

Use of Force Fatality Investigation

Ronny Dunning

Seattle Police Force Investigation Team

2020FIT-0026 and 2020-315736



King County Prosecuting Attorney

Public Integrity Team

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DECLINE MEMORANDUM

This memorandum has been approved by the King County Prosecuting Attorney to be published on the website of the Prosecuting Attorney's Office Public Integrity Team.¹

¹ <https://kingcounty.gov/en/dept/pao/about-king-county/about-pao/team-leadership/organizational-structure/criminal/mainstream/public-integrity-team>

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I. INTRODUCTION

1. Purpose of the Memorandum

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm.² The independent investigation is conducted in the same manner as a criminal investigation and must be completely independent of the involved agency.³

The Revised Code of Washington requires the prosecuting attorney to represent the State of Washington and to prosecute all criminal actions in which the state or the county may be a party.⁴ In addition to exercising its prosecutorial discretion to initiate criminal proceedings, the prosecuting attorney is required to review certain incidents regarding police use of force and to determine if sufficient evidence exists to support the filing of criminal charges.⁵ Therefore, the review of an incident by the King County Prosecuting Attorney's Office (KCPAO) does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist in an independent investigation involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.⁶

2. Scope of the Memorandum

The KCPAO's decision whether the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials

² RCW 10.114.011. See also WAC 139-12-010.

³ WAC 139-12-010.

⁴ RCW 36.27.020(4).

⁵ Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies. RCW 10.114.011. Similarly, if the Office of Independent Investigation is the lead investigation agency, the prosecutorial entity must review the investigation. RCW 43.102.020. 2021 c 318 § 101.

⁶ Id. See also WAC 139-12-010.

provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable burden of proof, and the KCPAO's Filing and Disposition Standards.

The KCPAO's determination is not intended to address matters outside the scope of this memorandum including, but not limited to, an administrative action by the involved agency, any civil action, or any inquiry, or other proceeding. Compared to a criminal prosecution, these proceedings involve different areas of the legal system, utilize different standards of proof, and may include evidence that is not admissible in a criminal prosecution. The KCPAO expresses no opinion regarding the propriety or likely outcome of any such actions. However, topics that are relevant to matters outside the scope of this memorandum, such as department policy, procedures, or training, may be included and reviewed in this memorandum to the extent those topics are relevant to assessing whether the police action was justified or if there was a criminal action such that criminal charges should be filed.

3. Status of the Independent Investigation

After a thorough review of the independent investigation and applicable laws, the Public Integrity Team (Team), assigned to the Special Operations Unit of the KCPAO, has determined the investigation into this matter is complete.

II. OVERVIEW

On November 9, 2020, King County Sheriff's Office Deputies attempted to speak with Ronny Dunning. When the deputies approached Dunning and told him they wanted to help him, Dunning ran from them, drew a handgun, and shot both deputies. The deputies discharged their handguns in return, striking Dunning. Deputies administered life savings efforts, but Dunning died as result of his injuries.

III. INVESTIGATION MATERIALS

1. Police Reports – Seattle Police Department 2020FIT-0026 and 2020-315736
2. Police Reports – Bellevue Police Department 2020-52012
3. Police Reports – King County Sheriff's Office C20035790
4. Civilian Statements
5. Computer Aided Dispatch

6. Crime Scene Investigation
7. Autopsy and Toxicology Reports
8. Involved Officer Information
9. Subject Information
10. 911 Call and Police Radio Traffic
11. Audio
12. Other Video
13. Photos

IV. **FACTUAL SUMMARY**⁷

1. Facts Prior to and During the Use of Force

The following information is based upon several sources, including, but not limited to, witness observations, police reports, the King County Sheriff's Office (KCSO) and Seattle Police Department (SPD) computer aided dispatch (CAD) reports, recorded police radio, 911 recordings, and video from November 9, 2020.

At approximately 12:17 pm, a civilian called 911 to report that as he was driving, he observed a male going through the back of a vehicle, there was glass on the ground, and the male appeared possibly "high." The caller described the male, later identified as Ronny Dunning (Dunning), as a white male, in his twenties, wearing a black beanie hat, black hoodie, and blue or black pants.⁸ Approximately twenty minutes later, Witness Officer 1 and Involved Officer 1 responded to the location of the vehicle, located at NE 189th St. and 141st Ave NE in Woodinville. The deputies located the vehicle, a Honda Pilot, and observed it was registered to

⁷ The Factual Summary is based upon the investigation and evidence outlined in Section III. When necessary, the Team will identify the source of the information. It is common for witnesses, including law enforcement officers, to provide multiple statements about the events witnessed. Similarly, it is common for multiple witnesses to provide information about the same event. If a witness provides multiple statements and the statement contains material and substantial differences that could affect the investigation or analysis, the Team will identify information that is materially and substantially different. However, if the information has a de minimis effect on the investigation or analysis, the differences may not be identified. Similarly, although some events may be observed by more than one witness, the Team may not summarize each witnesses' statement unless it has a material and substantial effect on the investigation and analysis.

⁸ Dunning's identity was not established when police were initially dispatched. Unless stated otherwise, the witnesses did not identify Dunning by name or recognize him. However, because Dunning's identity is not at issue for purposes of this memorandum, the individual that the witnesses described will be referred to as Dunning for clarity throughout the memorandum.

Civilian Witness 1 in Renton. The vehicle had a broken driver's side rear window and the deputies observed glass inside and outside the vehicle. Involved Officer 1 advised that he saw the vehicle earlier this morning and noted there was a rifle case inside the vehicle.

