Supreme Court No. 96009-7
Court of Appeals No. 76242-7-I consol. with 76243-5, 76244-3, 76243-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

Abigail Brockway et. al.,
Petitioners.

PETITION FOR REVIEW

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

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IDENTITY OF PETITIONER

Abagail Brockway, Michael Lapointe, Patrick Mazza and Jackie Minchew, through his attorney, Suzanne Lee Elliott, seek review of the opinion designated in Part II.

II.
COURT OF APPEALS DECISION

On May 29, 2018, the Court of Appeals issued an unpublished decision in *State v. Brockway, et. al.* Appendix 1.

III.
ISSUE PRESENTED FOR REVIEW

Where the defendants, charged with trespass while peacefully protesting the use of coal and oil trains, safety for rail workers and the public, and the failure of the political system to stop or limit climate change, presented two days of evidence regarding the lack of reasonable legal alternatives to their trespass and their thwarted efforts to influence policy makers by other means, did the trial court err in failing to instruct the jury on the defense of necessity?

IV.
STATEMENT OF THE CASE

On September 2, 2014, Abigail Brockway, Michael LaPointe, Jackie Minchew and Patrick Mazza entered the "Delta Yard" at a

Burlington Northern Santa Fe Railroad (BNSF) facility in Snohomish County. They intended to peacefully protest the use of coal and oil trains, safety for rail workers and the public, and the failure of the political system to stop or limit climate change. Each of the protesters admitted they entered the Delta Yard without permission, but argued that their trespass was excused by the legal defense of necessity. The four Petitioners were charged with Count 1, obstructing or delaying a train in violation of RCW 81.48.020 and Count 2, criminal trespass in violation of RCW 9A.52.080. A jury acquitted them of delaying the train but convicted them of criminal trespass.

The only question in this appeal is whether the trial court erred in failing to give WPIC 18.02 regarding the protestor's claim of necessity.

These four protesters and many others entered the BNSF Delta Rail Yard on September 2, 2014, to peacefully protest the use of coal and oil trains and climate change caused by the burning of fossil fuels. Oil train traffic has increased in the Delta Yard over the last 10 years. CP 691. The BNSF Delta Yard is a very large, unfenced piece of property.[1] The protesters set up a tripod structure over a railroad track in the yard. CP

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[1] When asked how many acres the lot encompassed, one officer said "a zillion. It's huge. It's really big." CP 943. A BNSF employee testified that the yard had 20 sets of tracks, each over a mile long. CP 609.

944. The four Petitioners secured themselves to the structure or to each other. CP 960. They also had banners explaining their political positions. CP 947.

The protest lasted throughout the day. Eventually all protesters left the Delta Yard except the four Petitioners. CP 960. They were instructed to leave by a railroad police officer. CP 609.[2] When the four refused to leave, they were removed, arrested and charged. CP 613-14.[3]

The Petitioners called several experts to discuss the health and safety risks of transporting oil and coal by train, the effect that burning fossil fuel has on the climate and the urgency of these issues. Dr. Frank James is a health officer for San Juan County, the Health Director for the Nooksak tribe, a clinical professor of public health at the University of Washington and an adjunct professor of medicine at Yang Ming University in Taipei. CP 290. He is an expert on health promotion and disease prevention. *Id.*

Dr. James became involved in issues regarding the public health risks associated with coal and oil transportation when two children, one of

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[2] BNSF is the only private corporation in the United States with its own commissioned police force. CP 654.

[3] Several other protesters were on the tracks but left when instructed to do so and were not arrested. CP 640.

whom was his patient, were killed when a gas line exploded near Bellingham in 1999. CP 294. He and others tried to enact stricter safety laws. CP 296. He said that legislatively, "in the end, we lost repeatedly." *Id.*

Dr. James testified that when oil trains are in transit they lost between .5 and 3% of the volume. This means that the chemical benzene is being released into the environment. Inhaling benzene increases a person's risk of cancer. CP 302.

He also noted that coal trains were so long that they blocked intersections in small towns for extended periods. CP 299. This impeded ambulances trying to get patients to the hospital. *Id.* They also increased health damages associated with high noise levels. CP 301.

Dr. James said that because of Washington's ports, the projection is that there will be one train per hour traveling to an oil terminal. CP 303. He testified that the health risks are urgent. "People die because of this already." CP 305. But the rail industry "doesn't want to hear" about the health risks. *Id.* Only community action would bring change. CP 306. He opined that "without that action people will die." *Id.*

Dr. James looked at the literature regarding the impact of civil disobedience on change. In his review of the literature, "the only way that change can happen is because individuals made a choice to break the laws

and to create the ability of a society to change that was locked into a way of being . . ." CP 308.

Michael Elliott, a lobbyist for the Brotherhood of Locomotive Engineers and Trainmen testified. CP 317. He had been employed at BNSF. *Id.* He had reported extreme safety violations at the railroad and was fired. CP 318.[4]

In September 2014, BNSF was moving to reduce the number of conductors on oil trains. CP 320. He said that such an action would have negative public safety implications. CP 321. He believed the protest at the railyard affected those issues. It raised public awareness and spawned proposed legislation. CP 322. He said that, in his experience as a lobbyist, if citizens were not raising their voices and putting pressure on the legislators, no action would be taken against big, powerful corporations like BNSF. CP 325-26.

Erick DePlace is the policy director for the Sightline Institute, a research center based in Seattle. CP 509. He works on issues related to climate change and transportation economics. CP 510. He researched fossil fuel transport about 2010. He has published 300 articles on coal

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[4] He later filed a whistleblower lawsuit in federal court and prevailed. *Id.*

export and coal and oil transport. CP 512. He presented at conferences and testified before legislative bodies. CP 513.

DePlace said that the impact of coal and oil trains went from the relatively benign – obstructing traffic – to spreading coal dust – a serious health risk – to derailment and explosions – a very significant public safety risk. CP 517. He said burning fossil fuels releases carbon dioxide and warms the planet. *Id.* If all the new projects in fossil fuels were completed there would be an additional 822 million metric tons of carbon dioxide released into the atmosphere or eight times as much as is being released annually in Washington. CP 518.

