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Division I
State of Washington
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Supreme Court No. 96996-5

No. 77413-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATHEW CLARK HEALEA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mathew Clark Healea, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Healea appealed his conviction for fourth degree assault, in connection with an altercation with his former girlfriend. The Court of Appeals affirmed in an unpublished decision on February 25, 2019. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth and Fourteenth Amendments to the United States Constitution guarantee an accused person the right to present a defense and meet the charges against him. Where the trial court barred Mr. Healea from introducing evidence directly relevant to the credibility and history of self-harm of the alleged victim, did the court deprive Mr. Healea of his right to present a defense, and was the Court of Appeals decision thus in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

2. The Due Process Clause requires the State prove each element of an offense beyond a reasonable doubt. In addition, where a fact negates an essential component of an offense, the State must disprove that fact beyond a reasonable doubt. Where the lawful use of force negates a fact

necessary for conviction and there is "some evidence" supporting the lawful use of force, the trial court must instruct the jury on the use of force and the State's burden to disprove it. Should the trial court have instructed the jury on the defense of another, and was the Court of Appeals decision thus in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

Mr. Healea incorporates by reference the statement of facts in his Opening Brief at pages 3-5; an abbreviated statement follows.

After moving some furniture in his Maple Valley home, Mathew Healea watched nervously as his former girlfriend, Christina Wheeler, attempted to hitchhike home. RP 247-50, 344-46. Mr. Healea did not think it was safe for a person in Ms. Wheeler's drug-addled condition to get into a car with strangers, so when a car pulled over, Mr. Healea attempted to prevent Ms. Wheeler from leaving with the unknown motorists. RP 344-46, 454, 464.

The motorists called 911, and described seeing Mr. Healea attempting to lift Ms. Wheeler and carry her away from the roadside. RP 347-50. Ms. Wheeler was screaming, but the motorists could not hear Mr. Healer's words. Id. When the motorists dropped off Ms. Wheeler at a local market, she was examined by emergency responders and refused

medical attention. RP 247, 254, 266, 298. She disclosed that she had a history of methamphetamine use, and the paramedic could not rule out that she had been using on that day. RP 250, 255.

Mr. Healea was charged with unlawful imprisonment and assault in the fourth degree (domestic violence). CP 1-2.

At trial, Ms. Wheeler did not appear to testify, yet the court declined to give a missing witness instruction, as proposed by Mr. Healea. RP 414, 417, 419. The court also declined to instruct the jury on the defense of another, as proposed by Mr. Healea. RP 415, 418.

In addition, Mr. Healea sought to call a King County Sheriff's Deputy as a defense witness, to testify that shortly before this incident, Ms. Wheeler had made unreliable and alarming statements to police officers and had been involuntarily committed – evidence that was key to Ms. Wheeler's credibility and to Mr. Healea's defense. RP 408-10. The court excluded the defense witness. RP 410.

At the conclusion of the jury trial, Mr. Healea was acquitted of unlawful imprisonment and convicted of assault in the fourth degree. CP 63-64. His sentence has been stayed pending appeal. RP 504-06.

He appealed, and on February 25, 2019, the Court of Appeals affirmed in an unpublished decision. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. The trial court violated Mr. Healea's right to present a defense by excluding relevant evidence, in conflict with State v. Jones.

Mr. Healea properly attempted to offer evidence relevant to Ms. Wheeler's credibility and capacity. King County Sheriff Deputy Jeffrey Dorsch would have testified that six months before the alleged assault at issue at trial, Dorsch had responded to a call for a mental health check at the same address, due to suicide threats by the complainant, Ms. Wheeler. RP 408. Deputy Dorsch was prepared to testify that due to the previous incident, Ms. Wheeler was involuntarily committed for her mental health and substance abuse issues, as well as her history of self-harm. Id. The prior incident was relevant to Ms. Wheeler's credibility and to her capacity. The relevance of the prior incident was of particular importance, due to the State's failure to produce Ms. Wheeler to testify at Mr. Healea's trial.

The court excluded the testimony of Deputy Dorsch, finding the evidence was not sufficiently relevant. RP 410. The court held that if the incident had occurred "on the same day of the event," the court might have allowed the testimony. Id.

a. The court's exclusion of relevant evidence and limiting cross-examination denied Mr. Healea his right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

> The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Washington, 388 U.S. at 19

Relevant evidence tends to make a material fact more or less probable. ER 401. Relevant evidence is generally admissible. ER 402. Evidence relating to Ms. Wheeler's mental capacity – or lack thereof – as well as her credibility, was relevant.

