NO. 97182-0

COA No. 77044-6-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner,

v.

KENNETH ARTHUR WARD,

Respondent.

PETITION FOR REVIEW

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ROSEMARY KAHOLOKULA, WSBA#25026
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WASHINGTON COURT RULES

TREATISES

I. IDENTITY OF PETITIONER

The petitioner, State of Washington, the respondent below, by and through Rosemary Kaholokula, Chief Criminal Prosecuting Attorney for Skagit County, and Erik Pedersen, Senior Deputy Prosecutor, petitions this Court to review the April 8, 2019, decision of the Court of Appeals in *State v. Ward*, ___ Wn. App. 2d ___, 438 P.3d 588 (2019) (77044-6-I, 2019 WL 1513834). A copy of the published opinion is attached as Appendix A.

II. COURT OF APPEALS DECISION

On April 8, 2019, the Court of Appeals issued a decision holding that the trial court deprived the defendant of his right to present a necessity defense by precluding expert testimony regarding climate change in defense to a charge of burglary for breaking into a locked fenced area and shutting off oil pipeline valves. The trial court had held that the defendant could not establish no reasonable legal alternatives existed to permit the defense.

This is a decision terminating review permitting review under RAP 13.4(a).

III. ISSUES PRESENTED FOR REVIEW

1. Where the trial court determined the defendant had not shown that no other legal alternatives were available, is the Court of Appeals decision permitting the necessity defense in conflict with prior

decisions of this Court under RAP 13.4(b)(2)?

2. Where the trial court determined the defense could not establish that no other legal alternative was available, and thus the evidence was not relevant, is the Court of Appeals decision to apply the de novo review standard in conflict with other decisions of this Court and the Court of Appeals under RAP 13.4(b)(1) and (2)?

3. Where the defendant acknowledged during testimony that other legal alternatives were available, is the Court of Appeals decision providing for the defense of necessity a significant question of law under the Constitution of the State of Washington or the United States or an issue of substantial public interest that should be determined by Supreme Court. under RAP 13.4(b)(3) and (4)?

IV. STATEMENT OF THE CASE

1. Summary of Trial Court Proceeding.

Kenneth Ward cut the lock on a fenced pipeline valve station, two locks on valves, and turned the valves thereby shutting off the pipeline. Ward livestreamed his actions with the help of an assistant in order to document his cause.

Ward was charged with sabotage, burglary, and criminal trespass. CP 9-10.

The State moved to preclude testimony of a necessity defense. CP 1, 1/24/17 RP 2-5.[1] Ward responded. CP 1-8. At the hearing, Ward conceded there were alternatives to direct action, including some he had not tried:

> And on the fourth prong [of WPIC 18.02] no reasonable alternative existed. This case more than most others I think we've seen where the necessity defense has been proposed meets that fourth prong. We have here a defendant who has worked in the environmental movement now for close to four decades. **It's not that there are things he could have tried, which there are**. But there are also a long list, as I set forth in the brief, of things that he actually did try. And some of them were -- well, some of them just didn't work for whatever reason, and that could be true with regard to legislative lobbying or proposals of bills to lobbying administrative committees, to public education. He's tried a significant number of avenues.

1/24/17 RP 12 (emphasis added). The trial court denied the motion finding that the harm to be avoided by Ward's action was so infinitesimal that the harm was not avoided at all and that there were reasonable legal alternatives available. 1/24/17 RP 16-8. The first jury failed to reach a verdict. CP 13. Ward filed a lengthy motion on reconsideration. CP 11-381. The motion made an extensive offer on proof regarding climate change, asserting that is caused by fossil fuels and "9 out of 10 climate scientists agreed." CP 12. Reconsideration was denied by the trial court. CP 11-381, 6/6/17 RP 135.

[1] Ward did not designate the State's pleadings filed in the trial court.

At trial a deputy testified that he responded to a complaint by pipeline officials that a pipeline was being shut down. 6/5/16 RP 40, 54, 60-1. The deputy found Ward inside a fenced area, with locked gates, that surrounded a containment area for pipes. 6/5/16 RP 41-42, 61. Ward had cut the lock on the fence, and on two valves, and had installed a chain and a lock on the two valves. 6/5/16 RP 44, 46-8.

Ward was supported by two people, one with a video camera. 6/5/16 RP 43. The area was signed with no trespassing signs and warned of dangers of hydrogen sulfite that was present in the crude oil being piped though the area. 6/5/16 RP 61-62. Shutting down the valve could have built up pressure to the point of breaking, causing harm to those nearby. 6/5/16 RP 63. The pipeline was restarted in four hours. 6/6/17 RP 64.

