99734-9
NO._____
Court of Appeals NO. 80436-7-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

DAVID ZAITZEFF,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

Noah Weil
Attorney for Petitioner

Law Office of Noah Weil PLLC
4500 9th Ave NE, #300
Seattle, WA 98105
Ph# (206) 459-1310
Noah@BetterNoahLawyer.com

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A. IDENTITY OF PETITIONER AND DECISION BELOW

David Zaitzeff, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision, filed April 5, 2021, terminating review. This decision affirmed Mr. Zaitzeff's conviction and is included in the Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Review should be granted because the published opinion, in finding the sword is a traditional, constitutionally-protected arm but affirming the conviction, conflicts with this Court's decision in *State v. Evans* and presents a significant question of constitutional law by allowing Seattle's Unlawful Use of Weapons ordinance to be applied to the carrying of a traditional arm in self-defense. RAP 13.4(b)(1), (3).
2. In affirming this ordinance, the Court of Appeals granted expansive power to legislatures to ban constitutionally-protected arms as long as any exemption exists, even if the exemption does not relate to self-defense. This is an issue of substantial public interest because it permits the Washington legislature and local municipalities to substantially alter the landscape of laws involving bearing arms. RAP 13.4(b)(4).

3. Review should also be granted because the published opinion conflicts with *State v. Ward* and presents a significant question of constitutional law regarding the ability of the trial courts to rule on necessity defenses and the evidences related therein *in limine*. RAP 13.4(b)(2).

C. STATEMENT OF THE CASE

On May 2, 2018, the petitioner Mr. David Zaitzeff was walking in Green Lake Park in the City of Seattle. Supp-CP 6-8. He had a sheathed sword strapped to his body. *Id.* Mr. Zaitzeff was not brandishing his sword or otherwise using it while walking. *Id.* Nonetheless, a citizen was alarmed and called the police.

When the police arrived, they confirmed Mr. Zaitzeff possessed the sheathed sword. They inquired whether Mr. Zaitzeff was engaging in hunting or fishing, and he replied he was not. *Id.* The police issued a citation, took possession of the sword, and left. *Id.*

Mr. Zaitzeff was later charged with Unlawful Use of Weapons under Seattle Municipal Code (SMC) 12A.14.080(B) in Seattle Municipal Court. CP 35. Mr. Zaitzeff challenged the ordinance at a motion hearing. CP 1. This motion was denied. CP 30-31

Mr. Zaitzeff proceeded to trial pro se. CP 35. Mr. Zaitzeff gave notice of the defense of necessity. CP 45. During motions in limine the

City moved to exclude the defense and all evidence related to that defense at trial. CP 55-60. The trial court invited an offer of proof that Mr. Zaitzeff was not being imminently threatened and based on the offer of proof the court granted the City's motion to exclude the defense of necessity and evidence related to that defense[1]. CP 60.

After the ruling, Mr. Zaitzeff proceeded to a stipulated facts bench trial. CP 78. The trial court found Mr. Zaitzeff guilty of violating the ordinance. CP 83.

Mr. Zaitzeff filed a RALJ appeal and the RALJ court affirmed, finding among other things that the sword was not a constitutionally protected arm. Mr. Zaitzeff moved for discretionary review in the Court of Appeals. The Court of Appeals accepted review.

In the published opinion included in the Appendix, the Court of Appeals differed from the lower courts and properly held a sword was a constitutionally-protected arm. But it held, despite this designation, Seattle's ordinance was valid because 1) swords were not banned inside the home, and 2) that swords were permitted to be carried on the street as long as they fell under the occupational exceptions in SMC 12A.14.100.

[1] While the court stated it would "reserve" on the ruling, the transcript makes it clear it would only revisit its decision to exclude if Mr. Zaitzeff produced a different offer of proof. The record is clear the court effectively excluded the defense and evidence related to that defense in limine.

The Court of Appeals also held parks were de facto sensitive areas, although the ordinance's sweep includes all of Seattle and is not limited to parks or sensitive areas.

The Court of Appeals, applying intermediate scrutiny, held that because of the exceptions to the ordinance, and the location Mr. Zaitzeff was arrested in, Mr. Zaitzeff's conviction should be affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The charging ordinance is unconstitutional as applied because a sword is a traditional arm and under established constitutional precedent cannot be banned in the wholesale manner enacted by the Seattle City Council.

While under the Second Amendment of the United States Constitution[2], and Art. 1, § 24 of the Washington State Constitution[3] a government is authorized to enact "reasonable regulations" to traditional arms, Seattle's ordinance goes far beyond what is reasonable.

This matter revolves around SMC 12A.14.080(B), "Unlawful Use of Weapons." The ordinance states

"It is unlawful for a person to:

[2] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. 2.

[3] "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." WA Const. Art. 1 § 24.

> B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm[.]

The code defines "dangerous knife" as "any fixed-blade knife and any other knife having a blade more than 3 1/2 inches in length." SMC 12A.14.010. This definition includes swords.

A separate ordinance contains a specific list of exemptions that negate the "unlawfulness" of possessing a dangerous knife. These are A) licensed hunters or fisherpersons actively engaging in the same, B) persons engaged in an occupation that utilizes the weapon, or C) if the weapon is carried in a secure wrapper while travelling from the place of purchase, repair, business, or home. SMC 12A.14.100.

Because the record did not show Mr. Zaitzeff fell under one of these exemptions, Mr. Zaitzeff was found guilty of violating SMC 12A.14.080(B). However, this ordinance is unconstitutional as applied to the facts of this case.

This specific ordinance runs afoul of modern United States Supreme Court Second Amendment precedent, specifically *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); and *Caetano v. Massachusetts*, 136 S. Ct. 1027, 194 L. Ed. 2d, 9984 USLW 4133 (2016). Both cases uphold an individual's right to possess a traditional arm for self-defense, the core of the Second

Amendment. Seattle's ordinance, including its exemptions, makes no accommodation for the rules *Heller* and *Caetano* require when a government attempts to regulate traditional arms.