Witness Officer 1 reported they did not observe a rifle case in the vehicle when they arrived, but they observed a high caliber rifle cartridge in the trunk area next to pieces of foil. Based on his training and experience, Witness Officer 1 noted people may use foil to smoke illegal drugs, such as heroin or methamphetamine. Additionally, he noticed a cartridge, possibly for a revolver, in the trunk. Involved Officer 1 requested the Renton Police Department contact the registered owner to determine if they knew where their vehicle was located.

Witness Officer 1 left the location to tend to an unrelated investigation. At approximately 1:01 pm, he heard via his radio Involved Officer 1 observed Dunning in near 181st Pl and 142nd Ave NE. Involved Officer 1 radioed Dunning was carrying a black rifle case on his back. Witness Officer 1 drove to that location and observed Dunning. Witness Officer 1 exited his patrol vehicle, identified himself to Dunning as a police officer, and asked Dunning to come talk with him. Dunning refused, yelling profanities at Witness Officer 1, telling the deputy to leave him alone, said he was going to the park and ride, and walked away. Witness Officer 1 updated the police dispatcher that Dunning walked away and he lost sight of Dunning as he turned the corner of NE 183rd St.

At approximately 1:04 pm, Witness Officer 2 joined Witness Officer 1 at his location. Witness Officer 2 asked Involved Officer 1, via radio, if there was probable cause to arrest Dunning and Involved Officer 1 replied, "Not really." Approximately three minutes later, Witness Officer 1 and Witness Officer 2 heard gunshots to their north, which was where they knew Involved Officer 1 and Involved Officer 2 were located. Witness Officer 2 was not certain how many shots were discharged, but he noted it sounded like two different calibers of guns that were discharged in quick succession. Involved Officer 1 and Involved Officer 2 radioed, "Shots fired," and added each of them had been shot. Witness Officer 1 and Witness Officer 2 drove to their location and parked in the back of 14170 NE 183rd St.

When he arrived, Witness Officer 1 observed Involved Officer 1 attempting to handcuff Dunning. Witness Officer 1 exited his patrol vehicle with his patrol rifle in the low ready position. He observed a female, later identified as Civilian Witness 2, who appeared to be in

distress. He asked her if she saw what happened, and she indicated she witnessed what had occurred. Witness Officer 1 advised her to stay there until another officer contacted her. Witness Officer 1 directed his attention to Dunning. He observed Dunning lying on his stomach, he was motionless, and there was a black rifle case slung on his back. Witness Officer 2 handcuffed Dunning and noted there was a black case slung over Dunning's shoulder. Additionally, he observed a fabric firearm holster on Dunning's left hip.

2. Facts Immediately After the Use of Force

Witness Officer 1 observed Involved Officer 2 had a gunshot wound on his right shoulder. Witness Officer 1 and Witness Officer 3 provided medical aid to Involved Officer 2. During this process, Witness Officer 1 secured Involved Officer 2's external vest in the trunk of his patrol vehicle while Witness Officer 3 secured Involved Officer 2's duty belt.

Next, Witness Officer 1 and Witness Officer 3 tended to Involved Officer 1's injury. Witness Officer 1 noted that it appeared Involved Officer 1 was shot in the stomach area. He removed Involved Officer 1's backup firearm from the inner holster of Involved Officer 1's vest, rendered it safe, and provided it to Witness Officer 3 to secure. Additionally, Witness Officer 3 secured Involved Officer 1's duty belt. While this occurred, medics arrived, but they quickly determined that Dunning was deceased.

Witness Officer 4 began taking photographs of the scene. As he photographed Dunning, he noticed what appeared to be a firearm barrel under Dunning's left leg. While taking photographs, Witness Officer 4 spoke with a male who was sitting outside. The male reported he heard someone say, "Mom, help me!" prior to hearing gunshots.



Figure 1 - Firearm barrel underneath Dunning's left hip.

V. INDEPENDENT INVESTIGATION

1. Independent Investigation Team

Other officers arrived and they secured the incident scene. As required by law, an independent investigation team was notified about the use of force and requested to respond to the scene to conduct an independent investigation.⁹

The SPD Force Investigation Team (FIT) was contacted, FIT was identified as the lead agency conducting the independent investigation, and Investigator 1 was designated as the lead investigator. FIT divided assignments between themselves, such as interviewing witnesses, officer processing, crime scene investigation, and evidence collection.

2. Officer Processing

Consistent with standard protocol, FIT determined which officers used force and processed those officers. Officer processing refers to the investigative steps of documenting the

⁹ RCW 10.114.011. See also WAC 139-12-010.

physical appearance and condition of uniforms and equipment of each involved officer. Depending on the specific facts and circumstances of the incident, officer processing typically consists of four parts:

- Investigators photograph the involved officer to document their appearance, including the involved officer's clothing and equipment worn during the use of force, uniform defects, injuries, equipment, and potential trace evidence.
- Investigators identify which weapons were involved during the use of force and document the condition of those items.
- Investigators determine and document the number of firearm cartridges, if applicable, in the involved officer's firearm, loaded magazine, and any spare magazines.
- Investigators collect firearms, equipment, uniforms, and other items as necessary.

Investigators determined that Involved Officer 1 and Involved Officer 2 discharged their handguns. Based upon the photographs taken by investigators, the involved officers wore KCSO uniforms, which were obviously marked with the word "Police" and other law enforcement insignias that clearly identified them as law enforcement officers.