Ward admitted to cutting the locks to get in, cutting the valve and the safety block valve, closing the valve, and attaching his own chain. 6/6/17 RP 112. The trial court permitted Ward to testify as to his work on climate change. 6/6/17 RP 95-9. The trial court also permitted Ward to testify over objection that his civil disobedience had worked.

> **Q**. Were there any acts of civil disobedience you engaged in that ultimately worked?
>
> MR. JOHNSON: Objection as to relevance.
>
> MS. REGAN: This goes to his motivation and intent.
>
> THE COURT: You may answer.

> THE WITNESS: Depends on how you define "worked". So no, nothing is working because the problem is getting worse. If part of the definition of working is to engage in a direct action, which affects whether or not a particular source of emissions continues, then yes, I have engaged in at least two actions that contributed to the shutting down of major sources of carbon emissions.

6/6/17 RP 106. Ward testified that he "got together with a group of people, and we decided to take action to directly address the burning of tar sands oil." 6/6/17 RP 108. Ward admitted planning with four others to the simultaneous shutdown of pipelines in five states. 6/6/17 RP 109. Over objection, Ward was permitted to testify and refer to a chart about the impact of seal level rise due to global warming. 6/6/17 RP 112-4.

> **Q.** Why were you attempting to do that?
>
> **A.** I was attempting to take the most effective measure that I could think of to address this problem to avoid cataclysmic climate change.
>
> **Q.** Did you believe that there was anything left to do that may have been legal that could have addressed the issue?
>
> **…**
>
> **A.** I think that there are legal steps that can be taken, and I continue to take those. But I think that alone they are insufficient.
>
> **Q.** What are the other steps that you continue to participate in?
>
> **A.** Well, I'm engaged in efforts in my own state, which has been quite successful. The City of Portland has just announced a plan to shift to 100

> percent renewable energy, and I supported that. I am engaged in general public education. And I am increasingly looking at ways to support candidates for office who endorse a significant plan of action on climate change.

6/6/17 RP 114-15.

The trial court denied Ward the necessity defense instruction as well as instructions pertaining to climate change and tar sands. CP 98, 101, 102, 6/6/17 RP 129, 130, 135.

Ward appealed contending "his actions were his only means to effect political change because he had exhausted all reasonable legal alternatives." Petitioner's Opening Brief at 6. Ward contended the trial court's decision violated his right to present a defense. Petitioner's Opening Brief at pages 13, 31.

2. Court of Appeals Decision.

The Court of Appeals held that the appropriate standard of review of the trial court's decision on the motion in limine to exclude the necessity defense was de novo review. *State v. Ward*, 438 P.3d at 592. The Court of Appeals reversed the trial court finding that that Ward had presented evidence supporting no reasonable alternatives. *State v. Ward*, 438 P.3d at 588. The Court of Appeals also held the error was not harmless beyond a reasonable doubt. *Id* at 597.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. The Court of Appeals decision providing for a necessity defense where the defense failed to establish that there were no reasonable legal alternatives is in conflict with decisions of this Court and the Courts of Appeal.

In order to sustain a necessity defense, a defendant must establish that no reasonable legal alternative existed. *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994)[2], *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979).

A defendant must 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." *State v. Parker*, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005) (necessity unavailable for unlawful possession of firearm where defendant did not contact police and did not establish he was under threat of harm). In this case, the Court of Appeals stated: "Here, in contrast with *Parker*, Ward offered evidence that he had tried the alternatives and they were unsuccessful." *Id* 438 P.3d at 595. This statement is not supported by the record in at least two respects. First, Ward conceded at the pretrial hearing that there were alternatives that he had not tried. 1/24/17 RP

[2] Trial court properly excluded evidence in support of a necessity defense where defendant's proffer did not preclude the alternative of seeking assistance from a police officer.

12[3]. Second, Ward testified at the trial that some of the alternatives, in fact, were successful: "Well, I'm engaged in efforts in my own state, which has been quite successful." 6/6/17 RP 115.

The requirement to avail oneself of the necessity defense is that there be no reasonable legal alternative. Here, there were reasonable alternatives that Ward had not tried. Further those alternatives that he did try were not unsuccessful. 6/6/17 RP 115.

In *State v. Brockway*, 3 Wn. App. 2d 1064 (Div. I 2018) (unpublished), [4] defendants were convicted of trespass after entering a railroad yard and blocking the tracks in order to protest the coal and oil trains. They appealed the trial court's refusal to instruct the jury on the necessity defense. The appellate court affirmed the trial court because of the defendants' failure to establish the lack of any reasonable legal alternative:

> 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. . . . The testimony offered by defendants recognized that there is a legal alternative to the illegal action: using the democratic process to effect change.

