SUPREME NO. 94021-5

NO. 74062-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ACKLEY,

Appellant.

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

The Honorable Susan K. Cook, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Christopher Ackley was the appellant below.

B COURT OF APPEALS DECISION

Ackley requests review of the decision issued by Division One of the Court of Appeal in State v. Ackley, (COA No. 74062-8-I), entered on December 19, 2016, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Was there sufficient evidence to satisfy petitioner low burden of production to warrant instructing the jury on his self-defense claim?

2. Did the trial court erroneously fail to consider evidence that petitioner was threatened prior to the confrontation?

D. REASONS TO ACCEPT REVIEW

Review is warranted under RAP 13.4(b)(3), because the denial of Ackley's constitutional right to present a defense raises a significant question of law under U.S. Const. amend. XIV; and Wash. Const. art I, § 3.

Review is also warranted under RAP 13.4(b)(1) because the Court of Appeals decision affirming the trial court's refusal to instruct the jury on Ackley's self-defense claim conflicts with this Court's long-standing

jurisprudence on the proper analysis in determining whether some evidence supports a self-defense claim.

E. RELEVANT FACTS

a. Trial

Ackley's wife is James O'Connor's cousin. 1RP 106, 157.[1] O'Connor decided to reveal to Ackley, Ackley's sister and Ackley's mother that Ackley's wife had an affair. 1RP 173; 2RP 153. The affair became a topic of discussion within the family. 1RP 159, 173. Ackley was angry with O'Connor for discussing the affair with family members. 1RP 107, 159, 173.

On the day of the incident O'Connor and his wife were on a walk. 1RP 109-110, 127-128, 161-163, 183-184. Ackley happened to drive by them and as he drove by Ackley said something to O'Connor. Ackley then turned his car around, parked perpendicular to the sidewalk, and got out of the car. 1RP 111, 117, 164-165.

When Ackley got out of his car, O'Connor's wife started to backup and O'Connor turned to face Ackley. 1RP 129. Ackley, who was about 20 feet from O'Connor, reached into his pocket, pulled out a knife and waved it at O'Connor. 1RP 112, 115, 165, 189-190, 192. Ackley started

[1] 1RP refers to the verbatim report of proceedings (VRP) for August 3, 2015; 2RP the VRP for August 4, 2015, the morning of August 5, 2015, and October 2, 2015; 3RP the VRP for the afternoon of August 5, 2015 and October 1, 2015.

walking toward O'Connor and said, "I will slice you open bitch." RP 165 (8/3/2015). O'Connor put his hands up in the air and told his wife to run and call 911. 1RP 167, 191.

While O'Connor's wife was running to find a phone she heard Ackley tell O'Connor that he was "going to slice you open bitch." 1RP 132. O'Connor's wife ran up to a person who was close by and asked her if she could borrow her phone to call police. 1RP 138-139. O'Connor's wife called 911. When O'Connor saw that his wife was on the phone with 911 O'Connor started yelling at Ackley that the police were coming. 1RP 168. Ackley then got back into his car and drove away. Id. Both O'Connor and his wife said they scared and afraid. 1RP 115, 168.

On cross examination O'Connor denied he stepped out and raised his hands towards Ackley when Ackley drove by and that he did not raise his hands until Ackley pulled out the knife. 2RP 8-10. However, O'Connor told police that when Ackley drove by and yelled at him O'Connor turned and raised his hands toward Ackley's car. 2RP 36.

Ackley testified he felt animosity towards O'Connor because O'Connor had told him that his wife cheated on him. 2RP 119. The last time Ackley spoke with O'Connor was the February before the May confrontation. During that conversation, in reference to O'Connor's

revelation that Ackley's wife had an affair, Ackley told O'Connor not to bring O'Connor's family drama into his family, and to keep Ackley's wife's name out of his (O'Connor's) mouth. 2RP 111-113. O'Connor hung up on Ackley but before he did O'Connor told Ackley he wanted to continue the conversation. 2RP 113-114.

O'Connor also testified that during the conversation Ackley told him to keep his (Ackley's) wife's name out of his mouth. 2RP 156. O'Connor was out of town at the time and he admitted that he told Ackley that when he returned they would talk again, and that at some point during the conversation he hung up on Ackley. 2RP 157.

