74062-8

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July 18, 2016
Court of Appeals
Division I
State of Washington

NO. 74062-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CHRISTOPHER THOMAS ACKLEY,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

The defendant did not admit to using force in self-defense. Further, an objective review of what a reasonable person in the same situation would have thought does not support giving a self-defense instruction. The defendant never established the necessity of force where he testified that the only immediate threat he perceived was the victim lifting his shirt after the defendant initiated the aggressive encounter. The record and explanation of how the Honorable Judge Susan Cook, trial judge, reached this decision is clear.

II. ISSUES

1. Where the defendant initiated the aggressive contact, denied assaulting the victim, and did not establish evidence to support the necessity to justify use of force in self-defense, did the trial court err in declining to provide a self-defense jury instruction? Answer: No.

III. STATEMENT OF THE CASE

1. The State's Evidence

Ackley and Mr. O'Connor are cousins by marriage. 08/03/2015 RP 106, 157. Ackley and Mr. O'Connor's conflict is believed to have stemmed from statements made by Mr.O'Connor about an affair he believed to have taken place between his cousin, the defendant's wife, and another man. 08/03/2015 RP 108, 158-59. The defendant began targeting the O'Connor's

home with disruptive acts, throwing firecrackers from his car towards their home early in the morning or throwing eggs at their house and vehicle. 08/03/2015 RP 107-108, 119-26, 159-60, 178. These incidents were captured on the O'Connor's home surveillance cameras. 08/03/2015 RP 107-108, 119-26, 159-60, 178.

On May 15, 2014, Jimmy O'Connor and his wife, Angie O'Connor, went for a leisurely walk in Bakerview Park near Vaux Center in Mount Vernon. 08/03/2015 RP 109-11, 160-61. As they walked Westbound on Fir Street they saw the defendant's car heading Eastbound, the defendant screaming towards them from his open window. 08/03/2015 RP 130, 164. The defendant quickly whipped his car around, cutting off another vehicle, pulled perpendicular into the curb blocking the road, and "flung the door open." 08/03/2015 RP 111-12, 128-30, 164. He jumped out of his vehicle, leaving his car door open and abandoning his seven to eight year-old daughter in the car, and moved towards the O'Connors. 08/03/2015 RP 112, 117, 131, 165-67, 193; 08/04/2015 RP 67. The defendant's young daughter leaned out the car window to watch the encounter. 08/03/2015 RP 193.

Mr. O'Connor stopped and pushed his scared wife, pushing her behind him to protect her from the approaching defendant. 08/03/2015 RP 112, 117, 135, 189,191. The defendant reached into his pocket and pulled out a closed switchblade knife, then clicked it open. 08/03/2015 RP 112,

115, 165-66, 193. The defendant stated, "I will slice you open, bitch," while advancing, knife blade straight out pointing towards Mr. O'Connor. 08/03/2015 RP 116, 131, 166. Mr. O'Connor told his wife to run away and call 911, which she did. 08/03/2015 RP 116, 167. The defendant was within twenty feet of Mr. O'Connor, steadily stepping closer, continuing to threaten to "slice" Mr. O'Connor. 08/03/2015 RP 115-116,166, 192.

"[W]hy do you have a knife, Chris? What are you going to do with that knife, Chris," Mr. O'Connor repeatedly asks, hands up in the air after he sees the defendant with the knife. 08/03/2015 RP 116-117, 166, 191-92; 08/04/2015 RP 9. On cross-examination, Mr. O'Connor repeatedly maintains that there is no point prior to the defendant pulling out his knife that he raises his hands nor does he ever lift his shirt. 08/03/2015 RP 187; 08/04/2015 RP 8-10. Mr. O'Connor sees his wife and two bystanders out of the corner of his eye, Mrs. O'Connor on the phone with the police. 08/03/2015 RP 168. Mr. O'Connor yells to the defendant that the police are on their way and, after two or three times of yelling this, the defendant flees to his vehicle and drives away. 08/03/2015 RP 168.

Officer Chantelle VanDyk responded to a "call that someone had pulled up to the reporting party and had exited a vehicle and displayed a knife and threatened them". 08/04/2015 RP 15. Officer VanDyk approached the O'Connors, Mrs. O'Connor with tears in her eyes, visibly

shaking, and her husband comforting her. 08/04/2015 15. The O'Connors reported the event to Officer VanDyk. 08/03/2015 RP 168; 08/04/2015 16. Fearful the defendant may be waiting for them, the O'Connors requested a courtesy ride home from Officer VanDykto make sure it was safe. 08/03/2015 RP 117-118, 168-69; 08/04/2015 17-18.