State v. Brockway, slip op at 4.

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[3] "We have here a defendant who has worked in the environmental movement now for close to four decades. **It's not that there are things he could have tried, which there are**. But there are also a long list, as I set forth in the brief, of things that he actually did try."

The existence of methods of distribution of a message defeats the claim of no legal alternatives.

> It is, of course, impossible to argue that nuclear war is not a more serious harm than a peaceful, if unlawful, anti-nuclear prayer demonstration. It is just as impossible, however, to argue that there are not reasonable alternatives to violating the law under which these defendants were convicted. **There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few**. *United States v. Bailey* authoritatively answers appellants' third argument in this appeal, inasmuch as "a reasonable, legal alternative to violating the law" clearly existed. *Id.*

U.S. v. Quilty, 741 F.2d 1031, 1033–34 (7th Cir. 1984) (bold emphasis added) (evaluating reasonable alternatives to trespass on military facility).

Generally, it would be very difficult for a defendant to make a showing of no legal alternatives in a civil disobedience case because harm can always be mitigated by congressional action. In fact, the very purpose of civil disobedience is to galvanize fellow citizens to action in the political process, i.e. to contact their representatives and press for change.

Ward testified to preparing a strategy "about how to have a public conversation about climate change" which led him to the incident where he shut off the pipeline. 6/6/17 RP 92. He also acknowledged calling upon the

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[4] This decision is unpublished. Pursuant to GR 14.1(a) this is cited as a nonbinding

President and the Federal Government to take action. 6/6/17 RP 108, 110-11. His acknowledged engagement in the democratic process defeats his ability to pursue his defense.

> Commentators supporting the political necessity defense argue that the 'no legal alternative' requirement should be relaxed to require that 'no reasonable traditional alternatives are available to stop or prevent the harm, or a history of futile attempts to use accepted means makes any anticipated results from such means illusory.'[5] …
> …
> But it does not follow that a person should be allowed to break the law just because his efforts to use traditional democratic channels do not always work. Inevitably, in a democracy—even a 'perfect' one—some lobbying efforts will not 'work' because the majority will reject them. Democratic principles do not promise that all ideas will prevail; they promise only that the ideas that do prevail, do so because a majority of representatives has endorsed them. … Protest groups should not be able to argue, then, that their failure to succeed in the democratic process should permit them to circumvent it.

Brent D. Wride, Political Protest and the Illinois Defense of Necessity, 54 U. Chi. L. Rev. 1070, 1084–85 (1987).

So, Ward cannot claim that political, democratic process is not a reasonable alternative for him to have used when it is that very process that he means to encourage citizens to engage in.

The Court of Appeals decision authorizing the necessity defense is in

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authority which may be accorded such persuasive value as the court deems appropriate.

conflict with other decisions of the Court of Appeals. RAP 13.4(b)(2).

2. The Court of Appeals decision applying a standard of de novo review for relevancy determinations is in conflict with decisions of this Court and the Court of Appeals.

The Court of Appeals below applied a de novo standard of review to the trial court's determination that the defendant could not establish the necessity defense because of a claim of a Sixth Amendment violation for right to present a defense. *State v. Ward*, 438 P.3d at 592.

This Court has held a trial court's ruling on a motion in limine or the admissibility of evidence will not be disturbed absent an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998) *citing*, *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion), *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion).

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[5] *Robert Aldridge and Virginia Stark*, Nuclear War, Citizen Intervention, and the Necessity Defense, 26 Santa Clara L. Rev. 299, 333 (1986).

Furthermore, 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) (escapee was not entitled to claim duress or necessity unless he could demonstrate that given imminence, escape was his only reasonable alternative).

In *State v. Aver*, this Court evaluated the trial court's ruling grant of a motion in limine to exclude defenses based on necessity and international law. *State v. Aver*, 109 Wn.2d 303, 311, 745 P.2d 479 (1987). The defendants in *Aver* had obstructed a train believed to have been carrying nuclear warheads. *Id,* at 305.The Court held 'that a necessity defense is not supported by the record in this case." *Aver*, 109 Wn.2d at 311. This Court held "that the trial court did not abuse its discretion in granting the motion in limine." *Id.* Ward acknowledged before the Court of Appeals that this Court had upheld the pretrial denial of the necessity defense because the offer of proof filed to satisfy the 'minimum standard." Petitioner's Opening Brief at 26.

