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No. _____

Case #: 1036744

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CECIL JHURAY HART,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 58281-3-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 22-1-02509-5
The Honorable Angelica Williams, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Cecil Jhuray Hart, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 58281-3, which was filed on November 21, 2024. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to meet its burden of proving that Cecil Hart's use of force was not justified and that he did not act in lawful self-defense, where the alleged victim: instigated the confrontation; implied he had a gun; threatened to use violence against Hart; followed Hart after Hart got into his car and drove away; then continued to make threatening statements and gestures towards Hart up until the time that Hart finally fired a warning shot towards the car that the alleged victim was riding in?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Cecil Jhuray Hart with two counts of first degree assault, while armed with a firearm; one count of drive-by shooting; and one count of unlawful possession of a firearm (UPFA). (CP 5-8)

At the State's request, the trial court instructed the jury on the lesser crimes of second degree assault. (3RP 359-60; CP 58-62) At Hart's request, the court also instructed the jury on the justifiable use of force in self-defense. (3RP 352-53; CP 22-25; 68-70)

The jury found Hart not guilty of first degree assault but guilty of second degree assault on counts I and II, and guilty of drive-by shooting and UPFA on counts III and IV. The jury also found that Hart was armed with a firearm during the commission of the assaults. (4RP 406-08; CP81-88)

The trial court imposed concurrent standard range

sentences on all counts, plus two consecutive firearm enhancements, for a sentence totaling 167 months. (5RP 419; CP 114) The court also imposed 18 months of community custody on counts I, II, and III, and imposed a \$500 crime victim assessment. (CP 112, 115)

Hart filed a timely Notice of Appeal. (CP 127) The Court of Appeals affirmed Hart's convictions. But the court agreed with Hart that the trial court unlawfully imposed a \$500 crime victim penalty assessment and that his sentence on the assault convictions combined with his community custody term exceeds the statutory maximum and sentence.

B. SUBSTANTIVE FACTS

On the morning of September 1, 2022, Cecil Hart and Demetrius Senter both drove vehicles into the Nisqually Market gas station located a few blocks south of 176th Street East on Canyon Road in Puyallup. (2RP 155, 157, 198; RP 313; Exhs. P39, P40) Hart was driving

his Chevrolet Tahoe truck and Senter was driving a white Toyota Camry owned by his girlfriend, Melissa Jacobus. (2RP 155, 253)

Senter and Jacobus saw the Tahoe drive forward and away from an available gas pump, as if it were going to pull into a parking space instead, so Senter pulled the Camry next to the gas pump and walked inside to pay for gas. (2RP 156, 199-200) But Hart had been waiting in line for this open pump, and had only pulled his Tahoe past it so that he could maneuver his large truck into the space. (3RP 314-15) When Hart put his truck into reverse, he saw that the Camry had pulled in close behind him and taken the pump. (3RP 316) Although the gas station was busy and there was a line of cars, Hart saw one other open pump so he drove the Tahoe there, then also went inside to pay for his gas. (3RP 314, 316)

According to Senter, Hart approached him inside the store and told him, in a “soft-spoken” tone, that he

almost hit Hart's truck and "if you would have hit my truck, it would have been an issue." (2RP 199, 200) To which Senter replied, "What the fuck do you mean, issue?" Then Senter, by his own description, "commenced to just verbally attack [Hart] for even just coming at me like that." (2RP 200) Senter testified that they exchanged words, and Senter began insulting Hart's clothing, called him "weak," and told Hart "You ain't shit." (2RP 201) Senter could tell that Hart was uncomfortable. (2RP 201)

Hart testified that he was calm and respectful towards Senter, and did not raise his voice. (3RP 317, 318) But Senter escalated the situation quickly. (3RP 318) Senter began yelling threats and calling him names, and told Hart, "I'll beat your ass." (3RP 318)

The two men went outside to pump their gas. (2RP 201; 3RP 318) Senter thought Hart seemed nervous, but he nevertheless continued "verbally attacking" Hart because he was still upset that Hart "challenged" him

inside the store. (2RP 219, 202, 220) At one point, Senter noticed Hart fidgeting with his shirt, and saw that Hart had a gun in his waistband. (2RP 203) Senter told Hart, "You're a bitch. Only bitches carry guns," and said, "You're still a coward. I'm not afraid. You know what I'm saying? Drop the gun, and I guarantee I'll kick your ass." (2RP 203; Exh. 203)