De Place noted that in the Pacific Northwest there were dozens of proposals to build new gas pipelines, 15 oil by rail proposals, and 10 new coal export terminals. CP 519. There was an immediate need for leadership on clean energy. *Id.* He said that some projects had been submitted to the permitting process and were often supported by hundreds of millions of dollars.

BNSF is the dominant hauler of crude oil. They had an oil train derail in Seattle under the Magnolia Bridge in 2014. CP 524. In that derailment BNSF did not notify "the relevant authorities" for almost two hours. CP 526. It also initially failed to disclose that the derailment involved hazardous materials. CP 527. He noted that the Washington

State Utilities and Transportation Commission found that in a four-month period from November 2014 to February 2015, BNSF failed to report 14 oil spills. CP 528.

DePlace said the governmental response had been woefully lacking. He noted that the confluence of the oil and rail industries resulted in a strong pro-industry influence in government.[5] CP 530. He said that other than when trains blew up in populated areas, the attempts to draw attention to these issues had not been adequate. *Id.*

Frank Millar testified that he had 30 years of experience working for the Environmental Policy Group and Friends of the Earth. CP 597-98. He was also a consultant to the Brotherhood of Railroad Engineers. *Id.* He testified before Congress and wrote proposed legislation aimed at environmental protection. He said that the major health and safety risks stemmed from the trains' length, using inadequate tank cars, their excessive speed, the condition of the tracks, the routing of trains through major cities and the volatility of the cargo. CP 598-606. Millar said that

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[5] He quoted Upton Sinclair:

> It is hard to convince a man that something is true if his salary depends upon it being false.

Id.

the rail industry persuaded Congress to let them use their judgment about rerouting trains around cities. CP 606.[6]

Millar said that citizen pressure on the legislature was important but had its limitations. He said the Federal Railroad Administration was a captive of the railroads. CP 617. And the railroads ignored the National Transportation Safety Board. CP 618.

Dr. Richard Gammon is a retired University of Washington professor of chemistry, oceanography and atmospheric science. CP 533. He explained global warming and said that man's effect on the climate had been to raise the temperature of the planet by 3-4 degrees warmer than before man and to raise the sea level by 30 to 50 feet. CP 540. The current climate is unstable. To stabilize the climate, we have to stop emitting carbon dioxide. CP 541. The Paris climate summit and treaty set a goal to end warming. *Id.*

Warming causes ocean acidification and decimates shellfish, which is occurring now. CP 544-45. Falling snow pack diminishes salmon runs. CP 544. Dr. Gammon said that the effects of climate change are already

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[6] BNSF also refused to provide its emergency response plans to the Washington Fire Chiefs Association. CP 615.

occurring. CP 549. He said that he "loses sleep over this" and has been called "Dr. Doom." *Id.*

Dr. Gammon said the federal government was not doing enough to prevent more damage. CP 552. He said the fossil fuel industry engages in an extensive misinformation campaign and "funded people who will stand up and politically say there is no problem." CP 553.

Each of the Petitioners testified about their other legal, but ultimately futile, efforts to address fossil fuel transport and climate change.

Patrick Mazza testified that he entered the BNSF yard intending to stop a coal train. CP 759. The goal was to increase public awareness of climate change and oil train regulation. *Id.* Mazza is the founder of a major climate change organization called "Climate Solutions." CP 717. He worked on bringing cleaner fuels to Washington, developing electric cars and legislation related to carbon reduction goals. CP 739.

Mazza testified that to stem global warming, society needed to act quickly. CP 740. Mazza said the "political system has responded inadequately." CP 742. He said this was because industry "has systematically bought the political system" via campaign donations. CP 743. He opined that the energy industry knows of global warming, but instead of mitigating the effects of their activities, they lied to the public.

CP 744. He said those concerned about climate change had been "frozen out" of the political system. CP 745. He said "politicians need to hear from people that this is a really serious situation." CP 746. He said that the political system was not responding in an "adequate way." CP 742. He noted:

> Just this past year in Washington State, Governor Inslee got a climate bill that was defeated by the fossil fuel industry and the politicians who they heavily contribute to in the Washington State Legislature.

CP 745.

In his view, civil disobedience was a way that Americans had traditionally created political responses. His participation on September 2, 2014, was a part of that tradition. CP 746. He said the railroad was a "semi-public" entity, and that citizens should have the right to challenge its actions. CP 757. Mazza said the protesters had suffered one legislative defeat after another. CP 751. He felt that legislative action had been exhausted and he was compelled to take extraordinary action. *Id.*

Mazza described the danger of coal trains:

> Every coal train is blowing dust off all the time. People are breathing it. Every oil train leaks, and sometimes oil trains explode and kill people, and they have in recent years.

CP 753. He admitted those opposed to climate change and the dangers posed by oil had had some political success but:

> [W]hat I'm saying is we haven't seen successes that scale to the immensity of the challenge.

CP 754.

Abigail Brockway testified that she and her husband ran a small contracting business. CP 561. She became politically active at a young age. CP 562. She learned about coal trains from other activists. CP 563. She learned about coal dust and the threats that coal trains posed to public health and safety. CP 563-66. Brockway joined groups concerned with climate change, attended lectures and gave lectures herself. CP 567. She wrote to President Obama, but she felt his response to her was "not powerful enough for the situation we are in." CP 568. She wrote to other legislators. *Id.* She testified before the Department of Ecology. CP 571. However, she did not feel these activities "working within the system" were making any difference. CP 572. So she engaged in protests. CP 573.

The September 2, 2014, protest influenced the pending decision on whether to reduce the number of conductors on the trains. CP 579. She also said:

> [W]e are trying to get our government, our legislators who are representing the people to stop listening to industry and actually listen to the people who don't want these projects.

CP 581.