The Court of Appeals decision which applied a de novo review standard on a grant of a motion in limine to exclude a necessity defense is in

conflict with this Court's decision in *Aver* and other published decision of this Court on review of motions in limine. RAP 13.4(b)(1).

In *State v. Horn*, Division II reconciled the standard of review on a Sixth Amendment claim with the standard of review on an evidentiary claim that the defendant was not permitted to introduce evidence of his defense. *State v. Horn*, 3 Wn. App. 2d 302, 415 P.3d 1225 (2018). While the claimed Sixth Amendment violation is reviewed de novo, a trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Horn*, 3 Wn. App. 2d at 310, *citing State v. Armstrong*, 188 Wn.2d 333, 394 P.3d 373 (2017), *State v. Jones*, 168 Wn.2d 713, 230 P.2d 576 (2010)[6], *State v. Strizheus*, 163 Wn. App. 820, 829, 262 P.3d 100 (2011).

*T*he *Horn* court noted the Sixth Amendment right to present a defense is reviewed under a three-step test: (1) is the evidence that the defendant desires to admit of "at least minimal relevance," (2) if relevant, has the State shown prejudice that would ensue upon its admission, and (3) does the prejudice outweigh the probative. *State v. Horn*, 3 Wn. App. 2d at 310. The *Horn* court held that step one, the relevance step, is reviewed under

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[6] In *Jones*, this court determined that exclusion of the defendant's own testimony that the victim had agreed to a sexual encounter during an all-night drug induced sex party was not marginally relevant but instead had "extremely high probative value" to the issue of consent. *State v. Jones*, 168 Wn.2d at 721. This was a misapplication of the law and thus not subject to abuse of discretion on review. *State v. Blair*, 3 Wn. App. 2d 343, 351, 415 P.3d 1232 (2018).

an abuse of discretion standard. That is because this "is the one most directly involving the admission of evidence and most directly demanding ample breathing room for the trial court." *State v. Horn*, 3 Wn. App. 2d at 311 "To ensure de novo review of the Sixth Amendment claim itself, the second and third prongs of the test would be reviewed de novo." *Id.* The *Horn* court explained application of this approach.

> This approach also tracks the Supreme Court's rulings in *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017), which held:
>
> > We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless " 'no reasonable person would take the view adopted by the trial court.' " *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (internal quotation marks omitted) (*quoting State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). If the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).
>
> As in *Clark*, we review the first step of the *Jones* test, whether the excluded evidence was minimally relevant, for an abuse of discretion. Consistently with *Clark*, if the first step is met, we would review the remaining two steps de novo.

State v. Horn, 3 Wn. App. 2d at 311, 415 P.3d 1225 (2018).[7] *See also State v. Blair*, 3 Wn. App. 2d at 349-53, 415 P.3d 1232 (2018) ("If the trial court

[7] Although the Court below cited to *State v. Jones*, the Court failed to recognize that the review of the determination of minimal relevance is for abuse of discretion. *State v. Ward*, 438 P.3d at 593.

erred in its evidentiary ruling, then we review the constitutional claim de novo.").

The Court of Appeals below noted in footnote 2 that had the trial court admitted the evidence but the trial court determined that the evidence was insufficient that this Court has stated review would have been under the abuse of discretion standard. *Id*. citing, *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). *Read* was a self-defense case where this Court held that review of sufficiency of a factual determination of the defendant's subjective belief of danger was subject to abuse of discretion, while review of whether no reasonable person would have acted as the defendant is an issue of law subject to de novo review. *State v. Read*, 147 Wn.2d at 243. The application in *Read* is consistent with the application provided in *Horn* and *Clark.*

Here Division I conflated the steps, reviewing the entirety of admission of the necessity defense de novo. That decision is in conflict with other decisions of the Court of Appeals. RAP 13.4(b)(2). The trial judge's determination should have been given appropriate deference.

The Court of Appeals distinction based upon a ruling on a motion in limine and a ruling after admission of the evidence fails to take into account the screening function of the trial judge and the importance of appropriate use of judicial resources on jurors.

> The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses.

United States v. Bailey, 444 U.S. at 416, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980).

Review of the applicable standard of review for admission of evidence of the defense of necessity is merited.

3. The Court of Appeals decision providing for a necessity defense for political action taken when the defendant acknowledged other legal alternatives existed is an issue of substantial public interest.

Testimony Ward presented was that he was among five individuals who simultaneously sought to close pipelines at five different locations to effect civil disobedience. 6/6/17 RP 108-9, 148.