By upholding the ordinance despite finding the sword is a traditional arm, the opinion below conflicts with this Court's decision in *Seattle v. Evans*, 184 Wn.2d. 856, 366 P.3d 906 (2015), *cert. denied*, 137 S. Ct. 474 (2016). While *Evans* upheld the ordinance in a narrow 5-4 decision, it did not resolve the Second Amendment question because it held the blade in *Evans*, a paring knife, was *not* a traditional arm and thus not subject to Second Amendment protection. *Id.* at 859. Because this case involves a sword, a traditional arm; and not a paring knife, a kitchen tool, the Second Amendment protections are applicable here.

In its holding, the Court of Appeals determined the exemptions listed above save the ordinance, an interpretation that has been criticized in a concurrence by this Court. *Seattle v. Montana*, 129 Wn.2d 583, 600, 919 P.2d 1218 (1996) (Alexander, J., concurring). In affirming the ordinance through these exemptions, the Court of Appeals granted vast discretion to legislatures to ban arms for self-defense, as long as some non-self-defense exemption was written in.

The Court of Appeals also conflicted with this Court's opinion in *Jorgenson* by finding intermediate scrutiny applied even though Seattle's

ordinance does not direct its ban to specific persons or specific places. *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013).

Finally, the Court of Appeals conflicted with United States Supreme Court precedent by finding the location of where Mr. Zaitzeff was arrested a basis to uphold the conviction, even though the challenged ordinance makes no distinction between parks or anywhere else. This essentially writes into an ordinance an extra element the legislature did not intend. This holding creates perverse incentives for law enforcement because the implied element requires law enforcement to hold off on arrests for violations until a defendant is in a de facto sensitive area. The use of this implied element does not give fair notice of proscribed conduct to citizens.

a. <u>This Court has previously addressed this ordinance and explicitly left open this challenge in *Evans*</u>.

In *Evans* the defendant was charged under the same Seattle knife-ban ordinance, SMC 12A.14.080(B). There the defendant was carrying a fixed-blade paring (kitchen) knife for self-defense. The defendant challenged the ordinance as applied to him, arguing *Heller* and subsequent Second Amendment case law rendered Seattle's knife ban unconstitutional. *Evans*, 184 Wn.2d. at 861-62.

The fives justice majority in *Evans* court held the defendant's specific conduct was not entitled to constitutional protection because his paring knife was a kitchen tool and not an "arm." *Id.* at 861.

While the *Evans* court reviewed *Heller* and matters from other jurisdictions, it also examined an earlier case addressing the same ordinance at bar. *Montana*, 129 Wn.2d at 583.

Montana mirrors the holding in *Evans*: "Under even the broadest possible construction, the term 'arms' extends only to weapons designed as such, and not to every utensil, instrument, or thing which might be used to strike or injure another person. *Id.* at 590-91.

In a concurrence, Justice Alexander noted that while the specific blades in the case were not "arms" in the constitutional sense, he chided the majority for presuming Seattle's ordinance was actually constitutional: "…**Seattle's ordinance is such a broad prohibition on the possession and carrying of knives, including those that fall within the definition of 'arms,' that it is not, as the majority indicates, a 'reasonable regulation.'"** *Id.* at 600. (Alexander, J., concurring) (emphasis added).

Evans expressly contradicts the Court of Appeals' holding that the ordinance can be upheld against the facts of this case: Indeed, *Montana* implies, and *Evans* specifically calls out, this case where Seattle's ordinance is challenged when the weapon is a true "arm."

> "We are mindful of—and expressly renew—the concern expressed in Justice Alexander's concurring opinion in *Montana:* many knives banned under the Seattle ordinance may be arms deserving constitutional protection…The problem that the concurrence identified was that "the ordinance exempts from its scope the carrying of knives while engaged in hunting, fishing, the culinary arts, and other lawful occupations, activities not protected by the constitution, **yet does not exempt from its scope the carrying of arms for the purpose recognized in the statute constitution, self-defense…**
>
> In a different case under appropriate facts, the ordinance's "broad prohibition" on carrying arms for purposes of self-defense may well be constitutionally infirm. **We reserve judgment on this issue for an appropriate case**."

Evans, 184 Wn.2d at 864 (fn.6) (internal quotations and citations omitted) (emphases added).

This is that appropriate case. The Court of Appeals recognized Mr. Zaitzeff's sword is a traditional arm. It deserves constitutional protection. Because the ordinance is unconstitutional as applied, the Court of Appeals opinion is in conflict with this Court's prior opinion and raises a substantial constitutional issue. Review should be granted pursuant to RAP 13.4(b)(1), (3).

b. <u>The United States Supreme Court, through *Heller* and *Caetano*, prohibit the City from banning traditional arms for self-defense purposes.</u>

The seminal cases of modern Second Amendment jurisdprudence are the United States Supreme Court cases of *Heller* and *Caetano*.

Broadly *Heller* stands for a few, related propositions. First, the Second Amendment functions as codifying the individual's right to self-defense and to bear an arm for self-defense. Its protections encompass all traditional weapons, not merely those utilized in conjunction with military service.

Heller also referenced, and later cases made more explicit, the rights enshrined in the Second Amendment pervade public spaces, and do not exist solely in one's home. Rather, the Court noted Second Amendment protections were greatest in one's home, and least applicable for legislation referencing "sensitive areas." Seattle's ordinance does not reference sensitive areas and encompasses the entire public sphere of the City of Seattle. Seattle's ban vitiates the right to bear an arm for self-defense, and does so without regard to "sensitive areas."

This right to bear arms on the streets was addressed again by the Court in *Caetano*. In *Caetano*, the Court reviewed a conviction of unlawfully possessing a weapon, specifically a stun gun, carried on the street. The Court reversed the conviction, finding unanimously *per curiam* the ordinance at issue was unconstitutional under modern Second Amendment jurisprudence, especially *Heller*. *Caetano,* 136 S. Ct. at 1027.

In this matter Mr. Zaitzeff was carrying a sword, a traditional arm both used by the military and predating firearms. Unlike previous cases

involving this ordinance, discussed below, the Court of Appeals held Mr. Zaitzeff's sword was a traditional arm. Because of United States Supreme Court precedent and this Court's past discussions of this ordinance, the ordinance as applied to the facts of this case is unconstitutional.

