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

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6. Did the trial court properly exercise its discretion in admitting the photomontage from which an eyewitness identified the defendant as the shooter?

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B. STATEMENT OF THE CASE.

1. Procedure

On January 10, 2005 , the Pierce County Prosecutor's office charged appellant, DMarcus George ("defendant"), with one count of first degree murder in Piece County Cause No. 05-1-00143-9. CP 104. A warrant issued for defendant's arrest. CP 101. Defendant first appeared before the Pierce County Superior court on March 31, 2008. CP 102. The State filed an amended information adding a second count charging defendant with felony murder in the second degree predicated on assault. CP 5-6. The State alleged firearm enhancements on each count. *Id.* Both charges stemmed from an incident that occurred on June 21, 2004, which resulted in the death of Isaiah Clark. *Id.*

On January 15, 2009, the case was assigned to the Honorable Katherine M. Stolz for trial. RP 2. At the close of evidence, defendant proposed instructions on self-defense. CP 7-26. After considering the

decision in *State v. Walker*, 136 Wn.2d 767, 966 P.2d 883 (1998), and hearing the arguments of counsel, the trial court found that defendant had not met his burden in adducing evidence showing that he was entitled to such instructions. RP 1366-1386; CP 27-58. The defendant took exception to the court's ruling. RP 1384.

The jury was instructed on premeditated first degree murder and the lesser crimes of murder in the second degree (intentional) and manslaughter in the first degree on Count I; the jury was instructed on second degree felony murder charge in Count II. CP 27-58. After deliberations, the jury returned verdicts finding defendant not guilty of premeditated murder and indicating an inability to agree on the lesser crime of intentional murder; the jury did convict defendant of manslaughter in the first degree as to count I. CP 59, 60, 61. The jury also convicted defendant of felony murder in the second degree as charged in Count II. CP 62. The jury also returned special verdicts finding defendant was armed with a firearm at the time of these crimes. CP 63, 64.

The court held sentencing on March 13, 2009. 3/13/09 RP 2-23. On the conviction for felony murder, the court imposed a high end standard range sentence of 220 months – based upon a zero offender score- plus an additional sixty months for the firearm enhancement for a total period of confinement of 280 months, followed by 24-48 months of community custody. 3/31/09 RP 20. The court assessed extradition costs

of \$3,675.96 and restitution of \$10,662.92 for medical and burial expenses as well as \$710 in other legal financial obligations. 3/31/09 RP 20; CP 70-83. The court did not impose judgment on the manslaughter verdict. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. CP 84-96.

## 2. Facts<sup>1</sup>

On June 21, 2004, Monica Johnson, was with her four children at the Parkland Shell/Mini Market at 132<sup>nd</sup> and Pacific Avenue in order to get gas for her car. RP 281-82. There were several other vehicles at the station including a Cutlass type car parked at Pump 3, which was nearest the store. RP 283-85. Two men were standing near the driver side door of this vehicle parked at Pump 3. RP 285. Another man, later identified as Isaiah Clark, was standing in front of the doors leading into the store. RP 286. A white man was standing outside of the store, at the corner, as well. RP 337. As Ms. Johnson walked by the two men to get to the door, she could hear them arguing. RP 288-89. The man with the striped shirt, who appeared to be the driver of the car, was trying to leave, and the man with the braids seemed to be causing the argument. RP 289. Ms. Johnson could see that there was someone sitting in the back seat of this car on the

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<sup>1</sup> In its case in chief, the State spent considerable time adducing evidence regarding the police investigation and how the police ultimately identified defendant as being a suspect in this case. This evidence largely became irrelevant when defendant admitted being the shooter in the defense case and will not be summarized here.

passenger side; it appeared to her that it was a male. RP 289-90. The passenger side door was open and a female was standing outside the car with her back against the open door. RP 291, 324. On her way into the store, Ms. Johnson passed by Clark who was standing in front of the doors, just off the sidewalk; he was not saying anything and he didn't have anything in his hands. RP 290-91. She asked him what was going on -- as the arguing was now getting loud; Clark responded with a shrug, his hands at shoulder height and elbows bent and a shake of the head. RP 292.

Ms. Johnson proceeded to the register. RP 293. The argument outside became very loud and drew her attention back outside. RP 293. She saw the driver return to the car, then a man got out of the back of the Cutlass, held out his gun and shot Isaiah Clark; she heard two gunshots and saw Clark begin to fall. RP 294-95. The man shot three more times as the victim was falling. RP 295. It did not appear to her that Clark had moved since she passed him on her way into the store. RP 296. Immediately after the shots the female pulled the seatbelt forward and the shooter backed into vehicle, then the car sped off. RP 299. Ms. Johnson checked on her children then went to Clark and tried to stop the bleeding, until the medics arrived. RP 299-303. The man with the braids came over to Clark; he appeared to know Clark and was distraught. RP 300. On July 8, 2004, Ms. Johnson was shown a photo montage and asked if she recognized the shooter in any of the pictures. RP 307-309. She identified the defendant photograph as the shooter. RP 309-11. Ms. Johnson also

made a courtroom identification of the defendant as being the shooter. RP 311-12.

Brett Beal was working as the cashier at the Parkland Shell Mini Market on June 21, 2004. RP 210-11, 221-22. He was working inside with customers, so did not see anything, but recalls hearing several shots fired at his station just past 5:00 p.m. RP 222. He believes that there was a series of six shots with a pause between the first one and the next five. RP 222. The shots were coming from the general vicinity of the car that was parked at pump 3. RP 223. He immediately got on the phone to call 911, then looked to get the license plate number of the car; he passed this information on to the 911 operator. RP 223, 226-27. Another customer came in with the license plate number, he compared his number with the other and they were the same number. RP 227. He estimates the suspect car left less than twenty seconds after the shots ended. RP 227. Mr. Beal testified that there were a few people who went to where the man was laying on the ground; one woman came inside to ask for some towels to stop the bleeding. RP 229-30.