Figure 2 - Involved Officer 2's vest, which contains markings and items identifying him as a law enforcement officer.

While examining an involved officer's firearm, investigators determine if the firearm is loaded, whether there is an unfired cartridge in the chamber of the firearm, whether there are unfired cartridges in the magazine loaded into the firearm, and whether there are unfired cartridges in the involved officer's spare magazines. Based on this examination, investigators can estimate how many cartridges were discharged during the use of force. Crime scene investigators also seek to collect discharged cartridge casings located at the use of force scene to ensure that all the involved officer's discharged cartridges are accounted for.

a. Involvement Officer 1

Weapon Examined: Glock 22, .40 caliber handgun			
Location	Quantity	Capacity	Headstamp
Chamber	1	1	1 – Federal 40 S&W
Loaded Magazine	10	15	2 – FC 19 40 S&W 8 – Speer 40 S&W
Spare Magazine	15	15	15 – FC 19 40 S&W
Spare Magazine	15	15	13 – FC 19 40 S&W 1 – Federal 40 S&W 1 – Speer 40 S&W

If Involved Officer 1 filled his loaded magazine to capacity with an additional cartridge in the chamber, his handgun was loaded with sixteen cartridges, which would indicate that he discharged five cartridges.

Involved Officer 1's backup weapon, a Sig Sauer P365, 9 x 19mm handgun, contained one unfired cartridge in the chamber, ten unfired cartridges in the magazine, and the magazine had a maximum capacity of ten cartridges. All the unfired cartridges from this firearm had a headstamp of "FC 9mm Luger."

An SPD armorer examined Involved Officer 1's backup weapon. He noted that the backup weapon was carried in a holster attached to the strap of Involved Officer 1's bullet resistant vest. This vest would sit under his uniform jumpsuit but over an undershirt. Given where the firearm was kept, the armorer noted lint inside the barrel. Had this firearm been used, the armorer would not have expected to see lint. Therefore, there was no indication that Involved Officer 1's backup firearm was used during the use of force.

b. Involved Officer 2

Weapon Examined: Glock 17, 9 x 19mm handgun			
Location	Quantity	Capacity	Headstamp
Chamber	1	1	19 - FC 9mm Luger
Loaded Magazine	18	21	

If Involved Officer 2 filled his loaded magazine to capacity with an additional cartridge in the chamber, his handgun was loaded with twenty-two cartridges, which would indicate that he discharged three cartridges.

3. Civilian Witnesses Statements

a. Civilian Witness 2

Civilian Witness 2 provided a statement to investigators. She reported she was throwing out trash when she observed Dunning, who was dressed in black and carrying a case. Dunning asked how she was doing and she said, "Good morning." Dunning continued to try to make conversation with her, but Civilian Witness 2 observed a patrol vehicle quickly approach. She heard two males yelling and Dunning ran up to Civilian Witness 2 and said, "Help me. Help me." Approximately four seconds later, the police told Dunning, "Stop, we are here to help you." Dunning continued asking Civilian Witness 2 for help while walking towards her. An officer said, "Don't get closer to her." When the second officer arrived, Dunning began to run in between the trash compactors. As the officers moved towards Dunning, he said "Fuck!" and reached into his waistband, producing a firearm. Dunning shot at one officer and then he shot at the other officer. Civilian Witness 2 tried to hide behind a dumpster. She heard multiple gunshots and someone saying, "Move, move." When she emerged from behind the dumpster, she saw one officer on the ground and another officer next to her. She observed the officer on the ground was bleeding and the officer next to her reached down towards his waist, which led her to believe he had been shot. She next observed Dunning on the ground and saw more officers arrive.

b. Civilian Witness 3

Civilian Witness 3 provided a statement to investigators and stated he recorded the incident. He reported he was on his phone when he looked out of his window and saw an officer

talking to Dunning, who was walking on the trail. The officer appeared to try to get Dunning to stop, but Dunning did not. He described the officer as calmly walking towards Dunning. He heard Dunning tell Civilian Witness 2, "Help me. Help me. They're trying to hurt me." A second officer approached and Dunning tried to "juke" a couple of times to get away from the officers. Dunning "squeezed" between the two dumpsters and created distance between him and the officers. Dunning reached into his pocket and retrieved a handgun, which he immediately fired at the second officer. The first officer drew his firearm and fired, followed by the second officer reaching for his weapon. Civilian Witness 3 heard multiple gunshots before ducking down and accidentally turned off the recording.

c. Civilian Witness 4 (15 YOA)

Civilian Witness 4 provided a statement to Witness Officer 5. Civilian Witness 4 was visibly upset and reported she was inside her apartment at her kitchen table participating in a Zoom meeting with classmates from her school. Civilian Witness 4 stated she heard two different people outside her apartment repeatedly yelling "Put your weapon down!" She stated a male, which Witness Officer 5 assumed referred to Dunning, was making "noises" that she could not understand. She then heard six or seven gunshots. Witness Officer 5 estimated the distance from Civilian Witness 4's kitchen table to Dunning's location was approximately 15'.

4. Crime Scene Investigation and Search Warrants

Investigators conducted a crime scene investigation, documented the location of various items that appeared to have evidentiary value, and collected various items as evidence. Investigators used a laser scanner to document the scene.

When investigators were able to more closely examine the rifle, they determined it was a Romanian Arms model RH10, 7.62 x 39mm rifle. It contained one unfired cartridge and a loaded magazine.



Figure 4 - Rifle located in the black case.

