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NO. 64364-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE WALTERS, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. SUFFICIENT EVIDENCE SUPPORTS WALTERS'S FIRST DEGREE ASSAULT CONVICTION.	6
a. Walters Intended To Inflict Great Bodily Harm.	8
b. Walters Used Unlawful Force To Defend Himself And Chappelle.....	11
2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE NECESSITY DEFENSE.....	16
D. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Paolello, 951 F.2d 537
(3d Cir. 1991) 19, 21

Washington State:

State ex rel. Carroll v. Junker, 79 Wn.2d 12,
482 P.2d 775 (1971)..... 18, 20, 22

State v. Acosta, 101 Wn.2d 612,
683 P.2d 1069 (1984)..... 11

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 7

State v. Benn, 120 Wn.2d 631,
845 P.2d 289, cert. denied,
510 U.S. 944 (1993)..... 17

State v. Brown, 3 Wn. App. 401,
476 P.2d 124 (1970)..... 12

State v. Diana, 24 Wn. App. 908,
604 P.2d 1312 (1979)..... 18

State v. Elmi, 166 Wn.2d 209,
207 P.3d 439 (2009)..... 8

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 7, 10

State v. Ginn, 128 Wn. App. 872,
117 P.3d 1155 (2005), review denied,
157 Wn.2d 2010 (2006)..... 17

<u>State v. Griffith</u> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	17
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	11
<u>State v. Jeffrey</u> , 77 Wn. App. 222, 889 P.2d 956 (1995).....	18, 20, 22
<u>State v. Parker</u> , 127 Wn. App. 352, 110 P.3d 1152 (2005).....	19, 23
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<u>State v. Stockton</u> , 91 Wn. App. 35, 955 P.2d 805 (1998).....	19, 21
<u>State v. Trevino</u> , 10 Wn. App. 89, 516 P.2d 779, <u>review denied</u> , 83 Wn.2d 1009 (1974).....	11, 15
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	17
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	8

Statutes

Washington State:

RCW 9A.04.110	8
RCW 9A.08.010	8
RCW 9A.16.020	11
RCW 9A.36.011	7

Other Authorities

13B Seth A. Fine & Douglas J. Ende,
Washington Practice: Criminal Law §3305 (2009-10) 11

Wayne R. LaFave & Austin W. Scott,
Criminal Law § 50, 381-83 (1972) 18

A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Assault in the First Degree requires the specific intent to inflict great bodily harm. The State presented evidence that Walters fired multiple shots at Washington's head while Washington lay unarmed on the ground, and continued shooting at Washington's back as Washington fled the gas station. Is this sufficient evidence to demonstrate the intent to inflict great bodily harm?

2. Self defense and defense of others are complete defenses to Assault in the First Degree. Walters fired multiple shots at Washington after he dropped his shotgun, and continued shooting at Washington's back as he fled the gas station. Is this sufficient evidence to disprove self defense and defense of others beyond a reasonable doubt?

3. A defendant can claim necessity as a defense to unlawful possession of a firearm if he was under an unlawful and present threat of death or serious bodily injury. The State presented evidence that Walters possessed a firearm before

Washington obtained a shotgun and fired it. Did the trial court properly refuse to instruct the jury on the necessity defense under these circumstances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Johnnie Walters, Jr., with Assault in the First Degree with the firearm enhancement, and Unlawful Possession of a Firearm in the Second Degree. CP 1-2. The jury convicted Walters as charged. CP 48-53. The trial court sentenced Walters within the standard range on both counts: 138 months for Assault in the First Degree and 22 months for Unlawful Possession of a Firearm in the Second Degree. CP 60-68; 2RP 191.¹ Additionally, the trial court sentenced Walters to serve 60 months, consecutive to his underlying sentence, based on the firearm enhancement. Id.

¹ Although the Verbatim Report of Proceedings consists of five volumes, the State will only refer to the trial and sentencing transcripts and will therefore adopt the Appellant's reference system: 1RP (8/17/09 and 8/18/09) and 2 RP (8/19/09, 8/25/09, and 10/8/09).

