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STATE OF WASHINGTON
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95635-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE GEHRKE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Did the trial court abuse its discretion in allowing an amendment of the information before the State rested its case in chief?

II. STATEMENT OF THE CASE

Four days after a street fight with Michael Gehrke in September 2015, Christopher Pineyro died from a knife wound sustained during the fight that severed his carotid artery and jugular vein. There was conflicting evidence whether Mr. Gehrke initiated the fight or was defending himself following a threat and assault by Mr. Pineyro. The defendant was charged with second degree felony murder based upon a second-degree assault.

The case proceeded to trial three months later. At trial, before the State rested, the State was granted its motion to amend the information, adding the alternative offense of first degree manslaughter. Convicted of first degree manslaughter, Mr. Gehrke appealed, and Division Three affirmed the conviction in an unpublished opinion. ("Opinion" hereinafter). This Court accepted review on the question of whether the trial court properly allowed the State to amend the information. Order, June 6, 2018.

The facts of this case are important because the overarching issue in this case is whether the defendant was surprised and prejudiced by the amendment of the information. The State's position regarding his claim of

prejudice is that the amendment changed *nothing* - that self-defense was the *only* issue in the case.

A. <u>Trial testimony.</u>

Trial witnesses included three eyewitnesses[1] to the fight between Mr. Gehrke and Mr. Pineyro. Ty Olmstead was driving home when his path was blocked by a white SUV and two men moving into the middle of the road. One, Mr. Pineyro, was approaching on a bicycle and slowed down as he approached Mr. Gehrke. Mr. Gehrke approached Mr. Pineyro, and upon reaching him, Mr. Gehrke kicked him, causing both the bicycle and Mr. Pineyro to fall to the ground. Mr. Olmstead noticed that Mr. Gehrke was holding what appeared to be a cell phone, but after Mr. Pineyro was on the ground, Mr. Olmstead saw that it was a knife, and that Mr. Gehrke had flipped open its blade. Mr. Pineyro stood up and produced a hammer, after which Mr. Olmstead described the two men as "sparring, debating on who was going to strike first." RP 176. Mr. Olmstead observed the two men swinging their weapons at one another, moving away from Mr. Olmstead's car, until Mr. Gehrke stabbed Mr. Pineyro and Mr. Pineyro fell to the ground, holding his neck. At that point, Mr. Gehrke stood there briefly, then

[1] The three witnesses to the actual battle were Mr. Olmstead, an uninvolved citizen; Mr. Gerhke; and Jill Swenson, a roommate of Mr. Gehrke's girlfriend.

threw down his knife, held up his hands and said "'self-defense, self-defense.'" RP 178. When asked by the prosecutor "who initiated this confrontation between the two individuals," Mr. Olmstead answered, "Mr. Gehrke." RP 179.

Mr. Gehrke testified he was involved in a prior altercation with Mr. Pineyro at a 7-11 store approximately one year earlier. RP 709-11; Ex. P-92[2] at 8:22:08-8:22:25, 8:23:41. At that time, Mr. Pineyro was screaming words at him and was armed with a baton. Ex. P-92 at 8:22:54, 8:23:35- 8:23:52. Mr. Gehrke was not afraid of him. RP 711. He told Mr. Pineyro he was not going to fight him because the police station was only five blocks away, but, instead, invited him to meet him up the road. RP 711; Ex. P-92 at 8:23:52-8:24:00. Mr. Pineyro failed to appear. *Id*.

A year later, Mr. Gehrke heard that Mr. Pineyro was back in the neighborhood; Mr. Gehrke knew there would be a confrontation. Ex. P-92 at 8:22:37. Upon seeing Mr. Pineyro, Mr. Gehrke walked to the front of the vehicle towards him. *Id.* at 8:45:20. Mr. Gehrke stated that as he approached Mr. Pineyro, Mr. Pineyro stated "I've got something for you bitch." In response, Mr. Gehrke kicked Mr. Pineyro's bike, causing him and his bike

[2] Defendant Gehrke's statements and testimony came into trial through his direct testimony and through a videotaped interview that was partially edited. RP 657-719; Ex. P-92 (viewed by the jury at RP 485).

to fall to the ground. *Id.* at 8:45:25. After falling to the ground, Mr. Pineyro threw off his bags and pulled out a hammer. *Id.* at 8:45:32. Mr. Gehrke stated it was then that he pulled out his knife. *Id.* at 8:35:48.