Investigators also recovered a black nylon handgun holster that was removed from Dunning's left hip by the medical examiner who responded to the scene. The holster contained six unfired cartridges with the headstamp "Federal 357 Mag."



Figure 5 - Holster and ammunition that was removed from Dunning's left hip.

During the medical examiner's preliminary exam at the scene, investigators also recovered a black Smith & Wesson 19-3, .357 caliber revolver. The revolver was recovered from underneath Dunning's left hip and it contained six fired cartridge cases.



Figure 6 – Fired cartridges located in the revolver found under Dunning's left hip.

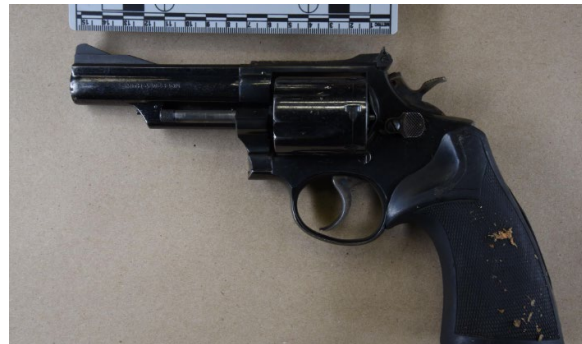


Figure 7 - Revolver found under Dunning's left hip.

Investigators examined clothing, gear, and property belonging to Involved Officer 2. His external ballistic vest contained obvious police markings. In addition to other equipment, Involved Officer 2's two spare magazines were located on the vest. Each magazine had a capacity of 21 cartridges and each magazine was loaded with 21 unfired cartridges. All

cartridges had the headstamp “FC 9mm Luger.” Involved Officer 2’s uniform jumpsuit had apparent bloodstains on both sides with two visible defects to the right shoulder on the upper back side of the uniform.



Figure 8 - Damage to Involved Officer 2's uniform.

Investigators examined the clothing, gear, and property belonging to Involved Officer 1. Investigators noted an apparent bullet defect on his ballistic vest. There was corresponding damage to the back side of the vest where an object appeared to be bulging or protruding outward from the inner ballistic vest. When investigators removed the ballistic armor from the vest, they recovered a largely intact fired bullet.



Figure 9 - Fired bullet removed from Involved Officer 1's vest.

Finally, investigators searched Civilian Witness 1's Honda Pilot for evidence related to this incident. Based on the vehicle's condition, sleeping items, and personal hygiene items found inside, investigators opined someone was likely living inside the vehicle. Additionally, investigators located a large quantity of unfired cartridges from multiple areas of the vehicle. The cartridges consisted of various brands of .357 caliber cartridges and 7.62 x 39 rifle cartridges. Some of the ammunition was found loose in various areas of the vehicle, in a food storage container, in an ammo can, loaded into speed loaders, and loaded into eleven rifle magazines.



Figure 10 – Various items, including ammunition, recovered from the Honda Pilot.



Figure 11 - Additional ammunition found in the Honda Pilot.



Figure 12 - Additional ammunition found in the Honda Pilot.



Figure 13 - Speed loaders found in the Honda Pilot.

5. Video Evidence

At the time this incident occurred, KCSO deputies involved in this incident were not equipped with body worn cameras. However, Civilian Witness 3, who was in his apartment during the use of force, used his cell phone to record a portion of the incident. Screenshots from

Civilian Witness 3's recording relevant to the Team's analysis are included below, including, if relevant, statements captured by the video.



When Civilian Witness 3 began recording, Civilian Witness 2 (circle) and Dunning (rectangle) are in frame. Although Dunning's voice cannot be heard, Civilian Witness 3 narrated what he heard. Civilian Witness 3 stated, "He is saying, 'Please help me. Please help me. They're trying to hurt me.'"¹⁰

¹⁰ Faces of the individuals have been blurred, but the Team reviewed an unblurred version of the same video.



Civilian Witness 3 panned to the right and captured Involved Officer 1 walking towards the location of Civilian Witness 2 and Dunning. Civilian Witness 3 stated, “This guy [referring to Involved Officer 1] is not doing anything. He’s very calmly walking over there.”



As Dunning walked towards Civilian Witness 2, Involved Officer 2 entered the frame from the left. Civilian Witness 3 stated, “They’re saying, ‘We’re here to help you, dude.’”



Dunning, with his arms crossed, moved closer to Civilian Witness 2.



As the involved officers approached, Dunning ran. Neither of the involved officers had drawn any weapons.