When the defendant assaulted Mr. O'Connor with his switchblade knife Mr. O'Connor did not have a weapon. 08/03/2015 RP 169.

After taking the O'Connors home, officers went to the defendant's residence to investigate the allegations of assault. 08/04/2015 RP 19. After being called out of his garage by the police, the defendant approached the officer stating that he did something stupid. 08/04/2015 RP 19. Officer VanDyk then informed him that he was under arrest. 08/04/2015 RP 34. Then, the defendant attempted to show Officer VanDyk text messages that were on his phone from February of 2014, three months prior to the assault, which he alleged were threatening. 08/04/2015. Officer VanDyk did not read the months old text messages because she determined they were not relevant to the incident which took place on that day in mid-May. 08/04/2015 RP 20. VanDyk testified that, "typically when somebody is threatened they don't instigate contact if they're afraid of what's going on".

The defendant told Officer VanDyk that he did pull out a knife, wanting to harm Mr. O'Connor when he confronted him, but that he changed

his mind and set the knife down, instead wanting to talk to Mr. O'Connor. 08/04/2015 RP 20, 34-35. He claimed to suffer from PTSD and anxiety and that when he saw Mr. O'Connor he got upset and yelled from his car window for Mr. O'Connor to "suck it, bitch." 08/04/2015 RP 20-21, 34. The defendant stated he was approximately twenty feet from Mr. O'Connor. 08/04/2015 RP 20-21. Officer VanDyk recovered the switchblade knife the defendant used in the assault from the defendant's right, front jean pocket. 08/04/2015 RP 21.

2. Testimony of the Defendant

The defendant testified that that he did throw fireworks out near the O'Connors' residence on two occasions following a phone conversation with Mr. O'Connor, although he denied ever throwing eggs at their vehicle. 08/04/2015 RP 114. The defendant testified that his family had told him to let go his anger towards Mr. O'Connor, but he couldn't get his mind off of it so he decided to "be a butthead and drive by his house and throw out a string of fireworks and disturb his sleep." 08/04/2015 RP 115.

On May 15, 2014, the defendant was driving on Fir Street with his, at the time, seven-year-old daughter, Makenna. 08/04/2015 RP 67. While driving, he saw Jimmy O'Connor walking on the sidewalk and yelled "suck it, bitch," out of his car window. 08/04/2015 RP 67. The defendant saw Mr. O'Connor raise his hands in the air and interpreted the gesture to mean,

"come on back, we'll talk." 08/04/2015 RP 68. The defendant "pulled my car perpendicular to traffic" making a half U-turn, stopping other cars, blocking off traffic, and parking across traffic pointing towards Bakerview Park. 08/04/2015 RP69-70, 118. He chose to park his car this way so there would be "witnesses to what was about to happen, if anything happened." 08/04/2015 RP 128. He turned his car around because it was a "reflex response" to Mr. O'Connor's raised hands. 08/04/2015 RP 81. His intention at the time was that he and Mr. O'Connor were either going to talk or fight. 08/04/2015 RP 128. He testified that he could have kept driving, but he is a "prideful individual," he was frustrated, and he was reacting. 08/04/2015 RP 134.

When the defendant stepped out of his car, "Jimmy O'Connor pulled his hands down rather quickly and pulled his shirt up or started to pull his shirt up, and what flashed through my mind, I grew up in L.A., California, and it flashed on me that this could turn into a bad situation , and I thought he was going to pull a gun on me. 08/04/2015 RP 71-72. Mr. O'Connor pulling up his shirt prompted the defendant to pull out his knife. 08/04/2015 RP 73, 81. Getting out of the car and pulling out the knife was just a reaction. 08/04/2015 RP 122. Then, "it clicked in my head, my hand went from my pocket, and I snapped my knife out, and I held it down by my leg." 08/04/2015 RP 72. He described pushing the trigger on the knife to click it

open, displaying the blade that was previously folded, and then holding it down by his side. 08/04/2015 RP 74.