Daniel Brooks is a retired military man who is a frequent customer of the Parkland Shell station. RP 358-59. He was there on June 21, 2004, getting a can of gas for his lawn mower. RP 359-61. Mr. Brooks filled his gas can at Pump 4, but did not park his pickup at the pump. RP 362-64. He recalls that there a Cutlass-type car at Pump 3; the driver of this car was pumping his gas. RP 365-68. As the driver pumped his gas a

stocky man came over to talk with him; nothing about the tone of this conversation caused Mr. Brooks any concern at this time. RP 368. He recalled a few other people being over by the building, but they did not seem to be a part of this conversation. RP 370. One was a young white college student who was waiting for a ride; he ran off when the shooting began. RP 371, 383-84. As Mr. Brooks walked to the building to pay for his gas, he walked by the Cutlass where the two men were talking; nothing about their conversation caused him any concern. RP 373.

After paying for his gas, Mr. Brooks came outside; the driver who had been pumping his gas looked irritated and Mr. Brooks assumed the conversation had gone sour. RP 374. He then saw the other man in the conversation take a swing at the driver. RP 375. A second or two later the door to the Cutlass opened and Mr. Brooks could hear a female inside shout "Don't shoot him" several times in a row. RP 375-77. Assuming that someone had a gun, Mr. Brooks set down his gas can and did a "tuck and roll" to come up on the other side of his truck. RP 377-78. A man who was coming out of the back seat of the Cutlass was shooting at a man. RP 379-380. Mr. Brooks thought that the man who was shot was the same man who had been talking to the driver of the Cutlass. *Id.* Mr. Brooks heard about six shots. RP 380. Mr. Brooks testified that he was taking cover behind his truck and when he looked back around he saw the man who had been shot collapsing. RP381. Mr. Brooks did not see anything in the hands of the man who had been shot. RP 383. Mr. Brooks got the

license number of the Cutlass then went inside the store to relay this information to the cashier. RP 385. He then went back out to see if he could help the victim. RP 385.

Rickie Millender testified that he is a good friend of Isaiah Clark and that he grew up with Freddie McGrew. RP 59-60. McGrew and Millender had a mutual friend Ranique<sup>2</sup> Mosely who had been killed in 2003. RP 59-60. On June 21, 2004, Millender saw McGrew at the Parkland Shell and stopped his car because he wanted some clarification about the circumstances of Mosely's death. RP 61. Also in Millender's car were Clark and his girlfriend, Kristal. RP 61. Millender caught up with McGrew as he came out of the building and followed him over to the car where he began pumping gas. RP 62-63. Millender could see there was a male in the back seat of the car and a female in the front; he didn't recognize either. RP 63.

Millender tried to get McGrew to talk to him about Mosely, so he could get the full story from someone who was there the night Mosely was killed. RP 63-64. McGrew did not want to talk to him. RP 65. Millender persisted and he saw some one reaching for something under the back seat and was afraid that that person might be getting a weapon. RP 66. When McGrew tried to get in the car, Millender tried to stop him and get him to

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<sup>2</sup> This name appears erroneously as both "Monique" and "Raelene" in the report of proceedings.

talk. RP 67-68. Upset, Millender took a swing at McGrew. RP 68.

Millender then hears a series of shots and thought it might be aimed at him; he ran off weaving as he ran to avoid being a target. RP 69. When he felt safe he stopped and looked back at the station; he saw Clark on the ground; the man who had been in the back of McGrew's car was standing over him, with a gun in his hand. RP 70-71.

A medical examiner testified that the autopsy of Isaiah Clark's body revealed that he had died as a result of four bullet wounds. RP 828-843. One bullet entered on the upper left back and traveled in a forward and downward direction into the body hitting the shoulder blade then hitting the rib cage where it broke into pieces, one of which perforated the lung. RP 844-48. This was a life threatening injury. RP 851. A second bullet entered on the back of the left arm, continued through the arm, the ribs on the left side, the left lung, the esophagus, the right lung, the diaphragm, and the right rib cage before exiting the body. RP 851-55. The entrance wound of this injury showed signs of gunpowder stippling indicating that the muzzle of the gun was within three feet of the body at the time it was fired. *Id.* The wound was not survivable, due to the collapse of both lungs and the rapid loss of blood it would cause. RP 857. The third bullet wound examined showed an entrance wound at the back of the left arm just slightly lower than the second wound described. It also had stippling. RP 858. The bullet traveled through the armpit exited then went immediately back into the side of the chest, through the chest wall on

the left side, through the left lung and lodged in the lower spine; this bullet had a downward and slightly back to front trajectory. RP 858-64. This is a life threatening wound that likely would have caused impairment of the lower extremities, had the victim survived. RP 865. The last wound examined had an entrance site on the front of the chest on the right side; passing beneath the skin through tissue in the chest, then exiting then reentering traveling through the abdomen, causing a tear in the liver, stomach, and small bowel, before ending up in the left flank area. RP 866-72. This was also a life threatening wound. RP 872. The court admitted photographs where metal rods had been inserted into the bullet pathways so that the jury could understand the trajectory of the bullets. RP 873-878. The fourth wound described was consistent with the victim having been bent over or falling forward as the bullet entered his body. RP 878-79.

Defendant was arrested on his warrant on March 27, 2008 in Stafford Virginia. RP 952. Two detectives flew to Virginia and brought him back to Pierce County. RP 952-53.

A summary of the defendant's testimony regarding his version of the events at the gas station on June 21, 2004 are set forth in detail later in the brief. *See* Respondent's Brief at pp 14-15. Defendant admitted that he was the shooter at the Shell station on June 21, 2004 and that he fired the shots that struck Isaiah Clark and caused his death. RP 1253-54. After the shooting, he could see there was blood on Dickman's clothing and in the

vehicle. RP 1241. Defendant threw away the clothes he had been wearing at the time of the shooting and threw the gun off of a bridge in the Puyallup area. RP 1243, 1277. Defendant left the state a couple of days after the shooting upon hearing that Clark had died. RP 1247, 1315. He went first to Louisiana and then to Virginia. RP 1249-51, 1314-15. He never contacted the police in order to give his side of the story. RP 1314.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ANY OF THE EVIDENTIARY RULINGS THAT ARE CHALLENGED ON APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992); *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state’s legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under

standard rules of evidence” (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Supreme Court has stated that the defendant’s right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)(discussing Washington’s rape shield law).