Ackley testified that he was driving his daughter home from softball practice when he saw O'Connor and O'Connor's wife walking. Out of his car's window he yelled to O'Connor "suck it bitch." 2RP 66-67. When he looked in the rear view mirror after passing O'Connor, he saw O'Connor raise his hands in the air in a manner that Ackley believed indicated O'Connor wanted to talk to him. 2RP 68. Ackley turned his car around and got out. 2RP 69.

As Ackley got out of the car O'Connor quickly put his hands down to his waist and pulled his shirt up. 2RP 71, 73. Ackley, who grew up in Los Angeles, explained it was a dangerous city when he was growing up

and that what flashed through his mind when O'Connor pulled up his shirt was that O'Connor was going to pull a gun on him. 2RP 72, 120. In response Ackley pulled out his pocketknife, clicked the blade out, and held it down by his side. 2RP 72, 73. O'Connor then asked Ackley in loud voice what his was going to do with the knife and if Ackley was going to "slice" him. 2RP 74. Ackley took a few steps towards O'Connor and O'Connor again asked Ackley what he was going to do with knife. Ackley thought he might have said something to O'Connor but after a few seconds he realized O'Connor did not have a gun. 2RP 74-75. At that point Ackley did not believe he needed a weapon to defend himself so he closed the knife, walked back toward his car, and threw the knife inside. 2RP 76.

Ackley then asked O'Connor if there was something O'Connor wanted to talk about. O'Connor told Ackley that his wife was calling police, that he did not have anything to say to Ackley, and he asked Ackley to leave. 2RP 79-80. Their conversation was loud and laced with profanities. 2RP 80, 134. Ackley got back into his car and drove home. Id.

When police came to his house Ackley explained to the officers he stopped because he saw O'Connor raise his hands as he drove by. 2RP

105. Ackley admitted that pulling out the knife was stupid but that he did it in reaction to O'Connor lifting his shirt. He believed O'Connor was going for a gun and he pulled out his knife to defend himself. 2RP 106, 124, 127. Ackley also wanted the officer to hear a message on his phone. 2RP 85.

The defense theory was self-defense. Prior to O'Connor's testimony Ackley moved to admit the message O'Connor left on Ackley's phone about two months before the confrontation, and that Ackley wanted the police to listen to when they came and spoke with him. In that message O'Connor threatened Ackley. 1RP 148-153; CP 89 (transcript of the message)[2]. Ackley argued the message was relevant to his self-defense claim because it was evidence of his state of mind at the time of the confrontation. RP 149-150.

The trial court ruled the phone message evidence was not relevant because Ackley was not entitled to a self-defense instruction. 2RP 104. The court reasoned Ackley was required to acknowledge he committed second degree assault before he was entitled to claim self-defense, and because he testified he held the knife at his side "...there isn't an assault,

[2] O'Connor told Ackley "If you fucking think that I'm gone and someone over there to do my dirty work, bring it bitch. I will be there as soon as I get here. As soon as I am done here I'll be over there, okay. Keep your fucking mouth going motherfucker. I'll come fucking fix it for you. Fuck you cock sucker." CP 89.

and therefore there can't be a justifiable assault." 2RP 104. The court concluded, "...therefore there isn't any need for self-defense instructions." 2RP 103.

Later, during Ackley's testimony, counsel requested permission to examine Ackley about a conversation O'Connor and Ackley had in late January or early February. Counsel made an offer of proof that part of the conversation included threats. 2RP 108. The court again ruled defense counsel could not examine Ackley about any threats O'Connor made during that call because Ackley was not entitled to claim self-defense. Id.

Ackley requested the court instruct the jury on self-defense. 2RP 142-143; see, CP 53-63 (defense proposed instructions). The court denied the request. It reasoned:

> Number one, Mr. Ackley did not use force when he held the knife down next to his leg, and its very difficult for to see that my reasonable juror could find that he was presented with a need to protect himself simply by Mr. O'Connor pulling on his shirt.
>
> And I do read RCW 9.41.270[3] to require a use of presently threatened unlawful force, or use of unlawful force, and we don't have that here. What we have is Mr. Ackley's testimony that Mr. O'Connor pulled up his shirt in a way that Mr.

[3] "It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." RCW 9.41.270(1).

> Ackley felt demonstrated the fact that he might have a gun under there simply because of -- apparently Mr. Ackley's experience in L.A. So this not a self-defense case either for the unlawful display of a weapon or for the Assault in the Second Degree.

2RP 146-147.