Jackie Minchew testified that he is a retired music teacher. CP 773. In his retirement he became very concerned about the planet. CP 775. He sought out and talked to politicians. CP 777. In 2005, he and his wife traveled to Washington, D.C. to talk with their representatives, Rick Larson, Patty Murray and Maria Cantwell. *Id.* He left with the clear impression that nothing would be done to address climate change and "peak oil" by Congress. CP 778. He explained that the two issues were related because the burning of fossil fuels is directly related to climate change. CP 779. His political campaigns were focused on climate change, energy and other social justice issues. CP 786. Minchew came to realize that none of these activities was "moving the ball forward." CP 787.

Personally, he reduced his "carbon footprint." CP 781. He was co-founder of Green Everett, an environmental group. CP 783. He ran for the Everett City Council five times but lost each time. CP 785. His platform was "energy and climate centric." CP 786.

Minchew said that he deemed his successes from things he had done "other than this protest" to be "minor ones." CP 804. So he turned to direct action, which included his participation in the September 2nd entry onto BNSF property. CP 797. He testified that his actions were necessary and urgent. CP 801.

Michael LaPointe is part-owner of a coffee shop and community meeting place called The Firewheel in Everett. CP 805. The coffee shop was established when the Occupy Everett movement needed a place to meet and had been denied the use of rooms in the county administration building. CP 812.

He participated in direct action at age 18 when he helped a union organize a factory. CP 806. He became involved with climate change because he felt "it is the most important of all of the issues because if we fail at saving our planet, nothing else matters." CP 807. He ran for office, gave speeches, wrote letters, picketed, met with politicians and urged local involvement to fight climate change. CP 808, 814. At the time of trial he was running for office. *Id.* He was concerned these trains came within a half mile radius of his coffee shop. CP 810.

LaPointe noted that at the time of the protest there were efforts to build a coal shipping terminal in Ferndale. The facility would ship coal to China "where they have less safety regulations than we have." CP 811. And BNSF and its union were in negotiations regarding reducing the number of conductors on the trains. The protestors believed that reducing the number of conductors was a safety issue. He said that after the protest, the railroad dropped its efforts to reduce staff on the trains. CP 816. LaPointe said, "I felt very convinced that this [the trespass and protest]

was necessary." CP 817. He said that time and time again he had been disappointed by the political system to respond to what he viewed as an urgent matter. CP 818.

At the conclusion of the trial, the protesters proposed WPIC 18.02. The judge found that the protesters reasonably believed that the commission of the crime was necessary to avoid or minimize the harm. CP 373. He found that the harm they sought to prevent was greater than any harm they caused by their act of civil disobedience. *Id.* Finally, he found that the threatened harm was not brought about by them "as frankly the court is convinced that the defendants have been far from the problem and more about the solution to the problems facing the planet." *Id.*

Nevertheless, the trial judge ruled that the protesters' evidence "fails to establish that there was no reasonable legal alternative to their acts of September 2 and no objective reasonable trier of fact could find that no reasonable legal alternative existed." CP 377. He said:

> Prima facie evidence was not presented from the defense that there was no reasonable legal alternative available to them and that you have failed in your burden of production on that prong of the analysis.

CP 378. He refused to give the instruction.

Brockway and her co-defendants appealed to the Snohomish County Superior Court. The Superior Court Judge found there was no

statutory or legal bar to presenting the defense to a criminal trespass charge. But he said:

> However, the trial court was correct in evaluating the totality of the evidence, including the volume of expert testimony, and concluding that there was insufficient evidence of the fourth prong of WPIC 18.02 to allow the jury to consider the defense. The fourth prong of WPIC 18.02 requires defendant to prove by a preponderance of the evidence that "no reasonable alternative existed."

He affirmed the convictions. CP 9-12.

The Court of Appeals granted review and affirmed. Its reasoning will be discussed more fully below.

V.
ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH *STATE V. MAY*[7] *STATE V. WILLIAMS*,[8] AND *MOYER V. CLARK*,[9] RAP 13.4(B)(1)&(2).

A trial court must instruct on a party's theory of the case if failing to do so is reversible error. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (citing *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972)), *review denied*, 142 Wn.2d 1004, 11 P.3d 825 (2000).

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[7] 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

[8] 93 Wn. App. 340, 348, 968 P.2d 26 (1998).

[9] 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility. *May*, 100 Wn. App. at 482 (citing *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999)). If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. *Moyer v. Clark*, 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

The trial court's decision not to instruct the jury and the RALJ decision affirming that decision conflict with the above cited cases. Those two courts failed to consider the evidence in a light most favorable to the protesters. Although the State does not concede that Brockway met this minimal standard, it makes almost no argument that Brockway and her co-defendants failed to present a jury question here.

The petitioners testified to their real efforts to use legal means to get their message out and legislation passed. The State's "rebuttal" to the protestors' evidence was the argument that, because the protesters failed to pursue every conceivable political solution, the court could refuse to give the instruction. CP 356. But this was a jury question. The jury, not the judge, should have decided whether the alternative means were

"reasonable" given the protestors' previous, futile attempts to effectuate change.

And the trial court adopted an unduly limited construction of the phrase "reasonable legal alternative." He interpreted it to mean that if there were other means of legally protesting oil trains and climate change, no matter how hypothetical and futile those legal means might be, the protesters were not entitled to the instruction. But such an interpretation reads the word "reasonable" out of the definition. The jury, not the judge, should have been permitted to apply the reasonableness requirement to the question of whether legal alternatives exist.

"Reasonable" means something different than "available." It means "effective." These petitioners presented prima facie evidence that the other legal methods have proved so ineffective in changing the political response to their issues that a reasonable social reformer would feel compelled to resort to another strategy. On the question of "reasonableness" the jury was entitled to weigh the petitioners' testimony about their futile attempts to address the issues by legal means against the State's arguments that there were hypothetical additional legal avenues to address the issue.

The Court of Appeals ignores *May*, *Williams* and *Moyer*. The Court of Appeals simply says "we agree with the trial court that the

defendants failed to demonstrate the final element of the necessity defense." Slip Opinion at 9. In doing so, the Court of Appeals, like the trial court, failed to interpret the evidence most strongly for the defendant and failed to submit the question of fact – if reasonable legal alternatives truly existed - to jury.