The confrontation clause in the Sixth Amendment protects a defendant’s right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness’s bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

In the case now before the court, defendant asserts the trial court made several errors in the admission and exclusion of evidence. He claims that the trial court erred in admitting evidence of a photo montage shown to a witness in an identification procedure because it contained the defendant’s booking photograph and erred in admitting evidence that the defendant chose to break the law by carrying a gun when he was a minor.

Defendant also challenges the court's rulings sustaining the prosecutions objections based upon hearsay, speculation, and relevance that had the net effect of excluding some evidence. Defendant contends that these exclusions prevented him from presenting his self defense claim. As will be discussed below, these claims have either not been properly preserved for review or are without merit.

- a. Defendant failed to properly preserve some of his claims of improperly excluded evidence by failing to make the required offer of proof setting forth the content of the evidence and the legal theory showing its admissibility.

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made know to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116

Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

On appeal, defendant assigns error to the trial courts exclusion of certain evidence on hearsay grounds made during the testimony of Ms. Dickman and of the defendant, as well as the exclusion on relevancy grounds of some testimony regarding Ms. Dickman's internal thought processes. See Appellant's Brief at pp. 40-43 referencing RP at 1057, 1059, 1071, 1091-92, 1198. Defendant does not identify where in the record, the defense made an offer of proof regarding this excluded evidence which :1) informed the trial court of the specific nature of the proffered evidence; and 2) informed the trial court of the legal theory under which the proffered evidence was admissible. The State can find no offer of proof regarding these rulings excluding evidence as required by ER 103(2).

As such defendant failed to preserve these issues for appellate review and this court lacks the proper record necessary to engage in any sort of review. It is impossible to know the nature of the excluded evidence, its admissibility, or its relative importance. Defendant argues that the evidence excluded as hearsay was not being admitted for the truth of the matter asserted, but there is nothing in the record to support his claim that the defense was seeking to adduce this evidence on this basis. These claims have not been properly preserved for appellate review and should be summarily dismissed.

- b. The defendant fails to show that the trial court abused its discretion in excluding a few of defendant's responses, which were not based on personal knowledge and speculative, and further fails to show that these rulings precluded him from presenting his self defense claim.

Defendant asserts that the trial court erred in excluding evidence relevant to self-defense by sustaining the objections in the following instances. The following exchange occurred on direct examination:

Defense Counsel: Did Isaiah [Clark] ever back off after you pulled the gun to put it between yourself and him?

Defendant: No. He had seen it and – it seemed like he showed no fear of it, like he—*like he had one of his own or something.*

RP 1235. The State objected and moved to strike the last comment, italicized above; the court sustained the objection, struck the last comment as speculation. *Id.* Defendant asserts this ruling was in error.

The comment was properly stricken as it amounts to the defendant's speculation as to why Isaiah Clark was not frightened by the defendant's display of a gun. Evidence Rule 602 prohibits a witness from testifying to a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." "The burden of laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies is upon the proponent of the testimony." *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984).

Defendant is not a competent witness as to what would be occurring inside of Isaiah Clark's mind and provided no foundation to support a conclusion that he had personal knowledge that Clark was carrying a gun. Later testimony, discussed below, made it clear that defendant did not know if Clark was carrying a gun or not. RP 1342. Defendant has not shown error in this ruling.

It is important to note that this is the only claim of erroneous exclusion of evidence that occurred during the direct of the defendant. Defendant does not point to any other instance where he attempted to testify to facts in his direct, but the jury was precluded from hearing the information due to an erroneous evidentiary ruling. Such a record suggests that the course of defendant's testimony was generally unfettered by the court's evidentiary rulings and that defendant was allowed present information within his personal knowledge relevant to his defense.

Defendant's remaining challenges to the exclusion of his testimony occur during his redirect examination:

Defense Counsel: Were you afraid of Isaiah?

Defendant: I knew at that time that what they came there for was really serious.

RP 1324. The State objected to the answer; the court sustained the State's objection based on its speculative nature. *Id.* Again under ER 602, the defendant had no personal knowledge of why Ricky Millender or Isaiah Clark were at the gas station that day, much less that the two were there

for the same reason. Defendant was merely speculating as to their motivation and the comment was properly stricken. The answer was also non-responsive to the question asked; defense counsel immediately re-asked the question and obtained a more responsive and non-speculative answer.

Defense Counsel: The question is, Dmarcus, at that point were you afraid of Isaiah?

Defendant: I was afraid of Isaiah, and I was afraid of Ricky [Millender].

RP 1324. This evidence came in without objection. Looking at the record as a whole, defendant cannot show abuse of discretion in the court's ruling striking the speculative answer or show any ultimate harm to his ability to present a defense. The last of defendant's challenged rulings also occurred during redirect:

Defense Counsel: When you were at the Shell gas station, you didn't see any guns? You didn't see Ricky [Millender] or Isaiah [Clark] with a gun; is that correct?

Defendant: I didn't see one. *I knew somebody had something.*

RP 1339. The court sustained the State's objection to the italicized portion of the defendant's answer and struck it as speculative. *Id.* The court also sustained the State's objection to the next proposed question which asked if the defendant felt that anyone was armed. RP 1339. It had already been established on cross examination that defendant had not seen a gun in Isaiah Clark's hands, but that he expected Isaiah to have one,

even though he had never seen Isaiah Clark before in his life. RP 1296-97. Furthermore, defense counsel returned to this topic later in redirect to clarify whether defendant had a subjective belief that Isaiah Clark had been armed:

Defense Counsel: Dmarcus, when you were grabbing for the gun, at that point you didn't know whether Isaiah had a gun or didn't have a gun. Correct?

Defendant: No, I didn't know.

...

Defense Counsel: As far as what you are feeling, did it really – was that something that you were really concerned about as you are reaching for your gun to defend yourself?

Defendant: Like, I was concerned that he possibly had one, yes.

Defense Counsel: Now as far as defending yourself, as this whole ...incident is unfolding...do you recall whether you felt that there was any other action you could have taken?