In its analysis the trial court does not mention the prior threats O'Connor made to Ackley.

b. Court of Appeals Decision

The issues on appeal were whether the trial denied Ackley his right to present a defense when it failed to instruct the jury on is self-defense theory, and whether it erroneously failed to consider evidence of the threatening message O'Connor made to Ackley a few months before the confrontation in analyzing Ackley's self-defense claim. Brief of Appellant (BOA) at 14-29 Reply Brief of Appellant (RBOA) at 1-8. The Court of Appeals affirmed the trial court. Appendix at 1.

The Court of Appeals reasoned that although Ackley displayed a knife the display of a knife "without any action indicating that its use is imminent, does not constitute an assault." Appendix at 7-8. It concluded that because Ackley does "not admit to any otherwise unlawful use of force...he is not entitled to a self-defense instruction." Appendix at 8 (citing State v. Aleshre, 89 Wn. 2d 67, 568 P.2d 799 (1977).

The Court of Appeals also reasoned that Ackley did not show he acted in self-defense "because no evidence shows he had a subjective belief that force was needed." Appendix at 8. The court found it significant that Ackley testified he held the knife by his side and that was not an unlawful use of force, and that Ackley did not present evidence "that he felt the need to take some action that would constitute self-defense. Appendix at 8-9. The court concluded that therefore Ackley did not "present sufficient evidence to show a subjective belief he needed to use force that would otherwise be unlawful." Appendix at 9. The court also concluded that even if Ackley had presented evidence to show a subjective belief he needed to use force, he failed to show that belief was reasonable. Appendix at 9.

Lastly, like the trial court, the Court of Appeals ruled that because there was insufficient evidence to support Ackley's claim of self-defense the trial court correctly excluded evidence of the threatening messages. Appendix at 10-11.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW IS WARRANTED BECAUSE WHETHER PETITIONER WAS ENTITLED TO PRESENT HIS SELF-DEFENSE THEORY TO THE JURY IS A SIGNIFICANT ISSUE OF LAW UNDER THE CONSTITUTION AND THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE CONFLICTS WITH A NUMBER OF THIS COURT'S DECISIONS. RAP 13.4 (b) (1) and (3).

It is a constitutional right to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). Due process also requires the State prove the absence of self-defense. State v. Acosta, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984).

Under this Court's longstanding jurisprudence, in analyzing whether there is sufficient evidence to support a self-defense claim "the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." State v. Read, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). In the context of a self-defense claim if there is merely some evidence to support the claim the issue is properly raised. State v. Werner, 170 Wn.2d 333, 336–37, 241 P.3d 410 (2010); State v. Walden, 131

Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). "The defendant's burden of 'some evidence' of self-defense is a low burden." State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). In determining whether a self-defense claim is warranted the court must view the evidence in the light most favorable to the defendant. State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). Indeed, a court is justified in refusing to instruct the jury on self-defense *only* where there is no credible evidence to support a self-defense claim. State v. Fisher, 185 Wn.2d 835, 849, 374 P.3d 1185 (2016); McCullum, 98 Wn.2d at 488.

a. There was Sufficient Evidence to Require the Court to Instruct the Jury on Self-Defense.

The Court of Appeals decision affirming the trial court's denial of Ackley's self-defense claim conflicts with this Court's decisions in the above cited cases and denied Ackley his constitutional right to present a defense.

In affirming the trial court's refusal to instruct the jury on Ackley's self-defense claim, the Court of Appeals relied on this Court's decision in Aleshire. Appendix at 7. This Court's Aleshire decision is inapplicable.

Aleshire and his companion were at a bar and attacked a patron and bartender with their fists and then with pool cues. 89 Wn. 2d at 68.

At trial, however, Aleshire explicitly and expressly denied that he had hit anyone with a pool cue or with his fists. Id. at 71. This Court held Aleshire was not entitled to a self-defense instruction reasoning, "One cannot deny that he struck someone and then claim that he struck them in self-defense." Id.

Aleshire is factually distinguishable. Moreover, the Court of Appeals and the trial court failed to take into account all the evidence in analyzing whether there was sufficient evidence to support Ackley's self-defense claim. This Court has long held that evidence of self-defense may come any source and the evidence does not need to be the defendant's own testimony. Callahan, 87 Wn.App. at 933. This Court has recently affirmed the defendant may point to other evidence presented at trial, including the State's evidence. State v. Fisher, 185 Wn.2d at 850.