2. For three reasons, the Court of Appeals conflicted with previous decisions in affirming the ordinance as constitutional despite the holding that the sword was a traditional, constitutionally-protected arm

a. Whether the ordinance should be evaluated under intermediate scrutiny, as applied by the Court of Appeals, or another standard is a significant constitutional question meriting this Court's review.

An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *Evans*, 184 Wn.2d at 862.

While the challenger has the initial burden, the government bears the burden of establishing the constitutionality of the Second Amendment restriction under the appropriate scrutiny level.

Heller itself declined to apply a standard since the Court held the D.C. ordinance was clearly unconstitutional under any standard. 554 U.S. at 628. However, the Second Amendment right to self-defense has been considered a "fundamental right." *State v. Sieyes*, 168 Wn.2d 276, 287,

225 P.3d 995 (2010)[4]. Traditionally, strict scrutiny is appropriate when the right is fundamental and the burden is high. *State v. Haq*, 166 Wn. App. 221, 253-54, 268 P.3d 997, *review denied*, 174 Wn.2d 1004 (2012).

In *Jorgenson*, the court reviewed a challenge to RCW 9.41.040(2)(a)(iv), which forbids those charged with a serious crime to possess firearms. *State v. Jorgenson*, 179 Wn.2d at 145. The court noted "The level of scrutiny (if any) applicable to firearm restrictions challenged under the Second Amendment is not settled." *Id*. at 159. The court ultimately settled on intermediate scrutiny because, drawing on analogy to First Amendment cases, it determined that if a statute was a restriction on "particular people" or "particular places", intermediate scrutiny was appropriate. *Id.* at 160-62. The court specifically noted the RCW was subject to intermediate scrutiny because it was *not* like the forbidden one in *Heller*: "[T]he handgun prohibition in *Heller*…applied to everyone in the jurisdiction…" *Id.* at 162.

In this case, SMC 12A.14.080 *does* apply to every person in the jurisdiction. The Court of Appeals conflicts with *Jorgenson* because it applied intermediate scrutiny even though the ordinance does not address "particular people" or "particular places." The question of scrutiny level

[4] Interestingly, the *Sieyes* court, despite finding the Second Amendment right fundamental, followed the *Heller* model and declined to apply a level of scrutiny to claimed violations. *Sieyes*, 168 Wn.2d at 295.

when an ordinance is broader than the challenged one in *Jorgenson* is a significant constitutional question that warrants review pursuant to RAP 13.4(b)(3).

b. The Court of Appeals discussion of the exemptions of this ordinance raises an issue of substantial public interest because it seriously alters the landscape of arm-restricting legislation

The ordinance serves as a sweeping ban on the right to possess constitutionally-protected arms for self-defense. The Court of Appeals held the ordinance does not completely ban the possession of swords because it does not ban swords in the home; and the ordinance permits a sword to be carried in a secure wrapper to and from places of repair or abodes or business. Slip Op. at p. 13.

But these are exemptions that swallow the rule. As the *Evans* court noted, the exemptions involving secure wrappers and hunting and fishing are explicitly outside the scope of the purpose of the constitutional provisions, namely self-defense. *Evans*, 184 Wn.2d at 864 (fn.6). Indeed, requiring arms to be carried in secure wrappers explicitly interferes with a citizen's ability to employ self-defense.

Under the opinion of the Court of Appeals, any jurisdiction can now severely restrict constitutionally-protected arms from the street as long as some exemption identified exemption exists, even if it has nothing

to do with self-defense. The legislature could ban possession of firearms in Washington unless they were possessed for hunting, or were taken to or from places of repair, or only openly carried in a gun safe.

Such exemptions would be a de facto and unconstitutional ban on firearms in the state. *See State v. Tarango,* 7 Wn. App. 2d 425, 433, 434 P.3d 77 (2019) (Washington is an "open carry" state). "Legal restrictions on an individual's possession of a firearm are imposed based on *e.g.*, the type of firearm; the individual's age, criminal history, or mental illness; provisions of protective orders; and on the possession of weapons in certain locations." *Id.* Here Seattle's ordinance makes no district on age, criminal history, mental illness, existence of protection orders, or locations.

Since both firearms and swords have been held to be constitutionally-protected arms, the Court of Appeals opinion treating their possession differently and upholding the ordinance conflicts with Court of Appeals and Supreme Court opinions. RAP 13.4(b)(1), (2).

c. <u>The Court of Appeals's decision frequently references sensitive locations to affirm Mr. Zaitzeff's conviction, although that text does not appear anywhere in the ordinance.</u>

The Court of Appeals held the ordinance should be upheld because Mr. Zaitzeff was carrying a sword in a park when he was cited. The

opinion frequently references this fact as germane when upholding Mr. Zaitzeff's conviction. *See, e.g.* Slip Op. p. 10: ("[A]n ordinance prohbiting the carrying of 24-inch swords in a public park in Seattle is reasonably necessary to protect public safety..."), *Id.* at p. 13: ("Prohibiting Zaitzeff from carrying his sword in Green Lake Park does not serverely burden his Second Amendment rights to warrant strict scrutiny."), *Id.* at p. 14: ("Swords are weapons. Carrying one around a public park can lead to violence or injuries.").

But the Court of Appeals' references to parks is anamolous because the ordinance makes no distinction between parks and everywhere else.

To be clear, the ordinance criminalizes the possession of swords the moment someone steps out of their home, as they walk down the street, as they stop to tie their shoes, and continues to criminalize the conduct if they end up walking to the local pier, alley, or dump.

Under this holding, law enforcement now has a perverse incentive to *not* arrest someone for a violation of the law if and until the person enters a park, in order to secure a conviction. That Mr. Zaitzeff was arrested in a park is part of the *res gestae*, but it has nothing to do with the constititionality of this ordinance.

Citizens should not have to be legal scholars to know whether their conduct is actually legal or illegel. *See Lanzetta v. State New Jersey,* 306 U.S. 451, 59 S .Ct. 618, 83 L. Ed. 888 (1939) (citizens must be given fair notice of proscribed conduct).

