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No. 64364-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE WALTERS, Jr.,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

During an argument with Charles Chappelle, Deche Washington displayed and fired a shotgun, endangering both Chappelle and his friend Johnnie Walters, Jr. Walters fired a handgun at Washington to protect himself and Chappelle, injuring Washington. The State convicted Walters of first degree assault on the theory that, while Walters initially acted in self-defense by shooting Washington, continuing to fire after Washington was hit was unlawful.

On appeal, Walters argues his conviction for first degree assault must be reversed and dismissed because the State did not prove beyond a reasonable doubt that he did not act in self-defense because a reasonable person in Walters' position would not know Washington was injured or no longer armed. Walters also argues the trial court erred by refusing to instruct the jury on the necessity defense to unlawful possession of a firearm.

B. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Johnnie Walters did not act in lawful defense of himself or another as required to convict Walters of first degree assault.

2. The State did not prove beyond a reasonable doubt that Walters acted with intent to inflict great bodily harm as required to convict him of first degree assault.

3. The trial court erred by refusing to give Walters' proposed jury instruction on the defense of necessity for the crime of unlawful possession of a firearm.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Walters of assault in the first degree, the State was required to prove every element of the crime beyond a reasonable doubt and to also prove beyond a reasonable doubt that he did not act in self-defense. Walters shot several times at the alleged victim in defense of himself and another man, and a reasonable person in Walters' shoes would not have known that the need to protect himself and his friend was over. Viewing the evidence in the light most favorable to the State, must Walters' conviction be reversed because the State did not prove the absence of self-defense beyond a reasonable doubt.

2. To convict Walters of assault in the first degree, the State was required to prove every element of the crime beyond a reasonable doubt, including the element that Walters acted with intent to inflict great bodily harm. Walters had no animosity towards

Washington and fired slightly over the man's head. Viewing the evidence in the light most favorable to the State, must Walters' conviction for assault in the first degree be dismissed in the absence of proof of intent to inflict great bodily harm?

3. The federal and state constitutions protect the right of an individual to use a weapon in self-defense. Walters had a prior felony conviction and was not permitted to possess a firearm, but even a convicted felon may possess a firearm when necessary to protect himself or another person. Must Walters' conviction for unlawful possession of a weapon in the first degree be reversed because the trial court refused to instruct the jury on the justification defense?

D. STATEMENT OF THE CASE

Detra Harris and her friend Trenique Crowder drove Deche Washington to a Union 76 station in Seattle on the evening of June 23, 2007. 1RP 120-21.¹ Harris took Washington to the gas station because he was upset about something, not because any of them wanted to buy anything at the gas station, and she backed the car

¹ The verbatim report of proceedings contains five volumes of transcripts covering several different dates. Walters' jury trial and sentencing hearing are in two multi-date volumes referred to as:

1RP – August 17 and August 18, 2009

2RP – August 19, August 25, and October 8, 2009.

in at the air and vacuum area and the three got out. 1RP 121, 153-54; Ex. 105, #3 at 10:18:36.² Harris claimed she did not notice the shotgun Washington apparently placed in her front seat. 1RP 154-55.

Johnnie Walters, Jr. and Charles Chappelle were at the gas station purchasing gas. Ex. 105, #1 at 10:16:51. Chappelle and Washington started arguing near the gas pumps and then began moving around each other with their fists raised, as if they were going to fight. 1RP 123, 129; Ex. 105, #2 at 10:19:00-10:21:00.

Harris and Walters stood near each other in the vicinity of the gas pumps watching Washington and Chappelle. 1RP 130. Harris asked Walters why the two were fighting, and Walters said he did not know, as he thought the men were friends. 1RP 130, 156. Walters did not say anything derogatory about either man, but Harris claimed that she could see that Walters had a gun inside his coat. 1RP 130-31, 156-57.

² Exhibit 105 is a CD with footage from three surveillance cameras at the Union 76 station. In this brief, #1 refers to the camera entitled "7-Pumps;" #2 refers to the camera entitled "8-Dome," and #3 refers the camera named "9-Air/Water." The times on the cameras are one hour late. 2RP 66.

The man in the video wearing a white tank-top is Chappelle; Walters is wearing a dark jacket and white shoes; Washington has the shotgun. 1RP 128-29, 136; 2RP 63. The woman seen near the fight is Crowder, not Harris. 1RP 136.

Washington broke away from Chappelle, returned to Harris's car, and pulled out a shotgun. 1RP 132; Ex. 105, #3 at 10:20:47 and at 10:20:53-10:21:05. Chappelle was running away as Washington walked rapidly towards him with the shotgun. 1RP 132; Ex. 105, #1 at 10:21:08-10:21:20. Washington fired the shotgun at least once.³ In Exhibit 105, it appears that while he was near the gas pump Washington fired at Chappelle and pointed the shotgun at Walters as he lost his balance; the shotgun may have gone off again as Washington fell. Ex. 105, #1 at 10:21:19-10:21:22. Harris, however, claimed Washington fired in the air. 1RP 132.

After Washington fired the shotgun, Walters fired a handgun in the direction of Washington in order to protect himself and Chappelle, who was trying to escape. 1RP 132; 2RP 62-63, 65; Ex. 105, #1 at 10:21:28-10:21:33; Ex. 105, #2 at 10:21:27-10:21:30; Ex. 130 at 3-4. Washington stopped, stumbled in the other direction, and dropped the shotgun. 1RP 138; Ex. 105, #2 at 10:21:20-10:21:28. He then ran away in a zigzag pattern and rapidly crossed Rainier Avenue. 1RP 132, 138-39. Harris and Crowder got into Harris's car and picked up Washington across the

³ Walters told the police Washington fired the shotgun two times, but Harris only mentioned him firing once. Ex. 130 at 3-4; 1RP 137.

street. 1RP 132-33; Ex. 105, #3 at 10:21:30-10:21:35. Harris realized Washington was in bad condition because the women had to pull him into the car, and Crowder noticed blood on Washington's clothing. 1RP 141-44.

