Supreme Court 934240
(Court of Appeals No. 73132-7-I)

IN THE SUPREME COURT THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDILBERTO GUZMAN-MORALES,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Pursuant to RAP 13.4(b)(1), (2) and (3) Edilberto Guzman-Morales asks this Court to accept review of the June 20, 2016 opinion of Division I of the Court of Appeals in State of Washington v. Guzman-Morales, --- P.3d ----, 73132-7-I decision terminating review designated in Part B of this petition. (Appendix A.)

B. OPINION BELOW

Edilberto Guzman-Morales was convicted of assault in the second degree. The charge arose out of a scuffle with a nightclub bouncer where Mr. Guzman-Morales was choked and the bouncer stabbed. Despite ambiguity as to the sequence of these two events – and the possibility that Mr. Guzman-Morales lawfully defended himself after being choked – the trial court refused to instruct the jury on self-defense.

Mr. Guzman-Morales contends that considering all of the available evidence in a light most favorable to him, sufficient evidence had been produced as to give the instruction. Two weeks after the Court of Appeals applied an abuse of discretion standard of review to this issue, this Court wrote that where a trial court's refusal to give requested jury instruction is an allegation of lack of evidence supporting the defense, the correct "standard of review is de novo." State v. Fisher, No. 91438-9, at 6 (Wash. July 7, 2016). The lower courts' error should be corrected.

C. ISSUE PRESENTED FOR REVIEW

The question of whether a defendant produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. Critically, in evaluating the evidence, the trial court must view the evidence in the light most favorable to the defendant. And, the defendant may rely on any evidence adduced at trial – no matter the source – to satisfy the threshold burden of production.

The case below turned on a disputed sequence of events: did Mr. Guzman-Morales stab the bouncer *before* or *after* the bouncer put him in a chokehold? The trial judge recognized that nightclub security footage could be interpreted as Mr. Guzman-Morales initially only hitting, but not stabbing, the bouncer. 2RP 374. To the police, when asked about the stabbing, Mr. Guzman-Morales testified that "he was scared." 2RP 274, 278. The trial court refused to give the self-defense instruction.

Should review be granted because the trial court failed to view all available evidence in a light most favorable to Mr. Guzman-Morales?

Should review be granted because the Court of Appeals used the overly deferential abuse of discretion standard, rather than the de novo standard of review?

D. STATEMENT OF THE CASE[1]

Self-defense was at the heart of how the case developed and the trial progressed.

Before trial, relying on RCW 9A.16.110, defense counsel gave notice that Mr. Guzman-Morales, who had but two driving-related misdemeanors on his record, intended to use self-defense to fight the charge. CP 8, 59. In opening statement, defense counsel told the jury that Mr. Guzman-Morales was lawfully protecting himself: "after he was in the choke hold which [he] couldn't breathe is when he started poking at [the bouncer] to get him off of him, and that, ladies and gentlemen, is self-defense." 1RP 16. Defense counsel proposed self-defense jury instructions. CP 9-12. The trial judge refused these. 2RP 368, 373; CP 18-38.

Mr. Guzman-Morales testified that he believed he may have been hit with a bottle as he moved through the nightclub crowd but then did not remember much that happened after. 2RP 336. Looking back on the security footage, Mr. Guzman-Morales agreed with the prosecutor that he was not hit and not really in danger before he encountered the bouncer. 2RP 348, 350, 351, 353; Ex. 10. Watching the video, Mr.

[1] Pages 1 through 4 of the Opinion (Appendix A) set out the facts of the case.

Guzman-Morales also testified about how the bouncer put his hands on him. 2RP 351.

Mr. Guzman-Morales was injured that night; he awoke in jail with "pain in the back of [his] head, in the side of [his] face." 2RP 337. His face was "black and blue." 2RP 337. He testified that he had flashbacks of "getting choked." 2RP 336.