While courts have added implied elements to crimes, these are generally to implement the goal of the legislature or follow the common law. *See State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) ("Intent" is not statutory but a court-implied element of assault), *State v. Stockwell,* 159 Wn.2d 394, 150 P.3d 82 (2007) (The crime of intimidating a teacher contains an implient element of intent to utter the threat), *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1989) (Robbery includes an implied element that the taker has no good-faith claim to the property).

Here adding an implied element, that the possession is illegal only in a park or other sensitive area, in order to affirm a conviction, is clearly not the intent of the Seattle City Counsel and does not align with the common law. Adding this implicit element in order to uphold the conviction conflicts with past decisions.

While it is possible a future version of this ordinance could explicitly restrict carrying swords in parks and deliniated sensitive areas, that is not the ordinance before this Court. This Court should accept review pursuant to RAP 13.4(b)(1), (3).

3. The appellant's Sixth Amendment rights were violated when the trial court ruled in limine that Mr. Zaitzeff could neither put on his defense nor evidence in support of his defense

At the trial level Mr. Zaitzeff gave notice of his intent to use the necessity defense. The City objected to the instruction itself and evidence relating to the defense in limine. CP 55.

The trial court inquired whether there was a person "imminently threatening" Mr. Zaitzeff, and the answer was there was not. CP 56. The trial court then ruled that "[T]he necessity defense isn't available to you." CP 58. Mr. Zaitzeff objected and the trial court requested an offer of proof. CP 58. Mr. Zaitzeff explained he had been previously assaulted and had police reports to substantiate those past assaults. CP 58-59.

The Court of Appeals, in affirming this ruling in limine, conflicted with past Court of Appeals decisions and review should be granted pursuant to RAP 13.4(b)(2). *See State v. Ward***,** 8 Wn. App.2d 365, 438 P.3d 588 (2019), *review denied*, 193 Wn.2d 1031 (2019).

In *Ward*, the defendant was charged with Burglary in the Second Degree when he broke into a pipeline facility to turn a valve; an event the defendant felt was required to address climate change. *Ward*, 8 Wn. App.2d at 369. The defendant there gave notice of his intent to use the defense of necessity. The trial court granted a motion in limine to deny the necessity defense and all evidence in support of that defense. *Id.*

In *Ward*, as here, the prosecution argued that the offer of proof was insufficient to establish the necessity defense. *Id.* at 372. But the record is clear the trial court for Mr. Zaitzeff, like in *Ward,* did not engage in the appropriate standard of review.

By challenging the sufficiency of the offer of proof in limine, the prosecution "admits the truth thereof and all inferences that can reasonably be drawn therefrom." *Id.* (internal citations omitted).

"The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness. '[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies…'" *Ward*, 8 Wn. App. 2d at 371 (internal citations and quotations omitted).

"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." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Here the motion granted by the trial court did not just exclude the defense itself in limine but *all* evidence related to that defense. CP 74. That ruling fundamentally implicated Mr. Zaitzeff's right to present a defense. Because the ruling swept not just an affirmative defense but also the presentation of records and argument, it also

prevented a proper record from being created. *See Olsen v. Allen*, 42 Wn. App. 417, 420, 710 P.2d 822 (1985) (Trial courts must make records sufficient to allow meaningful appellate review).

The Court of Appeals, in affirming this trial court ruling, conflicted with United States Supreme Court and published Court of Appeals decisions. Review should be granted pursuant to RAP 13.4(b)(1), (2).

E. CONCLUSION

This Court should grant review. RAP 13.4(b).

Respectfully submitted this _4th___ day of May 2021.

Noah Weil, WSBA #42902
Attorney for Petitioner David Zaitzeff

DECLARATION OF FILING AND DELIVERY

I certify under penalty of perjury under the laws of the State of Washington that I served this Petition for Review to the Supreme Court to which this declaration is attached and filed in the Court of Appeals under Case No. 80436-7-1 and delivered to the following attorneys and/or parties:

TO: Richard Greene richard.greene@seattle.gov
Assistant City Attorney for the City of Seattle

TO: David Zaitzeff
Petitioner

Dated at Seattle, Washington, this ___4th__ day of May, 2021

Noah Weil, WSBA# 42902
Law Office of Noah Weil PLLC
Attorney for Petitioner

APPENDIX A

April 5, 2021, Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID ZAITZEFF, Petitioner, v. CITY OF SEATTLE, Respondent.	No. 80436-7-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — David Zaitzeff walked around Seattle's Green Lake Park with a sheathed sword hanging from his neck. The City of Seattle charged him with violating Seattle Municipal Code (SMC) 12A.14.080(B) for carrying a "dangerous knife." Zaitzeff challenged the constitutionality of this ordinance under article I, section 24 of the Washington Constitution and the Second Amendment to the United States Constitution, which challenge the municipal court rejected. The municipal court reserved ruling on Zaitzeff's necessity defense, suggesting that it was denying the defense unless more proof came to light during trial. Zaitzeff then agreed to a stipulated facts bench trial. The municipal court found him guilty. Zaitzeff appealed to the superior court, which affirmed. A commissioner of this court then granted Zaitzeff's petition for discretionary review. We hold that while Zaitzeff's sword is constitutionally protected, as applied here, SMC 12A.14.080(B) does not violate either the state or federal right to bear arms. We also hold that the municipal court did not violate Zaitzeff's Sixth

Amendment[1] right to present a defense by rejecting his necessity defense. As a result, we affirm.

I. BACKGROUND

In May 2018, Zaitzeff walked around Green Lake Park with a sheathed sword hanging from his neck. A citizen called 911. The caller said Zaitzeff was wearing a thong, approaching women, and taking photos of them. When police officers arrived, they confirmed he had a sword, which measured about 24 inches long. Zaitzeff acknowledged he was aware of the ordinance against fixed blade knives and that he was not hunting, fishing, or going to or from a job requiring a sword. The officers took the sword and cited him.

The City charged Zaitzeff with unlawful use of weapons under SMC 12A.14.080(B). Zaitzeff moved to dismiss the charge, challenging the ordinance as unconstitutional as applied to his case. The municipal court denied the motion, concluding that the sword is not a constitutionally protected arm.