Due to the trial court's ruling excluding the evidence of Ms. Wheeler's psychological fragility, the jury was left with no context for the incident, and an inaccurate picture overall.

In State v. Jones, this Court held that for evidence of high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." 168 Wn.2d at 720 (quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)). This Court held that where the trial court had excluded "essential facts of high probative value," the defendant was "effectively barred ... from presenting his defense," in violation of the Sixth Amendment. Id. at 721.

As in Jones, the trial court excluded a witness who would have provided the jury with "essential facts" with high probative value – no witness other than Deputy Dorsch could provide context for Ms. Wheeler's behavior, particularly since Ms. Wheeler did not appear at trial, herself. Likewise, no state interest was served by excluding such critical testimony. Id.

b. The Court's decision is in conflict with *Jones*; therefore, the Court of Appeals decision should be reviewed by this Court.

Because the court's exclusion of relevant evidence denied Mr. Healea his Sixth Amendment right to present a defense, the error requires reversal unless the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Jones, 168 Wn.2d at 724. The State did not meet this burden.

The failure of the State to produce Ms. Wheeler to testify at trial enhances the relevance of the testimony of Deputy Dorsch. Mr. Healea argued he was attempting to protect Ms. Wheeler, who was hitchhiking in a remote area. RP 409. Without Deputy Dorsch's testimony concerning Ms. Wheeler's recent involuntary commitment – and indeed, without the complainant, herself – the State's witnesses remained unimpeached in their versions of events.

Accordingly, the Court of Appeals decision is in conflict with decisions of this Court; this Court should grant review under RAP 13.4(b)(1).

2. The trial court relieved the State of its burden to prove the necessary elements of the offense by refusing to instruct the jury on the lawful defense of another.

a. The State must prove each fact necessary for conviction beyond a reasonable doubt, including those that negate an ingredient of the offense.

"[T]he burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted." Davis v. United States, 160 U.S. 469, 487, 16 S.Ct. 353, 40 L.Ed. 499 (1895). The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

"The State is foreclosed from shifting the burden of proof to the defendant ... when an affirmative defense does negate an element of the crime." Smith v. United States, 568 U.S. 106, 133 S.Ct. 714, 719, 184 L.Ed.2d (2013) (internal citations omitted); see also State v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012), cert. denied, 133 S Ct. 991 (2013).

Thus, in addition to the statutory elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in

the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. State v. McCullum, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); see also Deer, 175 Wn.2d at 734 ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense"). Applying this framework to Mr. Healea's case, it is clear the State must bear the burden to prove the use of force in defense of another was unlawful.

b. Because it is an affirmative defense to assault in the fourth degree, the State must disprove the lawful use of force.

Pursuant to RCW 9A.16.020(3), the use of force is lawful under the following circumstances:

> . . . used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person.

By definition, where the use of force is lawful, it negates the unlawfulness of any act. McCullum, 98 Wn.2d at 495. For example, after examining the definition of criminal negligence in RCW 9A.08.010, this Court in State v. Dyson, 90 Wn. App. 433, 952 P.2d 1097 (1997), held that self-defense must be available in a third degree assault because it negated proof that the act was unlawful. Specifically, a person acting in self-defense was not "fail[ing] to be aware of a substantial risk that a wrongful

act may occur." See RCW 9A.08.010(1)(d). That is, the lawful use of force negates the person's awareness that a wrongful act may occur. Dyson, 90 Wn. App. at 438.

The same is true where the State must prove a person acted with knowledge. In State v. Acosta, the Court held that when force is lawfully used it negates the State's proof that he person was aware of facts or circumstances "described by a statute defining an offense;" the definition of knowledge in RCW 9A.08.010. 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

c. There was evidence presented that Mr. Healea believed Ms. Wheeler was in danger and needed assistance.

Mr. Healea believed he was protecting Ms. Wheeler from harm when she began to get into the car with strangers while in a state of meth-induced intoxication. Ms. Wheeler discussed her history of methamphetamine addiction with emergency medical personnel, and the EMT's stated her symptoms were consistent with the ingestion of meth. RP 247-52, 262. Although the court permitted Mr. Healea to argue that he was trying to prevent Ms. Wheeler from leaving with strangers, in order to keep her safe, the jury was never able to fairly evaluate whether Mr. Healea acted in reasonable defense of another, because it did not receive fair, accurate, and complete jury instructions.