2. SUBSTANTIVE FACTS.

On June 23, 2007, Detra Harris drove her friends Deche Washington and Treniqua Crowder to a gas station in South Seattle. 1RP 117, 120. Harris took Washington to the gas station because he appeared "stressed" and she did not want him to go alone. 1RP 120. As Harris parked her car, she saw Charles Chappelle approach her vehicle, loudly saying, "What's up? Nigger you talking shit. Let's go head up." 1RP 122-23. Harris understood Chappelle to be saying "let's fight" and noticed that Chappelle had his fists raised and balled up as if he intended to punch Washington. 1RP 123. As Harris watched Chappelle and Washington "squaring up," Walters walked up to where Harris was standing. 1RP 129-30. Harris asked Walters why the two men were fighting and if Walters would intervene. 1RP at 130. Walters did not intervene, but "flashed" his gun for Harris to see. 1RP at 131. Washington walked away from Chappelle and grabbed a shotgun from Harris's car.² 1RP at 132.

² Harris denied knowing Washington had a shotgun or seeing it earlier in her car. 1RP at 135, 156.

After Washington retrieved his shotgun, he started walking toward Chappelle and fired a "warning shot" in the air. 1RP at 132. Security cameras at the gas station captured Washington walking toward Chappelle with his shotgun pointed outward and Chappelle running away with his arms waving in the air. Ex. 105, #1 at 10:21:09-11.³ Based on security video footage, it appears that Walters remained at the gas station with his eyes and body turned toward Washington while Chappelle ran away. Ex. 105, #1 at 10:21:09-18.

Within seconds of walking after Chappelle, Washington rapidly turned around clutching his side and fell to the ground, dropping his shotgun in the process. 1RP 138; Ex. 105, #1 at 10:21:22-25. Although Harris did not know it at the time, Washington had been shot. 1RP 137. Harris testified that Walters fired several shots by Washington's head as Washington lay on the ground unarmed trying to cover his head. 1RP 132. Washington crawled a few feet before scrambling up from the ground and

³ Security cameras from three different angles captured most of this incident. At trial, the State introduced the security video footage as Exhibit #105. The State adopts the Appellant's reference system and will refer to the first camera only as #1 (entitled "7-Pumps").

running away from Walters. Ex. 105, #1 at 10:21:25. Washington left his shotgun lying where he dropped it and never returned to pick it up. 1RP 138; Ex. 105, #1 at 10:21:25-33.

According to Harris, Washington ran off in a "zigzag" pattern "trying to dodge the bullets" while Walters chased after him, still shooting. 1RP 138-39. Security video footage shows Walters continuing to shoot at Washington while simultaneously chasing Washington out of the gas station lot and into the street. Ex. 105, #1 at 10:21:27-33. Later, at the scene, detectives collected one shotgun shell from Washington's shotgun and fifteen .40 caliber cartridge casings, presumably from Walters's firearm. 1RP 77, 89; 2RP 67-68.

Harris ran to her car and picked up Washington in a vacant lot across the street. 1RP 132, 141. When Harris arrived, Washington was barely breathing and near collapse. Id. at 141-42. As Harris sped to Harborview hospital at speeds of 75-80 mph, she saw Walters following behind them in his car. Id. at 142-43. Walters followed Harris's car for half a block before turning off. Id. at 144. Although paramedics pronounced Washington dead on arrival, Washington survived with a gunshot wound to his groin. Id.; 2RP 86.

The State prosecuted Washington for shooting Chappelle. 2RP 29-30. At the time of this trial, Washington was serving time in prison. 2RP 9. Neither Washington nor Walters testified at trial. Detectives testified, however, that Walters told them that he shot Washington in self defense and defense of Chappelle. 2RP 39, 65. Throughout the trial, defense counsel argued that Walters reasonably and lawfully shot Washington. 1RP 18-19; 2RP 144-45, 153, 161-62. The State conceded that Walters may have initially acted in self defense or defense of others, but argued that the charged assault occurred when Walters continuously fired at Washington after Washington dropped his shotgun. 1RP 11-12, 15. Although Walters sought to have the jury instructed on the defense of necessity, the trial court refused, based on its finding that Walters was in possession of a firearm prior to Washington arming himself with a shotgun. 2RP 109, 112-13.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS WALTERS'S FIRST DEGREE ASSAULT CONVICTION.

Walters argues that the State failed to prove beyond a reasonable doubt that he acted with the intent to inflict great bodily harm. Additionally, Walters argues that the State failed to disprove

beyond a reasonable doubt that he was acting in self defense or defense of others. This argument fails on both counts. There is substantial evidence in the record that Walters intended to inflict great bodily harm and that he was not acting to defend himself or others when he committed the acts underlying the charged assault.