The defendant steps toward Mr. O'Connor while Mr. O'Connor repeatedly asks what the defendant intends to do with his knife in his hand and if the defendant intends to harm him. 08/04/2015 RP 74, 78. Mr. O'Connor backs away from the defendant. 08/04/2015 RP 126. He felt that Mr. O'Connor was trying to antagonize him into "using the knife that I had just produced." 08/04/2015 RP 120. The defendant describes his thoughts, testifying that "my mind is trying to catch up, it just went from he's going to pull a gun on me, I need to protect myself, to now he's asking me questions about what I'm going to do with my weapon." 08/04/2015 RP 75. Mr. O'Connor did not have a gun, knife, or produce any other weapon. 08/04/2015 RP 118. The defendant realizes he is "in a bad situation." 08/04/2015 RP 75-76. The defendant then closes his knife, tosses it on the seat of his car, and started walking back towards Mr. O'Connor asking him if he had something he wanted to talk about now. 08/04/2015 RP 76, 79. Because he had put the knife back in his car, the defendant did not think there was any issue. 08/04/2015 RP 124.

In describing the end of the interaction between Mr. O'Connor and himself, the defendant stated it was "like, hey, look, my wife is scared, the police are on their way, would you just please leave, can you just leave?

Because, I mean, are you sure you don't want to talk about something? No? All right. Please leave. Okay. And I didn't want to scare his wife. His wife isn't -- I mean, I barely even know his wife." 08/04/2015 RP 135.

According to the defendant, "[t]his is all about me and Jimmy." 08/04/2015 RP 135.

The defendant confirmed at least three more times throughout his testimony that the knife was down at his side throughout the encounter. 08/04/2015 RP 74, 80, 106. He claimed that by having his knife at his side he was defending himself. 08/04/2015 RP 106.

When law enforcement arrived at his home, he met with the officers and told them he had done something stupid. 08/04/2015 RP 83. When asked to clarify what he meant by that, he said "[t]he fact that I yelled something out the window. The fact that I was trying to reduce the drama in the situation and it had escalated instead. The fact that I had my daughter with me, and I stopped and possibly put her in a dangerous situation. There was a couple of reasons." 08/04/2015 RP 83-84.

3. Self-Defense Theory Analysis

Prior to Mr. O'Connor's testimony, the trial court addressed the admissibility of a voicemail message alleged to have taken place prior to the assault between the defendant and Mr. O'Connor. 08/03/2015 RP 148. Because there had not yet been any evidence of self-defense, the voicemail

message was not admitted. 08/03/2015 RP 154. The trial court held that admitting the voicemail message at that point without evidence of self-defense would be "very prejudicial, it's very distracting, and it's not relevant. 08/03/2015 RP 154. When the State closes its case, the court rules that there has still not been any evidence of self-defense presented and the court will not make rulings regarding self-defense until such evidence is presented. 08/04/2015 RP 42.

On direct examination of the defendant he is asked about the voicemail message previously ruled inadmissible. 08/03/2015 RP 154. The the trial court excuses the jury to hear argument by the parties on sufficiency of the evidence of self-defense. 08/04/2015 RP 84-85. Based on the defense's argument regarding Mr. O'Connor's lifting his shirt as an act instilling fear in the defendant to justify self-defense, the trial court reasoned that "[w]hat you're asking me to do…is find that the gesture of grabbing your shirt and starting to pull it up is an aggressive act that justifies the use of force." 08/04/2015 RP 90.

The trial court analyzed whether the defendant had testified that he used force at all so as to allow for a justified Assault Second finding. 08/04/2015 RP 91. The trial court reasoned that using a self-defense theory requires the defendant must first admit to the use of force and then that it was force justified in self-defense. 08/04/2015 RP 92. Here, the trial court

found, the defendant testified that "he had a knife in his hand, he held it down at his side, and he made no threats to Mr. O'Connor." 08/04/2015 RP 92. Thus, " he hasn't committed an Assault in the Second Degree. There is no need to justify his assault. There's no need to justify his use of force. Because he hasn't committed a use of force." 08/04/2015 RP 93. The trial court held that the defendant could not claim that there was a justified assault second under self-defense theory. 08/04/2015 RP 94-96. "[I]n order to have a justified Assault Second, you have to say that you committed an Assault Second, and then you go on to justify it. He is saying I didn't commit an Assault Second." 08/04/2015 RP 96.

Following conclusion of the State's case-in-chief, the defense renewed its request for a self-defense instruction and to present evidence of self-defense. 08/05/2014 RP 143. The court denied the request, finding there was not sufficient facts presented to support that Mr. O'Connor raising his shirt justified use of unlawful force in self-defense or that the defendant admitted to using force at all. 08/04/2015 RP 146-47. At the conclusion of trial the court reiterated that there would be no self-defense instruction because this case has no self-defense. 08/04/2015 RP 164.