The defense of another expressly permits the defendant to act on appearances. Washington requires the jury to inquire whether "under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force." State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977) (emphasis added) (citing American Law Institute's Model Penal Code § 3.05(1) (Adopted 1962)).

Even if he was mistaken, Mr. Healea was entitled to use force in assistance of Ms. Wheeler, who he believed to be mentally ill, on methamphetamines, and on the verge of being abducted by unknown drivers. The denial of the defense of another instruction was erroneous.

d. Mr. Healea was entitled to an instruction on the lawful use of force in defense of another.

The defendant is entitled to instructions embodying his theory of the case if any evidence supports that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) ("some evidence"). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. Id. at 455-56. Once any evidence supporting the defense is produced, "the defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate

to support such a view of the case were he [or she] the trier of fact …."
State v. Adams, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982).

Once some evidence is presented that the force used was lawful, the defendant is entitled to have the jury instructed on the State's burden to prove beyond a reasonable doubt that the force used was not justifiable. McCullum, 98 Wn.2d at 499-500. Where the refusal to instruct on the lawful use of force is based on a legal ruling rather than on a finding that no supporting evidence was presented, this Court reviews the propriety of the refusal *de novo*. State v. George, 161 Wn. App. 86, 94-95, 249 P.3d 202 (2011).

The jury heard testimony from the paramedic and from responding police officers that Ms. Wheeler had a history of methamphetamine use and that her behavior on the night of the incident was consistent with meth use. RP 250, 255. Ms. Wheeler refused medical treatment and had no injuries or signs of physical trauma; she refused to cooperate with the State's prosecution by appearing at trial. RP 254, 266. In his closing argument, Mr. Healea asked the jury to consider what level of force a person can use to intercede when they see a loved one who has been using drugs, who is danger. RP 453. Mr. Healea argued the jury should consider whether a person has the legal authority to prevent a friend from leaving the area in an unknown car, and stated the incident with Ms.

Wheeler was a mutual fight, rather than an assault. Id. at 454; CP 31 (proposed WPIC 17.02).

Plainly, there was some evidence to support the instruction. The court erred and relieved the State of its burden of proof in refusing to instruct the jury on lawful force. RP 418.

e. The court's failure to instruct the jury on the defense of another required reversal.

Where a constitutional error occurs, a conviction must be reversed unless the State can prove beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Where the outcome of a case turns on which version of events a jury believes, the failure to give a lawful force instruction is prejudicial. State v. Werner, 170 Wn.2d 333, 338, 241 P.3d 410 (2010).

By failing to properly instruct the jury, the trial court effectively removed the right to the lawful defense of another from the jury's consideration. The court telegraphed an erroneous message to the jury that, despite Mr. Healea's defense theory about interceding to protect a friend using drugs, no Washington law would support his actions.

Because defense of another was the critical question for the jury, and because the State cannot show the error was harmless, the Court of Appeals should have reversed. Werner, 170 Wn.2d at 338.

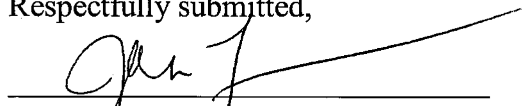
Because the Court of Appeals decision is thus in conflict with decisions of this Court, review should be granted under RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 25th day of March, 2019.

Respectfully submitted,



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATHEW CLARK HEALEA, Appellant.	No. 77413-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 25, 2019

SMITH, J. — Mathew Healea appeals his conviction for fourth degree domestic violence assault. Healea argues that the trial court erred by excluding a defense witness's testimony, refusing to instruct the jury on the affirmative defense of lawful defense of another, and denying his request for a missing witness instruction. He also argues that the trial court violated the antiattachment provision of the Social Security Act, 42 U.S.C. § 407(a), by imposing mandatory legal financial obligations (LFOs) when his only income is from Social Security disability benefits.

We affirm Healea's conviction. The expected defense witness testimony was not relevant to the assault, the evidence presented did not support an instruction on the lawful defense of another, and a missing witness instruction was not warranted because the absent witness was not peculiarly available to the State. But we remand to the trial court to amend the judgment and sentence

to specify that the LFOs imposed may not be satisfied out of any funds subject to the antiattachment statute.