Zaitzeff informed the court and the City that he planned to assert a necessity defense. The City moved in limine to prohibit introduction of the defense and all evidence related to it. The court requested an offer of proof from Zaitzeff. He explained that he carried the sword because he had been assaulted in the past. But he conceded that "[t]here was no one imminently threatening me that particular day, no." The court reserved ruling on whether it would allow Zaitzeff to raise the defense, saying that it could revisit the issue if testimony showed that Zaitzeff faced an imminent threat around the time at issue. Zaitzeff

[1] U.S. CONST. amend. VI.

then agreed to a bench trial with stipulated facts. The court did not revisit the issue of the necessity defense. And it found Zaitzeff guilty as charged.

Zaitzeff appealed to superior court, claiming that the ordinance is unconstitutional as applied to him, that the trial court violated his right to present a defense under the Sixth Amendment, and that insufficient evidence supported the guilty finding. The superior court affirmed. First, applying intermediate scrutiny, it determined that Zaitzeff had not met his burden of showing that the ordinance violated his constitutional rights under either Washington or United States constitution. It noted that insufficient evidence supported a finding that a sword is traditionally or commonly used as a weapon of self-defense. Next, it determined that the trial court correctly decided that Zaitzeff's offer of proof did not support a necessity defense. And finally, it concluded that sufficient evidence supported the conviction.

Zaitzeff sought discretionary review before this court on the issues of the constitutionality of the ordinance and his ability to present a defense. A commissioner of this court granted review.

II. ANALYSIS

A. The Constitutionality of SMC 12A.14.080(B) as Applied to this Case

Zaitzeff says that as applied here, SMC 12A.14.080(B) violates article I, section 24 and the Second Amendment. The City responds that neither constitutional provision protects his sword as an arm. And it adds that even assuming such protection, the ordinance is constitutional as applied. We conclude that as applied here, the ordinance does not violate either constitution.

We review de novo constitutional issues. City of Seattle v. Evans, 184 Wn.2d 856, 861–62, 366 P.3d 906 (2015). "We presume that statutes are constitutional and place 'the burden to show unconstitutionality . . . on the challenger.'" Id. (alteration in original) (internal quotation marks omitted) (quoting In re Estate of Hambleton, 181 Wn.2d 802, 817, 335 P.3d 398 (2014)). In an as-applied constitutional challenge to an ordinance, a party claims that application of the law to the specific context of their actions is unconstitutional. Id. at 862. "'Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.'" Id. (internal quotation marks omitted) (quoting City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004)).

Under article I, section 24 of the Washington Constitution, "[t]he right of the individual citizen to bear arms in defense of [themselves], or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Under the Second Amendment to the United States constitution, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In District of Columbia v. Heller, the United States Supreme Court held that "the inherent right of self-defense has been central to the Second Amendment right." 554 U.S. 570, 628–29, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The Supreme Court applied the Second Amendment to the states through the Fourteenth Amendment in

McDonald v. City of Chicago, Ill., 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

SMC 12A.14.080 provides, "It is unlawful for a person to: . . . B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm." A dangerous knife is "any fixed-blade knife and any other knife having a blade more than 3 ½ inches in length." SMC 12A.14.010. Exceptions apply to SMC 12A.14.080(B) for using a knife for fishing, hunting, or occupational purposes, and carrying a knife to one's home or work in a secure wrapper. SMC 12A.14.100.

1. Whether the federal or state constitution protects Zaitzeff's sword

Zaitzeff says that a sword is constitutionally protected because it is a traditional arm. He asserts that a sword has been historically used for self-defense. The City parries by contending that a sword is an offensive tool of war, not one commonly used for self-defense.[2] We conclude that the federal and state constitutions protect Zaitzeff's sword as an arm.

a. Federal case law

In Heller, the United States Supreme Court addressed a District of Columbia statute banning the possession of handguns in the home. 554 U.S. 570. The Court recognized arms as "'[w]eapons of offense, or armour of

[2] The City seems to conflate the inquiry of whether a sword is an arm traditionally or commonly used for self-defense with that of whether Zaitzeff was in fact using his sword for self-defense and whether such conduct was justified. The two inquiries are distinct and only the former is at issue. Also, Zaitzeff never asserted self-defense.

defence,'" and "'any thing that a [person] wears in [their] defense, or takes into [their] hands, or useth in wrath to cast at or strike another.'" Id. at 581 (first alteration in original) (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed. 1773) (reprinted 1978); 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)). The Court said that the Second Amendment protects weapons "'in common use at the time'" of the founding.[3] Id. at 627 (quoting United States v. Miller, 307 U.S. 174, 179, 59 S. Ct. 816, 818, 83 L. Ed. 1206 (1939)). And the Court noted that "'[i]n the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" Id. at 624–25 (second alteration in original) (quoting State v. Kessler, 289 Ore. 359, 368, 614 P.2d 94 (1980) (citing G. NEUMANN, SWORDS AND BLADES OF THE AMERICAN REVOLUTION 6–15, 252–254 (1973)). The Court held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." Id. at 624–25.

Heller addresses handguns[4] and offers no explicit guidance on swords.[5] But Heller's definitions of arms suggest that the Second Amendment protects

[3] See Evans, 184 Wn.2d at 865 (In Heller, "the Supreme Court defined the term 'arms' to encompass all bearable arms that were common at the time of the founding and that could be used for self-defense").

[4] In Caetano v. Massachusetts, the Supreme Court made clear that the scope of Second Amendment protection reaches beyond firearms. ___ U.S. ___, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016). There, the Court addressed the constitutionality of a statute banning stun guns. Id. The Court held that the Second Amendment protects stun guns even though they were not in common use at the time of the founding. Id. at 1027–28.