IV. ARGUMENT

A. THE COURT PROPERLY DENIED PROVIDING THE INSTRUCTION WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A SELF-DEFENSE CLAIM

To determine whether a defendant is entitled to a self-defense instruction, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002) (citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. *State v. Walker*, 136 Wn.2d at 772. A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *See 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. *State v. Janes*, 121 Wn.2d 220, 238 n.7, 850 P.2d 495 (1993).

1. A Reasonable Person in the Defendant's Shoes Would Not Have Believed A Threat was Present

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, and the standard of review is de novo. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). Considering both the subjective and objective inquiries necessary for assessing the reasonable person in the defendant's shoes, the trial court must determine whether the defendant produced any evidence to support the claim he or she subjectively believed in good faith that he or she was in danger and whether this belief, viewed objectively, was reasonable. *Walker*, 136 Wn.2d at 773 (citing *State v. Bell*, 60 Wn. App. 561, 567, 805 P.2d 815 (1991)). The question is what a reasonable person would have done if placed in the defendant's situation. *Id.*; *State v. LeFaber*, 128 Wn.2d 896, 900-01, 913 P.2d 369 (1996). The objective part of the standard "keeps self-defense firmly rooted in the narrow concept of necessity." *Walker*, 136 Wn.2d at 773 (citing *Janes*, 121 Wn.2d at 240).

Here, the trial judge heard all of the testimony, observed the demeanor of the witnesses, and reviewed all of the evidence. The trial judge had the opportunity to view the defendant in court and while he testified. The trial judge was in the best position to hear and

weigh the evidence to determine if any of it supported the defendant's self-defense claim. *See Walker*, 136 Wn.2d 767, 777-78, 966 P.2d 883 (1998).

Factually, only the defendant alleged there was a gesture from Mr. O'Connor that could have caused fear. 1 RP starting at 105, (testimony of Angie O'Connor specifically not witnessing Mr. O'Connor tugged on his shirt); 1 RP 169, lines 2-5 (O'Connor testified that during the assault, he had no weapons of any kind); 1 RP 191, lines 9-19 (O'Connor describing the assault and denying any motions with his hands). 1 RP 191, lines 9-19 (on cross examination of Mr. O'Connor, explaining where his hands where positioned when the petitioner got out of the vehicle "I held my wife back, I set her behind me, and then I was just – in front of me, I don't remember exactly what direction. Q: Okay. Are you making any motions with your hands, Mr. O'Connor? A: Not until after I seen the knife. Q: And what motion did you make when you saw the knife? A: I put my hands up."); 2 RP 9 (Q: Is there any point before Mr. Ackley gets out of his car that you raise your hands? A: No, ma'am. Q: Okay. And so at the moment after Mr. Ackley does step out of the car, isn't that true that you lift the front of your shirt? A: No, ma'am.).

The defendant's testimony contradicted that of the other witnesses. 2 RP at 71, lines 20-25, 72, lines 1-2, (testifying that when petitioner stepped out of his car "Jimmy O'Connor pulled his hands down rather quickly and pulled his shirt up or started to pull his shirt up, and what flashed through my mind, I grew up in L.A., California, and it flashed on me that this could turn into a bad situation, and I thought he was going to pull a gun on me."); 2 RP 72, lines 4-6 (testifying that "it clicked in my head, my hand went from my pocket, and I snapped my knife out, and I held it down by my leg"); 2 RP 73, lines 17-18, 24-25 (testifying that it was O'Connor's hands pulling his shirt up" that prompted him to pull out his knife). However, besides the defendant's comment that he "grew up in L.A.," no other evidence or testimony explained why or how that would have translated into a threatening gesture. *C.f. State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (as cited by petitioner as supporting the instruction, but where the evidence also included the defendant's fear of the other person, defendant knew he was armed, had been specifically threatened, and thought he would shoot him). The record does not explore any similar occurrences in the past where that gesture resulted in some sort of threat or immediate danger, or elaborate on any personal knowledge or background that

would have led someone to believe the petitioner saw that gesture as a threat. Furthermore, petitioner did not testify that he was in fear of Mr. O'Connor, and to the contrary, it was the petitioner who instigated the contact. 2 RP 66-67 (petitioner admitted yelling out of the car window as he drove by). It was the petitioner who turned his vehicle around to contact Mr. O'Connor. 2 RP 69. A reasonable person in the petitioner's shoes, given the context of the contact, would not have felt threatened by Mr. O'Connor.