The Court of Appeals cites to and is clearly mislead by the erroneous opinion in *State v. Gallegos*, 73 Wash. App. 644, 651, 871 P. 2nd 621 (1994). Gallegos was charged with attempting to elude. He argued the trial court erred in failing to instruct the jury on his claim of necessity. [10] The Court of Appeals held that it was not error because Gallegos failed to prove by "a preponderance of the evidence" the three prerequisites to the defense." Id at 651.

But *Gallegos* mistakenly applies the burden of proving the defense to the jury, to the question whether the defendant has presented sufficient evidence to submit the defense to the jury. Defendants need not "prove" the affirmative defense by a preponderance of the evidence to be entitled to the instruction. Defendants need only show that justifiable inferences

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[10] It appears that the common law necessity defense has since been superseded by a specific statute related to eluding. RCW 46.61.024(2)(a); WPIC 94.10

from the evidence upon which reasonable jurors could find the evidence would sustain the defense. This Court should also grant review to disavow *Gallegos*' misstatement of the law.

2. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH *STATE V. READ*.[11] RAP 13.4(B)(1).

The opinion cites to *State v. Read,* for the proposition that a trial court's refusal to give a jury instruction, if based on a factual determination, is reviewed for an abuse of discretion. But that is not what *Read* says.

> The standard of review when the trial court has refused to instruct the jury on self-defense depends on why the court refused the instruction. If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. *If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.*

State v. Read, at 243, emphasis added. Here the trial court did not find *no* evidence of necessity. It refused to give the instruction because, in its view, reasonable legal alternatives existed. Thus, under a plain language

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[11] 147 Wash. 2nd 238, 243, 53 P.3rd 26 (2002).

of *Read*, the Court's review should have been de novo. Thus, Court of Appeals decision, which applies the abuse of discretion standard, conflicts with *Read*.

3. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND BECAUSE TRIAL COURTS ARE ISSUING CONFLICTING RULINGS ON THE SAME ISSUE. RAP 13.4(B)(4).

The issue of when defendants have presented evidence sufficient to support an instruction on necessity is a recurring issue that yields differing results. Attached as Appendix 2 is a copy of Spokane County District Court findings on nearly identical facts that conflicts with the opinion in this case. There the district court judge correctly understood that, once some evidence was presented on each of the elements of the defense, the question must be submitted to the jury. This Court should grant review to resolve the conflict.

VI.
CONCLUSION

The Court should accept review.

DATED this 25th day of June 2018.

Respectfully submitted,

Suzanne Lee Elliott, WSBA #12634
Attorney for Brockway et.al.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated, and by United States Mail one copy of this brief on:

Appellate Division
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, MS 504
Everett, WA 98201-4061

June 25, 2018
Date

Suzanne Lee Elliott

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ABIGAIL C. BROCKWAY, MICHAEL E. LAPOINTE, PATRICK A. MAZZA, and JACKIE W. MINCHEW, Appellants.	)	No. 76242-7-I consolidated with No. 76243-5 No. 76244-3 No. 76245-1
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: May 29, 2018

MANN, A.C.J. — Abigail Brockway, Michael LaPointe, Jackie Minchew, and Patrick Mazza appeal their misdemeanor convictions for second degree trespass after they entered a railroad yard to protest coal and oil trains and raise awareness of climate change. The defendants argue on appeal that the trial court erred in failing to instruct the jury on their claim for a necessity defense and that the court violated their constitutional rights to present a defense. Because the trial court did not abuse its discretion in refusing to provide the requested instruction and did not violate the defendants' rights to present a defense, we affirm.

FACTS

The Trespass

Early on September 2, 2014, Brockway, LaPointe, Minchew, Mazza, and Elizabeth Spoerri entered Burlington Northern Santa Fe's Delta Yard, a railroad yard in Everett, without permission. Inside, they erected a large metal tripod over a grade crossing and chained themselves to it. Brockway sat at the top of the tripod, twenty feet off the ground, and the other four sat on the ground in chairs chained to the tripod's legs. They blocked the tracks to protest the coal and oil trains and raise awareness for railroad workers' safety and climate change. They were peaceful and civil. Eventually, the tripod was dismantled and they were arrested.

The State charged the five defendants with one count of obstructing or delaying a train in violation of RCW 81.48.020 and one count of second degree trespass in violation of RCW 9A.52.080, both misdemeanor offenses. The cases were consolidated for trial in Snohomish County District Court.

Before trial, the defendants requested the trial court instruct the jury on the affirmative defense of necessity and for leave to call experts in support of the affirmative defense. The defendant's motion recognized the burden for asserting a necessity defense as recognized in Washington Pattern Jury Instruction (WPIC) 18.02:

> Necessity is a defense to a charge of (fill in crime) if
>
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

> (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and the
>
> (3) the threatened harm was not brought about by the defendant; and
>
> (4) no reasonable legal alternative existed.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016) (WPIC).

In a lengthy written decision, the trial court denied the defendants' motion concluding that the necessity defense was not available as a matter of law. The next day, however, the trial court reconsidered its decision and allowed the defendants to put on expert testimony in support of the necessity defense.

Trial Testimony Supporting a Necessity Defense

The defendants offered evidence at trial supporting the defense. Mazza testified first. He testified that he had worked on finding solutions to climate change since 1998. He has written books and articles, worked on legislative campaigns and bills to reduce carbon in the atmosphere, and created programs for the adoption of alternative fuels. Despite his efforts, he believed that the political response to climate change was inadequate. In his opinion, the only way forward was to use civil disobedience to "start reviving our democracy" to create "a political response equal to the challenge of climate change." His goal was to

inspire citizens to "walk into their [C]ongressman's office and say, 'We are going to stay here until we hear from—we want to talk to you, Congressman, to find out what are you going to do about this.'" He admitted that legal protests were also effective.

Minchew testified that he had met with Congresswomen and Congressmen about climate change, but was disappointed by their responses. He had run for elected office to advance his climate-centric positions, but was unsuccessful. He believed that his trespass was "absolutely" necessary.