[5] Before Heller, one court addressed "swordlike" weapons: In a case involving a defendant who carried two sais on his belt "to be prepared," the Court of Appeals of Texas indicated that the Second Amendment does not grant the defendant "the right to

swords as arms. Historically, swords have been weapons of offense used to strike at others. And while law-abiding citizens do not typically carry swords for lawful purposes today, as further discussed below, swords were common at the time of founding.

b. State case law

In Evans, the Washington Supreme Court held that neither the state nor federal constitutions protected the appellant's paring knife. 184 Wn.2d at 873. The court said that "arms" requires that the instrument be a weapon. Id. at 865. The court held that under both article I, section 24 and the Second Amendment:

> [T]he right to bear arms protects instruments that are designed as *weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense*. In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that *a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense*. We will also consider the weapon's purpose and intended function.

Id. at 869 (emphasis added).

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carry 'swords' upon his person in public in the manner and for the purpose stated." Masters v. State, 653 S.W.2d 944, 945–46 (Tex. App. 1983), aff'd, 685 S.W.2d 654 (Tex. Crim. App. 1985). And an oft-cited 19th century case, State v. Workman, 35 W. Va. 367, 14 S.E. 9, 11 (1891), states that the Second Amendment must:

> be held to refer to the weapons of warfare to be used by the militia, such as *swords*, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls.

(Emphasis added). But the case does not involve a sword.

Heller then altered the landscape of Second Amendment jurisprudence. Yet few cases post-Heller seem pertinent to the inquiry here. One is State v. DeCiccio, 315 Conn. 79, 128, 105 A.3d 165 (2014), which holds that the Second Amendment protects dirk knives as arms. This opinion further discusses DeCiccio below. The other is State v. Montalvo, which holds, with little analysis, that the Second Amendment protects the right to possess a machete in the home for self-defense. 229 N.J. 300, 323, 162 A.3d 270, 284 (2017).

Evans discusses two cases from other jurisdictions in reaching its conclusion: In State v. Delgado, 298 Or. 395, 403, 692 P.2d 610 (1984), the Oregon Supreme Court held that the Second Amendment as well as article I, section 27 of the Oregon constitution protects switchblades.[6] In State v. DeCiccio, 315 Conn. 79, 128, 105 A.3d 165 (2014), the Connecticut Supreme Court held that under Heller, the Second Amendment protects dirk knives[7] as arms. Evans distinguishes these cases by emphasizing that a paring knife's primary purpose is culinary and not for self-defense. 184 Wn.2d at 872.

In DiCiccio, the court noted, "as a general matter, fixed, long blade '[k]nives have long been part of American military equipment.'" 315 Conn. at 120 (alteration in original) (quoting KNIVES AND THE SECOND AMENDMENT, 47 U. MICH. J.L. REFORM 167, 192–93 (2013)). The court also noted that, "in New England, the typical choice for persons required to own a bayonet or a sword was the sword." Id.

Dirk knives and swords are similar. The court in DiCiccio noted that the "double-edged dirk used in early nineteenth century" essentially became "a short sword." 315 Conn. at 94 (quoting E. JANES, THE STORY OF KNIVES (1968) at 55, 67). The court also noted that a "naval dirk" is described as a "companion to and substitute for the sword." Id. at 94–95 (quoting H. PETERSON, AMERICAN KNIVES: THE FIRST HISTORY AND COLLECTORS' GUIDE (1958) at 95–101). The court said

[6] Article I, section 27 of the Oregon constitution is analogous to Washington's article I, section 24. Evans, 184 Wn.2d at 868.

[7] A dirk knife is a long, thrusting dagger, similar to, but smaller than, a sword.

that "dirk knives bear a close relation to the bayonet and the sword, and have long been used for military purposes." Id. at 122–23.

As law-abiding citizens traditionally used swords for self-defense, we conclude that both constitutions protect Zaitzeff's sword as an arm.[8]

2. Whether SMC 12A.14.080(B) is constitutional as applied to this case

Zaitzeff says that strict scrutiny applies to the analysis here and that the ordinance passes neither strict nor intermediate scrutiny. The City responds that a "reasonably necessary" standard applies to the article I, section 24 issue, and that the ordinance meets that test. And the City says that intermediate scrutiny applies to the Second Amendment issue, and that the ordinance is substantially related to an important government interest. We agree with the City.

a. Article I, section 24

"When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007).

"The right to bear arms under the state constitution is not absolute but is instead subject to 'reasonable regulation.'" State v. Jorgenson, 179 Wn.2d 145, 154, 312 P.3d 960 (2013) (internal quotation marks omitted) (quoting City of Seattle v. Montana, 129 Wn.2d 583, 593, 919 P.2d 1218 (1996), abrogated by

[8] "In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life . . . a knife was a constant necessity." Delgado, 298 Or. at 401 (citing three books by H. PETERSON: ARMS AND ARMOUR IN COLONIAL AMERICA, 1526–1783 (1956); AMERICAN KNIVES (1958); DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD (1968)).

Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019)). "[A] constitutionally reasonable regulation is one that is 'reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.'" Id. at 156 (quoting Montana, 129 Wn.2d at 594). "We 'balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.'" Id. (alteration in original) (quoting Montana, 129 Wn.2d at 594).

As applied to this case, SMC 12A.14.080(B) is a constitutionally reasonable regulation under article I, section 24. In Montana, the Washington Supreme Court addressed an older, but functionally similar, ordinance prohibiting the carrying of dangerous knives. 129 Wn.2d at 589. The court concluded that the paring knife at issue was not a constitutionally protected arm, but it held that even if it was protected, the ordinance was constitutional under article I, section 24. Id. at 590–91, 593–95. The court stated:

> Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed.

Id. at 595. Likewise, an ordinance prohibiting the carrying of 24-inch swords in a public park in Seattle is reasonably necessary to protect public safety and welfare and is substantially related to the goal of preventing sword-related injuries and violence.[9] See id. at 592–93 (noting that "street crime involving

[9] Zaitzeff says that the City cannot claim that the ordinance is for the purpose of public safety, given that the City's regulation of firearms is limited compared to its

knives is a daily risk" and that "SMC 12A.14.080 furthers a substantial public interest in safety").

b. Second Amendment

The United States Supreme Court has yet to say how to determine the level of scrutiny for as-applied challenges under the Second Amendment. Jorgenson, 179 Wn.2d at 159. In Heller, the Court rejected rational basis review and an "interest-balancing" approach. Heller, 554 U.S. at 628 n.27, 635. The Court held that the handgun law at issue there was unconstitutional "[u]nder any of the standards of scrutiny." Id. at 628.