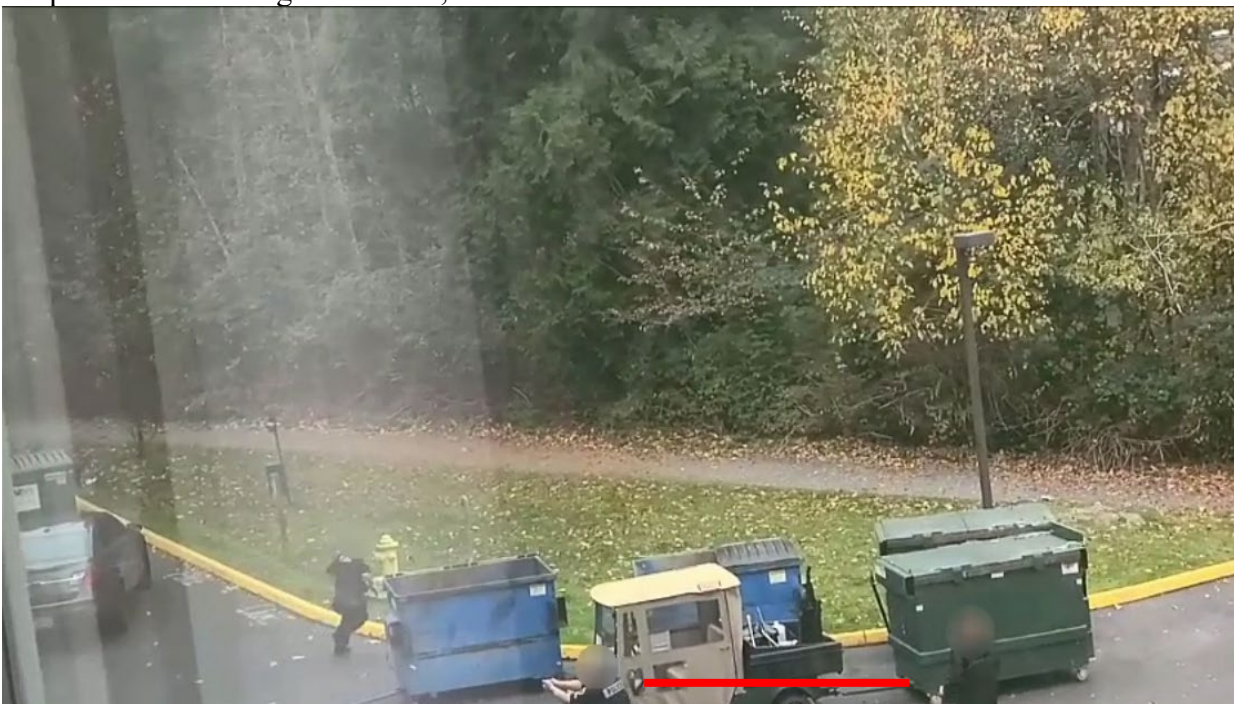
As Involved Officer 1 positioned himself between Dunning and Civilian Witness 2, Dunning quickly changed directions and ran in between the two dumpsters. Neither of the involved officers had drawn a weapon.



As the involved officers pursued Dunning, he ran in between a dumpster and a cart. Neither of the involved officers had drawn a weapon.



As Dunning continued past the cart, the involved officers continued to pursue him. Dunning abruptly turned to his right and his left arm reached towards his waist area on his left side. As Dunning moved his extended arm and hand became more clear. Involved Officer 1 was still in the process of drawing his firearm,



At 27.333 seconds into Civilian Witness 3's video, the first gunshot was audible on the recording. While Involved Officer 2 retreated for cover, Involved Officer 1 drew his firearm and pointed it at Dunning. Civilian Witness 2 stood within feet behind Involved Officer 1.



At 28.566 seconds into Civilian Witness 3’s video, several more gunshots are audibly heard on the video. Directly after the first gunshot, Civilian Witness 3 said, “Oh my god, oh my god. He [referring to Dunning] just pulled out a gun.” Involved Officer 1 pointed his firearm towards Dunning, who was out of frame. As he completed his sentence, Civilian Witness 3 took cover and the video turned off.

6. Autopsy and Toxicology

The King County Medical Examiner’s Office performed an autopsy of Dunning to determine the cause and manner of death. The cause of death is a term used to indicate *what* specific injury or disease led to death. The manner of death is a term used to categorize *how* the injury or disease led to death. Manner of death is categorized into one of five categories:

- Accident is defined as a death other than natural, where there is no evidence of intent.
- Homicide is defined as a death due to intentionally inflicted harm of one person by another. It is also defined as the killing of one person by another.¹¹ Thus, the term homicide as used in an autopsy report refers to the mechanism of death and does not refer to legal terms, such as murder or manslaughter,

¹¹ HOMICIDE, Black’s Law Dictionary (11th ed. 2019).

which do include a determination legal liability or culpability.

- Natural is defined as a death solely by organic disease. If natural death is hastened by injury, such as a fall, the manner of death will not be considered natural.
- Pending is a temporary designation used when additional investigation, information, or test results are required to determine the cause or manner of death.
- Suicide is defined as a death as the result of a purposeful action, with intent to end one's life.
- Undetermined is defined as a death when there is insufficient evidence or information to assign to accident, homicide, suicide, or natural categories, or when two plausible manners are equally likely.

The King County Medical Examiner's Office opined the cause of death was a single gunshot wound of the head sustained during a confrontation with police and the manner of death was homicide.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Dunning's blood. The results showed that Dunning's blood tested negative for acetone, ethanol, isopropanol, and methanol. Dunning's blood tested positive for amphetamines (amphetamine .042 mg/L; methamphetamine .17 mg/L) and opiates (codeine .023mg/L; morphine (.29 mg/L).

7. Involved Officer's Statement

a. 5th Amendment Protections

Under current law the independent investigation must be conducted in the same manner as a criminal investigation.¹² Moreover, one of the primary purposes of the independent investigation is to "inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies."¹³ Thus, a law enforcement officer, like any other citizen, is protected by the 5th Amendment of the United States Constitution, which prohibits compelling a person to be a witness against themselves.¹⁴ A law

¹² WAC 139-12-010.

¹³ Id.

¹⁴ U.S. Const. amend. V.

enforcement officer, like any other citizen, can choose whether or not to voluntarily waive their 5th Amendment protection and provide a statement to criminal investigators.