Defendant: No, not at that point. Like I really didn't. I felt like, I guess, it was a last resort when you try to leave. Nothing else I could have done.

RP 1342-43. Ultimately, the jury heard evidence that the defendant did not *know* whether Isaiah Clark was armed with a gun, but that he believed that Clark might be. Contrary to the assertion raised in defendant's brief, he was not precluded from adducing evidence regarding his fear of the victim or of his subjective belief that his attacker was armed. During direct examination, the defendant gave a lengthy description of his

interactions with the victim, including how he fired the gun because he feared Isaiah Clark and thought that his life was in danger. RP 1235-1249. Nor was the defendant precluded from testifying to the fact that he had a subjective belief that the victim was armed. RP 1296-97, 1342-43. The record below indicates that whenever the defendant tried to state his subjective belief as if it were a known fact or testify as to the subjective motivations of another person, the court sustained the State's objections. *See e.g.*, RP 965-968 (court instructing defense witness, on joint motion of parties, not testify as to what other people are thinking only to what he is thinking). When the defendant presented testimony articulating his own fears, thought processes and subjective beliefs, the evidence was admitted.

The court did not abuse its discretion in making its evidentiary rulings and the defendant's right to present a defense was not impeded.

- c. When defendant testified as to the reasons he began carrying a gun at the age of 16, the State could properly cross examine him regarding the choices defendant made to arm himself.

A party who chooses to introduce inadmissible or potentially prejudicial evidence "opens the door" to the opposing party's inquiry into the subject matter and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence. K. Teglund, 5 Washington Practice, Evidence Law and Practice, § 103.14, at 52-53 (Fourth Edition 1999).

The door is generally opened only by the introduction of evidence; it is not opened by counsel's opening statements to the jury. *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990). The rule is based upon the belief that an adversary system is essential to determining the truth. *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969). The trial court has considerable discretion as the keeper of the open door. K. Teglund, 5 Washington Practice, Evidence Law and Practice, § 103.14, at 58. In *State v. Gefeller* the Supreme Court further explained the rationale for the open door rule, as follows:

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, 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 at 455.

The rule is powerful enough that it is possible for a criminal defendant to open the door to evidence that would otherwise be excluded on constitutional principles. In *Harris v. New York*, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), the Supreme Court of the United States

held that a voluntary statement made by a defendant that is constitutionally inadmissible as a part of the State's case-in-chief could nevertheless be used for impeachment purposes because "the shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, . . . ." *Harris*, 401 U.S. at 226, 91 S. Ct. at 646, relying on *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); see also *State v. Jones*, 111 Wn.2d 239, 759 P.2d 1183 (1988) (testimony by the defendant's psychiatrist, regarding the defendant's invocation of his Fifth Amendment privilege during examination by the State psychiatrist, opened the door to allow the State psychiatrist to comment on the defendant's invocation of self-incrimination privilege in the defendant's homicide trial); *State v. Kendrick*, 47 Wn. App. 620, 736 P.2d 1079 (1987)(the defendant portrayed his cooperation with police as evidence of his innocence and in so doing, he "opened the door" to further inquiries about the subject. The State was, therefore, allowed to elicit testimony that the defendant made no statements to police following his arrest, which was otherwise inadmissible as an unconstitutional comment on the defendant's right to remain silent).

The rule also applies to evidence that is otherwise inadmissible on non-constitutional grounds. Applying the open door rule, the Washington Supreme Court in *State v. Hayes*, 73 Wn.2d 568, 439 P.2d 978 (1968), allowed the use of evidence suppressed by a pretrial order where the defendant opened the door to its admissibility by seeking to gain

extraordinary advantage from the fact of suppression of that evidence. The appellate court upheld the trial court's admission of the previously suppressed evidence because the defendant had himself opened up the subject of the degree of his intoxication. The Court stated:

It is one thing to say the State cannot make affirmative use of evidence which has been suppressed by pretrial order. It is quite another to say that a defendant can turn the pretrial order into a shield against contradiction.

*State v. Hayes*, 103 Wn.2d at 571.

In the instant case on direct examination defendant testified that he had know Freddie McGrew since he was 14 or 15, that they were best friends, and that they would frequently be together. RP 1171-75.

Defendant indicated that he had been shot at between five and ten times, always when he was with Freddie McGrew, and that, from his perspective, the target was always McGrew. RP 1177-1179, 1215-16. Defendant testified that the reason he had a gun with him on the day of the charged crime was that he had been shot at before and wanted to have one for his protection. RP 1214. Defendant testified that he first acquired a gun at the age of 16, shortly after he had been shot at the first time. RP 1216-17. Since acquiring the gun he would carry it "off and on...depending on how [he was] feeling." RP 1217.

On cross examination the State returned to explore defendant's explanation as to why he carried a gun. RP 1256-1258. The State confirmed that the reason defendant carried a gun was to protect himself

from being shot at when he was 'hanging out' with Freddie McGrew. RP 1256-57. The State established that defendant opted to arm himself with a gun rather than to decrease or stop the time he spent with Freddie McGrew:

Prosecutor: But the choice you made was to stay with Freddie and arm yourself with a gun; is that correct?

Defendant: I stayed with him, but not every time I was with him did I have a gun.

Prosecutor: Pardon?

Defendant: I stayed with him. He was my friend, but not every time I was with him did I have a gun.

Prosecutor: Okay. It wasn't legal for you to be carrying a gun at 16, was it?

Defendant: Not at all.

...  
Prosecutor: All right. So you, also, made a choice to break the law at that point in time, is that correct?

Defense Counsel: Objection, Your Honor, relevance.

Court: I'll overrule the objection.

Prosecutor: Is that correct?

Defendant: Yes.

RP 1258. Defendant now asserts that the trial court erred in overruling this objection and that by doing so improper propensity evidence was admitted.