Hart testified that, once outside, Senter continued to call him names and told Hart that he was a member of the Crips gang. (3RP 319) Hart laughed at Senter's rantings, and this made Senter even angrier. (3RP 319) At one point, Hart overheard Senter make a comment to Jacobus that sounded like he was telling her to open something and to grab something from inside the Camry. (3RP 320, 321) Hart thought Senter might be getting a gun, so he decided for safety reasons to get his own gun. (3RP 321, 338, 342) Hart testified that he carried a gun with him because he and his wife have been the victims of a prior

drive-by shooting, and his wife was struck by a bullet in one of those incidents. (3RP 322-23)

Jacobus also saw that Hart had a gun, so she decided to begin recording the interaction on her mobile phone. (2RP 157, 159; Exh. P42) Jacobus testified that Senter backed away from Hart once he saw the weapon, but he continued to berate Hart and call him derogatory names. (2RP 159, 160, 162) Jacobus heard Senter tell Hart that he would “kick his ass.” (2RP 160)

On the video, Senter can also be heard telling Hart, “I’ll fuck you up[.]” (2RP 221; Exh. P42) Jacobus thought Hart seemed “shooked up” and he was “moving around kind of quickly.” (2RP 160) The video confirms this, as Hart appears visibly anxious and hurried, and does not respond in kind to Senter’s aggressive, loud, profanity-laden tirade. (Exh. P42)

Hart finished pumping his gas and quickly left. (2RP 163, 207; 3RP 324) When exiting the Nisqually

Market gas station, cars can turn right and immediately reach Canyon Road, or cars can turn left and follow a side road as it makes several turns and eventually reaches a signaled intersection at 176th Street East. (Exh. P39-P41; 2RP 183, 247; 3RP 346) Hart turned left when he drove away. (3RP 324) The signal was red when he approached 176th Street, so he pulled into the left-turn lane and stopped. (3RP 324)

A few moments later, Hart saw the white Camry pull up next to him and stop in the right lane. (3RP 324) Hart's first thought was that Senter "was crazy." (3RP 324) Although Senter and Jacobus claimed they had not followed Hart, Senter immediately began yelling that Hart was "still a bitch." (2RP 163, 182, 207, 208) Jacobus testified that Senter was "[s]till talking shit to [Hart]." (2RP 166) Senter shouted that Hart was "a bitch," and he spit towards Hart's truck. (2RP 166) Senter testified that he got out of the Camry and stood next to Hart's truck, and

told Hart he was a “pussy” and a “bitch,” then got back into the Camry. (2RP 208, 215, 225)

According to Senter and Jacobus, when the light turned green and they began to pull into the intersection, they heard a loud pop. (2RP 166, 208) Jacobus felt something hit the center console, and felt some shrapnel hit her thigh. (2RP 166, 208) They could see Hart’s hand holding a firearm out of his sunroof. (2RP 166, 226)

Hart testified that he could not hear what Senter was yelling because he had loud music playing on his stereo. (3RP 324, 326) But he saw Senter get out of the Camry and it appeared to Hart that Senter was going to walk towards him. (3RP 328) Hart thought that Senter might have a gun and might shoot and kill him. (3RP 330) Hart could not drive away because the light was still red and there was cross-traffic in the intersection. (3RP 330) Fearing for his life, Hart fired a single warning shot out of the sunroof and towards the back of the Camry.

(3RP 330, 332) He only hoped to scare Senter away, and did not aim at him or try to shoot him. (3RP 328, 330)

Another motorist, Alfred Thompson, was stopped for a different red light at the same intersection and saw the incident unfold. (2RP 188-89) He saw the drivers of the Camry and Tahoe exchange words. (2RP 189-90) He saw the Camry driver lean out of his window towards the Tahoe, then turn back towards the Camry's passenger. (2RP 192, 195, 196) Then Thompson saw a hand come out of the Tahoe sunroof, holding a handgun. (2RP 190) He heard a gunshot, and immediately called 911. (2RP 192; Exh. P43)