LaPointe testified that he had been politically active since he was 18 years old; he had organized factory workers, supported unions, and participated in demonstrations for years. To fight climate change, he demonstrated, wrote letters, contacted elected officials, attended political meetings, and spoke with other citizens. He was currently running for political office on a climate-centric campaign and believed that he could combat climate change if he was elected. He also testified that the coffeehouse he owned served as a gathering space for people to discuss issues, and organize themselves to combat climate change. LaPointe "felt very convinced that [trespassing] was necessary."

Spoerri described her history of activism with climate change. After growing concerned that too few people knew about climate change, she decided to engage in civil disobedience in order to "let people know that this state is on the brink of becoming a carbon corridor."

Brockway testified that she had written letters to her elected representatives, testified before the Department of Ecology, and collected

signatures on petitions for various climate-action movements. She testified that even while she was at the top of the tripod in the Delta Yard she was "petitioning the government. . . . for a moratorium on fossil fuel projects." Her goal in trespassing was "to have a fossil fuel moratorium—to have [Governor Inslee] reject all new fossil fuel structured projects" and to protest oil and coal trains. While she believed trespassing was necessary, she also planned to continue attending public hearings and writing letters supporting her positions.

Erik De Place, the policy director at the Sightline Institute, a research center based in Seattle, testified about the dangers of transporting fossil fuels by rail. He also testified that the "traditional means in raising awareness about this issue" were "not very effective" and that the government's response was "woefully lacking." DePlace admitted, however, that he had no scientific or statistical evidence that illegal protests are more effective at getting the word out about climate change than legal protests.

Dr. Richard Gammon, a retired professor of chemistry and oceanography from the University of Washington, also testified. Dr. Gammon explained how fossil fuel emissions affect the climate. In his view, international climate agreements and action at the federal, state, and local levels are needed to address climate change. He also gave examples of what people can do to raise awareness about climate change: institute a carbon tax, make homes energy efficient, buy carbon offsets, drive and fly less, and inform other people. He admitted that he had "no scientific data" about whether illegal protests are more effective than legal ones in combating climate change.

Dr. Frank James, a physician and a health officer for San Juan County, testified about the dangers oil trains pose to public health. He cited a scientific study that showed illegal action was more effective than legal action in changing policy.

District Court's Ruling

At the conclusion of testimony, the defendants asked that the trial court instruct the jury on the affirmative defense of necessity based on WPIC 18.02. The trial court found that the defendants had demonstrated the first three elements of the necessity defense: (1) that they reasonably believed their actions were necessary to avoid or minimize a harm, (2) that the harm they sought to avoid was greater than the harm resulting from their trespass, and (3) that the threatened harm was not brought on by the defendants; indeed, the trial court noted that the "defendants have been far from the problem and more about the solution to the problems facing the planet." The trial court decided not to give the requested instruction, however, because the defendants had failed to establish the fourth element—that there was no reasonable legal alternative to their actions:

> The evidence presented from the defendants fails to establish that there was no reasonable legal alternative to their acts of September 2 and no objective reasonable trier of fact could find that no reasonable legal alternative existed.
>
> Therefore the court finds that WPIC 18.02 will not be given to the jury. The necessity defense is not available to the defendants in this case.

The jury acquitted all of the defendants of obstructing a train, but it found them all guilty of trespass.

Brockway, LaPointe, Mazza, and Minchew appealed the district court's ruling to the superior court. The superior court affirmed the ruling. It ruled that:

> 1. The trial court, in its role as evidentiary gatekeeper, did not abuse its discretion in declining to instruct the jury on the necessity defense via the defendants' proposed jury instruction WPIC 18.02.
>
> 2. This court agrees with the defendants' position that there is no statutory or legal bar in presenting such a defense to a criminal trespass charge.
>
> 3. However, the trial court was correct in evaluating the totality of the evidence, including the volume of expert testimony, and concluding that there was insufficient evidence of the fourth prong of WPIC 18.02 to allow the jury to consider the defense. The fourth prong of WPIC 18.02 requires a defendant to prove by a preponderance of the evidence that "no reasonable legal alternative existed."

Brockway, LaPointe, Mazza, and Minchew (collectively Brockway) moved for discretionary review, which we granted.[1]

ANALYSIS

Necessity Defense

Brockway, LaPointe, Mazza, and Minchew argue first that the trial court erred by refusing to instruct the jury on the affirmative defense of necessity. We disagree.

Each side in a case is entitled to instructions that support its theory of the case, but only if evidence supports the theory. State v. Benn, 120 Wn.2d 631,

[1] See Ruling on Discretionary Review of April 11, 2017.

654, 845 P.2d 289. A trial court's refusal to give a jury instruction, if based on a factual determination, is reviewed for abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. The appellant bears the burden to demonstrate the trial court abused its discretion. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007).

Washington recognizes the common law defense of necessity. A necessity defense is "available when circumstances cause the accused to take unlawful action in order to avoid a greater injury." State v. Jeffrey, 77 Wn. App. 222, 224, 889 P.2d 956 (1995). The necessity defense is not available, however, where "the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused." State v. Diana, 24 Wn. App. 908, 912-13, 604 P.2d 1312 (1979).

To establish the necessity defense, "the defendant must prove by a preponderance of the evidence that (1) he or she 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, and (3) no legal alternative existed." State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994) (citing Diana, 24 Wn. App. at 916). The final element at issue in this appeal is whether a legal alternative existed.

1. Availability of Defense in Civil Disobedience Actions

As a preliminary matter, the State argues that under State v. Aver, 109 Wn.2d 303, 745 P.2d 479 (1987), the necessity defense is not available to a

defendant engaged in civil disobedience, including attempts to block a train in protest, as a matter of law. We disagree.

In Aver, our Supreme Court held that RCW 81.48.020, a statute prohibiting a person from willfully obstructing a train "lawfully operated," was not unconstitutionally vague and that the trial court did not abuse its discretion by refusing to give the necessity defense. 109 Wn.2d at 308. In Aver, the defendants obstructed a train that they believed was carrying nuclear warheads to a naval submarine base. 109 Wn.2d at 305. On appeal, they argued that RCW 81.48.020 was unconstitutionally vague. They also argued that the trial court abused its discretion by refusing to give the necessity defense. Aver, 109 Wn.2d at 311-12. The Supreme Court upheld RCW 81.48.020 and found that the "necessity defense [was] not supported by the record in this case." Aver, 109 Wn.2d at 311.