According to Mr. Gehrke, he didn't even flip the blade open until Mr. Pineyro swung the hammer at him. Later in an interview, Mr. Gehrke told the detective it was obvious that Mr. Pineyro did not "know how to fight or even how to nail in a nail." Ex. P-92 at 8:36:20; RP 711. Asked if he was ever hit by Mr. Pineyro, Mr. Gehrke said, "No, I'm too fast for that." Ex. P-92 at 8:46:40.

B. <u>Amendment Procedure.</u>

Prior to starting jury selection, the prosecutor informed the trial court that the State may move to amend the charge to include manslaughter in the first degree as an alternative. The defense acknowledged that they had been informed of this possibility some hours earlier:

> THE COURT: Thank you. Mr. Nagy, I was advised that there may be just a brief voir dire issue before we get the jurors up here.
>
> MR. NAGY: Yes, your Honor. Two quick things. First, in reviewing for the trial and confirming some information with defense counsel today, I asked defense counsel if they would have any objection to the State amending to add the charge of manslaughter in the first degree in the alternative to murder in the second degree. I didn't think that it would be prejudicial and it's a lesser offense. They were not in favor of that, therefore, I'm not going to submit that, but I did put

> them on notice that, at the conclusion of the State's case, I may be moving for that to be charged in the alternative.
>
> THE COURT: Okay. Counsel was put on notice of that and are aware what your request was?
>
> MR. NAGY: I sent it to them.
>
> MR. SCHMIDT: Yes, your Honor. Mr. Nagy did make us aware of that about a couple hours ago.
>
> THE COURT: Thank you, sir. Thanks, Mr. Nagy.

RP 122-126.

Then, *prior* to calling the medical examiner, Dr. Howard, as a witness, the State readvised the trial court that, as anticipated, it would ask for a brief recess after Dr. Howard's testimony to address the amendment of the information to add the alternative of first degree manslaughter. The defendant acknowledged that he anticipated the proffered amendment and was willing to respond to that issue after the State had completed Dr. Howard's testimony:

> THE COURT: Counsel, good morning. Please be seated. Counsel, when you're ready would somebody get us started with a caption and we'll take whatever the issue is we can take to move things along for you.
>
> MR. NAGY: Thank you, your Honor. This is the date and time, day four of jury trial, State of Washington versus Michael Gehrke, Cause No. 15-1-04223-9. Mr. Gehrke is present and he's represented by Mr. Griffin and Mr. Schmidt. Dale Nagy, Pat Schaff and Detective Cestnik present for the State. Your Honor, the State would -- just wanted the Court to know we do have Dr. Howard. At the

> completion of his testimony, I would ask for a brief recess prior to resting. The State will again address the Court and request for amending the Information adding the alternative first degree manslaughter.
>
> THE COURT: Which, as I recall, Counsel, was something we discussed, but we didn't do it at the beginning of the trial because you have the opportunity to do that all the way through closure of your case-in-chief.
>
> MR. NAGY: Yes, your Honor.
>
> THE COURT: Okay. Good morning, Mr. Schmidt.
>
> MR. SCHMIDT: Good morning, your Honor, and we'll be prepared to address that issue at the recess if the Court wants to take that up.

Prior to resting its case, the State moved to amend the information to include the alternative crime of manslaughter. RP 543; CP 95-96. Defense counsel acknowledged they had been notified of this possibility *before* trial started. RP 543-44. Counsel for defendant objected, first arguing there was no probable cause for the charge of manslaughter because "this was an intentional act of self-defense, not an act of recklessness." RP 544. Counsel then offered that, had they known about the proposed amendment earlier, "defense would have likely looked for an opportunity to then potentially get a self-defense expert that would show that Gehrke's actions were not reckless but an appropriate use of force in self-defense." Notably, the defense never requested a continuance.

In response to the defendant's objections, the trial court carefully examined the court rule, CrR 2.1(d), noting that "the pivotal question that the Court always has to focus on in terms of whether [it is] going to provide for an amendment is whether in this judicial officer's mind, that amendment is going to substantially prejudice a defendant and I would suggest that here it does not." RP 547. The trial court also compared how the rule had applied in a prior case. RP 548-49. The trial court found that the facts of this case clearly supported the amendment. RP 548-50.