Hart then turned left and quickly drove away. (2RP 166, 209; 3RP 328) Senter chased after Hart while Jacobus called 911. (2RP 167, 209) At the urging of the dispatch operator, Senter eventually stopped chasing Hart and pulled over to the side of the road. (2RP 169, 211, 212; Exh. P44)

Hart acknowledged that he did not see Senter with a gun, but thought Senter had been trying to make Hart think he had a gun. (3RP 336-37, 348) Both Senter and Jacobus claimed they did not display or possess a firearm that day. (2RP 167, 205)

Pierce County Sheriff's Deputies Richard Hecht and Frederick Johnson responded to the 911 calls, and contacted Senter and Jacobus. (2RP 231, 245) Jacobus was extremely upset "[a]bout the fact that a bullet had just got shot into my car and it hit me, and the fact that two grown men want to take it amongst themselves and act like little fucking children." (2RP 186) She partially blamed Senter for the incident, and told him several times, "I hate you." (2RP 186; Exh. 45)

Jacobus showed Deputy Johnson a bruise on her hip from where plastic from the console had struck her. (2RP 172, 245; Exh. P9) Deputy Hecht noted an entry bullet hole in the rear door of the Camry, and damage to

the center console. (2RP 234; Exhs. P2-P8) But he did not find a bullet or any bullet fragments inside the Camry. (2RP 236, 237) Deputy Johnson went to the intersection of 176th Street and the side road, and found a 9mm pistol cartridge casing in the crosswalk. (2RP 247-49)

Four days later, on September 5, 2022, Deputy Johnson provided backup during a routine traffic stop of the Tahoe truck driven by Hart. (2RP 253, 265, 267) Johnson recognized Hart and his truck from the video that Jacobus had filmed at the gas station, and questioned him about the incident. (2RP 253, 257, 258; Exh. P42) Hart told Johnson that Senter fired at him first, and directed Johnson to a bullet hole by the gas cap of his truck. (2RP 259; Exh. P48)

While there was a bullet hole in this area of the Tahoe, Johnson reviewed Jacobus' video and saw the bullet hole was already there during the gas station confrontation and before the shooting at the intersection.

(2RP 258-59; 3RP 289-90; Exh. P42) Hart explained that he told Deputy Johnson this fib because he was scared and afraid of going to jail. (3RP 331)

During a subsequent search of the Tahoe, Deputy Tristin Marrs noted several older bullet strikes on both the driver and passenger sides of the Tahoe. (3RP 287, 289-91, 299; Exhs. P12-P21) In the footwell behind the front passenger seat, Marrs found a pouch with a Ruger firearms logo on it. (3RP 294) He testified that this type of pouch is commonly issued with the purchase of a new handgun. (3RP 294) He also found one unfired 9mm cartridge in the footwell behind the driver's seat. (3RP 297)

Hart's wife, Raquera Veliz, confirmed that she and Hart had been the victims of a random shooting a few months prior when they were in the Tahoe together. (3RP 306, 309) Veliz was struck in her thigh by a bullet, and Hart drove her to the emergency room for treatment.

(2RP 306-07) They reported the incident to the police, but no suspects were ever identified. (3RP 307, 308)

V. ARGUMENT & AUTHORITIES

The issues raised by Hart's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2). By finding sufficient proof of the absence of self-defense under the facts of this case, the Court of Appeals improperly relieved the State of its constitutional burden of proof beyond a reasonable doubt.

Hart claimed he only fired his gun toward the Camry because he feared Senter would shoot or kill him. The jury was subsequently instructed that "assault in the second degree, and/or drive-by shooting is justifiable when committed in lawful defense of the defendant[.]" (CP 68) The State presented insufficient evidence to

prove that Hart's use of force was not justifiable.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, 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 inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal as a due process violation. *State v. Sweany*, 162

Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

To convict Hart of second degree assault as instructed in this case, the State had to prove that Hart assaulted Senter and Jacobus “with a deadly weapon.” (CP 61, 62) *See also* RCW 9A.36.021(1)(c). To convict Hart of drive-by shooting, the State had to prove that Hart “recklessly discharge[d] a firearm ... in a manner which create[d] a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle[.]” RCW 9A.36.045(1).