Aver does not support the State's position. It does not stand for the proposition that a defendant cannot request the necessity defense when blocking a train or that, as a matter of law, the necessity defense is unavailable to defendants who were engaged in civil disobedience. Aver, 109 Wn.2d at 311-12. The defense may be available where the evidence supports all necessary elements.

2. Sufficiency of Evidence to Support Instruction

In this case, however, we agree with the trial court that the defendants failed to demonstrate the final element of the necessity defense—that no reasonable legal alternatives existed. The defendants' own testimony

acknowledged multiple legal alternatives available to support their efforts to draw attention to the global climate change and the impacts of rail shipping of fossil fuels.[2] Indeed, defendant's counsel conceded during argument that "one can go ad infinitum on reasonable alternatives." The testimony offered by defendants recognized that there is a legal alternative to the illegal action: using the democratic process to effect change. Because the defendants failed to offer sufficient evidence of no reasonable legal alternative, the trial court did not abuse its discretion in refusing to provide the instruction. State v. Werner, 170 Wn.2d 333, 336-37 241 P.3d 410 (2010).

The defendants argue that the trial court adopted an unduly limited construction of the phrase "reasonable legal alternative" and that "reasonable" must mean more than available, but actually effective. The defendants argue that State v. Parker's interpretation of the phrase "no reasonable alternative" supports their position. 127 Wn. App. 352, 355, 110 P.3d 1152 (2005). In Parker, Division Two of this court affirmed the trial court's refusal to give the necessity defense in a trial for the unlawful possession of a firearm where the defendant failed "to show 'that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative.'" Parker, 127 Wn. App. at 355 (quoting U.S. v. Harper, 802 F.2d 115, 118 (1986)).

[2] See, e.g., Clerk's Papers (CP) at 555-56 (Brockway testifying that her goal in trespassing was to have Governor Inslee impose a fossil fuel moratorium and reject all new fossil fuel projects).

Even if this statement from Parker is correct, it does not support the defendants' argument. Here, like Parker, while the defendants were frustrated with the political response to climate change, they all believed that the ultimate solution was political and were intent on continuing political activities. Here, after listening to the testimony, the trial court found that "[t]he evidence presented from the defendants fails to establish that there was no reasonable legal alternative to their acts of September 2 and no objective reasonable trier of fact could find that no reasonable legal alternative existed."

In conclusion, we hold that while the necessity defense may be available in actions involving civil disobedience, because the defendants here failed to demonstrate that there were no reasonable legal means available other than an illegal trespass, the court did not abuse its discretion by refusing to instruct the jury on the affirmative defense of necessity.

Right to Present a Defense

The defendants next argue that their right to present a defense was violated because the trial judge allowed the defendants to present evidence of the necessity defense but then refused to instruct the jury on the defense. We disagree.

The right to a fair trial includes the right to present a defense. The Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 21 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a

fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). "We review a claim of a denial of Sixth Amendment rights de novo." State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The trial court did not deny Brockway her right to present a defense. A defendant is only entitled to an instruction on the defendant's theory of the case if there is evidence to support that theory. Werner, 170 Wn.2d at 336-37. Although the defendants presented evidence supporting the first three elements of the necessity defense, they failed to present sufficient evidence to demonstrate that there was no reasonable legal alternative to accomplish their goal. Where an affirmative defense, including necessity, consists of several elements and the testimony supporting one element of the defense is lacking, there is no right to present the defense. U.S. v. Bailey, 444 U.S. 394, 415-16, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980). Accordingly, refusing to give the defense did not violate Brockway's right to present a defense.

We affirm.

Mann, A.C.J.

WE CONCUR:

Cox, J.

Becker, J.

Appendix 2

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	No. 6Z0117975
	)	
v.	)	PA# 16-6-90725-2
	)	RPT# CT I, II: 2016-00950725
GEORGE E. TAYLOR	)	RCW CT I: 9A.52.080-M (#17735)
WM 12/15/39	)	CT II: 81.48.020-M (#63031)
	)	FINDINGS OF FACT AND
Defendant(s).	)	CONCLUSIONS OF LAW
	)	

THIS MATTER having come on for hearings on June 26. 2017 and August 21, 2017 pursuant to the Defendant's pre-trial Motion to Allow Affirmative Necessity Defense and to Call Expert Witness at Trial. Those present included Defendant GEORGE TAYLOR, and Counsel for the Defendant, ERIC CHRISTIANSON, MARK HODGSON, and RACHEL OSBORN, and Counsel for the State, MARGARET MACRAE and RACHEL E. STERRET. The Defendant, after the hearings on the motion, obtained counsel KAREN S. LINDHOLT and ALANA L. BROWN.

The Defendant presented testimony of Dr. Steven Running and Professor Tom Hastings, both of whom who are qualified as experts upon motion in their respective fields, testified regarding their respective fields, and were subject to cross-examination by Counsel for the State of Washington. Defendant George Taylor testified and presented the Declaration of Fred Millar, submitted by agreement of the parties. The State of Washington presented the testimony of Karl Dreyer, Burlington Northern Santé Fe Corp (BNSF) police officer. The COURT having heard the live testimony, reviewed both parties briefing on the motion and reviewed the stipulated declaration, and heard Counsels' oral arguments, now makes the following:

FINDINGS OF FACT

I. On September 29, 2016, the defendant was a part of a group of approximately twenty-four (24) protestors who walked onto BNSF Railway property and stood on the mainline railroad tracks in front of a BNSF freight train near the intersection of Crestline and E. Trent Avenue.

II. The protestors were on BNSF property which is private property and posted with signs that read "No Trespassing".

III. The defendant knew that he was entering private property and that he did not have permission to enter that property.