A great deal of the State's case was focused on painting the bouncer as a man of good character who would not initiate a fight, and this evidence would have been relevant only if self-defense was at issue. E.g. 1RP 148 ("he is not one to start fights"); 2RP 224, 227 (prosecutor asking employer to confirm he believes bouncer acted appropriately and is trustworthy); 1RP 202 (prosecutor asking fellow bouncer to confirm the complainant is a good co-worker and boss); 1RP 163, 175-76 (prosecutor asking supervising bouncer to confirm complainant is "an ideal employee... polite," had no history of "poor judgment or using excessive force," and handled himself "professionally and justifiably.").

Regarding the video, the bouncer testified he believes he can see the stabbing in the footage. 1RP 85-86, 120-21. Ex. 10-14. Because the footage is not all that clear, defense counsel cross-examined the

bouncer about the video, positing that it shows Mr. Guzman-Morales hitting the bouncer *in the side with an empty hand*, not stabbing him *in the thigh with a knife*. 1RP 119.

The State's forensic video analyst agreed that the video shows Mr. Guzman-Morales' hand going to the side of the bouncer's body, at the "right hip." 2RP 301, 307.[2] The analyst testified that the video *could be* showing the stabbing just as described by the bouncer, but is not definitive, in part because it does not seem to show a knife, and the scuffle continues out of the camera's view. 2RP 304, 309; see also Op. at 3 (describing that bouncer put Mr. Guzman-Morales "in a chokehold, and the struggle moves outside the exit, mostly out of the camera's view").

In the patrol car, Mr. Guzman-Morales told Officer Leighton "he was scared because people were hitting him." 2RP 273. Mr. Guzman-Morales told the officer that "African-American men"[3] were hitting him and he "also mentioned that he had been hit by a bottle."

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[2] The treating physician testified that the bouncer was cut not on his hip, but at "his right interior thigh." 2RP 319; See Op. at 3 ("the footage appeared to show Guzman-Morales moving his hand towards the guard's right hip, while the guard's stab wound was located on his inner right thigh").

[3] The bouncer confirmed there had been a group of African-American patrons in the club, that one of them got his attention because of Mr. Guzman-Morales, but no one from this group was ever identified or brought to court. 1RP 105.

2RP 273. When the Officer asked Mr. Guzman-Morales about the stabbing itself, he answered plainly: "I was scared." 2RP 274, 278.

A bouncer who punched Mr. Guzman-Morales in the face while the complainant had him in a chokehold told the police she heard Mr. Guzman-Morales saying that he was scared. 1RP 198-99, 204.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review to re-educate the lower courts as to when a self-defense instruction should be given and how this issue should be resolved on appeal.

1. A criminal defendant is entitled to have the jury instructed on his theory of the case if any evidence supports it.

An accused is "entitled to have the jury instructed on [her] theory of the case if there [was] evidence to support that theory." State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Failure to honor this principle is reversible error. State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

The accused need not be the source of the evidence supporting the theory of defense. Rather, this evidence may come from "whatever source" that tends to show that the defendant is entitled to the instruction. State v. Fisher, citing State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

In fact, "because the defendant is entitled to the benefit of all the evidence... her defense may be based on facts inconsistent with her own testimony." State v. Fisher, citing to State v. Gogolin, 45 Wn, App. 640, 643, 727 P.2d 683 (1986), State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). And, in evaluating evidence relating to a requested defense, the trial court must view it in the light most favorable to the defendant. State v. Fisher at 5, citing State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000).

In Fisher, this Court discussed the statutory affirmative defense to felony murder. RCW 9A.32.030(1)(c). The Court made it clear that a defendant "may testify or call her own witnesses," but is not required to do so, because "[m]aking this a necessity means of satisfying the burden of production would force the defendant to waive one constitutional right in order to invoke the other." Rather, "the defendant may point to other evidence presented at trial, including the State's evidence." Id.

"The question of whether the defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court." Fisher at 6, quoting Janes, 121 Wn.2d at 238 n.7.

The defendant's burden of production is "not overwhelming;" he "is required to produce only some evidence to satisfy the burden of production." Fisher at 7, quoting United States v. Zuniga, 6 F.3d 569, 570

(9th Cir. 1993) ("Even if the alibi evidence is 'weak, insufficient, inconsistent, or of doubtful credibility,' the instruction should be given.")