The use of force is lawful and justified “whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person.” RCW 9A.16.020(3). To properly assert self-defense, a

defendant must show that they subjectively feared they were in imminent danger of harm.¹ *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020). A defendant must then show that their belief in the imminent harm was objectively reasonable. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Last, the defendant has to prove that they exercised no greater force than was “reasonably necessary.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citing *State v. Callahan*, 87 Wn. App. 925, 929, 943 P. 2d 676 (1997)).

Courts evaluate evidence of self-defense “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). This standard incorporates both objective and

¹ Here, the jury was instructed that Hart was entitled to use force if he “reasonably believed that [Senter] intended to inflict death or great personal injury[.]” (CP 68)

subjective elements. *Janes*, 121 Wn.2d at 238. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her. *Janes*, 121 Wn.2d at 238. The objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wn.2d at 238.

When the defendant raises some credible evidence of self-defense in a criminal prosecution, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984); *Janes*, 121 Wn.2d at 237. The absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191,198, 156 P.3d 309 (2007).

Here, Hart produced sufficient evidence to warrant a self-defense jury instruction. (CP 68) So the burden then

shifted to the State to disprove this assertion of self-defense beyond a reasonable doubt. The record shows that the State failed to do so.

The evidence shows Hart's fear that Senter intended to shoot or kill him, or otherwise cause him great personal injury, was both subjectively and objectively reasonable. The testimony unequivocally showed that Hart first approached Senter in a soft-spoken and respectful manner, and that Senter escalated the interaction by yelling, using profanity, and name-calling. (2RP 199, 200; 3RP 317, 318) Senter berated Hart both inside and outside the store. Hart seemed nervous and uncomfortable with Senter's aggressive behavior. (2RP 160, 201; Exh. P42) But, by Senter's own admission, he continued "verbally attacking" Hart, and told Hart he would "kick your ass" and "fuck you up." (2RP 160, 203, 219, 202, 220, 221)

Hart was the first to leave the gas station, which

should have ended the encounter. Hart was peacefully listening to music and waiting at a red light a few blocks away from the gas station, when Senter pulled the Camry into the lane next to him. (2RP 165, 207; 3RP 324, 346) Instead of taking a right turn and driving away, Senter stopped the Camry, got out, and once again began verbally assaulting Hart. (2RP 165-66, 208) Just as any reasonable person in Hart's position would have, Hart believed that Senter had followed him. (3RP 324, 345) Just as any reasonable person in Hart's position would have, Hart thought that Senter may be armed. (3RP 330) And just as any reasonable person in Hart's position would have, Hart feared that Senter intended to shoot or kill him. (3RP 330, 332)

Senter's behavior at the gas station made it seem as if he also had a gun. (3RP 320, 321) And, even though he knew that Hart had a gun, Senter did not back down or attempt to de-escalate the situation, as one

would expect a reasonable unarmed person to do in that situation. (2RP 159, 160, 162) Instead, Senter continued to berate Hart, followed Hart when he left the gas station, and re-engaged with Hart at the intersection. This makes Hart's suspicion that Senter was armed completely reasonable.

The fact that Hart may have been mistaken about Senter being armed is not dispositive because, as the jury was instructed:

A person is entitled to act on appearances in defending himself or herself, if that person believes in good faith and on reasonable grounds that he or she is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

(CP 69) See also WPIC 17.04.

Hart had already seen that driving away was not enough to end Senter's aggressive behavior. So, by firing a warning shot aimed towards the back of the Camry and

not at Senter or Jacobus (3RP 328, 330), Hart exercised no greater force than was reasonably necessary to end the encounter and stop Senter from causing him death or great personal injury.

The Court of Appeals found that the State met its burden to disprove self-defense, holding:

Hart testified that Senter intimated that he had a gun and used threatening words during their argument, but this was before Hart fired at Senter's vehicle. While Hart claims Senter was outside his vehicle and coming toward Hart at the time he fired his gun, we leave witness credibility determinations to the trier of fact. Given these facts, a reasonably prudent person would not believe Senter was about to inflict imminent harm at the time Hart fired his gun. Viewing this evidence in the light most favorable to the State, we hold that the State provided sufficient evidence that Hart did not act in self-defense. Accordingly, we affirm his convictions for two counts of assault in the second degree and drive-by shooting.