The defendants in *Brockway*, likewise sought to use civil disobedience by stopping trains to create a political process to address climate change. *State v. Brockway*, slip op at 4. In addition, the Petitioner's Opening Brief cites to a Spokane County trial court case involving the obstruction of coal and oil trains in 2016. Petitioner's Opening Brief at 25-6.

As of December, 2018, "the climate necessity defense had been attempted at least twenty-one times in the United States" with the first attempt in 2009. *Lance N. Long, Ted Hamilton,* The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases, 38 Stan. Envtl. L.J. 57, 61 (2018). The first attempt to pursue the defense was in 2008, by an individual who fraudulently placed bids totaling nearly 1.8 million dollars, which he had no funds to pay. *Id.* at 62, *U.S. v. DeChristopher*, 695 F.3d 1082 (10th Cir. 2012) (holding the court need not go any further than evaluating the absence of legal alternative because the defendant had the obvious legal alternative of pursuing a lawsuit).

The availability of the necessity defense to defendants who commit crimes for purposes of advancing climate change activism is an issue of substantial public interest in the State of Washington as well as around the country.

The availability of a defense of necessity sought where the goal was to pursue a political process where other legal alternatives are available is a significant question of law under the Constitution of the State of Washington or the United States or an issue of substantial public interest that should be determined by Supreme Court under RAP 13.4(b)(3) and (4).

VI. CONCLUSION

For the reasons set forth in this petition, this Court should accept review and reverse the Court of Appeals opinion which provided for the defense of necessity.

Respectfully submitted this 8th day of May, 2019

By: 

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DECLARATION OF DELIVERY

I, _Karen R. Wallace declare as follows:

I sent for delivery by; [X] United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Ralph Hurvitz, addressed as Attorney at Law, P. O. Box 2542, Seattle, WA 98165-11421300; and to Lauren Regan, addressed as Civil Liberties Defense Center, 783 Grant Street, Suite 200, Eugene, OR 97402 and electronically to: ralph@hurvitz.com and lregan@cldc.org. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this __8th_ day of May, 2019.

Karen R Wallace

DECLARANT

APPENDIX A

FILED
4/8/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KENNETH A. WARD, Petitioner.	)	No. 77044-6-I DIVISION ONE PUBLISHED OPINION FILED: April 8, 2019

MANN, A.C.J. — Washington recognizes a common law necessity defense. The defense may be raised when a defendant demonstrates that they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, the harm sought to be avoided was greater than the harm resulting from a violation of the law, the threatened harm was not brought about by the defendant, and no reasonable legal alternative existed.

Kenneth Ward appeals his conviction for burglary in the second degree after he broke into a Kinder Morgan pipeline facility and turned off a valve, which stopped the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties. Ward intended to protest the continued use of tar sands oil, which he contends significantly

contributes to climate change, and the inaction by governments to meaningfully address the crisis of climate change. Ward argues that he was deprived of his Sixth Amendment right to present his only defense—necessity—after the trial court granted the State's motion in limine excluding all testimony and evidence of necessity.[1] We agree and reverse.

I.

Kinder Morgan transports tar sands oil from Canada into the United States by pipeline. On October 11, 2016, Kinder Morgan was notified by telephone that persons "would be closing a valve, one of our main line valves in the Mount Vernon area within the next 15 minutes." Following the call, Ward cut off a padlock and entered the Kinder Morgan pipeline facility off of Peterson Road in Burlington. Ward then closed a valve on the Trans-Mountain pipeline and placed sunflowers on the valve. At the same time, other protesters closed similar valves in North Dakota, Montana, and Minnesota. Collectively, the protests temporarily stopped the flow of Canadian tar sands oil from entering into the United States.

Ward was arrested at the pipeline facility and charged with burglary in the second degree, criminal sabotage, and criminal trespass in the second degree. Ward admitted his conduct but argued that his actions were protected under a necessity defense. The trial court granted the State's pretrial motion in limine to preclude all witnesses and evidence offered in support of Ward's necessity defense.

[1] Ward also argues that the trial court erred in refusing to instruct the jury on a necessity defense. Because we conclude that the trial court violated Ward's constitutional right to present a defense, we reverse and remand for a new trial. Therefore, we do not address whether the trial court also erred in rejecting Ward's jury instruction.

Ward's first trial ended with a hung jury. The State then recharged Ward with burglary in the second degree and criminal sabotage. Ward moved for reconsideration of the trial court's order granting the State's motion in limine. In support of his motion, Ward offered argument, the curriculum vitae for eight proposed expert witnesses, and voluminous scientific evidence documenting the impacts of climate change, that climate change is primarily caused by greenhouse gas emissions resulting from human activity, and the contribution of burning tar sands oil. The trial court denied Ward's motion for reconsideration and excluded all testimony and evidence in support of Ward's necessity defense. A second jury found Ward guilty of burglary but were unable to return a verdict on criminal sabotage. Ward appeals.