Of import, the trial court noted that the new charge would not require Mr. Gehrke to retool his defense – that self-defense was always the defense in the case, implying that the claim that the defendant could have employed a self-defense expert was not sound, noting the defense "could have also employed a self-defense [expert] for the initial charge of murder in the second degree. That's a strategy situation that isn't affected either way." RP 550.

On review, defendant claims that the trial court abused its discretion in granting the amendment pursuant to CrR 2.1(d).

III. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING AN AMENDMENT OF THE INFORMATION BEFORE THE STATE RESTED ITS CASE IN CHIEF WHERE THE AMENDMENT DID NOT AFFECT EITHER PARTIES' STRATEGY AND THE FACTUAL BASIS FOR, AND DEFENSES TO THE NEW CHARGE WERE THE SAME AS IN THE ORIGINAL CHARGE.

A. Standards of review.

1. Bright line *Pelkey* rule.

In *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987), this Court announced one of the constitutional limitations to CrR 2.1(d). Under *Pelkey*, the State cannot amend a charge *after* it has rested its case in chief unless the amended charge is a lesser included offense or a lesser degree of the same offense. *Pelkey*, 109 Wn.2d at 491.

In *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993), this Court limited *Pelkey* to situations where the State brings the motion to amend the information *after* resting its case, explaining that "such amendments are not permitted following the close of the State's case because the likelihood of prejudice is too great." *Schaffer*, 120 Wn.2d at 621. The Court also clarified that this same risk of prejudice did not exist and prejudice should not be presumed if the State moved to amend the information during its case in chief, even if the State called no more witnesses following the amendment. *Schaffer*, 120 Wn.2d at 620-22. Instead, this Court held that if the State moved to amend before resting its case, the amendment was proper if it

complied with CrR 2.1(d), which provides, "the court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."

This Court acknowledged the *Schaffer* holding in *State v. Vangerpen*, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995) ("We reiterated the bright line *Pelkey* rule in *Schaffer* when we explained that '[t]here is no need to redraw the line established in *Pelkey* to a point earlier in the criminal process.' *Schaffer*, 120 Wn.2d at 622, 845 P.2d 281").

The appellate courts have similarly refused to expand the reach of *Pelkey's* per se rule. *See State v. Ziegler*, 138 Wn. App. 804, 809, 158 P.3d 647 (2007); *see also State v. Phillips*, 98 Wn. App. 936, 940-41, 991 P.2d 1195 (2000) (finding that the State may amend the information to correct a defect before the State rests); *State v. Murbach*, 68 Wn. App. 509, 843 P.2d 551 (1993) (allowing amendment of charges where it occurred before the State rested and there was no prejudice); *State v. Wilson*, 56 Wn. App. 63, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010 (1990); *State v. Brown*, 55 Wn. App. 738, 780 P.2d 880 (1989).

Mr. Gehrke did not argue for expansion of the *Pelkey-Schaffer* rule below, and does not argue for such expansion now. *See* Petition at 9 (trial court abused its discretion under CrR 2.1(d) by allowing amendment). There is no reason to abandon the *Pelkey-Schaffer* rule at this point. *See*

State v. Otton, 185 Wn.2d 673, 374 P.3d 1108 (2016) (because of the many benefits of adhering to precedent, this Court will only revisit prior decisions upon a clear showing that an established rule is both incorrect and harmful). Therefore, the analysis in this case centers around the question of whether the lower court abused its discretion when it allowed the amendment pursuant to CrR 2.1(d).

2. CrR 2.1(d) Standard of review.

The trial court's grant of a motion to amend an information is reviewed for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *Schaffer*, 120 Wn.2d at 621-22. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017).

Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict if the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Importantly, under the rule, the defendant has the burden of showing specific prejudice to a substantial right. *State v. James*, 108 Wn.2d 483, 486, 739 P.2d 699 (1987); *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982); *and see Schaffer*, 120 Wn.2d at 623 ("If a defendant is prejudiced by an amendment, then he or she should be able to demonstrate this fact").