Here, unlike is Aleshire, Ackley *did not deny* he assaulted O'Conner. Ackley admitted he pulled out a knife and then walked towards O'Connor because he believed that when O'Connor lifted up his shirt he was going for a gun. It was Ackley's use of the knife to threaten O'Connor that was the very basis for the assault charge and his conviction on that charge.

O'Connor testified that Ackley waved the knife at him as Ackley walked towards him and said, "I will slice you open bitch." O'Connor's

testimony, coupled with Ackley's admission supported the inference that Ackley intentionally used force and the use of that force was in self-defense because Ackley subjectively believed O'Connor had a gun. BOA at 25-27. The Court of Appeals decision conflicts with this Court's decisions in Callahan and Fisher because it failed to consider O'Connor's testimony in addition to Ackley's testimony when it concluded Ackley's conduct did not constitute an assault and therefore he was not entitled to a self-defense claim under the holding in Aleshire.

The Court of Appeals also found that even if the evidence showed Ackley's subjective belief that he had to defend himself because he thought O'Connor was going for a gun when O'Connor lifted his shirt, that belief was not reasonable. Appendix at 9-10. This Court has long held that where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account "all the facts and circumstances known to the defendant, including those known substantially before the [incident]." Id. at 234; State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The "vital question is the reasonableness of the defendant's apprehension of danger," the jury must stand "as nearly as practicable in the shoes of [the]

defendant, and from this point of view determine the character of the act." Wanrow, 88 Wn.2d at 235 (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

Ackley received a threatening message from O'Connor a few months prior to their encounter. Ackley explained that given his prior experiences growing up in Los Angeles, coupled with O'Connor's threat, he believed that when O'Connor lifted his shirt he thought O'Connor was going for a gun. This evidence was sufficient to show Ackley subjectively believed O'Connor was going for a weapon when he lifted his shirt, and when properly viewed from the standpoint of a reasonable person who "knows all the defendant knows and sees all the defendant sees" and in the light most favorable to Ackley, this evidence satisfies Ackley's low burden to show that some evidence supported his claim of self-defense.

b. The Trial Court Erroneously Excluded Evidence of O'Connor's Prior Threats, Which were Relevant to Ackley's Subjective Belief and the Reasonableness of His Belief that O'Connor was Going for a Gun.

The trial court excluded the evidence of O'Connor's prior threats. It did so because it concluded Ackley did not present sufficient evidence to justify a self-defense instruction. BOR at 19-20. The Court of Appeals agreed with the trial court. Appendix at 10-11. The prior threat, however, was relevant to Ackley's subjective belief that O'Connor was going for a

gun when he lifted his shirt. Wanrow, 88 Wn.2d at 234. The evidence was vital to properly assess Ackley's subjective belief and whether that belief was reasonable. The trial court's failure to consider that evidence in determining whether Ackley presented sufficient evidence of his self-defense claim to have the issue decided by the jury and its ruling excluding that evidence conflicts with this Court's decision in Wanrow and Walker. BOA at 22-24; RBOA 4-5.

It is undisputed that there was animosity between Ackley and O'Connor. It is undisputed that Ackley and O'Connor spoke on the phone a few months before the incident about O'Connor revealing Ackley's wife's affair and that O'Connor told Ackley they would talk again before he hung up on Ackley. 2RP 113-114; 157. At that same time O'Connor left Ackley a threatening phone message. CP 89; 2RP 107-108; 3RP 3. Ackley testified when he saw O'Connor raise his hands in the air he believed O'Connor wanted to talk. 2RP 68. Ackley testified when he got out of the car O'Connor quickly put his hands down to his waist and pulled his shirt up. 2RP 71, 73. Ackley explained he grew up in Los Angeles, that it was a dangerous city when he was growing up, and that what flashed through his mind when O'Connor pulled up his shirt was that O'Connor was going to pull a gun on him. 2RP 72, 120. O'Conner testified Ackley reached into his pocket, pulled out a knife, waved it at

O'Connor, walked towards him and said, "I will slice you open bitch." 1RP 112, 115, 165, 189-190, 192; RP 165 (8/3/2015). Under these facts there was some evidence to support Ackley's self-defense claim and therefore the jury should have been instructed on that claim.