It is clear that defendant introduced the first evidence that he carried a gun since the age of sixteen and of the reason he chose to do so. The defense apparently wanted the jury to have an understanding of why defendant would have a gun on him that day and also perhaps, what his frame of mind might be since he was with Freddie McGrew that day. Having opened the door to this information, the State was free to explore it on cross-examination. The prosecutor's questions explored his rationale and the choices he made in arming himself. Believing himself to be at risk, defendant did not *choose* to decrease the likelihood that he would be shot at by avoiding McGrew. He did not choose to arm himself with a form of weapon that would be legal for him to carry. Instead, he *chose* to engage in behavior that was criminal and assert that it was for his self protection. Self-defense cases are largely about the choices a person makes in a situation that may or may not be perilous. Defendant introduced evidence that he hoped would convince the jury that his actions in shooting Isaiah Clark were done in self defense and were reasonable under the circumstances. Having introduced this topic into the trial, the defense opened the door to the prosecutor's cross-examination. The State was free to adduce evidence that showed the defendant was more concerned about his self protection than he was at trying to protect himself within the boundaries of the law. The trial court did not abuse its discretion in overruling this objection.

- d. When the defense objects to the phrasing of a question and the State rewords the question so as to alleviate the defense concern, no error has occurred, much less one that has been preserved for review.

Defendant contends that by overruling a defense objection the trial court allowed the prosecutor to imply that the defendant had been an active participant in prior shootings. The record shows that while the court overruled the objection, the prosecutor reworded the question to eliminate the defense concern and that consequently, the court's ruling could have no prejudicial impact on the trial. During the cross examination of defendant the following exchange occurred:

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

Defense Counsel: Objection, Your Honor. This goes—

Court: Hold on a minute ...[The court then excuses the jury for the afternoon recess] ... Counsel?

Defense Counsel: Thank you, Your Honor. Your Honor, my objection is, primarily to the form of the question because the question seems to imply that he's been involved in situation where he's shot at somebody in the past or where he's been engaged in gunfight in the past. That goes beyond anything that the Defense elicited during direct examination, one; and, two, certainly it brings up shades of 404 (b) becoming involved as to whether or not he's been involved in any shootings in the past. There's no – I don't believe that he's, actually been involved in a shooting in the past.

RP 1268. The prosecutor responded that she thought she had worded her question in a manner to try to establish that the current incident was different than the drive by shootings defendant had experienced in the past; she indicated that she was not trying to introduce any events more or different than what was already in front of the jury. RP 1269. The defense responded:

Defense Counsel: Your Honor, if I may, essentially, one key word in this issue of semantics, the difference between saying experienced and involved....

RP 1269. The trial court overruled the objection finding that the terms “involved in” and “experienced” were sufficiently interchangeable. RP 1269-70. Nevertheless, when the jury returned from its break, the prosecutor re-asked the question using the defense preferred word of “experienced.”

Prosecutor: I’m going to re-ask that question. This scenario at the gas station is very different from all of the drive-by shootings that you have experienced in the past, wasn’t it?

RP 1271. Considering that the prosecutor rephrased the question to eliminate the defense concern and the fact that the jury is instructed that the attorney’s questions are not evidence, defendant fails to identify any error at trial. *See* CP 27-58, Instruction No. 1. The reworded question clearly refers to matters that were already in evidence. This claim is without merit.

- e. The trial court did not abuse its discretion in admitting a copy of the photo montage that was shown to an eyewitness to the shooting and from which she identified the defendant.

Admission of a photo identification or a photomontage is governed by the same standards of review governing the admission of other types of evidence in a criminal case, which means that it is left to the sound discretion of the trial court. *State v. Kinard*, 109 Wn. App. 428, 36 P.3d 573 (2001). Evidence of the identification of persons involved in a crime by an eyewitness, be it an in-court or out-of-court identification, is generally admissible unless the identification procedure is so impermissibly suggestive as to deny the defendant due process of law. *State v. Vaughn*, 101 Wn.2d 604, 607-612, 682 P.2d 878 (1984). If there is no constitutional infirmity in the process, it is up to the jury to decide the weight to be given the identification. *Id.*

The evidentiary value of a pretrial photographic identification is extremely high. As the United States Supreme Court noted:

[E]vidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind.

*Gilbert v. California*, 388 U.S. 263, 272 n.3, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)(quoting *People v. Gould*, 54 Cal.2d 621, 626, 7 Cal.Rptr.

273, 275, 354 P.2d 865, 867 (1960), *overruled on other grounds*, ***People v. Cuevas***, 12 Cal.4th 252, 906 P.2d 1290, 48 Cal.Rptr.2d 135 (1995)).

In the case now before the court defendant challenges the trial court's ruling admitting Exhibits 48A, 48B,<sup>3</sup> the physical montage from which an eyewitness had identified defendant, claiming that it prejudicial impact outweighed its probative value because the photograph of the defendant was a booking photograph from which the jury would infer that he had criminal tendencies. Appellant's brief at p. 48. Defendant objected to allowing the jury's being able to view these exhibits and his objection was overruled. RP 635-641, 646. Defendant does not challenge the identification procedure as being impermissibly suggestive.

These montages had been shown to the witness on July 8, 2004, just 17 days after the shooting on June 21, 2004. RP 610, 642. The same witness who had identified defendant from the montage, made her first in court identification on January 29, 2009. RP 311. Thus, there was a lapse of four and a half years between her first and second identification. It should be noted that at no point during the trial were the photographs in any montage shown to a witness referred to as "booking photos." They were referred to as "pictures" or "photographs." RP 306-311, 627- 646. When defense counsel raised his objection, the prosecutor pointed out that

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<sup>3</sup> Exhibits 48B and 48C were both copies of the photomontage. The witness was shown Exhibit 48B; after she had made an identification of the defendant's picture she was asked to sign next to his picture on a separate copy which became Ex.48A. RP 308-310.

there was no evidence before the jury as to the origin of the photographs and that the court's instructions would inform the jury that it was to base its decision on the evidence presented and on the facts proved at trial rather than speculation. RP 637-638; *see* CP 27-58, Instruction No. 1. The prosecutor argued that the montage was very probative to the issues in the case as the jury needed it to assess the reliability of the witness's identification by looking at the montage for itself; the prosecutor argued that the State had taken affirmative steps to minimize the unfairly prejudicial impact of this evidence. RP 637-638. The court agreed that the probative value of the evidence outweighed the prejudicial impact, especially since there was significant delay between the incident date and the trial date. RP 639-641. The court thought that any remaining prejudice could be cured by a limiting instruction. *Id.*

This ruling does not reveal any abuse of discretion. The trial court weighed the probative value of the evidence against the unfairly prejudicial aspect and determined that that balance tipped in favor of admission. The trial court offered to give a limiting instruction if one was wanted. Defendant has failed to show any error and this ruling should be upheld.