The involved agency, however, may compel an involved officer to provide a statement in an administrative investigation for the purpose of determining if the involved officer's actions were in accordance with the agency's policy and training. If an involved officer refuses to provide a statement during an administrative investigation, their refusal may result in consequences such as termination.

While the involved officer's statements may be used against them in an administrative or civil proceeding, such compelled statements are inadmissible against an officer in a subsequent criminal trial.¹⁵ Police and prosecutors are also barred from making "indirect evidentiary use" of the officer's compelled statement, which includes investigative efforts or testimony that has been shaped, altered, or affected, directly or indirectly, by the officer's compelled statement.¹⁶ Therefore, the investigators conducting the independent investigation may not receive any compelled statements from an involved officer or any investigative content that was informed by such compelled statements.¹⁷

b. Compelled Statements Taken During the Current Incident

The involved officers in this incident were compelled to provide a statement to their agency during an administrative investigation. Although the compelled statement and information derived from such a statement cannot be used to support criminal charges against an involved officer, a credible compelled statement provides insight into the potential testimony of an involved officer. At times, such a statement may be useful to the Team in analyzing a use of force incident and may be used in support of a finding of no criminal liability for the officer's actions. While the involved officers provided a compelled statement to their agency during an administrative investigation, the Team did not review or rely upon the involved officers' compelled statements.

¹⁵ Garrity v. State of N.J., 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

¹⁶ U.S. v. North, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

¹⁷ WAC 139-12-030.

VI. POTENTIAL IMPEACHMENT INFORMATION

Law enforcement agencies are required to report misconduct that an officer has engaged in that affects their credibility.¹⁸ In turn, each county prosecutor is required to develop and adopt a written protocol addressing potential impeachment disclosures pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and subsequent case law.¹⁹ The Team has confirmed that, to its knowledge, there is no potential impeachment information regarding the involved officers who used deadly force in this incident.

VII. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

In a criminal prosecution, the State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.²⁰ The KCPAO will file charges if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defenses that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder.²¹

In addition, the State must disprove the existence of a defense that negates an element of the crime beyond a reasonable doubt.²² Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in a complete defense for the accused and there is no substantial evidence to refute the affirmative defense.²³

Therefore, in addition to proving that the accused committed a crime, the State will be required to disprove one or more of the following defenses:

1. Justifiable Homicide by Peace Officer²⁴

¹⁸ RCW 10.93.180(2)(a)(ii).

¹⁹ RCW 10.93.180(1)(a).

²⁰ RCW 9A.04.100; WPIC 4.01.

²¹ KCPAO Filing and Disposition Standards.

²² WPIC 14.00.

²³ KCPAO Filing and Disposition Standards.

²⁴ RCW 9A.16.040; WPIC 16.01.

2. Justifiable Homicide Defense of Self or Others²⁵
3. Justifiable Homicide Resistance to Felony²⁶

2. Applicable Law Regarding Justifiable Homicide by a Peace Officer

This incident occurred on November 9, 2020. The applicable pattern jury instruction for Justifiable Homicide by a Peace Officer requires the State to prove the involved officer acted without good faith.²⁷

3. Applicable Jury Instructions

The following jury instructions, contained in Appendix A, would be applicable in a criminal prosecution and provided to the factfinder to determine whether the State met the required burden of proof. Therefore, these instructions are highly relevant to the Team's analysis and conclusion:

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer
2. WPIC 16.05 - Necessary
3. WPIC 2.09 - Felony
4. WPIC 2.16 - Peace Officer
5. WPIC 120.07 - Lawful Arrest and Probable Cause
6. WPIC 16.02 - Justifiable Homicide – Defense of Self and Others
7. WPIC 2.04.01 - Great Personal Injury
8. WPIC 16.07 - Justifiable Homicide – Actual Danger Not Necessary
9. WPIC 16.03 - Justifiable Homicide – Resistance to a Felony

²⁵ RCW 9A.16.050(1); WPIC 16.02.

²⁶ RCW 9A.16.050(2); WPIC 16.03.

²⁷ For offenses committed on or prior to December 6, 2018, the former version of WPIC 16.01, based upon RCW 9A.16.040, required the prosecution to prove the officer acted with malice. For offenses committed between December 7, 2018, and February 3, 2019, RCW 9A.16.040, based upon Laws of 2019, Chapter 1, § 7, removed the malice standard and required the prosecution to prove the officer did not act in good faith. There are no pattern jury instructions for offenses committed between December 7, 2018, and February 3, 2019. For offenses committed on or after February 4, 2019, the current version of WPIC 16.01, based upon RCW 9A.16.040, requires the prosecution to prove the officer did not act in good faith. RCW 9A.16.040(1)(a) utilizes the malice and good faith standard, but this section only applies when a “public officer applied deadly force in obedience to the judgment of a competent court.”

VIII. ANALYSIS AND CONCLUSION

1. Summary of Conclusion

Under the KCPAO filing standards, “Homicide cases will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.”²⁸

The KCPAO declines to file charges against the involved officers because the independent investigation and the Team’s analysis reveal that the involved officers’ actions were lawful and justifiable as either Justifiable Homicide by a Peace Officer, Justifiable Homicide in Defense of Self or Others, or both. These defenses contain related but distinct concepts and definitions. Criminal charges should be declined because the defenses are of such nature that prosecution would result in a complete defense for the accused and there is no substantial evidence to refute either affirmative defense.

2. Justifiable Homicide by a Peace Officer

a. Graham v. Connor

In Graham v. Connor, the seminal case on evaluating police use of force, the United States Supreme Court determined that the test to determine whether the force used by the police was “reasonable” is not capable of a “precise definition or mechanical application.”²⁹ Instead, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or

²⁸ KCPAO Filing and Disposition Standards.