Additionally, when a defendant does not request a continuance, it suggests there is no prejudice. *Murbach*, 68 Wn. App. at 512; *Wilson*, 56 Wn. App. at 65 (failure to request continuance waived objection to amended information; *Brown*, 55 Wn. App. at 743 ("the fact that the defendant does not request a continuance is persuasive of lack of surprise and prejudice").

B. <u>Discussion.</u>

Petitioner's overarching claim is that "*Pelkey* and its progeny ought to have provided applicable guidance to demonstrate that the trial court erred in permitting the State to amend its charges against Mr. Gehrke pursuant to CrR 2.1(d), and in doing so, abused its discretion." Petition at 9.

However, *Pelkey* and its progeny all address situations where the defendant *first learned* about the State's motion to amend *after* the State rested its case. *See Pelkey*, 109 Wn.2d at 486 (State moved to amend after close of its case in chief and after defense counsel moved to dismiss for lack of evidence on an element of the originally charged offense; then defense counsel also moved to dismiss "based on the amendment of the information"); *see also Vangerpen*, 125 Wn.2d at 785 (trial court granted State motion to amend information that omitted premeditation element *after* (1) the State rested its case, (2) the trial court denied a defense counsel motion to dismiss for insufficient evidence of premeditation, (3) defense

counsel rested his case without presenting any witnesses, (4) defense counsel moved to dismiss based on the insufficiency of the information, and (5) defense counsel objected to the untimely amendment); *State v. Markle*, 118 Wn.2d 424, 427-28, 823 P.2d 1101 (1992) (State moved to amend at close of its case over defense objections). Not one of these cases addresses the circumstances we have here, where the State informed the defendant prior to voir dire, opening statements, and cross-examination that it would likely move to add the alternative charge, then re-informed defense counsel and the court that it was going to amend prior to calling its expert witness, Dr. Howard, at which time the defendant informed the State and the Court *he was ready* to address the amendment, but agreed to wait for a break in the proceedings which would occur after Dr. Howard's testimony.

There was no ambush or surprise here. Thus, as recognized in the Opinion,[3] this case is more factually like *Schaffer*. As in *Schaffer*,

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[3] At page 11 of the Opinion, the court notes:

> The absence of prejudice is clearer here than it was in the controlling case of *Schaffer*. As in *Schaffer*, the State in this case made its motion after calling its last witness but before resting. But in *Schaffer*, the State did not give notice of its interest in amending until it had called its next to last witness. Here, Mr. Gehrke was aware of the possibility of amendment before the trial started, even if only a few hours before it started. Mr. Gehrke does not demonstrate an abuse of discretion.

Mr. Gehrke was aware of the proposed amendment well before the State rested its case, and, as explained below, his theory of the defense – self-defense – remained unchanged. Indeed, as in *Gosser*,[4] the amendment had no effect on the nature of his defense, or his approach to opening statements or cross-examination, and he provides none. He could not provide the trial court with any reason as to how he was prejudiced by the amendment, so he invented one. First, he claimed that there was no probable cause for a lesser standard of recklessness because all the testimony established the acts were intentional. Perhaps immediately recognizing that a reckless act *is* established by a purposeful act, he then claimed that, had he known that he was facing a manslaughter charge, he would have obtained a self-defense expert to tell the jury why he was not guilty:

> The manslaughter charge has into it a reckless standard. I would first suggest that there's no probable cause to charge manslaughter in this case because all the testimony that we've heard elicited to this point was that this was an intentional act of self-defense, not an act of recklessness.

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[4] In *Gosser*, *supra*, on the first day of trial, the court allowed the prosecutor to amend the assault charge from a knowing assault of another with intent to commit a felony of first degree escape, RCW 9A.36.020(d), to a knowing assault of another with a weapon or other instrument or thing likely to produce bodily harm, RCW 9A.36.020(c). Defendant objected, claiming he was prepared to defend the charges as originally alleged but not the charges as amended. A continuance was not requested. The court noted, "Although proof of the assault as originally charged and as amended is somewhat different, the State was required to prove an assault in each instance. Defendant has failed to show prejudice. We find no abuse of discretion in permitting the amended charge." 33 Wn. App. at 435.