A person is guilty of assault in the first degree if he uses a firearm to assault another with the intent to inflict great bodily harm. RCW 9A.36.011(1)(a). At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be

convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

a. Walters Intended To Inflict Great Bodily Harm.

A person acts with intent when he has the objective of accomplishing a result that constitutes a crime. RCW 9A.08.010(1)(a). Assault in the First Degree requires the specific intent to inflict great bodily harm.⁴ State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result." Id. Although specific intent cannot be presumed, it can be inferred from all of the facts and circumstances, including the manner of committing the assault and the nature of the prior relationship between the parties. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

⁴ By statute, great bodily harm is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Walters argues that his manner of firing and his lack of a prior relationship with Washington demonstrate his lack of intent to inflict great bodily harm. *App. Br.* at 17. Walters interprets the security video footage as showing him "firing slightly over a person's head" and argues that by using his gun in such a manner, he did not intend to inflict great bodily harm. Id.

The security video footage, however, is subject to more than one interpretation. The video captures Walters firing at Washington, with his arm outstretched at chest level, but it is difficult to conclude more given the limited quality of the video and the camera angle. Ex. 105, #1 at 10:21:28. Although Walters contends that he was "firing slightly over a person's head," a rational trier of fact viewing this footage could just as reasonably conclude that Walters fired directly at Washington. Viewing the evidence in the light most favorable to the State and deferring to the trier of fact on issues of conflicting testimony, the Court should reject Walters's competing interpretation.

Walters's argument that he lacked intent ignores Harris's testimony that Walters fired multiple shots by Washington's head as

Washington lay unarmed on the ground "trying to cover his head."⁵ 1RP 132. This evidence alone is sufficient for a rational trier of fact to conclude that Walters intended to inflict great bodily harm on Washington. Discharging a firearm by someone's head as the person lies on the ground unarmed demonstrates a specific intent to permanently maim and possibly kill the person.

Further, Harris testified, and the security video footage confirms, that Walters continued shooting at Washington's back as Washington fled across the gas station lot unarmed and into the street. 1RP 138-39; Ex. 105, #1 at 10:21:28-33. By simultaneously firing at and chasing after Washington, Walters displayed his intent to inflict great bodily harm on Washington, an unarmed man trying to flee. Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the Court should conclude that Walters's manner of firing and continued shooting at Washington demonstrated his intent to inflict great bodily harm.

⁵ The fact that the security video footage failed to capture this is of little consequence. 1RP 133. The Court must defer to the trier of fact on issues of conflicting testimony and witness credibility. Fiser, 99 Wn. App. at 719.

b. Walters Used Unlawful Force To Defend Himself And Chappelle.

Walters argues alternatively that even if he intended to inflict great bodily harm on Washington, his actions were lawful because they were based on self defense and defense of others. By statute, self defense is defined as a lawful act. RCW 9A.16.020(3). Self defense negates the mental states of intent, knowledge, and recklessness. State v. Acosta, 101 Wn.2d 612, 616-18, 683 P.2d 1069 (1984). The State bears the burden of disproving self defense beyond a reasonable doubt. Id. at 616. Evidence of self defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). Using this knowledge, the jury must determine the degree of force a reasonable person in the same situation would believe is necessary to defend himself. Id. at 239.

A person may use the same amount of force to defend someone else as he may use to defend himself. State v. Trevino, 10 Wn. App. 89, 99, 516 P.2d 779, review denied, 83 Wn.2d 1009 (1974); 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law §3305 (2009-10). The only distinction is that the

person being defended must be present at the time of the incident. Id. Both self defense and defense of others are complete defenses to Assault in the First Degree. State v. Brown, 3 Wn. App. 401, 404, 476 P.2d 124 (1970).

Walters does not challenge the trial court's instructions to the jury on self defense or defense of others. Rather, Walters argues that the State failed to disprove beyond a reasonable doubt that he used reasonable force to defend himself and Chappelle. To make his argument, Walters focuses on the short, three-minute duration of the incident and the fact that even Harris did not know that Washington was injured until she pulled him into her car. *App. Br.* at 13-14. Additionally, Walters maintains that he had no duty to retreat and that Washington could have been armed with another weapon. Id. at 14-16.