Defendant cites to *State v. Sanford*, 128 Wn. App. 280, 115 P.3d 368 (2005), for the proposition that evidence that an officer looked at a booking photograph prior to arresting the accused should not be used to

prove identity at trial if identity is not at issue. Defendant asserts that as he admitted shooting Clark, this montage evidence was unnecessary.

The prosecution has the burden of proving each and every element of the crime charged. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995)(citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). The prosecution presents its case first and the defendant may move for a dismissal at the close of the State's case if the State has failed to present sufficient evidence from which a jury could find the elements of the crime. *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996). Consequently, a prosecutor must assume that a defendant is contesting each and every element of the charged crime and submit sufficient proof in the State's case-in-chief to convince the jury of every element or risk a dismissal at the close of the State's case. Here the prosecution had Monica Johnson's identification of defendant from a photomontage and her in-court identification as the only evidence offered in the State's case-in-chief that defendant was the shooter. Unlike *Sanford*, which involved a crime of domestic violence between long term partners, the identification in this case was not of person well known to the witness. Defendant did not admit that he was the shooter until the defense case. Defendant did not offer a stipulation to the fact that he was the shooter in order to prevent the montage from coming into evidence. Thus, neither the prosecutor nor the court could assume that the challenged evidence was unnecessary to proving the elements of the charged crime.

At the time the court made its ruling, defendant had not yet admitted his involvement in the shooting. Defendant seeks to undermine the court's ruling by information that was not known to the court at the time the ruling was made.

This court should affirm the evidentiary rulings as defendant has failed to demonstrate any abuse of discretion.

2. THE TRIAL COURT PROPERLY DENIED  
DEFENDANT'S PROPOSED INSTRUCTIONS  
ON SELF DEFENSE.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not

misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

To be entitled to self-defense instructions in a murder prosecution, a defendant has the burden of producing "some evidence to establish the killing occurred in circumstances amounting to defense of life and produce

some evidence he or she had a reasonable apprehension of great bodily harm and imminent danger.” RCW 9A.16.050; *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002); *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). All self-defense is rooted in the principle of necessity and deadly force is “only necessary where its use is objectively reasonable, considering the facts and circumstances as they were understood by the defendant at the time.” *State v. Brightman*, 155 Wn.2d 506, 521-522, 122 P.3d 150, 158 (2005). When assessing whether a defendant is entitled to an instruction on self-defense, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees; this involves both a subjective and an objective test or analysis. *Read*, 147 Wn.2d at 242.

The subjective test requires the trial court to place itself in the defendant’s shoes and view the defendant’s acts in light of all the facts and circumstances the defendant knew when the act occurred. *Walker*, 136 Wn.2d at 772. If the trial court refuses to give a self-defense instruction because it found no evidence supporting the defendant’s subjective belief of imminent danger of great personal injury, an issue of fact, the standard of review is abuse of discretion. *Walker*, 136 Wn.2d at 771-72.

For example in *State v. Read*, supra, the Court determined that Read was not entitled to a self defense instruction when the evidence viewed from his perspective showed only that Read believed Larson, the

person he killed, was angry at the way Read had acted toward Larson's brother. Larson stepped toward Read and moved his arms so that Read did not have a clear path to the exit door. Read testified he thought he was going to get hurt and "panicked." Read then shot and killed Larson. The court stated that even if Read reasonably believed he could get hurt, that does not excuse the use of deadly force under these circumstances. *Read*, 147 Wn.2d at 244. The court held that Read had fallen short of producing evidence demonstrating he reasonably believed he was in imminent danger of death or great personal injury and because Read failed to satisfy the subjective element of self-defense, the trial court did not err refusing to consider self-defense claim.

In *Walker*, supra, the trial court found that the subjective test had not been met even though Shepardson, the person Walker killed, had made prior threats to "kick the shit out of" Walker and was of greater stature than Walker. Walker and Shepardson were in a fistfight with each other that Shepardson had started. Walker was getting the worst of the blows. Shepardson had backed Walker up against a car, when Walker pulled a knife out of his pocket and struck out about three times with the knife. Shepardson died from a knife wound to his aorta. *Walker*, 136 Wn.2d at 770-71. Walker's main claim of self defense was that he feared for his life because of the beating he was receiving from Shepardson. But the court found that self-defense instructions were not warranted because the evidence did not support the claimed fear; even taking into account

Walker's subjective perceptions, the evidence did not indicate any threat of great personal injury and that any reasonable person standing in Walker's shoes, would have perceived that only an ordinary battery was intended. *Id.* at 778-79

The objective test requires the trial court to determine what a reasonable person would have done if placed in the defendant's situation. *Walker*, 136 Wn.2d at 772. If the trial court refuses 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. *Walker*, 136 Wn.2d at 771-72.

The defendant must satisfy both these prongs to be entitled to instructions on self defense. *Walker*, 136 Wn.2d at 773. The trial court must determine whether the defendant produced any evidence to support his claimed good faith belief that deadly force was necessary and that this belief, viewed objectively, was reasonable. *Id.* If either prong is missing, self-defense is not available to a defendant. *Id.* The Supreme Court noted that the objective aspect of this analysis is extremely important because without a reasonably prudent person overlay, a person's subjective beliefs would always justify his actions:

Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not and who blind themselves to opportunities for escape that seem plainly available.