(Opinion at 6-7, citation omitted)

The court's holding ignores that the jury must consider all the facts and circumstances known to the

defendant, which in this case obviously includes what happened “before Hart fired at Senter’s vehicle.” (Op. at 6) The court’s holding also ignores that a person is entitled to act on appearances, and that actual danger is not necessary for the use of force to be lawful. And the court’s holding ignores that, even if the jury believed that Senter was inside his vehicle at the time Hart fired, Senter instigated the entire confrontation, Senter implied he was armed, Senter threatened to “fuck [Hart] up,” Senter followed Hart after he left the gas station, and Senter continued to berate Hart as they waited at the signal. An objectively reasonable person under these circumstances would feel that Senter posed a threat of imminent harm.

Because the State presented insufficient evidence from which a juror could find the absence of self-defense beyond a reasonable doubt, Hart’s assault and drive-by shooting convictions must be reversed and the charges dismissed. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.

Ct. 628, 61 L. Ed. 2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 216, 616 P.2d 628 (1980).

VI. CONCLUSION

This Court should accept review, and reverse and dismiss Hart's assault and drive-by shooting convictions.

I hereby certify that this document contains 3,816 words, excluding the parts of the document exempted from the word count, and therefore complies with RAP 18.17.

DATED: December 4, 2024



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APPENDIX

Court of Appeals Opinion in *State v. Cecil Jhuray Hart*, No. 58281-3-II

November 21, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CECIL JHURAY HART,

Appellant.

No. 58281-3-II

UNPUBLISHED OPINION

VELJACIC, J. — Cecil J. Hart appeals his convictions for two counts of assault in the second degree while armed with a firearm, drive-by shooting, and unlawful possession of a firearm in the first degree. He contends that the State failed to prove that he did not act in self-defense because it failed to prove that his use of force was not justified. Hart also contends the trial court unlawfully imposed a \$500 crime victim penalty assessment (CVPA) and that his sentence on the assault convictions combined with his community custody term exceeds the statutory maximum. The State concedes the sentencing errors. We affirm Hart’s convictions, but we accept the State’s concessions and remand for resentencing to strike the CVPA and correct Hart’s sentence on the assault convictions so that it does not exceed the statutory maximum.

FACTS

Demetrius Senter and his girlfriend, Melissa Jacobus, pulled into a gas station. Hart pulled into the gas station at roughly the same time. There was a misunderstanding about the use of a gas pump. Words were exchanged between Senter and Hart inside the gas station. The two continued

to argue as they returned to their vehicles. Hart left the gas station and was waiting to turn left at a nearby stoplight. Senter pulled up next to him in the right lane.

Senter and Hart continued to exchange words. A witness testified that as Senter began to pull up in the intersection, Hart pulled out a gun, reached through his vehicle's sunroof, and shot toward Senter's vehicle. The bullet went through the driver's side rear passenger door and hit the vehicle's center console, causing debris to hit Jacobus's leg. Jacobus sustained a bruise on her hip from where the shrapnel of the center console hit her leg.

The State charged Hart with two counts of assault in the first degree while armed with a firearm, one count of drive-by shooting, and one count of unlawful possession of a firearm.

During trial, Senter testified that Hart approached him inside the gas station and said, "You almost hit my truck, and if you did, it would've been a problem." 2 Rep. of Proc. (RP) at 199. Hart related a different initial encounter. He testified that he calmly approached Senter, stating, "Sir . . . [h]ey you almost hit my car." 3 RP at 317.

Both men testified that they argued inside the store and continued to argue outside. Senter further testified that at one point Hart lifted his shirt, revealing the butt of a handgun. He also testified that Hart was fidgety and braced the gun as if he was getting ready to pull it out. Senter backed up, pumped his gas, and continued to yell at Hart. Senter testified that he called Hart a coward and said, "Drop the gun, and I guarantee I'll kick your ass." 2 RP at 203. He testified that Hart continued to clasp the gun at his waistband and replied, "We'll see. Yeah, yeah. Come on. We'll see." 2 RP at 214.