II.

Ward argues that the trial court denied his constitutional right to present a defense by granting the State's motion in limine striking all testimony and evidence of necessity. We agree.

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); State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015). Since Ward argued that his Sixth Amendment right to present a defense has been violated, we review his claim de novo.[2]

The Sixth Amendment to the United States Constitution and article 1, sections 21 and 22 of the Washington Constitution guarantee a defendant the right to trial by jury

[2] This is in sharp contrast with the abuse of discretion standard for reviewing a trial court's refusal to give a jury instruction. If, for example, the trial court here had allowed Ward to introduce evidence supporting his necessity defense, but then refused, based on that evidence, to instruct the jury on necessity, we would review for abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

and to defend against criminal allegations. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038 35 L. Ed. 2d 297 (1973). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." Jones, 168 Wn.2d at 720.

> The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness. '[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'

Lizarraga, 191 Wn. App. at 552 (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

This right is not absolute. "The defendant's right to present a defense is subject to established rules of procedure and evidence." Lizarraga, 191 Wn. App. at 533 (internal citation omitted). A defendant does not have a constitutional right to present irrelevant evidence. Jones, 168 Wn.2d at 720. "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. "The State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." Darden, 145 Wn.2d at 622.

Below, the trial court prohibited Ward from presenting evidence or witnesses on the necessity defense. If Ward submitted a sufficient quantum of evidence to show that he would likely be able to meet each element of the necessity defense, then the trial court's exclusion of evidence in support of his sole defense violated Ward's constitutional rights.

III.

"[A]n act is justified if it by necessity is taken in a reasonable belief that the harm or evil to be prevented by the act is greater than the harm caused by violating the criminal statute." State v. Aver, 109 Wn.2d 303, 311, 745 P.2d 470 (1987). Necessity is available when "the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law . . . [but not where] a legal alternative is available to the accused." State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994) (citing State v. Diana, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979)).

To successfully raise the necessity defense the defendant must prove, by a preponderance of the evidence, that: (1) they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed. Gallegos, 73 Wn. App. at 650; See also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016) (WPIC).

The State argues that Ward's offer of proof failed to establish the elements of the necessity defense. A challenge to the sufficiency of evidence "admits the truth thereof and all inferences that can reasonably be drawn therefrom." State v. Cole, 74 Wn. App. 571, 578, 874 P.2d 878 (1994). "It requires the trial court and appellate courts to interpret the evidence most favorably for the defendant." Cole, 74 Wn. App. at 578-79. In this light, we review Ward's offer of proof as to each element of the necessity defense.

A.

Ward presented sufficient evidence that he reasonably believed the crimes he committed were necessary to minimize the harms that he perceived. Ward's offer of proof included evidence of how past acts of civil disobedience have been successful, evidence of previous climate activism campaigns, and evidence of his own personal successes in effectuating change through civil disobedience. Specifically, Ward offered evidence that he has been working with environmental issues for more than 40 years but that the majority of his efforts failed to achieve effective results. Ward asserted that because of these failures he "came to understand that the issue of climate change would require other than incremental change" and that "direct action was necessary to accomplish these goals." Ward offered three experts—Eric de Place, Bill McKibben, and Martin Gilens—who were prepared to testify as to the efficacy of civil disobedience and how such actions have become necessary in the climate movement. Ward argued that to decide whether his actions were "reasonably calculated to be effective in averting the imminent harm of climate change requires [the] expert testimony and evidence" that

he was prepared to present to the jury, and that whether his beliefs were reasonable was a question for the jury, not the trial court, to decide.

The State argues that it was unreasonable for Ward to believe that the commission of this crime was necessary to avoid or minimize harm. The State asserts, first, that all Ward did was temporarily inconvenience Kinder Morgan's employees so it was unreasonable to think that his actions would actually avoid or minimize the broader harms associated with climate change. And second, that because Ward had legal alternatives available it was unreasonable for him to believe that his actions were necessary to avoid or minimize harm.