IV. The defendant took actions to safely protest, including placing a phone call to BNSF to tell the company that there was a planned protest at one of their properties and reviewing train schedules to plan the protest when no trains were scheduled to be on the tracks, believing these actions would prevent the risk of harm.

V. While on the property and tracks, some of the protestors chanted, held up signs and displayed large banners protesting the transport of coal and oil.

VI. For the safety concerns of the protestors, BNSF employees and the public, trains in the general vicinity were held idling at the railway yard.

VII. BNSF and other law enforcement officers responded to the area.

VIII. The protestors, including the defendant, were advised to leave and warned by law enforcement that they would face arrest if they did not leave.

IX. Three protestors, including the defendant, politely refused to leave the property and remained on the railroad tracks.

X. The three remaining protestors were escorted off the railroad tracks, peacefully arrested and transported to the Spokane County Jail where they were charged and released.

XI. The Defendant, Mr. George Taylor testified:

1. His actions on September 29, 2016 were acts of civil disobedience to bring attention to the Legislative and Executive Branches about the imminent harm he perceived was occurring;
2. He believed his actions and the actions of the other protestors were necessary to avoid or minimize the imminent danger to the Earth due to climate change and the serious and imminent risk of danger to safety of Spokane citizens in the downtown area where BNSF transports volatile oil.
3. He believed the danger to the public by BNSF transporting coal and oil through the city of Spokane was far greater than his act of trespassing on the railroad tracks;
4. He stated that he and the other protestors took measures to protest safely and minimize any potential harm caused by their actions by providing notice of the protest to BNSF, planning the protest when no trains were scheduled to approach and making themselves aware of railroad safety;

5. He stated that the protestors' purpose was much more than to just garner media attention, they believed their actions would be an impetus to effect actual change;
6. He believes members of his family are at risk for asthma symptoms resulting from the environmental hazards of the transportation of coal;
7. He testified that he is seriously concerned about his granddaughter's safety as she attends Lewis & Clark High School near the downtown area where the trains travel. His concerns were that she and others would suffer tragic consequences if the oil cars derailed or erupted in flames due to the volatile nature of the oil and inadequate construction of the railroad cars.
8. He has voted for "green" legislation in support of his concerns;
9. He has met with all three Washington State Senators;
10. He has personally visited, called and sent emails to Representative McMorris Rodgers with no response.
11. He delivered a petition against the railroad transporting coal and oil personally to the office of Representative McMorris Rodgers.
12. He has testified three times on the dangers and risks of BNSF's decision to transport coal and volatile oil through the downtown corridor.
13. He supported the Spokane City Council's proposed ordinance to intervene in dangerous conduct of BNSF,
14. He is a member of the Sierra Club and Safer Spokane;
15. He noted that there have been seven derailments in 2017 and believes it is necessary to act now to minimize imminent harm caused by derailments and oil spills.

16. He is discouraged by the lack of progress on this issue but still hopes that the government will do the right thing;

17. He believes he has exhausted all other reasonable legal means.

XII. State's Witness BNSF Officer Dryer testified:

1. The protestors presented a dangerous situation because the trains travel through the area of the protest;
2. The advance call of the protestors was to the BNSF office in Texas and the details were too vague to support stopping the trains;
3. BNSF held trains in the vicinity at the railroad yard to protect the public;
4. Local law enforcement was contacted;
5. He responded to the scene and spoke to Mr. Taylor. He asked him to leave or face arrest;
6. The defendant refused to leave but was cooperative during the arrest;
7. BNSF had to check the tracks for any tampering before train track could resume. No evidence of tampering was found.

XIII. Defense Expert Witness Dr. Steven Running, Professor of Global Ecology at the University of Montana, testified:

1. He served as co-Lead Chapter Author for the 2014 U.S. National Climate Assessment, currently chairs the NASA Earth Science Subcommittee, is a member of the NASA Science Advisory Council and a member of the NASA Science Advisory Council. As Lead Author for the 4th Assessment of the Intergovernmental Panel on Climate Change, he shared the Nobel Peace Prize with Al Gore in 2007.
2. There are three basic facts that climate scientists see (a) Greenhouse gasses and carbon dioxide are going into the atmosphere and have been measured for over 50 years; (b)

Because of these increasing greenhouse gasses, the global air temperature has gone up and in the last 20 years has accelerated significantly; and (c) That, what we as climate scientists propose, is to reduce carbon emissions necessary to stabilize the global climate in the future.

3. The global impact is caused by human behavior – the largest source of CO2 emissions is from burning coal, the second is from burning oil and the third is from burning natural gas;
4. If carbon emissions continue to grow, all climate models project higher global temperatures in the coming decades.
5. With current national policies, temperatures in the Pacific Northwest could rise 10 Degrees Fahrenheit. Reducing carbon emissions reduces the CO2 in the atmosphere proportionally, which reduces temperature increases and impacts proportionally.
6. The failure to act more forcefully to abate GHG emissions will lead to harms that are severe, imminent, and irreparable, both at a global level and regionally in the Inland Northwest.
7. China is the largest consumer of coal and that coal comes from Montana and Wyoming and is shipped through our area. China is trying to reduce its CO2 emissions and is committed to reducing the amount of coal they import from the United States.
8. Global warming is increasing rapidly and is the result of the collective practices of global citizens. Individual choices such as driving cars as well as each country's government policies all contribute to the problem of global warming. It is crucial that this issue continues to be addressed and action taken before the damage to our planet is too great.