> Were the Court to find there's probable cause to allow the amendment, defense would have likely looked for an opportunity to then potentially get a self-defense expert that would show that Mr. Gehrke's actions were not reckless but an appropriate use of force in self-defense. That's not an issue under the felony murder.

RP 544-45.

The trial court noted that the new charge would not require Mr. Gehrke to retool his defense – that self-defense was always the defense in the case, implying that the claim that the defendant could have employed a self-defense expert was not sound because the defense "could have also employed a self-defense [expert] for the initial charge of murder in the second degree. That's a strategy situation that isn't affected either way." RP 550. Mr. Gehrke failed to explain, and still fails to explain, how expert testimony on the issue of self-defense would be probative and admissible because of the amendment. Moreover, he failed and fails to establish the admissibility of such an expert opinion on self-defense that would not be an improper opinion on the validity of his self-defense claim. The defendant did not claim he suffered from a special condition such as a battered woman syndrome. His claim of self-defense could easily be understood by a jury. Such expert testimony would be improper. *See State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002) (asking a witness if the defendant had any reason to defend himself, any reason to pull out a weapon

at that time, or any reason to shoot the victim, crosses the line and improperly asks for opinion testimony on the validity of the defendant's self-defense theory); *see also* ER 704; *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Most importantly, the amendment changed nothing in the prosecution or defense theories of the case. As is footnoted below, all the important pretrial motions dealt with self-defense.[5] Post-trial, the defendant

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[5] On February 1, 2016, before jury voir dire, the State notified the trial court of the potential amendment. RP 122. The amendment formerly occurred on February 4, 2016. RP 550. The following motions had already been signed and served, or filed, prior to that date:

CP 25-26 (Jan 22) Defendant's response to State's Motions in Limine:

> "Self-defense requires that the actor's belief that self-defense is necessary must be reasonable. The facts know to the defendant all must be looked at to determine the reasonableness of his response. That fact that defendant knew the deceased was a dangerous man is evidence of his state of mind. *State v. Crawford*, 31 Wash. 260, 71 P. 1030, 1903 Wash. LEXIS 617 (Wash. 1903); *State v. Tribett*, 74 Wash. 125, 132 P. 875,1913 Wash. LEXIS 2008 (Wash. 1913), *overruled, State v. Penn*, 89 Wn.2d 63, 568 P.2d 797,1977 Wash. LEXIS 972 (Wash. 1977); *State v. Moore*, 182 Wash. 111,45 P.2d 605, 1935 Wash. LEXIS 619 (Wash. 1935). Evidence of reputation of the deceased is admissible on issue of aggression. *State v. Adamo*, 120 Wash. 268, 207 P. 7,1922 Wash. LEXIS 896 (Wash. 1922)."

CP 35-39 (January 29) State's Trial Brief Aggressor Instruction noting at CP 35-36:

> Defense witnesses are expected to testify that it was Mr. Pineyro who first displayed a hammer in his hand to threaten Mr. Gehrke prior to Mr. Gehrke retrieving his knife

moved for an exceptional downward departure because of his failed self-defense claim. CP 209-213. This was a self-defense case.

> and kicking Mr. Pineyro's bike over. *The defense has notified the court that it intends to pursue a defense of self-defense*.

(Emphasis added.)

CP 40-68 (January 29) Defendant's Proposed Instructions to the Jury:

> CP 58 Justifiable murder WPIC 16.02;
>
> CP 59 Justifiable Homicide WPIC 16.03
>
> CP 60 A person entitled to act on appearances in defending himself or another WPIC 16.07
>
> CP 61 Necessary force WPIC 16.05
>
> CP 62 No duty to retreat WPIC 16.08
>
> CP 63 Lawful force WPIC 17.02
>
> CP 64 Entitled to act on appearances. WPIC 17.04
>
> CP 65 No duty to retreat WPIC 17.05

CP 71-74 (Signed February 1, filed February 2) Defendant's response to State's Additional Motions in Limine and Motions in Limine: Discussing self-defense and actor's belief victim had previous plan to kill him, admissible as evidence of aggression, and defendant's subjective state of mind; victims gang affiliation admissible on self-defense as subjective belief of defendant regarding victim being dangerous person.

CP 79- 81 (Signed February 3, filed February 4) State's Trial Brief [regarding] Self-defense instructions.