In Kitsap County v. Kitsap Rifle & Revolver Club, we noted that to determine the appropriate level of scrutiny in Second Amendment cases, we ask "'(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right.'" 1 Wn. App. 2d 393, 416, 405 P.3d 1026 (2017) (quoting Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)); see also Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (Heller II). The result of that inquiry

> "is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. That is what was involved in *Heller*. A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate."

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regulation of dangerous knives. He says that this regulatory structure encourages firearm ownership and he emphasizes that firearms are more dangerous than swords. But as the City points out, RCW 9.41.290 preempts cities from enacting laws relating to firearms unless specifically authorized to do so.

Kitsap Rifle, 1 Wn. App. 2d at 416 (quoting Silvester, 843 F.3d at 821). "[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." Heller II, 670 F.3d at 1257. In Second Amendment cases, "many courts have adopted intermediate scrutiny when evaluating restrictions on gun possession by particular people or in particular places." Jorgenson, 179 Wn.2d at 160.

First, the ordinance does not strike close to the core of the Second Amendment right. The core of the Second Amendment right is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635; see also Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013) ("the core of the right conferred upon individuals by the Second Amendment is the right to possess usable handguns *in the home* for self-defense"). While the ordinance does affect the ability of law-abiding citizens to carry dangerous knives for self-defense in public, it does not apply within the home. See Jorgenson, 179 Wn.2d at 158 ("Jorgenson also possessed the firearms while driving, rather than in the home, 'where the need for defense of self, family, and property is most acute.'" (quoting Heller, 554 U.S. at 628)); cf. Young v. State, ___ F.3d ___, 2021 WL 1114180, at *35 (9th Cir. Mar. 24, 2021) ("Indeed, we can find no general right to carry arms into the public square for self-defense.").

And second, the ordinance does not impose a severe burden on Zaitzeff's Second Amendment rights. Zaitzeff says the ordinance serves as a sweeping

ban on his right to bear arms because it contains no self-defense exception or a permitting or licensing scheme. But the ordinance does not completely ban the possession of swords. Most importantly, it does not apply within the home. And among other exceptions, it allows one to purchase a sword and, in a secure wrapper, carry it home, carry it to be repaired, and carry it to abodes or places of business. SMC 12A.14.100. Prohibiting Zaitzeff from carrying his sword in Green Lake Park does not severely burden his Second Amendment rights to warrant strict scrutiny.[10] Given the foregoing, we apply intermediate scrutiny. See New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 990 F. Supp. 2d 349, 366 (W.D.N.Y. 2013), aff'd in part, rev'd in part, 804 F.3d 242 (2d Cir. 2015). ("although addressing varied and divergent laws, courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context.").

A law survives intermediate scrutiny if it is "'substantially related to an important government interest.'" State v. Sieyes, 168 Wn.2d 276, 276, 225 P.3d 995 (2010) (quoting State v. Williams, 144 Wn.2d 197, 211, 26 P.3d 890 (2001)).

[10] Zaitzeff claims that strict scrutiny applies because the Second Amendment right to bear arms is a fundamental right. See State v. Sieyes, 168 Wn.2d 276, 287, 225P.3d 995 (2010) (finding the Second Amendment right a fundamental right); State v. Haq, 166 Wn. App. 221, 253–54, 268 P.3d 997 (2012), as corrected (Feb. 24, 2012) ("Strict scrutiny . . . applies to laws burdening fundamental rights or liberties."). The Supreme Court "has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." Heller II, 670 F.3d at 1256. Zaitzeff has cited no opinion, aside from the dissent in Evans, applying strict scrutiny in this context. We decline to apply strict scrutiny. See United States v. Miller, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (holding in a Second Amendment case that the defendant "cannot invoke strict scrutiny through a fundamental rights theory.").

Preventing crime and ensuring public safety are important government interests. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("the Government's general interest in preventing crime is compelling"); Schall v. Martin, 467 U.S. 253, 264, 104 S. Ct. 2403, 2410, 81 L. Ed. 2d 207 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." (quoting DeVeau v. Braisted, 363 U.S. 144, 155, 80 S. Ct. 1146, 1152, 4 L. Ed. 2d. 1109 (1960))); Kitsap Rifle, 1 Wn. App. 2d at 417 ("The County has an important government interest in public safety"); State v. Spencer, 75 Wn. App. 118, 124, 876 P.2d 939 (1994) ("People have a strong interest in being able to use public areas without fearing for their lives" and a statute prohibiting carrying a weapon in a manner that warrants alarm "protects this interest by requiring people who carry weapons to do so in a manner that will not warrant alarm."); see also Libertarian Party of Erie County v. Cuomo, 970 F.3d 106, 128 (2d Cir. 2020) ("As it is 'beyond cavil that . . . states have substantial, indeed compelling, governmental interests in public safety and crime prevention,' we consider only 'whether the challenged laws are substantially related to the achievement of that governmental interest.'" (alteration in original) (quoting New York State Rifle, 804 F.3d at 261)).

And the ordinance is substantially related to crime prevention and public safety. Swords are weapons. Carrying one around a public park can lead to violence or injuries. Prohibiting people from carrying swords around public parks addresses such risks. While Heller does not list parks as sensitive areas, the public safety concerns underlying the sensitive area distinction also apply here,

particularly the concern about protecting children. 554 U.S. at 626 ("nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings").

Zaitzeff says that the holdings of Heller and Caetano require us to find the ordinance unconstitutional. But both cases are distinguishable. Heller involved a sweeping ban on all handguns within the home. 554 U.S. at 628–29 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute."). And in Caetano, the Court did not rule on the constitutionality of the law banning stun guns; rather, it held that the lower court erred by concluding that stun guns were not constitutionally protected arms and remanded the issue. 136 S. Ct. 1027.

We conclude that, as applied here, the ordinance operates within the bounds of constitutionality because it is a reasonable regulation and satisfies intermediate scrutiny.