FACTS

On August 20, 2016, Pamela Aguilar and Harvey Avalos were driving down Maple Valley Highway when they saw a man and woman, later identified as Healea and C.W., on the side of the road. C.W. had her thumb out. Aguilar and Avalos decided to pick up C.W., but before C.W. could get into the car, Healea grabbed her by the neck and arm and dragged her down a steep embankment away from the road and toward a residence.

C.W. screamed for help, and Avalos called 9-1-1. Aguilar watched C.W. try to fight off Healea, grabbing at the ground while Healea tried to pick her up. C.W. pushed and kicked Healea and screamed that Healea was going to kill her. Healea attempted to throw C.W. over his shoulder multiple times but was unsuccessful. Eventually, C.W. dropped a backpack she was carrying onto the ground. Healea yelled at Aguilar and Avalos several times to go away. C.W. then grabbed on to a tree, and Healea hit her in the face and on the chest in an attempt to loosen her grip on the tree. When that failed, Healea left C.W. to grab her discarded backpack. At that point, C.W. ran to Aguilar's car and Aguilar drove C.W. to a store, where they were met by first responders.

The State charged Healea by information with one count of unlawful imprisonment (domestic violence) and one count of assault in the fourth degree (domestic violence). Aguilar and several of the first responders testified at trial. C.W. and Healea did not testify, but defense counsel argued that Healea

restrained C.W. to protect her from hitchhiking with strangers while high on methamphetamines. The jury found Healea guilty of assault in the fourth degree (domestic violence) but acquitted him of the unlawful imprisonment charge. At sentencing, the trial court imposed $600 in mandatory LFOs.

Healea appeals.

ANALYSIS

Admission of Defense Witness Testimony

Healea argues that the trial court violated his right to present a defense by excluding the testimony of Deputy Jeffrey Dorsch, who would have testified that C.W. had a history of self-harm, which is relevant to her credibility and capacity. We disagree.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Clark, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). A court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable reasons or on untenable grounds. State v. Black, 191 Wn.2d 257, 266, 422 P.3d 881 (2018). Where the trial court excludes relevant defense evidence, we review de novo whether the exclusion violates the defendant's constitutional right to present a defense. Clark, 187 Wn.2d at 648-49; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" Jones, 168 Wn.2d at 720 (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). A defendant's right to an opportunity to be heard

in his defense, including the right to offer testimony, is basic but not absolute. Jones, 168 Wn.2d at 720. "Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). "Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence." Jones, 168 Wn.2d at 720. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. A trial court properly excludes evidence that is "remote, vague, speculative, or argumentative because otherwise 'all manner of argumentative and speculative evidence will be adduced,' greatly confusing the issue and delaying the trial." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001) (quoting State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)), aff'd on other grounds, 147 Wn.2d 288, 53 P.3d 974 (2002)).

Here, Healea made an offer of proof that Deputy Dorsch would testify that he performed a mental health check on C.W. on February 24, 2016, six months before the assault. At the time, C.W. said she wanted to kill herself and she was involuntarily committed as a result. Healea argued that this testimony was relevant because it proved that C.W. had a history of self-harm and that Healea's decision to protect C.W. from a risky activity like hitchhiking was reasonable. The trial court did not allow Deputy Dorsch to testify, explaining that "[h]ad it occurred on the same day of the event, I would be much more inclined to see it as relevant evidence."

The trial court did not abuse its discretion by excluding Deputy Dorsch's testimony. Testimony about an isolated incident involving C.W.'s mental state six months before the assault is too remote to be relevant to Healea's actions on the date of the assault. Therefore, the exclusion of that testimony did not violate Healea's right to present a defense.

Relying on Jones, Healea argues that the trial court should have admitted Deputy Dorsch's testimony because it was of "high probative value." Jones, 168 Wn.2d at 721. He is mistaken. In Jones, a rape case, reversal was required because the trial court refused to allow the defendant to testify that the sex was consensual and to cross-examine the victim on consent. The Supreme Court explained that the trial court erred because this evidence constituted the defendant's "entire defense" and was therefore of "extremely high probative value." Jones, 168 Wn.2d at 721.

Here, although evidence of C.W.'s prior threat of self-harm may be a large portion of Healea's defense, it is not "highly probative" because the incident occurred many months before the assault. Unlike Jones, where the excluded testimony concerned the rape itself, evidence of C.W.'s threat of self-harm is remote in time to the assault. Therefore, Jones does not require reversal.