Walters's counsel, however, made many of these same arguments at trial and the jury rejected them. The Court should resist Walters's efforts to relitigate this case on appeal and have the Court substitute its judgment for that of the jury. From the beginning of the case, defense counsel argued that Walters used "lawful" and "reasonable" force to defend Chappelle. 1RP 18-19 (Def.'s Opening Statement). Defense counsel began his closing

argument by attempting to recreate the fear and confusion of the scene, exclaiming, "Boom! Rack!" and asking, "What do you do? What's reasonable under the circumstances?" 2RP 144. Defense counsel suggested that "There is only one answer, and that's to try to defend yourself from those blasts, to try to defend your friend from those blasts." 2RP 145. Defense counsel noted that Harris did not know that Washington had been shot and ultimately argued that Walters took the same steps "you would take." 2RP 153, 161-62.

The jury disagreed, however, and convicted Walters as charged. CP 48-51. Substantial evidence in the record supports the jury's conclusion that Walters used unlawful force to protect himself and Chappelle. Harris's eye witness testimony, the security video footage, and the manner in which Walters committed the assault confirm that Walters used unreasonable and unlawful force to assault Washington.

At trial, Harris testified that as Washington and Chappelle squared up to fight, she saw Walters flash his gun. 1RP 132. Washington retrieved a shotgun from Harris's car and walked toward Chappelle, firing a "warning shot" in the air. Id. Although Chappelle ran from the gas station with his arms waving in the air,

Walters remained and walked around the gas pumps with his eyes and body facing toward Washington. Ex. 105, #1 at 10:21:09-18. Within seconds, Washington turned around and doubled over, clutching his side. 1RP 138; Ex. 105, #1 at 10:21:22-25. Washington stumbled to the ground and dropped his shotgun in the process. 1RP 138; Ex. 105, #1 at 10:21:22-25. Washington never picked up his shotgun again. 1RP 138; Ex. 105, #1 at 10:21:25-33.

According to Harris, Walters fired multiple shots by Washington's head as Washington lay unarmed on the ground trying to shield his head. 1RP 132. Moments later, Washington scrambled up from the ground and took off running away from Walters and his fire. 1RP 132; Ex. 105, #1 at 10:21:25. Walters continued shooting at Washington as he chased Washington out of the gas station lot and into the street. 1RP 138; Ex. 105, #1 at 10:21:27-33. Later at the scene, detectives collected one shotgun shell from Washington's shotgun and 15 .40 caliber cartridge casings likely from Walters's firearm. 1RP 77, 89; 2RP 67-68.

Contrary to Walters's claims, a reasonably prudent person in "Walters's shoes" would not have used a firearm as Walters did to protect himself and Chappelle. Once Washington fell to the ground and dropped his shotgun, Washington no longer presented the

same threat to Walters or Chappelle. A reasonably prudent person in Walters's shoes would have seen Washington's shotgun lying on the ground, or at the very least seen Washington run off without it. Consequently, a reasonably prudent person would have known that Washington was no longer armed and able to inflict the same type of harm.

Walters argues that Washington might have had another weapon on him, but there is no evidence to support that in the record. Indeed, Harris testified that after Washington fell she never saw him try to get a firearm. 1RP 138. Washington's flight away from the line of fire suggests that he did not have another weapon on him. If Washington had been armed with another weapon, then he likely would have shot back, or he might have never gone to Harris's car in the first place to get his shotgun.

The fact that Walters continued shooting at Washington's back as he chased Washington out of the lot further suggests that Walters used unreasonable force. Chappelle had already left the lot when Walters chased after Washington firing bullets. Walters no longer needed to defend Chappelle because Chappelle was no longer present and in danger. Trevino, 10 Wn. App. at 99 (defense of others requires the person being defended to be present). A

reasonably prudent person in Walters's shoes would have let Washington continue to run away - unarmed - rather than chase after him firing more bullets. Alternatively, a reasonably prudent person might have called the police, retrieved Washington's shotgun, or simply yelled at Washington to leave. Walters, however, chased Washington out of the lot while simultaneously shooting at him. 1RP 138; Ex. 105, #1 at 10:21:27-33.

Sufficient evidence in the record supports the jury's conclusion that Walters used unreasonable and unlawful force to defend himself and Chappelle. Viewing the evidence in the light most favorable to the State, the Court should affirm Walters's conviction for Assault in the First Degree.

2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE NECESSITY DEFENSE.