²⁹ Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).

attempting to evade arrest by flight.³⁰ In other words, the reasonableness of whether the officer's use of force is justified is determined by "the totality of the circumstances."³¹

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.³² "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."³³ However, the inquiry is an objective one. The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.³⁴

b. Law Regarding Justifiable Homicide by a Peace Officer

Homicide is justifiable when necessarily used by a peace officer meeting the good faith standard to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.³⁵

In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others.³⁶ Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:

- 1 The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
- 2 There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.³⁷

³⁰ Id.

³¹ Id.

³² Id.

³³ Id. at 396-97.

³⁴ Id. at 397.

³⁵ RCW 9A.16.040(1)(c)(i); WPIC 16.01.

³⁶ RCW 9A.16.040(2).

³⁷ Id.

A peace officer acts in good faith, an objective standard, when considering all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.³⁸ Necessary means that no reasonably effective alternative to use the force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.³⁹

c. Analysis Regarding Justifiable Homicide by a Peace Officer

The evidence in the independent investigation showed there was probable cause for the involved officers to reasonably believe that Dunning had committed, had attempted to commit, was committing, or was attempting to commit various felonies. Specifically, based on Civilian Witness 2's statement and Civilian Witness 3's video, the involved officers attempted to speak with Dunning. Dunning fled from the involved officers and drew a firearm, discharging it at both involved officers, and injured them. Based on this, there was probable cause to believe Dunning had committed, had attempted to commit, was committing, or was attempting to commit felonies against the involved officers, such as murder, manslaughter, and assault.

The evidence in the independent investigation showed there was probable cause for the involved officers to believe that Dunning, if not apprehended, posed a threat of serious physical harm to the involved officers or others. This defense provides two explicit examples that may be considered by peace officers as a threat of serious physical harm. First, a threat of serious physical harm may include circumstances where the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening. Second, a threat of serious physical harm may include circumstances where there is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

In the current incident, the evidence and witness statements show Dunning discharged a firearm at the involved officers. Although the involved officers sustained non-life-threatening

³⁸ RCW 9A.16.040(4).

³⁹ RCW 9A.16.010; WPIC 16.05.

injuries, Dunning's actions sufficiently meet the definition of a threat of serious physical harm. Additionally, when Dunning discharged his firearm at Involved Officer 1, Civilian Witness 2 was standing within feet behind Involved Officer 1. Even assuming Dunning had no intention of injuring Civilian Witness 2, his actions sufficiently constituted a threat of serious physical harm to her. Therefore, it is highly likely the factfinder would find that Dunning's actions caused the involved officers to have probable cause to believe that Dunning, if not apprehended, posed a threat of serious physical harm to the officers or others.

The evidence in the independent investigation showed that the involved officers used deadly force with a good faith belief that their actions were necessary to prevent death or serious physical harm to the officer or another individual. A factfinder would likely find that the involved officers acted in good faith because, under an objective standard, when considering all the facts, circumstances, and information known to the involved officers at the time, a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual. Further, a factfinder would also likely find that the involved officer's use of deadly force was necessary because no reasonable effective alternative to the use of force appeared to exist and the amount of force used was reasonable to effect the lawful purpose intended.

At the time of the use of force, the involved officers had reason to suspect that Dunning was involved in a suspected vehicle prowler, was in possession of a rifle case that may have held a rifle, or he needed assistance. While Dunning was not under arrest when the involved deputies approached him, the involved officers' concern regarding why Dunning was approaching Civilian Witness 2 was warranted. Additionally, if Dunning was the individual who prowled the Honda Pilot, the involved officers would have been aware that ammunition was present inside the vehicle. Dunning refused to comply with their command not to approach Civilian Witness 2 and he attempted to flee. While he attempted to flee, Dunning drew a firearm and discharged it at the officers. In that moment, the involved officers had no reasonable effective alternative to the use of deadly force to protect themselves and Civilian Witness 2.

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the involved officers' actions were

lawful and justifiable and there is insufficient evidence to prove criminal charges beyond a reasonable doubt or refute this defense beyond a reasonable doubt.

3. Justifiable Homicide in Defense of Self or Others

a. Law Regarding Justifiable Homicide in Defense of Self or Others

The legislature recognizes that the defense of Justifiable Homicide by a Peace Officer established a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens' permissible use of deadly force under the defense of Justifiable Homicide in Defense of Self or Others is not restricted and remains broader than the limitations imposed on peace officers.⁴⁰

The defense of Justifiable Homicide by a Peace Officer allows a peace officer to use deadly force against another person only when necessary to protect against an *immediate* threat of serious physical injury to the officer or another person.⁴¹ An immediate threat of serious physical injury or death means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.⁴²

However, the defense of Justifiable Homicide in Defense of Self or Others is also applicable to peace officers.⁴³ Under this defense, homicide is justifiable in defense of self or others when the slayer reasonably believed the person slain intended to commit a felony, to inflict death, or to inflict great personal injury; the slayer reasonably believed there was *imminent* danger of such harm being accomplished; and the slayer employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the slayer.⁴⁴ Great personal injury includes an injury that the slayer reasonably

⁴⁰ RCW 9A.16.040 [1986 c 209 §3].

⁴¹ RCW 10.120.020(2). See also, Graham, 490 U.S. at 396.

⁴² RCW 10.120.020(2).