*State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993)(quoting Susan Estrich, *Defending Women*, 88 Mich. L.Rev. 1430, 1435 (1990))

A person is justified in using deadly force in self-defense only if the person reasonably believes he or she is in imminent danger of death or great personal injury. RCW 9A.16.050(1). Great personal injury is that which would result in “severe pain and suffering.” *State v. Walden*, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

Turning to the facts of the case before the court, defendant proposed self-defense instructions. CP 7-26. After considering the decision in *State v. Walker*, supra, and hearing the arguments of counsel, the trial court found that defendant had not met his burden in adducing evidence showing that he was entitled to such instructions. RP 1366-1386; CP 27-58. The defendant took exception to the court’s ruling. RP 1384.

- a. Viewing the defendant’s acts in light of all the facts and circumstances the defendant knew when the act occurred, there was no evidence supporting the defendant’s subjective belief that he was in imminent danger of great personal injury.

The following is a summary of the defendant’s testimony:

Defendant testified that on the day in question he had fallen asleep in the back seat of a car being driven by his friend Fred McGrew while they were on their way to pick up McGrew’s girlfriend, Tamrah Dickman. RP 1184-1186, 1213. Defendant had his gun with him that day, inside his

coat on the back seat. RP 1213-14. He was awakened by Tamrah who was shaking him; Tamrah, who was in the front seat, was scared. RP 1186. He found that the car was at a gas station. RP 1263. Defendant glanced out the side window and could see some people moving by the store. RP 1189. Tamrah and defendant got out of the car; as he got out, he saw McGrew coming out of the store; another person was walking behind McGrew. RP 1188-90, 92. Besides McGrew and his follower, defendant noticed a couple of other people standing near the store entrance- a white guy, and a person he later found out was Isaiah Clark. RP 1193, 1196. Defendant had never seen Isaiah Clark before in his life. RP 1211. By this time, McGrew was pumping gas into his car; there was an individual next to him that defendant had never seen before in his life, but who was later determined to be Rickie Millender. RP 1196, 1208, 1211.

Defendant saw Millender touching McGrew around the waist as if checking to see if he had something there, like a gun. RP 1209-10, 1264. At this time, Millender and McGrew were arguing, but not fighting. RP 1264. Defendant's attention was then drawn back to Clark as he saw movement in his periphery. RP 1210. Defendant started to move toward the back/trunk of the car, but Clark took a couple steps toward him and said something that made defendant stop. RP 1197-99, 1265. When defendant stopped his movement toward McGrew, Clark stopped his movement toward defendant. RP 1265-66. Defendant described Clark as

“his eyes were bloodshot red, like he was high or something; and he had braids, and the demeanor along [sic] his face, it sort of, like, intimidated me. He was, like, a little bigger... than me.” RP 1210-11. Defendant was about 6’1” and weighed about 160. RP1190, 1211, 1246. Defendant did not know if McGrew knew either Millender or Clark, but he could tell from the look on McGrew’s face “that this was not a good situation.” RP 1211. When he overheard what Millender and McGrew were talking about it “kinda scared me more,” he tried to position himself between McGrew and Dickman so that he could help out either one. RP 1212. Defendant testified that he did not have his gun with him when he stepped out of the car and that he never thought about retrieving it as he was watching the conflict develop between McGrew and Millender. RP 1219.

After McGrew finished pumping his gas, he started to get into the car; defendant testified that he saw Millender put an arm around McGrew’s neck to try to stop him or turn him around. RP 1221. At this point defendant is on the opposite side of the car from McGrew and Millender and just a couple of steps away from Dickman who is standing just outside the car door. RP 1221-22. Defendant saw Millender punch McGrew with his hand. RP 1223. Defendant did not see any weapons involved in this altercation between Millender and McGrew. RP 1267. Defendant testified that he got really scared, really nervous, because he had never been in a situation “close like that.” RP 1223. He really wanted to leave, he was so frightened. RP 1225. While this was going on,

defendant stated that Clark was in the same spot as before, over by the store. RP 1225. Defendant testified that things happened fast at that point: he recalls trying to get inside the car and getting hit along the back left side of his head. RP 1224. Defendant testified that he felt the presence of Clark coming toward him but didn't think that he was that close. RP 1225. Defendant described the blow as "powerful" and that it must have been Clark who hit him. RP 1226. He testified that the blow was "really hard and it felt like he hit me we something; but I don't know. RP 1288. After the blow he felt a bit dizzy; he feared for his life and he "didn't know what was going to happen." RP 1226. Defendant testified that the blow caused him to fall and that he fell into the passenger seat, which was pushed forward, and that he "kind of went inside the car, like a little bit" so he was halfway inside the car. RP 1227, 1233. Defendant testified that he was really scared and that he thought he was going to die, but he didn't know what was going to happen. RP 1234. Defendant described Clark as being on top of him,- standing over him-so he reached for his gun hoping that it might scare him so as to stop the situation, because that was the only thing that he could think of to get out of the situation. RP 1234, 1293, 1301. Defendant described his thought process as being that there was nothing he could do at that point- he'd been hit and he thought he was going to die - he was down and helpless. RP 1237. It did not go through his head to give Clark a verbal warning such as "stop or I'll shoot." RP 1302-03.

Defendant had the gun in his right hand between his body and Clark's; Clark did not seem frightened of the gun or deterred by it. RP 1235. Defendant does not recall pulling the trigger the first time and was shocked when the gun went off; he guesses that he panicked with the first shot. RP 1235-36, 1295. After the first shot, he felt Clark grip his left arm "extremely tight" and try to pull him out of the car. RP 1238. On cross examination, however, defendant testified that this gripping of his arm happened before the first shot "as I was trying to get back inside the car" and that the pulling also happened before defendant retrieved his gun. RP 1294-95. Defendant testified that he was thinking that he had never been in a close situation like this; he was frightened, panicked and thinking he was going to die, or end up in the hospital or that something bad would happen to him. RP 1237-38. After the first shot, defendant's indicated that his fear of Clark increased; Clark's face was coming at him and his eyes were really red. RP 1238. Defendant testified that he shot in the direction he was being pulled and that he can't recall how many times he pulled the trigger. RP 1239. Defendant kept firing until he felt the grip release on his arm. RP 1304. When the shooting stopped, he was glad that Clark had let go of his arm; he pulled his feet into the car and laid down in the back seat. RP 1239. Defendant indicated that there was no time to think about where he shots were directed. RP 1304. He doesn't recall where Clark was at that time and did not know if he had been hit by any of the gunshots because things happened too fast. RP 1239.