Jacobus testified that during this time, Hart appeared shaken up, moving around quickly, and left once he was done pumping his gas. When the two met up at the intersection, the men began yelling again. Jacobus testified that Senter did not get out of the vehicle. Instead, she

recalled that Senter spit towards Hart's bumper and called him "a bitch." 2 RP at 166. Jacobus testified that it was at this point that she heard a pop and looked over and saw Hart's hand with a firearm coming down from the sunroof. She testified that neither she nor Senter had a gun with them.

Senter testified that while at the intersection, he and Hart continued to insult one another through their cars. Senter testified that at one point he (Senter) got out of his vehicle, but he was standing near the driver's door. He testified that he turned, went back in the car, and then a few seconds later it was "like, boom" and he noticed inside the car shrapnel from the bullet and heard Jacobus exclaim, "I'm hit." 2 RP at 208-09. Senter testified that he did not see Hart's gun because "he had his back turned." 2 RP at 217.

Alfred Thompson was a witness to the intersection incident. He testified that he observed two men parked next to each other. Thompson saw the men exchanging words. Thompson testified that he did not see Senter get out of his vehicle, but he saw him lean out of his window. He testified that he observed Senter talking to Jacobus and appeared "to start[] to pull up a little bit" when Thompson looked back at Hart's vehicle and saw a hand come out of the sunroof and the gun was fired. 2 RP at 195. Thompson testified that "[Senter] was not even paying attention to [Hart] in the truck at that time when the shots were being fired." 2 RP at 196.

Hart testified in his defense that Senter kept yelling at him at the gas pump and made comments suggesting that Hart was in a gang. Hart testified that Senter went back to his vehicle and told Jacobus to open the door, but Jacobus said, "No, we're not about to be doing that. Just get in the car so we can go." 3 RP at 320. Hart claimed that he thought Senter wanted Jacobus to open the car door so he could get a gun, so Hart grabbed his gun and stuck it in his pants. Once

Hart grabbed his gun, Senter said, ““You’re a pussy. Only pussies carry guns.”” 3 RP at 349. At this point, Hart felt like he “got played” into thinking Senter had a gun. 3 RP at 349.

Hart testified that later, at the intersection, Senter stuck his head out of the window and continued to yell at Hart, but Hart could not hear him. Hart turned his music up, which made Senter mad. Hart said, ““Run along, run along.”” 3 RP at 326. Hart testified that he saw Senter begin to get out of his vehicle, but Jacobus appeared to grab him because Senter’s door closed again. Hart testified that he then saw Senter come out of his vehicle again this time his “whole body” was out of the vehicle and Senter appeared to be “getting ready to walk towards [Hart].” 3 RP at 328. Hart then fired a “warning shot” through the sunroof at the back of Senter’s vehicle.

The trial court granted Hart’s request to instruct the jury on self-defense relating to the assault and drive-by shooting charges. At the State’s request, the court also instructed the jury on the lesser crimes of assault in the second degree.

The jury found Hart not guilty of the two counts of assault in the first degree but guilty of the lesser offenses of assault in the second degree while armed with a firearm. The jury also found Hart guilty of drive-by shooting and unlawful possession of a firearm.

The trial court imposed standard range sentences on all counts, plus two consecutive firearm enhancements. The maximum sentence on the assault convictions was 120 months. The court sentenced Hart to 84 months for each of the assault in the second degree convictions plus a 36-month firearm enhancement on each count for a total of 120 months. The court also imposed 18 months of community custody on the drive-by shooting and two assault convictions and imposed a \$500 CVPA fee after finding Hart indigent.

Hart appeals his judgment and sentence.

ANALYSIS

I. SELF-DEFENSE

Hart contends that his convictions for two counts of assault in the second degree and drive-by shooting should be vacated because the State failed to disprove that he acted in self-defense. We disagree.

A. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence, we determine whether any rational juror could have found the essential elements of the charged crime beyond a reasonable doubt based on the evidence presented at trial. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015). In making this determination, we view the evidence in the light most favorable to the State. *Id.* All reasonable inferences from the evidence are drawn in the State's favor and interpreted most strongly against the defendant. *Id.* We defer to the trier of fact regarding conflicting testimony, witness credibility, and persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) We review de novo sufficiency of the evidence challenges. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

B. Legal Principles

Relevant to this appeal, a person is guilty of assault in the second degree if they, under circumstances not amounting to assault in the first degree, assault another with a deadly weapon. RCW 9A.36.021(1)(c). A person is guilty of drive-by shooting if they “recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle.” RCW 9A.36.045(1).