B. Sixth Amendment Right to Present a Defense

Zaitzeff says that the trial court violated his Sixth Amendment right to present a defense when it prohibited his necessity defense, and that a new trial is necessary as a result. He asserts that the trial court erred by ruling on the affirmative defense in limine. He also contends that the trial court failed to discuss all elements of the defense and failed to view the offer of proof in the light most favorable to him. The City responds that the trial court did not err,

given that Zaitzeff had not offered any proof of an imminent threat. We agree with the City.

We review de novo a claim of a denial of the Sixth Amendment right to present a defense. State v. Ward, 8 Wn. App. 2d 365, 370, 438 P.3d 588, review denied, 193 Wn.2d 1031, 447 P.3d 161 (2019). Under the Sixth Amendment, "'[t]he 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.'" Id. at 370–71 (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

To raise the defense of necessity:

> [T]he defendant must prove, by a preponderance of the evidence, that (1) they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.

Id. at 372.

When a defendant asserts the necessity defense in response to a charge of unlawful possession of a firearm, they must prove that they reasonably believed that they were facing some imminent threat of violence. State v. Parker, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005). Though it appears that Washington courts have not addressed this rule in cases involving the unlawful carrying of dangerous knives, we apply the same rule here, given the similarity of the crimes. Zaitzeff does not dispute that this imminent threat standard applies to the charge here.

Before trial, Zaitzeff sought to raise a necessity defense. The City moved in limine to prohibit introduction of the defense and all evidence related to it. The court asked Zaitzeff if he faced an imminent threat at the time of the incident. He responded "[t]here was no one imminently threatening me that particular day, no." The court then requested an offer of proof. He explained that he carried the sword because he had been assaulted in the past. The court began to rule in favor of the State, but then reserved ruling. It said that it could revisit the issue if later testimony established an imminent threat. Zaitzeff then agreed to a stipulated facts bench trial and presented no evidence. There was no such testimony to establish such a threat and the court did not revisit the issue.

Zaitzeff relies on Ward to contend that the trial court erred by ruling on the necessity defense in limine. But Ward does not support his position. Rather, it holds that the denial of the necessity defense in limine was error where the defendant "met his initial burden of showing that he would likely be able to submit a sufficient quantum of evidence on each element of necessity." Ward, 8 Wn. App. 2d at 376. Ward is distinguishable because the defendant there did not concede the absence of a required element of the defense. Also, the trial court here did not rule on the necessity defense before trial. It reserved ruling on the issue and stated that it could revisit the issue if testimony at trial established an imminent threat.

Zaitzeff also contends that the trial court erred by not considering all four elements of the necessity defense. But Zaitzeff said that he was not facing an imminent threat of harm on the day of the incident. See Parker, 127 Wn. App.

at 355 (noting that the defendant "also testified that he was not under any specific or imminent threat of harm at any time on April 9."). Once the trial court noted the absence of a required element—imminent harm—it was not required to decide whether he had satisfied any of the other elements of the defense.

Finally, Zaitzeff contends that the trial court should have viewed the evidence in the light most favorable to him, and it erred in not doing so. But viewing the evidence in the light most favorable to Zaitzeff, he did not satisfy a requirement for the necessity defense. As stated above, he conceded he was not facing imminent harm.

We affirm.

Chun, J.

WE CONCUR:

Coburn, J.

Dwyer, J.

APPENDIX B

SMC 12A.14.080
SMC 12A.14.100

12A.14.080 Unlawful use of weapons

It is unlawful for a person to:

A. Knowingly sell, manufacture, purchase, possess or carry any blackjack, sand-club, metal knuckles, switchblade knife, chako stick, slungshot, or throwing star; or

B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm; or

C. Knowingly possess a firearm in any stadium or convention center operated by a city, county, or other municipality, except that such restriction shall not apply to:

1. Any pistol in the possession of a person licensed under RCW 9.41.070 or exempt from the licensing requirement by RCW 9.41.060, or

2. Any showing, demonstration, or lecture involving the exhibition of firearms.

D. Knowingly sell or give away to any person under 18 years of age any dangerous knife or deadly weapon other than a firearm, or for any person under 18 years of age to knowingly purchase any dangerous knife or deadly weapon other than a firearm, or for any person under 18 years of age to knowingly possess any dangerous knife or deadly weapon other than a firearm except when under the direct supervision of an adult.

E. Knowingly use any contrivance or device for suppressing the noise of any firearm unless the suppressor is legally registered and possessed in accordance with federal law.

F. Furtively carry with intent to conceal any pistol.

(Ord. 124949 , § 6, 2015; Ord. 124684 , § 15, 2015; Ord. 124301, § 22, 2013; Ord. 123395, § 10, 2010; Ord. 117157 , § 5, 1994; Ord. 116872 , § 14, 1993; Ord. 113547 , § 3, 1987; Ord. 110785 , § 2, 1982; Ord. 110462 , § 2, 1982; Ord. 110179 , § 2, 1981; Ord. 109674 , § 12, 1981; Ord. 108814 , § 3, 1980; Ord. 102843 , § 12A.17.140, 1973.)

12A.14.100 Exemptions—Dangerous knives.

The proscriptions of Section 12A.14.080 B relating to dangerous knives shall not apply to:

A. A licensed hunter or licensed fisherman actively engaged in hunting and fishing activity including education and travel related thereto; or

B. Any person immediately engaged in an activity related to a lawful occupation which commonly requires the use of such knife, provided such knife is carried unconcealed; provided further that a dangerous knife carried openly in a sheath suspended from the waist of the person is not concealed within the meaning of this subsection;

C. Any person carrying such knife in a secure wrapper or in a tool box while traveling from the place of purchase, from or to a place of repair, or from or to such person's home or place of business, or in moving from one (1) place of abode or business to another, or while in such person's place of abode or fixed place of business.

(Ord. 113547 § 4, 1987: Ord. 109674 § 13(part), 1981: Ord. 108814 § 4(part), 1980: Ord. 108309 § 1(part), 1979: Ord. 108191 § 1(part), 1979: Ord. 102843 § 12A.17.160(2), 1973.)

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