XIV. Defense Expert Witness Tom Hastings, Assistant Professor of Conflict Resolution, at Portland State University testified:

1. He teaches courses on the efficacy of nonviolent civil resistance and has served as an Academic Advisor to the Washington DC-based International Center on Nonviolent Conflict and is a member of the Governing Council of the International Peace Research Association. He is also Co-Chair of the Peace and Conflict Studies Association.
2. Civil resistance is effective in bringing about social changes. Drs. Erica Chenoweth and Maria Stephan examined 323 case studies from 1900-2006, both violent and nonviolent, and found that nonviolent civil resistance is not only approximately twice as effective as violent civil resistance, but also that nonviolent civil resistance is more likely than not to succeed in achieving the stated goal (See Stephan, M.J. & Chenoweth, E. *Why Civil Resistance Works"*, Columbia University Press, 2011.)
3. Reverend Taylor's actions are an example of the non-violent civil resistor.
4. Civil resistance includes outreach to the media and others to educate fellow citizens and ultimately change public policy;
5. Some examples of civil disobedience resulting in significant changes include the Boston Tea Party, Women's Suffrage which resulted in the right of women to vote, and Labor Actions which resulted in the creation of unions to protect worker's rights;
6. Each resulted in victory where nonviolent resistance had been used. The same result could be accomplished for environmental protections, resulting in institutional, corporate, and public policy change.

7. When all other legal means have been taken, and those attempts have not resulted in change, the judicial branch is the last best hope. The most notable cases are (1) *Brown v. Board of Education*; (2) *Plessy v. Ferguson*; and (3) Rosa Parks.

8. Civil resistance is breaking a law to uphold a higher law when the threat is imminent and every legal means has not resulted in policy change.

9. He stated experts agree that climate change is conducive to a civil resistance campaign.

XV. **Defense Expert Fred Millar** is a recognized international analyst in nuclear waste storage and transportation and industrial chemical use, transportation and accident prevention, and emergency planning and homeland security.

1. His declaration addressed the lack of adequate preparedness and emergency response protocols around the nation to protect public safety in the event of crude oil train derailment, spills and/or explosion.

2. He stated the harm associated with the derailment of trains carrying BAKKEN crude oil is an imminent and grave harm. Governmental accident data and regulatory impact analyses estimate than an ongoing, almost monthly, occurrence of U.S. crude oil releases by rail derailments, some with oil spills and fire events. Such events have recently occurred with respect to trains carrying coal and oil products in Montana and Oregon, and involved trains that traveled through Spokane.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

I. The U.S. Constitution provides criminal defendants a Constitutional right to present a complete defense, including presenting the Affirmative Necessity Defense, when legally relevant.

II. The evidence must be relevant, although the threshold is low, "even minimally relevant evidence is admissible". *State v. Darden*, 145 Wn.2d 612.

III. Rules for the Necessity Defense are purposefully flexible and calls for reasonableness in its application, so that justice may be served. 38 New Eng. L. Rev. 3.

IV. Historically, the Necessity Defense has been allowed in numerous civil disobedience cases in other state court on a case-by-case basis: (1) Protesting nuclear weapons – Oregon (1977), Illinois (1978 and 1985), California (1979 and 1982), Pennsylvania (1989), Vermont (1984), Michigan (1984 and 1985); (2) Protesting alleged corruption of county officials – North Carolina (1988); (3) Anti-abortion protestors charged with Trespassing – Nebraska (1990); (4) Catholic priest charged with malicious mischief for painting over billboards advertising tobacco and alcohol – Chicago (1991); (5) Activists charged with illegally supplying clean needles to protect people from the spread of the AIDs virus – Chicago and California (1993).

V. While Washington courts have not officially recognized the Necessity Defense in civil disobedience cases, several courts have allowed criminal defendants to raise this defense. In 1985, the Necessity Defense was allowed when doctors in Seattle protested the medical and other effects of apartheid in South Africa at the home of the South African consul; and again, in 1987 when Evergreen State College students were arrested for Trespass and Disorderly Conduct when they also protested the effects of apartheid in South Africa.

VI. Other Washington courts have denied the use of the necessity defense in civil disobedience cases. In 2017, climate activists charged with Sabotage and Burglary while protesting a pipeline facility in Skagit County, responding to a call of action from the Standing Rock pipeline protests in N. Dakota were denied the use of the Necessity Defense.

VII. A defendant may assert the common-law Necessity Defense when circumstances cause the accused to take unlawful action to avoid a greater injury. *State v. Diana,* 24 Wn.App 908 (1979; *State v. Cozad,* 198 Wn.App 1007; WPIC 18.02

VIII. The defendant bears the burden of proof in asserting this defense and must satisfy four prongs by a preponderance of the evidence: (1) he 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 the violation of the law; (3) the threatened harm was not brought about by the Defendant; and (4) the Defendant believed no reasonable legal alternative existed.

IX. In the present case, the defendant believed that his actions were necessary to avoid or minimize the immediate harms of global change to the Earth.

X. The Defendant presented evidence that the harm sought to be avoided, the imminent danger to the planet as well as imminent risk of harm to citizens of Spokane, including his granddaughter was greater than the harm created when he and the other protestors violated the law and were arrested for Obstructing or Delaying Train and 2nd Degree Criminal Trespass.

XI. The harm that the defendant sought to prevent was not brought about by him or the other protestors.

XII. The Defendant believed that he had exhausted all legal alternatives and that no other reasonable alternative existed.

XIII. It is within the sole province of the jury, not the judge, to weigh the evidence, evaluate the credibility of each witness, and decide the facts at issue in the case. The jury will ultimately determine whether the Necessity Defense applies to the facts of the present case.

ORDER

Finding the Defendant has met the burden of proof by satisfying the four elements required to present the Necessity Defense by a preponderance of the evidence, the Court hereby grants the Defendant's motion to allow the Affirmative Necessity Defense to be presented at trial and grants the Defendant's request to present expert witness testimony at trial.

Dated: 3-13-18

JUDGE DEBRA R. HAYES

~~Presented~~ by: Agreed as to form:

RACHEL E. STERETT
Deputy Prosecuting Attorney
WSBA #27141

50783 for
MARGARET MACRAE
Deputy Prosecuting Attorney
WSBA#50783

Agreed by:

Withdrew from case
MARK HODGSON, WSBA #34176
Previous Attorney for Defendant

Rachael Osborn by KL
RACHAEL OSBORN, WSBA #21618
Previous Attorney for Defendant

KAREN LINDHOLDT, WSBA #24103
Attorney for Defendant

ALANA BROWN, WSBA #50018
Attorney for Defendant

LAW OFFICE OF SUZANNE LEE ELLIOTT

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