CP 82-88 (Signed February 3, filed February 4) Defense Memorandum of Authorities in support of objection to First Aggressor Instruction – THE LAW OF SELF-DEFENSE.

All the jury instructions regarding self-defense applied equally to the alternative manslaughter charges.[6] Instruction 27 set forth the defense of justifiable homicide and stated that "[i]t is a defense to the charges of murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree that the homicide was justifiable as defined in this instruction." CP 133. Instruction 28 established that a person is entitled to act on appearances to support a claim of justifiable homicide, and that actual danger is not necessary for a homicide to be justifiable. CP 134. Instruction 29 established that "It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat." CP 135.

The respective theories of this case were simple, and remained unchanged after the amendment. The theory of the State's felony murder charge was that Mr. Gehrke started a fight with Mr. Pineyro, and thereafter stabbed him with a four and one-half inch knife in the jugular area of his neck, causing him to die, and that Mr. Gehrke did not act in self-defense.

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[6] Defendant requested and received a lesser included offense of second degree manslaughter. The instructions informed the jury that self-defense applied to that charge as well.

The theory of the State's manslaughter charge was that Mr. Gehrke started a fight with Mr. Pineyro, and thereafter stabbed him with a four and one-half inch knife in the jugular area of his neck, causing him to die, and that Mr. Gehrke did not act in self-defense. The defendant's theory regarding the felony murder charge was that Mr. Pineyro started the altercation, and that Mr. Gehrke struck the deadly knife blow in self-defense. This exact defense applied to the manslaughter charge. All of Mr. Gehrke's closing argument centered around self-defense and how a jury must look at the facts through the eyes of the defendant. RP 795-823. That was the defendant's theory from day one. Counsel for Mr. Gehrke noted that "as one juror said in jury selection, you look at the truth from where he [Mr. Gehrke] was standing." RP 798. Mr. Gehrke's closing argument summed up the State's theory of the case:

> Let's talk for [a] second about the State's theory of what occurred. Mr. Nagy outlined that for us, what the State believes was happening here. And the State's belief is that Mr. Gehrke saw Mr. Pineyro and that he was going to take care of this problem once and for all. That's what the State is contending and that's what would have to be happening to make their theory make sense.
>
> …
>
> And the idea the State is saying is that Mr. Gehrke wanted to poke the bear, that he wanted to create a situation where then he could claim self-defense.

RP 812-813.

Likewise, the State's theory of the case was best expressed in one statement from the State's rebuttal closing argument:

> What's important is what happened before both men got their weapons out. Who started it, how did it occur, who was the aggressor and the evidence according to the testimony says that was Mr. Gehrke.

RP 826.

While Mr. Gehrke correctly notes that impermissible prejudice could be more likely when the amendment occurs late in the State's case, this general rule does not absorb the rule that "the possibility of amendment will vary in each case" and "it is for the trial court to judge each case *on its facts*, and reversal is required only upon a showing of abuse of discretion." *Schaffer*, 120 Wn.2d at 284 (emphasis added); *see also Gosser*, 33 Wn. App. at 435 (where the major element of the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial). Mr. Gehrke failed to establish prejudice at the time he addressed the amendment. This Court should find his "uncertain nod in the direction of prejudice is insufficient"[7]

[7] *State v. Buckman*, 190 Wn.2d 51, 71, 409 P.3d 193 (2018) (denying defendant's motion to withdraw guilty plea where defendant failed to show actual and substantial prejudice sufficient to warrant relief in his motion for collateral relief).

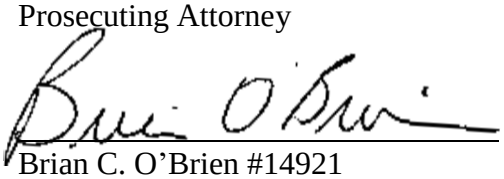
to establish that the trial court abused its discretion in granting the amendment in this case.

IV. CONCLUSION

For the reasons stated above the decision of the court of appeals should be affirmed.

Dated this 3 day of July, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE GEHRKE, Respondent.	NO. 95635-9 CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on July 3, 2018, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

John C. Julian
john@jcjulian.com

7/3/2018	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

July 03, 2018 - 9:04 AM

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