Instruction on Lawful Defense of Another

Healea argues that the trial court erroneously relieved the State of its burden of proving each element of the crime when it refused to instruct the jury on the affirmative defense of lawful defense of another. We disagree.

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support that theory. State v. Fisher, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). A trial court's failure to so instruct the jury is reversible error. Fisher, 185 Wn.2d at 849. In evaluating the defendant's evidence, the trial court must view it in the light most favorable to him. Fisher, 185 Wn.2d at 849. "'The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].'" Fisher, 185 Wn.2d at 849 (alterations in original) (quoting State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). The defendant bears the burden of production. Fisher, 185 Wn.2d at 849. In Washington,

> [t]he use, attempt, or offer to use force upon or toward the person of another is not unlawful . . .
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary.

RCW 9A.16.020. "The law allows defense of another person against a less-than-life-threatening assault, so long as the degree of force the defendant uses is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to that defendant." State v. Marquez, 131 Wn. App. 566, 575, 127 P.3d 786 (2006) (emphasis omitted).

Whether the defendant has produced sufficient evidence to raise an affirmative defense is a matter of law. Fisher, 185 Wn.2d at 849. If the basis for the trial court's refusal to give the requested jury instruction is a lack of evidence

supporting an affirmative defense, this court reviews that refusal de novo. Fisher, 185 Wn.2d at 849.

Here, Healea proposed a jury instruction on the lawful defense of another. Defense counsel argued that the instruction was necessary because "[C.W.] placed herself in a dangerous position by being potentially under the influence of methamphetamines along the side of a busy highway—such that Mr. Healea's actions could be seen as a form of defense of her." The trial court refused Healea's proposed instruction, explaining that

> in the Court's view [defense of another] requires that there be testimony in the record that the person who was lawfully aiding another had a reasonable belief that that person was to be injured and there's no evidence in the record to support that anyone had a reasonable belief that she was about to be injured and, therefore, needed the exertion of force against her.

Taking the evidence in a light most favorable to Healea, hitchhiking can be a risky activity and Healea could have had a legitimate concern for C.W.'s safety if she entered Aguilar's car. But the degree of force Healea used was more than a reasonably prudent person would use in that situation. Aguilar testified that Healea dragged C.W. down the embankment by her neck and arm, picked her up and dropped her several times, and hit her on the face and chest while she was holding on to a tree. Aguilar also testified that the altercation lasted for 20 minutes and that she and Avalos yelled to Healea and C.W. that the police were on the way. Even considered in the light most favorable to Healea, this evidence does not support a defense-of-another instruction. Healea's decision to continue to restrain and hit C.W. for an extended period of time was not reasonable, especially after hearing that the police were on their way. A reasonable person

in Healea's shoes would not have continued to use such force on C.W. Therefore, there was not sufficient evidence to support an instruction on lawful defense of another.

Missing Witness Instruction

Healea argues that the trial court violated his right to present a defense by refusing a missing witness instruction as to C.W. We disagree.

When a party fails to call a witness it would naturally call if the witness's testimony would be favorable, the "missing witness" doctrine permits the jury to make an inference that the uncalled witness's testimony would have been unfavorable. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). But the inference is not permitted when (1) the witness is not peculiarly available to the party failing to call the witness; (2) the witness's testimony is unimportant or cumulative; or (3) the circumstances do not establish, as a matter of reasonable probability, that the party would not knowingly fail to call the witness unless the witness's testimony would be damaging. Blair, 117 Wn.2d at 488-90. In other words, if a witness's absence can be explained, the jury is not permitted to infer that the witness's testimony would have been unfavorable. Blair, 117 Wn.2d at 489.

We review a trial court's refusal to give a requested instruction for abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

Here, the State made a motion in limine to exclude any missing witness argument. The prosecutor told the court that he had been in and out of contact with C.W., who frequently changed her phone number, but that C.W. indicated several months prior to trial that she had moved on with her life and "was

effectively not inclined to participate in the matter any further." C.W. then changed her mind and set up a phone interview with the prosecutor and defense counsel, but at the time of the meeting, she did not answer her phone or return any voice mails. Less than a week before trial, C.W. contacted the prosecutor with a new phone number and left a voice mail, asking if she had missed the meeting. C.W. did not answer or return the prosecutor's subsequent calls. Under these circumstances, which demonstrate that C.W. was not peculiarly available to the State, the trial court did not abuse its discretion by refusing to give a missing witness instruction.

