verbs, rather than adjectives.

The verbs are defined in relevant part:

**Involve** To draw in as a participant: engage, employ...(an organization...heavily *involved* in the nation's defense program – R.J.Cordiner)...<he got *involved* in a lawsuit>

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2002), at 1190.<sup>22</sup>

**Experience** To have the experience of: meet with: FEEL, SUFFER, UNDERGO (the first need for the reader of poetry is to ~ its impact – Mary M. McCollum)...**syn** UNDERGO, SUSTAIN, SUFFER: EXPERIENCE indicates an actual living through something and coming to know it first-hand, rather than through hearsay or report.

Id. at 800.

Here, the defense was correct in arguing that “experienced” implies a limited and passive role, while “involved” implies an active role. The trial court’s cavalier dismissal of the distinction was inappropriate, and its overruling of the objection would indicate to the jury that the prosecutor’s implication – that George had been an active participant in past shootings – was an acceptable and correct one. See, i.e., State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (where trial court overrules legitimate objections to prosecutorial misconduct, it may lend authority to the inappropriate actions of a prosecutor); State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (same). This

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<sup>22</sup> The dictionary lists many possible meanings for each of these words. “Involve” has at least eight meanings listed, not counting their sub-parts. WEBSTER’S, supra, (2002), at 1190. By the same count, “experience” has at least four meanings. Id. at 800. The definitions given are the ones most applicable here.

Court should, upon George's retrial, prohibit the implication that he was an actor in past shootings.

c. The Trial Court Erred by Admitting the Montage Used With Witness Monica Johnson, as the Montage Contained George's Booking Photograph.

One witness, Monica Johnson, successfully identified George from a montage which police administered close in time to the shooting. 3RP 307-11, 628-35. George did not object to admission of evidence that Johnson had successfully made the identification, or to evidence about how the montage was made or administered. 3RP 307-11, 628-35. He did, however, object to admission of the montage itself because the montage contained a photograph of George from a previous booking. Exhibit 48B, 48C; 3RP 635-39. The trial court overruled George's objection. 3RP 639-41.

This Court has determined at least twice that admission of evidence of or about booking photos may raise a prejudicial inference of criminal propensity. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005); State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000) (“[M]ug shots from a police department ‘rogues gallery’ are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior.”). As in Sanford and Henderson, the existence of George's booking photograph in Johnson's

montage informed the jury George had been previously arrested for another crime. Sanford, 128 Wn. App. 286-87.

Moreover, as in Sanford, identity was not at issue in George's trial because George admitted shooting Clark. 128 Wn. App. at 287; 3RP 1253. Thus, as in Sanford, the use of the montage itself was completely unnecessary. Compare Sanford, 128 Wn. App. at 287. This Court should therefore require that the montage itself be excluded upon retrial.

E. CONCLUSION

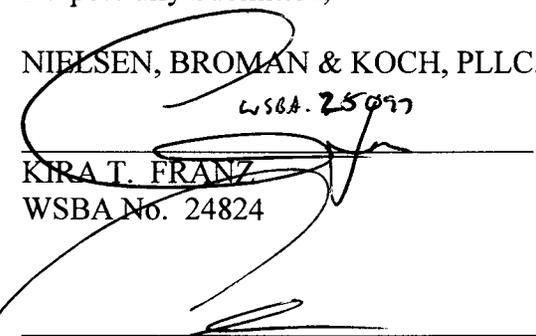
The failure to instruct the jury on self-defense, aggravated by evidentiary errors, requires a new trial. Although the self-defense issue mandates reversal, this Court should also review all the evidentiary issues raised herein, as they are otherwise likely to recur at a new trial.

DATED this 28th day of October, 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 39085-0-II
	)	
D'MARCUS GEORGE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF OCTOBER 2009.

X *Patrick Mayovsky*

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