Defendant testified that he did not need any medical attention or treatment after this incident and as far as he knew neither McGrew or Dickman needed to go to the hospital. RP 1279-80. Defendant received one blow to his head and had his arm gripped tightly by Clark, but this was the extent of his injury. RP 1304.

Defendant did not see any sort of weapon in Clark's hand but stated he "wasn't trying to look." RP 1304. He did not know if Clark had a weapon. RP 1304. Defendant acknowledged that there was no evidence of any gun other than his being present at the scene that day. RP 1308. The defendant's testimony was vague as whether he was intending to act in self defense that day when he fired his gun or if his gun fired without him intending to fire it or to hurt Clark. RP 1306-08, 1318-19, 1341. Defendant did testify that he did not want to die at that time. RP 1308.

Defendant indicated that he carried a gun for his protection because he "didn't like being in situations where my life was on the line." RP 1214. Defendant indicated that he was 15 or 16 the first time he was shot at and he was with Fred McGrew at the time. RP 1215. Defendant indicated that he had been shot at between five and ten times, most of them drive-bys, and always when he was with McGrew; from defendant's perspective, the target of these shootings was always McGrew. RP 1177-1179, 1215-16, 1256-57. Defendant testified that he first acquired a gun at the age of 16, shortly after he had been shot at the first time. RP 1216-17. He testified that he carried his gun "off and on" and that he "just happened

to have his gun on him that day.” RP 1217-18, 1261-62. Defendant carries his gun with a round in the chamber; once the safety is off the gun can be fired simply by pulling the trigger. RP 1273-75. Defendant testified that he never saw a gun in Clark’s hands, but that he expected him to have one. RP 1297. Defendant never saw Clark touch Tamrah Dickman. RP 1297-98.

Viewing the situation from the defendant’s perspective, there is no evidence supporting his claimed belief of imminent danger of great personal injury or death. Defendant had never seen Isaiah Clark in his life before. Thus, he had no prior knowledge or experience that might have created a fear that Clark would inflict of great personal injury upon him. There is no history of prior beatings or of previous death threats coloring the defendant’s perception of Clark or of the peril he might pose to defendant. His fear of Clark inflicting great personal injury upon him had to come from the situation at the gas station on June 21, 2004.

On that day, defendant had no knowledge that Clark was armed with any sort of weapon. Defendant testified that he expected Clark to be armed. There is no evidence in the record that supports this expectation. This expectation was not based upon defendant’s prior history or experience with Clark nor is there any evidence that defendant knew anything of Clark by reputation. Defendant did not testify that he saw a suspicious bulge under Clark’s clothing or that Clark’s movements suggested that he had a weapon hidden on his person. There is no

evidence that Clark said anything to defendant to suggest that he was carrying a weapon. Defendant admitted that he did not know if Clark was armed and that he never saw a gun in Clark's hand.

There is no evidence that Clark made any verbal threats to defendant that day which would suggest that Clark intended to inflict immediate great personal injury upon defendant.

Defendant testified that the fact Clark was bigger than he was added to his fear. Defendant was just over six feet tall and 160 lbs. At autopsy, the medical examiner measured Clark's body at six feet tall and 207 pounds, although he would have lost some weight due to loss of bodily fluids. RP 886. The difference between them is not dramatic enough to suggest that the mere difference in size made it likely that any blow by Clark would cause great personal injury upon defendant.

The blow to the back of the head that defendant said he received from Clark stunned defendant and caused him to fall. Defendant also testified that Clark gripped him tightly on his forearm and tried to pull him out of the car. Neither of these physical contacts caused any permanent or long lasting injury to defendant. Neither caused any injury that required medical attention. The blow and the grip were simple batteries.

Defendant had not witnessed any action by Millender against McGrew that indicated Millender was armed. He saw Millender punch McGrew, but nothing to indicate that the confrontation between Millender and McGrew was anything more than a simple fistfight.

While defendant stated repeatedly that he was frightened and that he thought he was going to die, there is no evidence to support this claim of a good faith belief of reasonable apprehension of great personal injury and imminent danger. The evidence viewed from defendant's perspective supports only the conclusion that defendant was at risk of a simple battery and not at risk of great personal injury or death. A person may not use lethal force to repel the threat of an ordinary battery. *Walker*, 136 Wn.2d at 777. There was insufficient evidence upon which to instruct on self-defense under the subjective test and the court properly refused the defendant's proposed instructions.

- b. The court properly refused to instruct on self defense as no reasonable person in the defendant's situation would have resorted to use of lethal force.

The court also properly refused to instruct on self defense because the defendant's use of lethal force was not objectively reasonable.

This incident happened at a busy gas station, in the late afternoon, in the middle of summer. Defendant was not in an isolated area. He was there with two friends and surrounded by many customers of the station. An employee of the station was behind the counter inside the store a few feet away. Defendant encounters Clark, a person whom he has never seen before, standing several feet away. He has no information that Clark is armed and this person is not threatening to hurt or kill him. Clark does

want defendant to stay out of the confrontation that is going on nearby between Millender and McGrew. In a short while, Clark punches defendant in the back of his head and then grabs onto his arm and pulls it. Clark does not make any demand for money or property concurrent with this use of force. Clark is not armed with a weapon.

No reasonable person looking at the scenario would perceive that defendant was at risk of great personal injury or death from Clark and conclude that use lethal force was *necessary* at this point. A reasonable person would not try to repel a simple battery with use of lethal force. A reasonable person would have shouted for help, run into the store for protection, or tried to fight back with his hands and feet.

Defendant cannot meet the objective test. Having failed to meet his burden of production of evidence to support the giving of self defense instructions using the mixed subjective/objective test, the court did not err in refusing the instructions.

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STATE OF WASHINGTON

D. CONCLUSION.

For the forgoing reasons, the state asks this court to affirm the  
conviction below.

BY \_\_\_\_\_  
DEPUTY

DATED: MARCH 26, 2010

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

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.

3/26/10 Johnson  
Date Signature