Self-defense is a defense to assault and drive-by shooting. *See* RCW 9A.16.020. “The use, attempt, or offer to use force upon or toward the person of another is not unlawful . . .

[w]henever used by a party about to be injured, or . . . in preventing or attempting to prevent an offense against his or her person.” RCW 9A.16.020(3). A defendant’s use of force is lawful and self-defense can be asserted as a defense if the defendant subjectively and reasonably believes that the victim will inflict imminent harm. *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020).

“The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees.” *Id.* (quoting *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)). “If the defendant meets the ‘initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense,’ then the State has the burden to prove the absence of self-defense beyond a reasonable doubt.” *Grott*, 195 Wn.2d at 266 (quoting *Riley*, 137 Wn.2d at 909).

C. The State Met Its Burden to Disprove Self-Defense

Here, Senter, Jacobus, and Thompson testified that Senter was inside his vehicle when Hart shot at it. Thompson specifically testified that Senter was pulling his vehicle up, talking to Jacobus, and “not even paying attention to [Hart]” when Hart fired his gun. 2 RP at 196. And Senter specifically testified that he was not paying attention to Hart with his back turned and about to pull away when Hart fired his gun. Hart testified that Senter intimated that he had a gun and used threatening words during their argument, but this was before Hart fired at Senter’s vehicle. While Hart claims Senter was outside his vehicle and coming toward Hart at the time he fired his gun, we leave witness credibility determinations to the trier of fact. *Thomas*, 150 Wn.2d at 874-75.

Given these facts, a reasonably prudent person would not believe Senter was about to inflict imminent harm at the time Hart fired his gun. Viewing this evidence in the light most favorable to the State, we hold that the State provided sufficient evidence that Hart did not act in self-defense. Accordingly, we affirm his convictions for two counts of assault in the second degree and drive-by shooting.

II. CVPA

Hart next contends that the trial court erred by imposing a \$500 CVPA. The State concedes the error. We accept the State's concession.

When the trial court sentenced Hart, it was required to impose a CVPA of \$500 under former RCW 7.68.035(1)(a) (2018), even though it found him indigent. But that statute has since been amended. It now states that courts "shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." RCW 7.68.035(4); LAWS OF 2023, ch. 449, § 1. The amendment took effect July 1, 2023. LAWS OF 2023, ch. 449, § 27. Although these amendments took effect after Hart's sentencing, they apply to cases pending appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). Therefore, we remand to the trial court to strike the CVPA.

III. COMMUNITY CUSTODY

Hart lastly contends that the trial court exceeded its statutory authority by imposing 18 months of community custody on the assault in the second degree convictions. The State concedes the error. We accept the State's concession.

Assault in the second degree is a class B felony, punishable by a maximum of 10 years of confinement (120 months). RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). RCW 9.94A.701(10) provides, "The term of community custody specified by this section shall be reduced by the court

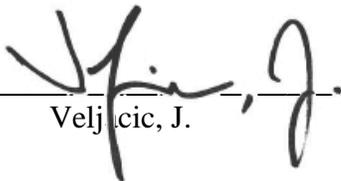
whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.”

Here, the trial court sentenced Hart to 84 months for each of the assault in the second degree convictions plus a 36-month firearm enhancement on each count. Because the court imposed a total of 120 months or 10 years in custody—84 months plus the 36-month sentencing enhancement—it did not have the authority to impose an additional 18 months of community custody. Therefore, we accept the State’s concession and remand to the trial court to correct the sentencing error regarding the assault in the second degree convictions.

CONCLUSION

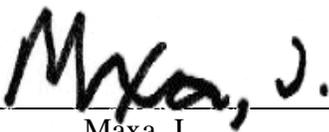
We affirm Hart’s convictions, but we accept the State’s concessions and remand for resentencing to strike the CVPA and correct Hart’s sentence so that it does not exceed the statutory maximum.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Veljicic, J.

We concur:



Maxa, J.



Cruser, C.J.

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