If the trial court finds no reasonable person in the defendant's shoes could have perceived a threat, then the court does not have to instruct the jury on self-defense. *Id*. (citing *State v. Bell*. 60 Wn. App. at 567-68). The trial court's findings included specifically that the court "[did not] think that a reasonable person would be afraid of injury, personal injury, simply by the motion of somebody lifting up the front of their shirt." 3 RP at 3, lines 20-23. This issue was addressed numerous times. *See* 2 RP 90, lines 15-19 (court confirming that petitioner is "asking me to find that the gesture of grabbing your shirt and starting to pull it up is an aggressive act that justifies the use of force."). The evidence presented does not support a good faith belief that the petitioner was in danger following

someone lifting up their shirt, nor is it objectively reasonable to see that gesture as necessitating self-defense.

2. The Defendant Failed to Meet the Burden of Production Sufficient to Give a Self-Defense Instruction

A defendant is entitled to a self-defense instruction if some evidence supports the instruction. *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). "Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue." *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The trial court must view the evidence in the light most favorable to the defendant. *State v. Fischer*, No. 91438-9, 2016 Lexis 818, at *16 (S.Ct. of Wa. July 7, 2016). Evidence of self-defense may come from 'whatever source' that tends to show that the defendant is entitled to the instruction. *Fischer*, 2016 LEXIS 818, at *17 (citing *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The trial court is justified in denying an instruction where no credible evidence appears in the record to support it. *Id*. (citing *McCullum*, 98 Wn.2d at 488). While the threshold burden of production for a self-defense instruction is low, it is not nonexistent.

The court required some evidence supporting self-defense, and the defendant's denial of any assault negated a necessary component of a self-defense claim. *See* 2 RP at 104, and preceding discussion. *See also People v. Freeman*, 8 Cal. 4th 450, 882 P.2d 249 (1994) (counsel may, in appropriate circumstances, chose to concede guilt in whole or part or not to present a defense). Where the evidence fails to support a self-defense claim, the court's refusal to give the instruction is proper.

Without additional evidence, a defendant cannot receive a self-defense instruction when denying committing the act underlying the charged crime. *See State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Gogolin*, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986). A defendant may support the request for self-defense instructions with evidence inconsistent with his or her own testimony. *State v. Callahan*, 987 Wn. App. 925, 933, 943 P.2d 676 (1997) (permitting self-defense claim where the defendant denied intentionally aiming the gun but victim testified).

The necessary elements of self-defense must be present in the record to support giving self-defense instructions. The proposed instruction from WPIC 17.02 explains that the use of force toward another person is lawful when used or attempted by a person who

reasonably believes he or she is about to be injured. WPIC 17.02, in part. In *State v. Aleshire*, insufficient evidence supported self-defense where the defendant expressly denied hitting anyone, "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense." *Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977). *See also Callahan*, 87 Wn. App. at 933 explaining that there must be evidence to support a self-defense instruction). In *State v. Bye*, the defendant could not claim self-defense because he denied the underlying act. *State v. Bye*, 2007 Wn. App. LEXIS 330, at *13-15 (Div. 1 Feb. 26, 2007) (explaining that where the evidence and defense was general denial, it is likely that inadequate evidence would be presented to merit a self-defense instruction). *See also State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d 683 (1986) (where the defendant testified that the victim fell accidently down the stairs rather than having been pushed, no evidence supported the claim that the defendant intentionally used force in response to reasonable subjective fear); *State v. Dyson*, 90 Wn. App. 433, 439, 952 P.2d 1097 (1997) (explaining that when a defendant claimed a victim's injuries were caused by accident rather than the defendant's actions, the defendant cannot claim self-defense).

Here, the defendant's theory of self-defense was not supported by the record. The petitioner testified that he held the knife at his side. 2 RP 74, lines 18-19; 2 RP 80, line 11; 2 RP 106, lines 2-4. The analysis and argument of the parties discussed the missing element from a self-defense claim, namely that justified force was used. 2 RP 92-95 (where the defendant testified "that he didn't use force, and given that testimony, [the court doesn't] think there's a self-defense theory here. He says he didn't use force. He got the knife out of his pocked and held it down at his side and he never threatened to use it."). The record is undisputed that Ackley was the initial aggressor; there is no evidence that Ackley's use of force was in response to a reasonable subjective fear of his victim; and Ackley specifically denied the use of any intentional force against the victim.