2. If viewed in a light most favorable to Mr. Guzman-Morales, the evidence was sufficient to meet the "not overwhelming" burden of production.

Here, the burden of production was met. The facts in the record – if viewed in a light most favorable to Mr. Guzman-Morales – show that the jury should have been instructed on self-defense.

The record shows:

- The bouncer said he was stabbed before the chokehold, but the videotape is ambiguous on this point. Ex. 10-14.
- A forensic video analyst agreed that the video may not show the stabbing. Ex. 10-14; 2RP 304, 309.
- The video analyst described the video showing a hit to the hip, but the bouncer was cut on the thigh. 2RP 304, 309; Op. at 3.
- Mr. Guzman-Morales was undoubtedly choked by the bouncer and the video did not capture this. Op. at 3.
- He was definitely injured that night, with pain around his head and face and "black and blue" marks 2RP 337
- When asked about the stabbing, Mr. Guzman-Morales told the police he "was scared" 2RP 274, 278
- He testified about having flashbacks of "getting choked" 2RP 336

- The State felt it necessary to repeatedly explain to the jury that the bouncer is not one to start a fight. E.g. 1RP 148, 202; 2RP 224, 227.

In sum, the evidence to justify giving the instruction was there even if Mr. Guzman-Morales truthfully testified that he did not remember the sequence of events well. In rejecting the requested instruction, both the trial court and the Court of Appeals, by necessity concluded that the bouncer was cut outside the club, before Mr. Guzman-Morales was choked.[4] However, this conclusion requires an interpretation of the inconclusive videotape that favors the bouncer's account and consequently, the State.

Under State v. Fisher and State v. Fernandez–Medina, any such weighing is to be done in a light most favorable to the moving party, here Mr. Guzman-Morales. The trial court and the Court of Appeals reached the wrong decision. The Court of Appeals is correct in stating "the security footage does not conclusively show Guzman-Morales stabbing the guard," and this is precisely why the instruction should have been given. In dismissing this key point as "immaterial," the Court of Appeals erred.

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[4] See Op. at 5 claiming that "no evidence at trial suggested that Guzman-Morales stabbed the guard after he was placed in a chokehold, rather than before."

Oddly, the trial court instructed the jury on the lesser-included offense of assault in the fourth degree and did so specifically because it was possible that the bouncer was only hit – but not stabbed – inside the bar. 2RP 373-74 (trial court saying that Mr. Guzman-Morales "can make the argument" that 'there was only a hitting of his hand rather than stabbing.") That judicial ruling was inconsistent with the rejection of the requested self-defense instruction.

"The defendant's burden of "some evidence" of self-defense is a low burden." State v. George, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). The ambiguity as to what the tape shows, combined with the other evidence, including the reality that Mr. Guzman-Morales was choked and "scared" when that happened, means that he had met the minimal threshold burden of production as to warrant the instruction being given.

3. The Court of Appeals failed to apply the correct standard of review.

This Court has said that on review, the de novo standard applies when a self-defense instruction is not given. State v. Fisher, at 6; State v. Janes, 121 Wn.2d at 238 n.7; State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168, 1171 (1985) ("The sufficiency of the evidence to raise a claim of self-defense is a question of law for the trial court, viewing the evidence from the defendant's perspective."); Accord State v. George,

161 Wn. App. 86, 97, 249 P.3d 202 (2011) (also noting that an appellate court examines de novo the question of whether a defendant seeking a lawful use of force instruction "produced sufficient evidence that his fear was reasonable").

But here, the Court of Appeals used an abuse of discretion standard: "Where the trial court declines to instruct the jury on self-defense based on a lack of evidence, we review for abuse of discretion." Op. at 5, fn.7, citing State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

In Read, this Court said that

> If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of [injury]... an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

Read at 243.

The ruling below is not clear as to what drove the trial court's decision, an issue of fact or an issue of law.

Review should be granted so that the proper review standard – de novo – can be applied to the facts. This can be done either by this Court, or via remand by the Court of Appeals.