Whether Ward's beliefs were reasonable was a question for the jury. See State v. Negrin, 37 Wn. App. 516, 524, 681 P.2d 516 (1984) ("It is the province of the jury to determine such issues" as whether the defendant acted with reasonable grounds.). And further, Ward did not have to prove that the harm he sought to avoid or minimize was actually avoided or minimized but instead that the reason he broke the law was in an attempt to avoid or minimize harm. Gallegos, 73 Wn. App. at 650 (describing the second prong as "the harm sought to be avoided [, not the harm actually avoided,] was greater than the harm resulting from a violation of the law."). Ward's past successes in effectuating change through civil disobedience in conjunction with the proposed expert witnesses and testimony about Ward's beliefs were sufficient evidence to persuade a fair minded, rational juror that Ward's beliefs were reasonable.

B.

Ward also offered sufficient evidence to show that the harms of global climate change were greater than the harm of breaking into Kinder Morgan's property. Ward

asserted that the extent of the harm resulting from his actions were the loss of a few locks and the temporary inconvenience to Kinder Morgan's employees. Compared to this, Ward introduced "voluminous scientific evidence of the harms of climate change." This evidence included information establishing climate change is real and detrimentally effecting Washington, and that tar sands oil poses a specifically acute threat to our environment. Further, Ward offered to present testimony from climate scientists, Drs. James Hansen, Richard Gammon, and Celia Bitz, supporting his defense.

C.

Whether the harms of global climate change was brought about by Ward was not an issue in this case. Nevertheless, Ward proffered evidence and expert testimony establishing the harms associated with global climate change and the root causes of global climate change.

D.

Ward also offered sufficient evidence to create a question of fact on whether there were reasonable legal alternatives. Ward argued that the window for action on climate change has narrowed to the point that immediate, emergency action is necessary. Ward offered evidence of his more than 40 years being involved in various environmental movements, the numerous attempts he has made to address climate change, and how most of those efforts have failed. Ward additionally offered proposed testimony by pipeline industry expert Eric de Place, professor and climate campaigner Bill McKibben, and professor of political science Martin Gilens, to the effect that the fossil fuel industry's influence over political institutions renders traditional legal avenues unreasonable as a means of addressing the climate emergency.

State v. Parker, 127 Wn. App. 352, 353, 111 P.3d 1152 (2005), discussed the "no reasonable alternative" element. Parker was charged with felon in possession of a gun. Parker claimed that he carried the gun because he had been shot the previous July and his assailants were still at large. Division Two of this court held that in order to show he had no reasonable alternative, Parker has to demonstrate "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.

Here, in contrast with Parker, Ward offered evidence that he had tried the alternatives and they were unsuccessful. Whether Ward's evidence was sufficient to establish that his history of failed attempts to address climate change revealed the futility of supposed reasonable alternatives was a question for the jury. Viewed in the light most favorable to Ward, and admitting the truth of his evidence and all reasonable inferences therefrom, Ward's offer of proof created a question for the jury. Cole, 74 Wn. App. at 578-79.

Because Ward met his initial burden of showing that he would likely be able to submit a sufficient quantum of evidence on each element of necessity to make it a jury question whether he established that element beyond a reasonable doubt, the trial court violated his constitutional right by granting the State's motion in limine.

IV.

The State argues that the necessity defense is unavailable when the real purpose is to advertise a political debate. We agree with the State that if Ward's true intent was to induce jury nullification, then the trial court would not have erred in

prohibiting Ward's evidence. Therefore, in order to determine if the trial court erred we must also determine what Ward's purpose was in offering his evidence.

"Jury nullification occurs in a trial when a jury acquits a defendant, even though the members of the jury believe the defendant to be guilty of the charges." State v. Nichols, 185 Wn. App. 298, 301, 341 P.3d 1013 (2014). But the jury's power of nullification does not stem from any legal right. State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005). Rather, the power of nullification is rooted in courts' unwillingness to inquire into deliberations because jurors can agree to acquit on virtually any basis without court knowledge. See State v. Elmore, 155 Wn.2d 758, 771, 773-74, 123 P.3d 72 (2005). Nevertheless, Washington courts have concluded that a trial court does not err by instructing the jury that it has a duty to convict, rather than that it may convict, if it finds all of the elements of the crime charged beyond a reasonable doubt. See, e.g., State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), abrogated on other grounds, State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

A trial court does not abuse its discretion if it prohibits a party from introducing evidence solely intended to induce jury nullification. If here, for example, Ward's actions were purely symbolic—if they had no ability to actually avoid or minimize the harms he perceived—then his proffered evidence would have been aimed not at proving necessity but instead at inducing jury nullification. In such a situation, the trial court would not have erred in prohibiting such evidence. If, however, Ward's actions were not purely symbolic—if they had some ability to actually avoid or minimize his perceived harms—then the evidence he offered would not have been aimed at inducing jury nullification and the trial court would have erred in prohibiting it. When civil

disobedience and the necessity defense intersect, it is the intent of the protester, not the effectiveness of the protest, that is of the utmost relevance.