G. CONCLUSION

Only if no credible evidence supported Ackley's self-defense claim was the trial court justified in the denying his request for self-defense instructions. State v. Fisher, 185 Wn.2d at 849 (citing, State v. McCullum, 98 Wn.2d at 488. Viewed in the light most favorable to Ackley credible evidence supported his self-defense claim. The trial court's refusal to instruct the jury on Ackley's self-defense claim and the Court of Appeals decision that Ackley did not present sufficient evidence to support his self-defense claim presents a significant question of law under both the United States and Washington constitutions and conflicts with a number of this Court's decisions. For the reasons stated, this Court should grant review.

Dated this 5 day of January, 2017.

Respectfully submitted
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74062-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
CHRISTOPHER THOMAS ACKLEY,	)	
	)	
Appellant.	)	FILED: December 19, 2016
	)	

LEACH, J. — Christopher Ackley appeals his conviction for second degree assault with a deadly weapon. He challenges the trial court's refusal to instruct the jury on self-defense and admit evidence related to self-defense. The record contains no evidence that Ackley ever formed a subjective belief that he needed to use force that would otherwise be unlawful. Because the record lacks evidence to support this element of self-defense, Ackley was not entitled to a self-defense jury instruction.

Because the record does not contain sufficient evidence to support an element of Ackley's self-defense theory, any evidence offered to support other elements of that theory is not relevant and was properly excluded.

We affirm.

FACTS

Substantive Facts

The following personal history led to the charged crime. Christopher Ackley's wife and James ("Jimmy") O'Connor are cousins. O'Connor believed that Ackley's wife had an affair with O'Connor's brother-in-law when Ackley was away in California. O'Connor discussed his belief with his sister, his mother, and Ackley's wife. Ackley was angry that O'Connor had these discussions with the family.

On two occasions, Ackley drove by O'Connor's home and threw firecrackers from the car. On another occasion, Ackley egged the O'Connors' car while it was parked in their driveway.

On May 15, 2014, O'Connor and his wife were out walking. Ackley was driving through the neighborhood with his daughter in the backseat when he spotted O'Connor. As he drove by, Ackley yelled "Suck it, bitch." Ackley then pulled his car perpendicular to the street, blocking traffic, and got out of the car.

According to O'Connor, when Ackley got out of the car he reached in his pocket and pulled out a knife, which he pointed or waved at O'Connor. O'Connor claims that Ackley walked toward him, saying, "I will slice you open, bitch." O'Connor put his wife, Angie O'Connor, behind him and told her to run and call 911. O'Connor asked Ackley why he had a knife and what he was going to do

with it. When O'Connor saw Angie on another corner with two bystanders, talking on the phone, he told Ackley that the police were on the way. Ackley returned to his car and drove away.

According to Ackley, after he had yelled out the car window at O'Connor, he saw O'Connor holding up his hands in a gesture that he interpreted to mean, "[C]ome on back, we'll talk." Ackley testified that when he stepped out of his car, "Jimmy O'Connor pulled his hands down rather quickly and pulled his shirt up or started to pull his shirt up, and what flashed through my mind, I grew up in L.A., California, and it flashed on me that this could turn into a bad situation, and I thought he was going to pull a gun on me."

Ackley claimed that because he felt he was in danger, he pulled out his knife: "[M]y hand went from my pocket, and I snapped my knife out, and I held it down by my leg." He claimed, "I didn't know what I was going to do with it, but . . . my only thought was, oh my gosh, I'm in a bad situation."

Ackley claims that once he realized that O'Connor did not have a gun, he didn't believe he needed a knife. So he closed his knife, walked back to the car, and tossed the knife on the driver's seat. He claims he took a few steps back toward O'Connor and asked if he wanted to talk about something and when O'Connor asked him to leave, he did.

Officer Chantelle VanDyk responded to the police call and spoke with the O'Connors about the incident. Officer VanDyk accompanied the O'Connors home and then went to Ackley's home to investigate. Ackley was exiting through his garage door when Officer VanDyk arrived. Ackley told Officer VanDyk that he had done something stupid, and he tried to show her threatening text messages sent by O'Connor a few months earlier. Officer VanDyk refused to look at the messages because she did not believe they were relevant to the assault allegation.

Procedural Facts

The State charged Ackley with second degree assault with a deadly weapon. At trial, the defense offered evidence of a threatening phone message that Ackley received from O'Connor at least a month before the assault. The trial court reserved ruling on the admissibility of the message until Ackley succeeded in producing evidence to support a self-defense claim. When the court later concluded that Ackley had not introduced sufficient evidence to support a self-defense theory, it decided that the message was not relevant.