4. Review should be granted and the matter should be reversed for a new trial.

> To ensure due process to a criminal defendant, a trial court must provide considerable latitude in presenting his theory of his case; more specifically, a trial court should deny a requested jury instruction that presents a defendant's theory of self-defense only where the defense theory is completely unsupported by evidence.

State v. George, 161 Wn. App. at 100 citing State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); U.S. Const. Amend. XIV.

The matter should be reversed for a new trial.

F. CONCLUSION

The State secured Mr. Guzman-Morales' conviction without the jury being instructed on his theory of the case – self-defense – where there was evidence to support that theory.

This Court should grant review and reverse.

DATED this 19th day of July, 2016

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 73132-7-I
Respondent,	)	DIVISION ONE
v.	)	
EDILBERTO GUZMAN-MORALES,	)	UNPUBLISHED
Appellant.	)	FILED: June 20, 2016

COX, J. – "[A] defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense."[1] Edilberto Guzman-Morales appeals his conviction for second-degree assault with a deadly weapon, arguing that the court abused its discretion by refusing to instruct the jury on self-defense. Because he failed to produce any evidence indicating that he acted in self-defense, the court properly denied his request. We affirm.

The State charged Guzman-Morales with second-degree assault with a deadly weapon based on an altercation in a nightclub. At trial, a security guard testified that he noticed an argument between Guzman-Morales and a group of other customers. When the security guard approached him, Guzman-Morales complained about someone spilling his beer. The guard asked Guzman-Morales to go outside to talk to him, but Guzman-Morales refused. The guard then offered to buy Guzman-Morales a beer and to refund his cover charge if he came

[1] State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010).

outside. When Guzman-Morales refused again, the security guard placed his arm on Guzman-Morales to guide him outside. Guzman-Morales then grabbed the guard's shirt and told him that he would regret it.

But Guzman-Morales nevertheless began walking towards the exit with the guard. On their way, Guzman-Morales stopped, turned around, grabbed the guard, and said "I'm a dangerous man, and this is going to end very badly for you." The guard resumed guiding Guzman-Morales to the exit.

A few feet from the door, the guard felt a sensation in his groin like being hit with a hot hammer. He turned and saw Guzman-Morales had a knife in his hand. He saw Guzman-Morales moving the knife towards him again, so he placed Guzman-Morales in a chokehold and tried to avoid the knife.

The guard yelled "he's got a knife" and "I have just been stabbed." He continued struggling with Guzman-Morales and yelling for help until another guard hit Guzman-Morales in the face, causing him to drop the knife.

An officer responding to the scene arrested Guzman-Morales. Guzman-Morales told the arresting officer that "he was scared because people were hitting him." He also mentioned being hit by a bottle.

Guzman-Morales also testified at trial. He testified that he remembered walking in the nightclub and being hit on the back of the head. He heard "glass splashing" and was not sure if he had been hit with a bottle or had his beer knocked out of his hand. After that point, he "lost it" and "blacked out." He further testified:

> I don't remember much other than that until when I was in the police car, a few flashbacks that I get in my head from when I was

> walking from, and I was getting choked, and the next day, I woke up in jail, and I didn't know what had happened the day before, the night before.[2]

He later testified that he blacked out after the security guard offered to buy him a drink.

At trial, the State introduced security footage from the nightclub. The footage shows the security guard escorting Guzman-Morales towards the exit. As he does so, Guzman-Morales swings his hand towards the guard. The security guard identified this as the moment he was stabbed. The guard then puts Guzman-Morales in a chokehold, and the struggle moves outside the exit, mostly out of the camera's view.

The footage was consistent with the guard's description of when and where he was stabbed. But the footage appeared to show Guzman-Morales moving his hand towards the guard's right hip, while the guard's stab wound was located on his inner right thigh.

The State's forensic video analyst explained that the video was taken at an angle, and "the depth perception and the two dimensional image can be thrown off." Thus, the knife blade could "possibly cover that area between the wound and where we see the hand going to." This witness also explained that the guard's clothing could have changed the knife's trajectory.