Walters contends that the trial court erred in declining to instruct the jury on the necessity defense to unlawful possession of a firearm. Walters disputes the trial court's finding that he possessed a firearm prior to Washington posing a threat. Walters's

argument fails because it overlooks the discretionary standard of review on appeal and does not address all of the elements required to obtain a necessity instruction.

In general, a trial court must instruct the jury on each party's theory of the case provided that the law and the evidence support it. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). A defendant claiming an affirmative defense is entitled to have his theory of the case submitted to the jury "when the theory is supported by substantial evidence in the record." State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). When evaluating whether evidence is sufficient to support giving a jury instruction, the trial court must interpret the evidence most strongly in the defendant's favor. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005), review denied, 157 Wn.2d 2010 (2006).

The standard of review applied to a trial court's refusal to give a proposed defense instruction depends on whether the refusal was based on law or fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give a jury instruction based on a factual dispute is reviewed for an abuse of discretion, while a trial court's refusal based on a legal ruling is reviewed de novo. Id. at 771-72. A court abuses its discretion only

when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In general, the necessity defense is available to a defendant when the physical forces of nature or the pressure of circumstances cause the defendant to take unlawful action in order to avoid a greater harm. State v. Diana, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979). Necessity is not a defense, however, where the defendant brought about the compelling circumstances or where a legal alternative existed. Id. at 913-14 (citing Wayne R. LaFave & Austin W. Scott, Criminal Law § 50, 381-83 (1972)).

Washington courts have recognized that necessity is a defense to unlawful possession of a firearm where the defendant demonstrates:

(1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Jeffrey, 77 Wn. App. 222, 225, 227, 889 P.2d 956 (1995).

Consequently, necessity is not a defense to unlawful possession of a firearm if the defendant is in possession of the

firearm *prior* to facing an immediate threat. Compare id. at 227 (trial court properly refused necessity instruction where defendant armed himself without evidence that the alleged intruder could immediately enter the home or cause serious bodily injury or death), and State v. Parker, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005) (trial court properly refused necessity instruction where defendant carried a gun for protection even though he did not face an immediate or specific threat), with State v. Stockton, 91 Wn. App. 35, 38, 43-44, 955 P.2d 805 (1998) (defendant entitled to necessity instruction where he grabbed a gun from someone trying to attack him), and United States v. Paoello, 951 F.2d 537, 541-43 (3d Cir. 1991) (same).

Here, the trial court refused to instruct the jury on the necessity defense, stating:

I think these facts are really quite similar to Jeffrey, 77 Wn. App. 222. At this point I will take the burden and the facts most favorable to the defense in looking at the evidence . . . [W]e have seen this videotape from three different angles. We don't see Mr. Walters going back to a car to get a gun. He's out there, and he shoots. From the videotape, there just is no evidence that he was not in possession of the gun before the incident -- before the shooting arose from Mr. Washington. So I am declining to give the instruction.

2RP 112-13.

Walters disputes the trial court's finding, arguing that the "surveillance tapes do not show every movement of Walters and cannot establish when Walters obtained the weapon." *App. Br.* at 28. Additionally, Walters contends that the facts of this case are distinguishable from Jeffrey. *Id.* at 28-29. Walters's arguments miss the mark by overlooking the discretionary standard of review and failing to address all of the requirements for obtaining a necessity instruction. The question of whether Walters was armed prior to Washington firing is inherently a factual inquiry that addresses the first requirement of a necessity instruction, specifically an "unlawful and **present** threat of death or serious injury." Jeffrey, 77 Wn. App. at 225 (emphasis added). The trial court's finding that Walters armed himself prior to a threat occurring should be upheld unless it is "manifestly unreasonable," or based on "untenable grounds." Junker, 79 Wn.2d at 26.

Although it is true that the security video footage does not capture Walters's every movement, it is equally true that there is no evidence in the record that Walters armed himself *after* Washington grabbed his shotgun and started firing. Indeed, the evidence is to

the contrary. Harris testified that she saw Walters flash his "shiny" gun *prior* to the shooting, while Washington and Chappelle were squaring up to fight. 1RP 131-32.

Further, as the trial court noted, the security video footage shows Walters "out there, and he shoots." 2RP 113. Mere seconds separate the moment Washington displayed his shotgun from the moment Walters started firing. There is no evidence to suggest that Walters armed himself during the seconds in between. The security video footage shows Walters's vehicle sitting empty and undisturbed during the entire incident. Ex. 105, #1. Walters did not return to his car until after he chased Washington out of the gas station. Ex. 105, #1 10:16:12-10:21:41.