⁴³ RCW 9A.16.040(5)(a).

⁴⁴ RCW 9A.16.050(1); WPIC 16.02.

believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering, if it were inflicted upon either the slayer or another person.⁴⁵

The Washington Pattern Instruction Committee noted that “Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out.”⁴⁶ Additionally, a person is entitled to act on appearances in defending themselves, if that person acts in good faith and on reasonable grounds, although it afterwards might develop that the person was mistaken as to the extent of the danger.⁴⁷

The reasonable person standard as used in this instruction does not expressly require the factfinder to compare the slayer to a reasonable officer. However, because law enforcement officers – especially compared to non-law enforcement civilians – receive significant amounts of training on weapons, defensive tactics, and the use of force, it is prudent to assume the factfinder would be required to take the involved officers’ training and experience into account to determine how a reasonable person would have acted. Therefore, the same evidence and testimony used to determine whether the involved officers acted as a reasonable peace officer under the previous instruction is also relevant to this instruction.

b. Analysis Regarding Justifiable Homicide in Defense of Self or Others

The evidence in the independent investigation showed the involved officers reasonably believed that Dunning intended to commit a felony, to inflict death, or to inflict great personal injury. As described above, Dunning drew a firearm and discharged it at the involved officers. Additionally, when he discharged the firearm at Involved Officer 1, there was a realistic chance that Civilian Witness 2 could have been injured given her proximity to Involved Officer 1. Based on this information, a factfinder would likely find that Dunning intended to commit a felony, to inflict death, or to inflict great personally injury.

⁴⁵ WPIC 2.04.01.

⁴⁶ WPIC 16.02.

⁴⁷ WPIC 16.07.

The evidence in the independent investigation showed the involved officers reasonably believed Dunning's actions constituted an imminent danger of such harm being accomplished. Under the broader standard of imminence, it is even more likely the factfinder would find Dunning's actions, as described earlier, caused the involved officers to reasonably believe Dunning's threats would be carried out.

The evidence in the independent investigation showed that the involved officers employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the involved officers.

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the involved officers' actions were lawful and justifiable and there is insufficient evidence to prove criminal charges beyond a reasonable doubt or refute this defense beyond a reasonable doubt.

IX. KING COUNTY INQUEST PROGRAM

Pursuant to Executive Order PHL 7-1-6 EO, the KCPAO shall inform the King County Inquest Program Manager in writing whenever the KCPAO becomes aware of a person's death following an interaction with law enforcement or while in the custody of law enforcement. The KCPAO previously complied with this requirement.

Appendix A

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer

It is a defense to a charge of [murder] [manslaughter] that the homicide was justifiable as defined in this instruction.

Homicide or the use of deadly force is justifiable:

[when necessarily used by a peace officer acting in good faith to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in discharge of a legal duty] [or]

[when necessarily and in good faith used by a peace officer or person acting under the officer's command and in the officer's aid [to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony] [or] [to prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility] [or] [to prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony] [or] [to lawfully suppress a riot if the actor or another participant is armed with a deadly weapon]. In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, a peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to others. Among the circumstances that may be considered by a peace officer as a “threat of serious physical harm” are the following: (a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or (b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm. Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, when, if feasible, some warning is given.]

[A peace officer shall not be held criminally liable for using deadly force with a good faith belief that such act is justifiable.]

“Good faith” is an objective standard. A peace officer acts in “good faith” if a similarly situated reasonable peace officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the peace officer or another individual. In deciding whether a peace officer acted in good faith, you should consider all the facts, circumstances, and information known to the officer at the time.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

2. WPIC 16.05 – Necessary

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

3. WPIC 2.09 Felony—Designation Of

_____ is a felony.⁴⁸

⁴⁸ Whether a crime is a felony is a matter of law for the court to decide.

4. WPIC 2.16 Peace Officer—Definition

Peace officer means a duly appointed city, county, or state law enforcement officer.

5. WPIC 120.07 Lawful Arrest—Definition

[An arrest is lawful if made pursuant to an arrest warrant.] [An arrest is [also] lawful if the arresting officer had probable cause to believe that the person arrested had committed the crime of (name of crime) [in the officer's presence]. “Probable cause” means facts that would cause a reasonably cautious officer to believe that the person had committed that crime. In determining whether the facts known to the officer justified this belief, you may take into account the officer's experience and expertise.]

6. WPIC 16.02 – Justifiable Homicide – Defense of Self and Others

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

(1) the slayer reasonably believed that the person slain intended to commit a felony⁴⁹ or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger⁵⁰ of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

⁴⁹ For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See *State v. Nyland*, 47 Wn.2d 240, 287 P.2d 345 (1955).

⁵⁰ Regarding imminent danger, the WPIC commented:

Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out. *State v. Janes*, 121 Wn.2d at 241 (citations omitted). While “immediate harm” means “occurring, acting, or accomplished without loss of time: made or done at once,” “imminent harm” means “ready to take place: near at hand: ... hanging threateningly over one's head.”

7. WPIC 2.04.01 – Great Personal Injury

Great personal injury means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering, if it were inflicted upon either the slayer or another person.

8. WPIC 16.07 – Justifiable Homicide – Actual Danger Not Necessary

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another 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 a homicide to be justifiable.

9. WPIC 16.03 – Justifiable Homicide – Resistance to a Felony

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony⁵¹ upon the slayer or in the presence of the slayer.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

⁵¹ For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See State v. Nyland, 47 Wn.2d 240, 287 P.2d 345 (1955)