At the close of evidence, Guzman-Morales requested a self-defense instruction. He argued that because the security footage appeared to show

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[2] Report of Proceedings (January 14, 2015) at 336-37.

Guzman-Morales striking the guard's hip rather than his thigh, the jury could conclude that Guzman-Morales stabbed the guard at a different, later point in time, when he was in a chokehold.

The trial court declined to instruct the jury on self-defense, determining that there was no evidence of self-defense.

The jury found Guzman-Morales guilty as charged and the trial court sentenced him.

Guzman-Morales appeals.

SELF-DEFENSE INSTRUCTION

Guzman-Morales argues that the trial court erred by declining to instruct the jury on self-defense. We disagree.

A defendant is entitled to an instruction on self-defense if some evidence demonstrates self-defense.[3] The defendant bears the initial burden of producing some evidence that he or she acted in self-defense.[4] To establish self-defense, "'there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary.'"[5]

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[3] Werner, 170 Wn.2d at 336-37.

[4] State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

[5] Werner, 170 Wn.2d at 337 (quoting State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997)).

"The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense."[6]

When the trial court declines to instruct the jury on self-defense based on a lack of evidence, we review for abuse of discretion.[7]

Here, the court properly denied Guzman-Morales's request for a self-defense instruction. No evidence suggested that he feared he was in danger of bodily harm when he stabbed the guard. Additionally, there was no evidence that such a belief would be reasonable, or that Guzman-Morales's use of force was reasonable.

Guzman-Morales argues that his statement "that he was scared, combined with the fact that he was choked by [the security guard], was sufficient to raise the issue of self-defense." This is insufficient because no evidence at trial suggested that Guzman-Morales stabbed the guard after he was placed in a chokehold, rather than before.

Guzman-Morales argues that the security footage was evidence that he stabbed the guard after being placed in a chokehold. This argument is unpersuasive.

The fact that the security footage does not conclusively show Guzman-Morales stabbing the guard is immaterial. This footage was not evidence

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[6] State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

[7] State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

suggesting that Guzman-Morales acted in self-defense. Rather it "support[ed]," without conclusively corroborating, the guard's testimony that Guzman-Morales stabbed him before he was put in a chokehold. Thus, this evidence did not create an inference that Guzman-Morales acted in self-defense.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Guzman-Morales filed a statement of grounds for review, arguing that he received ineffective assistance of counsel. We disagree.

The right to counsel includes the right to effective assistance of counsel.[8] One component of an ineffective assistance of counsel claim is deficient performance.[9] This requires showing that counsel's performance fell below "an objective standard of reasonableness."[10] Washington courts are "highly deferential to counsel's performance."[11] We presume that counsel provided effective representation and require the defendant to prove that no "legitimate strategic or tactical reasons" exist.[12]

Guzman-Morales first argues that his counsel's performance was deficient because counsel did not sufficiently examine him on the alleged assault.

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[8] Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Crawford, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006).

[9] Strickland, 466 U.S. at 687.

[10] Id. at 688.

[11] In re Pers. Restraint of Gomez, 180 Wn.2d 337, 348, 325 P.3d 142 (2014).

[12] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Specifically, he objects to counsel's failure to ask him why and when he used the knife.

But Guzman-Morales had already testified that he had "blacked out" and did not remember the events of the night after the moment when the security guard offered to buy him a drink. Nothing in the record suggests that it was not a legitimate tactical decision for counsel to choose not to ask specific questions about events Guzman-Morales stated he could not remember. Thus, counsel's performance was not deficient.

Guzman-Morales also argues that his counsel was deficient because he failed to investigate or call a witness who was present at the alleged crime. But the record on appeal is silent on this issue. Thus, we cannot review this issue on direct appeal.[13] "The appropriate means of raising matters outside our record is through the filing of a personal restraint petition."[14]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Duggan, J.

Becker, J.

[13] McFarland, 127 Wn.2d at 337-38.

[14] State v. Hart, 188 Wn. App. 453, 466, 353 P.3d 253 (2015).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73132-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 20, 2016