Here, in order to determine the intent behind Ward's actions, we must first determine what specific harm his protest was intended to avoid. If Ward was protesting global warming as a whole, then the impact of his action would be so infinitesimal that we would be unable to conclude anything other than that his actions were symbolic in nature. If, however, Ward was protesting more than climate change as a whole—if the harm he was attempting to alleviate was, for example, the danger of Canadian tar sands oil specifically or the danger that global warming poses to Washington—then we could conclude that his actions were actually intended to have an impact on the harm that he sought to avoid.

Below, Ward phrased the harm that he sought to avoid as more than just global climate change. Ward asserted that the harm he was attempting to avoid was threefold: (1) global climate change, generally, has the potential to destroy our way of life, (2) Canadian tar sands oil is a uniquely potent contributor to climate change, and (3) the localized impacts of climate change on Washington has the potential to be debilitating.

Ward argued that "tar sands oil represent[s] an elevated level of risk to global climate[,]" and that he felt he needed to act "in order to stop the advance of global warming, encompassing both current and projected warming in Washington state, ocean acidification, and impacts on local ecosystems and residents." Further, Ward argued that his "temporary shut-down of tar sands oil flowing through the Trans-Mountain Pipeline certainly minimized the harm flowing from that quantum's contribution

to climate change . . . and from the use of tar sands in particular." Ward also introduced exhibits about the danger that sea level rise poses to Washington.

Based on the specific harms that Ward asserted he was trying to avoid, his actions were not merely symbolic. The protesters' intent was to physically stop the flow of Canadian tar sands oil into the United States. Because one of the specific harm Ward asserted was that Canadian tar sands oil is a particularly potent contributor to climate change, the protest was not a purely symbolic act. It was a direct way of preventing a uniquely potent contributor to climate change from entering the United States.[3]

Because the harms that Ward asserted he was trying to alleviate were more than just climate change, generally, but also included both the specific dangers of Canadian tar sands oil and the impacts of sea level rise on Washington, Ward's actions were not intended to be merely symbolic in nature. As such, the evidence he planned to introduce was not solely aimed at inducing jury nullification and the trial court erred in preventing Ward from introducing evidence in support of his necessity defense.

V.

The violation of a defendant's constitutional right is presumed to be prejudicial, but may be harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Jones, 168 Wn.2d at 724. "Such a determination is made from an examination of the record from

[3] And this type of action appears to be somewhat of Ward's forte. In the past, Ward has physically placed himself in the way of what he perceived as serious threats to the environment, such as a coal transport ship, in an effort to stop those threats from causing harm.

which it must affirmatively appear the error is harmless." State v. Stephens, 93 Wn.2d 186, 191, 607 P.2d 304 (1980).

The closest question in this matter is whether Ward admitted that he had available reasonable legal alternatives. If he did, it would indicate that the trial court's error was harmless. The State points to Ward's testimony at trial concerning his legal alternatives.

> [Plaintiff's counsel]: What was your intent in shutting off that safety value on the 11th?
>
> [Ward]: To stop the flow of tar sands oil running through that pipeline.
>
> [Plaintiff's counsel]: Why were you attempting to do that?
>
> [Ward]: I was attempting to take the most effective measure that I could think of to address this problem to avoid cataclysmic climate change.
>
> [Plaintiff's counsel]: Did you believe that there was anything left to do that may have been legal that could have addressed the issue?
>
> . . . .
>
> [Ward]: I think that there are legal steps that can be taken, and I continue to take those. But I think that alone they are insufficient.
>
> [Plaintiff's counsel]: What are the other steps that you continue to participate in?
>
> [Ward]: Well, I'm engaged in efforts in my own state, which has been quite successful. The City of Portland has just announced a plan to shift to 100 percent renewable energy, and I supported that. I am engaged in general public education. And I am increasingly looking at ways to support candidates for office who endorse a significant plan of action on climate change.

When viewed in its entirety, Ward's testimony indicates that Ward was addressing the ineffectiveness of his alternatives and was not admitting that he had reasonable legal alternatives available to him. Moreover, if the jury was allowed to hear Ward's testimony in conjunction with the excluded expert testimony, it could well have concluded that Ward's available legal alternatives were futile. The error was not harmless.

We reverse and remand.

Mann, ACJ

WE CONCUR:

Smith, J.

Dwyer, J.

SKAGIT COUNTY PROSECUTOR

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