Healea argues that C.W. was peculiarly available to the State because the State had the ability to subpoena her for trial, which it did not do. But a witness is not "peculiarly available" merely because the witness is subject to the subpoena power. Blair, 117 Wn.2d at 490. Therefore, this argument fails.

Healea also argues that C.W.'s interests were aligned with the State and she was therefore peculiarly available to the State because Healea was not permitted to contact her due to the criminal charges against him. But

> [f]or a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968), overruled on other grounds, State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012). The fact that Healea is prohibited from contacting C.W. does not indicate a community of

interest between C.W. and the State or the State's superior opportunity for knowledge of C.W. such that C.W. is peculiarly available to the State. Healea's argument is not persuasive.

Mandatory LFOs

Healea argues that the trial court's imposition of $600 in mandatory LFOs violates the antiattachment provision of the Social Security Act because Social Security disability benefits are his only income. We hold that the antiattachment provision does not prohibit the imposition of LFOs, but remand to the trial court to amend the judgment and sentence to indicate that the LFOs may not be satisfied out of any funds subject to the antiattachment provision.

The Social Security antiattachment statute states:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, *or other legal process,* or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (emphasis added). Under this statute, "neither current nor future social security payments are subject to seizure by any process of law." State v. Catling, 2 Wn. App. 2d 819, 823, 413 P.3d 27, review granted, 191 Wn.2d 1001 (2018). The United States Supreme Court has held that "other legal process" requires the "utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385, 123 S. Ct. 1017,

154 L. Ed. 2d 972 (2003). Our Supreme Court has held that a trial court's requirement that a defendant pay $15 per month in discretionary LFOs from her Social Security benefits was prohibited as an "other legal process." City of Richland v. Wakefield, 186 Wn.2d 596, 609, 380 P.3d 459 (2016).

Here, the trial court ordered Healea to pay $600 in mandatory LFOs despite evidence that his only income is from Social Security disability benefits. Healea argues that the imposition of these mandatory LFOs is an "other legal process" that is prohibited under Keffeler and Wakefield.

In State v. Catling, Division III of this court addressed whether the imposition of mandatory LFOs on a defendant whose sole income is from Social Security disability benefits constitutes a violation of the antiattachment statute. Catling, 2 Wn. App. 2d at 822-23. The majority held that "[t]he anti-attachment provision prevents levying against Social Security disability proceeds, but it does not address the debt itself" because "[t]he statute distinguishes between the imposition of LFOs and compelled payment of LFOs from the exempt proceeds of a Social Security payment." Catling, 2 Wn. App. 2d at 826 (emphasis omitted). In so holding, the majority relied on In re Lampart, 306 Mich. App. 226, 856 N.W.2d 192 (2014), where the Michigan Court of Appeals held that enforcement of a restitution order against Social Security income benefits violated the antiattachment clause, but that the restitution order remained valid. Lampart, 306 Mich. App. at 245-46. The Michigan court reasoned:

> If it were determined that Alexandroni's only asset, or source of income, is and remains from SSDI benefits, 42 USC 407(a) prohibits the use of legal process—including by a finding of contempt—from reaching those benefits to satisfy the restitution

> order. If, however, Alexandroni is found to have income aside from her SSDI benefits, or other assets that are derived from other sources, that income or those assets could be used to satisfy the restitution award. The restitution order itself remains valid. Indeed, Alexandroni's receipt of SSDI benefits does not immunize her from the restitution order; rather, it merely prohibits the trial court from using legal process to compel satisfaction of the restitution order from those benefits. Because it is possible that Alexandroni may have assets or may receive income from other sources in the future, we affirm the trial court's refusal to cancel or modify Alexandroni's restitution obligation.

Lampart, 306 Mich. App. at 245-46 (citation omitted). The Catling majority concluded that the imposition of the mandatory LFOs was valid, but that remand was necessary so the trial court could "amend its judgment and sentence to indicate that the LFOs may not be satisfied out of any funds subject to 42 U.S.C. § 407(a)." Catling, 2 Wn. App. 2d at 826. This reasoning is persuasive, and we adopt the same remedy.

Therefore, we affirm Healea's conviction and the imposition of mandatory LFOs, but remand so that the trial court can amend the judgment and sentence to specify that the LFOs may not be satisfied out of any funds subject to the antiattachment statute.

Smith, J.

WE CONCUR:

Mann, J.

Appelwick, C.J.

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. 77413-1-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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