3. Where the Defendant was the First Aggressor the Evidence Does Not Support A Subjective Belief He was in Imminent Danger

A trial court's refusal to give an instruction to the jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 882 (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1991) (*overruled on other grounds*). The trial court confirmed that under both the

objective and subjective analysis required for denying a self-defense instruction, the evidence was insufficient. 2 RP 147, lines 10-25 (confirming that the court considered both objective and subjective standards).

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 bodily harm, an issue of fact, the standard of review is abuse of discretion. When subjectively assessing a defendant's self-defense claim, the trial court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances that the defendant knew when the act occurred. *State v. Read*, 147 Wn.2d at 243 (citing *Walker*, 136 Wn.2d at 772); *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The reasonableness of a person's response must be evaluated "from the defendant's point of view as conditions appeared to [the defendant] at the time of the act." *State v. Bell*, 60 Wn. App. 561, 567, 805 P.2d 815 (1991) (citing *State v. Allery*, 101 Wn.2d 91, 594, 682 P.2d 312 (1984)).

Although this issue was less relevant during trial, the evidence showed that on the date in question, the petitioner was the initial aggressor. 1 RP at 111-12 (petitioner "whipped his car around

and pulled in, like kind of diagonal right there towards the curb, and then jumped out;" "flung his door open, and then jumped out."); 1 RP at 116 ("[Petitioner] said, speaking to my husband, he said I'm going to slice you open, bitch."); 1 RP 164, lines 11-17 ("he screamed something out the window. And when I turned to look to see what's doing, that's when he – his car spun around, and he took up – actually spun around and cut this other car off, where she couldn't get around, she had to stay there the whole time. But it parked, not straight like the cars go, but . . . perpendicular."); 2 RP 67, lines 13-17 (testifying that when he saw O'Connor from his car, he yelled "suck it, bitch."); 2 RP 69, lines 1, 5 (petitioner pulled his "car perpendicular, like a half u-turn"); 2 RP 70, line 18 (petitioner admitted that his vehicle blocked traffic); 2 RP at 20 (petitioner telling Officer VanDyk that "when he saw Mr. O'Connor, he had gotten upset, and wanted to harm him.").

There was no evidence supporting the petitioner's subjective belief of imminent danger supporting self-defense because the petitioner denied using any force. 2 RP 96 (court confirms the first aggressor instruction would be appropriate, but defense is denial of assault second instead of self-defense). The record fails to support a claim that the petitioner believed he was in imminent danger.

B. THE JURY INSTRUCTIONS ALLOWED THE DEFENSE TO PRESENT THEIR THEORY OF THE CASE

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, and (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 237 P.3d 287 (2010) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). The State must prove every element of the offenses beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I § 22; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The trial court should deny a requested jury instruction that presents a theory of the defendant's case when the theory is unsupported by evidence. *Barnes*, 153 Wn.2d at 382. Why and how the defense theory of general denial was supported by the instructions is analyzed above.

C. EVIDENCE ANTICIPATED BY THE DEFENES BECAME IRRELEVANT WHEN NO CLAIM OF SELF-DEFENSE WAS PRESENTED

Once the defendant testified that an assault had not occurred, much of the evidence defense counsel had prepared to offer became irrelevant. Throughout the trial, the court evaluated whether

evidence supporting self-defense was, or became admissible. However, viewing the evidence most favorably to the defendant, the defendant's testimony negated a necessary element of self-defense; namely, that force had been used.

Throughout the testimony, it is clear that the court continues to assess the self-defense claim, and what evidence is relevant based on that presentation of evidence. In the middle of the state's case, a voice message is discussed. 1 RP 153 (discussing the relevance of the voicemail only if a case of self-defense is established, and that with the testimony thus far, no evidence supports self-defense). *See also* 2 RP 42, lines 1-5 (following the state's case in chief, no evidence has been presented on self-defense), 2 RP 86 (discussing what evidence of self-defense was presented following the petitioner's testimony).

V. CONCLUSION

The Court should deny this appeal.

DATED this 18th day of July, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

HALEY W. SEBENS, WSBA#43320
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Eric J. Nielsen, addressed as Nielsen Broman Koch PLLC. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this ____18th_____of July, 2016.

Karen R Wallace

_____

KAREN R. WALLACE, DECLARANT