Unlike other defendants who disarmed their assailants during an attack, Walters "flashed" his firearm before Washington even retrieved his shotgun from Harris's car. 1RP 131-32; See Stockton, 91 Wn. App. at 38 (defendant obtained assailant's gun); Paolello, 951 F.2d at 541-43 (same). Indeed, Harris's testimony suggests that the situation escalated after Walters displayed his gun. 1RP 132 ("after we saw the gun or whatnot, Deche (Washington) walks backwards to my car on the passenger's side, and he goes in the car and gets a gun"). Contrary to Walters's

claims, this case is akin to Jeffrey where the defendant armed himself *before* an immediate threat arose. 77 Wn. App. at 227. The Court should not disturb the trial court's finding that Walters armed himself prior to Washington posing a threat because it is neither "manifestly unreasonable," nor based on "untenable grounds." Junker, 79 Wn.2d at 26.

Finally, Walters failed at the trial court, and he fails on review, to make the requisite showing on each factor for a necessity instruction. Walters argues generally that he "was entitled to use force to protect his friend from death or serious injury," but he does not address all of the requirements, including that he had no reasonable alternative and that there was a direct causal link between his action and the threatened harm. *App. Br.* at 29-30; Jeffrey, 77 Wn. App. at 225.

Viewing the evidence in the light most favorable to Walters, there is insufficient evidence to find that no reasonable alternative existed and that there was a direct relationship between Walters arming himself and avoiding being shot. Walters had reasonable alternatives available to him other than possessing a firearm. When Washington and Chappelle started "squaring up," Walters could have yelled at them to stop, called the police, or tried to

intervene. Once Washington grabbed his shotgun, Walters could have run out of the lot like Chappelle, called the police, fled in his car, or simply stayed out of Washington's way.⁶ There is no evidence that Washington had a dispute with Walters. The security video footage never shows Washington pursuing Walters. Rather, the video shows Washington chasing after Chappelle and running away from Walters. Ex. 105, #1, 10:21:10-22. Washington turned toward Walters only after he had been shot and stumbled to the ground. Id. at 10:21:22-25. Walters had multiple reasonable alternatives available to him precluding his claim of necessity.

Additionally, Walters fails to demonstrate a direct causal link between his action and the threatened harm. Walters's possession of a firearm - prior to Washington's arrival - did not eliminate the later threat posed by Washington. See Parker, 127 Wn. App. at 356 (defendant's gun possession for "protection" did not eliminate the possibility of attacks by his assailants). Walters's decision to carry a firearm did not stop, and indeed may have provoked, Washington's decision to obtain his shotgun from Harris's car.

⁶ Although Walters had no duty to retreat in the face of an assault, vacating the area was nevertheless a reasonable alternative to possessing a firearm.

Having failed to demonstrate all of the requirements for obtaining a necessity instruction, Walters's claim of error fails. The trial court properly refused to instruct the jury on necessity.⁷

D. CONCLUSION

Viewing the evidence in the light most favorable to the State, there is sufficient evidence that Walters intended to inflict great bodily harm, and that his actions were not motivated by self defense or defense of others. The trial court properly refused to instruct the jury on the necessity defense. The Court should affirm Walters's convictions.

DATED this 8th day of October, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

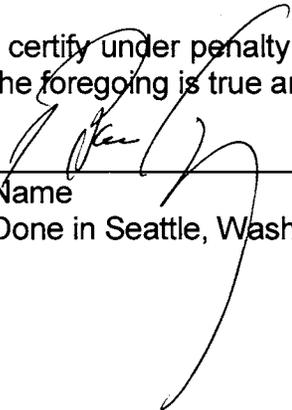
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Office WSBA #91002

⁷ If the Court finds that the trial court erred and the jury should have been instructed on necessity, then Walters's conviction for Unlawful Possession of a Firearm in the Second Degree should be reversed and remanded for a new trial.

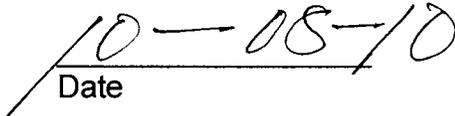
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine L. Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOHNNIE WALTERS, JR., Cause No. 64364-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

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