Ackley submitted proposed jury instructions on self-defense. The trial court refused to give the instructions. It concluded,

> Number one, Mr. Ackley did not use force when he held the knife down next to his leg, and it's very difficult for me to see that my reasonable juror could find that he was presented with a need to protect himself simply by Mr. Connor's pulling on his shirt.

> And I do read RCW 9.41.270 to require a use of presently threatened unlawful force, or use of unlawful force, and we don't have that here. What we have is Mr. Ackley's testimony that Mr. O'Connor pulled up on his shirt in a way that Mr. Ackley felt demonstrated the fact that he might have a gun under there simply because of—apparently Mr. Ackley's experience in L.A. So this is not a self-defense case either for the unlawful display of a weapon or for the Assault in the Second Degree.

The jury found Ackley guilty as charged. Ackley appeals.

STANDARD OF REVIEW

The standard an appellate court uses to review a trial court's refusal to instruct the jury on self-defense depends on the trial court's reasons for its decision.[1] We review a refusal based on a matter of law de novo.[2] We review a refusal based on a factual dispute for abuse of discretion.[3] The sufficiency of evidence to raise a claim of self-defense presents a matter of law.[4] Because the trial court found insufficient evidence supported Ackley's self-defense theory, we review its decision de novo.

ANALYSIS

Sufficiency of the Evidence

Ackley claims the trial court should have instructed the jury on self-defense. A defendant has a constitutional right to "'a meaningful opportunity to

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[1] State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).
[2] State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).
[3] Walker, 136 Wn.2d at 771-72.
[4] State v. Janes, 121 Wn.2d 220, 238 n.7, 850 P.2d 495 (1993).

present a complete defense.'"[5] Consistent with this right, a defendant is entitled to have the jury instructed on his theory of the case where the law and evidence support it.[6]

To decide if sufficient evidence warrants instructing the jury on self-defense, a trial court reviews the entire record in the light most favorable to the defendant.[7] The defendant may rely on evidence that is inconsistent with his own testimony.[8] If some evidence supports all elements of self-defense, then the court must instruct the jury on self-defense.[9] Thus, to get a self-defense instruction Ackley must show that the record includes "some evidence" to establish the assault occurred in "circumstances amounting to defense of life and produce some evidence he . . . had a reasonable apprehension of great bodily harm and imminent danger."[10] In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the court uses a subjective analysis, putting itself in the shoes of the defendant and considering all the facts and circumstances known to him.[11] The court must also determine

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[5] Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (internal quotation marks omitted) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

[6] State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

[7] State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

[8] Callahan, 87 Wn. App. at 933.

[9] Walker, 136 Wn.2d at 772-73.

[10] Read, 147 Wn.2d at 242.

[11] Walker, 136 Wn.2d at 772.

whether the defendant's reaction was objectively reasonable.[12] We affirm the trial court's self-defense decision because the record contains no evidence that Ackley ever formed a subjective belief that he needed to use force that would otherwise be unlawful.

Ackley cannot deny using force and also claim that he subjectively felt the need to use that force. In State v. Aleshire,[13] the Supreme Court concluded that "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense." Washington courts have repeatedly applied this reasoning.[14] To apply Aleshire's reasoning again here, we must first consider if Ackley's own account of his conduct constitutes use of force. "A person is guilty of assault in the second degree if he or she . . . assaults another with a deadly weapon."[15] Assault includes acting with the intent to create apprehension.[16] The defendant's conduct must include some physical action that creates a reasonable apprehension that physical injury is imminent.[17] Displaying a weapon, without

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[12] Walker, 136 Wn.2d at 772.

[13] 89 Wn.2d 67, 71, 568 P.2d 799 (1977), abrogated on other grounds by State v. Dowling, 98 Wn.2d 542, 656 P.2d 497 (1983).

[14] E.g., State v. Pottorff, 138 Wn. App. 343, 348, 156 P.3d 955 (2007) ("A defendant asserting self-defense is ordinarily required to admit an assault occurred."); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) ("Mr. Barragan was not entitled to a self-defense instruction because he denied the underlying act that was the basis for all the assault counts.").

[15] RCW 9A.36.021(1)(c).

[16] State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

[17] State v. Maurer, 34 Wn. App. 573, 580, 663 P.2d 152 (1983).

any action indicating that its use is imminent, does not constitute an assault. Ackley testified that he took the knife out of his pocket and opened the blade but kept it down by his side. The trial court refused to find that if Ackley pulled out a knife and held it down at his side, he committed an assault. We agree that this conduct would not constitute assault. Because Ackley does not admit to any otherwise unlawful use of force, like in Aleshire, he is not entitled to a self-defense instruction.

Ackley claims that sufficient evidence supports his self-defense claim because O'Connor's testimony shows his use of force and his own testimony shows a reasonable fear. Ackley correctly notes that the court should consider all the evidence, including facts inconsistent with his own testimony.[18] But considering all the evidence, Ackley still does not show lawful use of force (self-defense) because no evidence shows he had a subjective belief that force was needed. Only Ackley testified about his subjective belief. And, at most, Ackley presents evidence that he believed he needed to hold the knife at his side. He did not testify to any belief that he needed to do more to protect himself or another. He did not testify to any action from which a reasonable juror could infer this subjective belief. Holding a knife by one's side is not an otherwise unlawful

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[18] See State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (citing Callahan, 87 Wn. App. at 933; State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986)).

use of force, and Ackley does not present any evidence that he felt the need to take some action that would constitute self-defense. Thus, no evidence supports an essential prong of his self-defense theory.

Ackley contends that case law allows a defendant to argue inconsistent defenses. Ackley relies on State v. Werner.[19] But Werner does not apply to this case. Cases such as Werner and State v. Callahan[20] have concluded that the defenses of accident and self-defense are not mutually exclusive as long as the record includes evidence of both.[21] But as Callahan notes, in cases like Aleshire, the dispositive issue is not inconsistent defenses but, rather, the sufficiency of evidence supporting the self-defense theory.[22] Like Aleshire, this case involves the sufficiency of the evidence, not inconsistent defenses. Ackley does not present sufficient evidence to show a subjective belief he needed to use force that would otherwise be unlawful.

Even if Ackley had presented evidence to show a subjective belief, he fails to show that this belief was reasonable under the circumstances. To support his self-defense theory, Ackley offers evidence that O'Connor lifted up his shirt, that O'Connor had left him threatening messages months earlier, and that Ackley grew up in L.A. O'Connor pulling up his shirt would not cause a reasonable

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[19] 170 Wn.2d 333, 241 P.3d 410 (2010).
[20] 87 Wn. App. 925, 932, 943 P.2d 676 (1997).
[21] Werner, 170 Wn.2d at 337.
[22] Callahan, 87 Wn. App. at 932.

person in Ackley's shoes to believe he was in danger of imminent injury, particularly because the record contains no evidence that Ackley had reason to think that O'Connor had a gun. Ackley does not explain how his experiences in L.A. caused a reasonable belief he was in danger. Further, evidence of threatening messages from O'Connor from months earlier cannot justify a fear of harm when Ackley initiated the encounter and the O'Connors were simply on a walk in their neighborhood. We find that the evidence is not sufficient to show that Ackley had a reasonable apprehension of harm.

Excluded Evidence

Ackley also claims that the trial court should not have excluded evidence about prior threats by O'Connor. Ackley claims that this evidence was relevant to his state of mind at the time of the confrontation. The court did not decide the admissibility of this evidence until it had heard evidence related to Ackley's self-defense theory. Later, the court concluded that Ackley had not presented sufficient evidence of self-defense. "[C]ircumstances predating [an assault] by weeks and months [may be] entirely proper, and in fact essential, to a proper disposition of the claim of self-defense."[23] However, once the court determined that Ackley had not produced any evidence to support an element of self-defense, the evidence about prior threats was not relevant. Because the record

[23] State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977).

does not contain sufficient evidence to support Ackley's self-defense theory, the trial court correctly excluded evidence related to threats.

CONCLUSION

Because no evidence shows that Ackley had a subjective belief that use of force was necessary to defend himself, he was not entitled to have the jury instructed on self-defense. Because the record does not include at least some evidence to support one element of Ackley's self-defense theory, no evidence that supports the other elements is relevant. We affirm.

WE CONCUR:

NIELSEN, BROMAN & KOCH, PLLC

January 05, 2017 - 2:19 PM

Transmittal Letter

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Case Name: Christopher Ackley
Court of Appeals Case Number: 74062-8

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Trial Court County: Skagit - Superior Court # ____

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