Walters and Chappelle quickly left the area in Walters' car. Ex. 105, #1 at 10:21:36-10:21:50. Harris said Walters' car followed her car for about a half-block as she drove quickly to Harborview Hospital. 1RP 143-44.

Walters was charged with assault in the first degree with a firearm, with an added firearm enhancement, and with unlawful possession of a firearm. CP 1-2. At a jury trial before the Honorable Helen Halpert, the State conceded that Walters acted in self-defense when he initially shot at Washington, and the jury learned Washington was in prison for the assault on Chappelle. 1RP 15; 2RP 29-30, 68-69. The State hypothesized that Washington was hit when he stumbled and dropped his shotgun, and argued Walters then committed an assault by continuing to shoot after that point. 1RP 11-12, 15; 2RP 122-23 ("Where the crime kicks in, where the defendant made his choice was when Deche Washington drops that shotgun and is hit.").

The State's case rested largely on footage from the gas station's surveillance cameras, Exhibit 105, and evidence located by Seattle Police detectives who documented the crime scene. The crime scene investigators found the loaded Winchester 12-gauge shotgun with a sawed-off grip stock on the ground between the gas pumps. 1RP 50, 88-89; 2RP 73-74; Ex. 51-52. They located a fired shotgun shell casing near one of the pump stations and a shotgun shell was nearby. 1RP 57-59, 74-75. The police also found pieces of 15 fired cartridge casings and two bullet fragments in the gas station and a possible bullet hole in one of the gas pumps. 1RP 79, 86-87, 90-91; 2RP 46.

Harborview surgeon Ellen Bulger reported that Washington was seriously injured with a single gunshot wound to his left groin area. 2RP 87-88. The surgeons successfully operated on his femoral artery and vein. 2RP 86.

Harris was the only eyewitness called to testify. Harris had spoken to the investigating detective, Shandy Cobane, while Washington was being treated at Harborview. 1RP 146-47. Harris was not honest with the police, as she was afraid she might

incriminate Washington or even herself.⁴ 1RP 146-47, 148-50, 157-59. Harris claimed, however, that Detective Cobane was not being particularly intimidating when he shouted for her and threatened to put her in handcuffs.⁵ 1RP 147-48.

Cobane also interviewed Walters and showed him the gas station surveillance footage. 2RP 62. Walters identified himself as the person in the footage with the handgun and explained that he acted in self-defense. 2RP 65; Ex. 130.

Walters was convicted as charged and received a 198-month sentence. CP 48-53, 63. He appeals. CP 69-78.

E. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WALTERS COMMITTED ASSAULT IN THE FIRST DEGREE

Johnnie Walters was present when his friend Charles Chappelle and Deche Washington started to fight, and Walters saw Washington fire a shotgun and walk directly and quickly towards the fleeing Chappelle. Walters fired a handgun to protect

⁴ For example, Harris did not tell the police about Washington's shotgun and reported Walters shot first. 1RP 147.

⁵ Detective Cobane's tactics in threatening witnesses and using derogatory racial comments have met with less tolerance among other members of the Seattle community, and he is currently under investigation for his behavior in a recent incident. www.kirotv.com/news/24161309/detail.html (7/6/10); www.kirotv.com/news/23479966/detail.html (5/7/10).

Chappelle and himself, and a reasonable person in Walters' shoes would not know that Washington had been seriously injured or if he was armed or running towards an additional weapon. The State thus did not prove beyond a reasonable doubt that Walters did not act in defense of himself or another, and Walters' conviction for first degree assault must be reversed and dismissed.

a. The State was required to prove every element of assault in the first degree beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.⁶ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime

⁶ The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article I, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article I, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). The appellate court draws all reasonable inferences in favor of the State. Elmi, 166 Wn.2d at 215.

Mr. Walters was convicted of assault in the first degree; CP 1, 31, 49. The first degree assault statute reads in relevant part:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;

...
(2) Assault in the first degree is a class A felony.

RCW 9A.36.011. The elements of first degree assault as charged in this case thus are (1) an assault (2) on another person (3) with a firearm (4) done with the intent to inflict great bodily harm. RCW 9A.36.011; CP 31 (Instruction 5); Elmi, 166 Wn.2d at 214-15.

Moreover, a claim of self-defense negates the mental element of intent necessary to establish assault. State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). RCW 9A.16.020 provides that the use of force is lawful if the force is used in defense of oneself or another.

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . .

Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary. . .

RCW 9A.16.020(3). In addition to the elements of the crime, the State is required to prove beyond a reasonable doubt that the defendant did not act in defense of himself or another. Acosta, 101 Wn.2d at 619.

By definition, an assault requires the use of unlawful force. Since the use of force in self-defense is lawful, self-defense negates an element of assault. Consequently, where there is any evidence of self-defense, the state bears the burden of proving that the defendant did not act in self-defense.

Seth A. Fine and Douglas J. Ende, 13A Washington Practice: Criminal Law § 307 at 47 (2nd ed. 1998).

Assault is not defined in the criminal code, and Washington courts therefore rely upon its common law definition. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). In this case, the State acknowledged Walters initially shot Washington in self-defense, but that his act of shooting in the direction of Washington

after he was shot was not in self-defense. The jury was therefore instructed as to only one of the common law definitions of assault, attempted battery. CP 32 (Instruction 6); Wilson, 125 Wn.2d at 218 (“an attempt, with unlawful force, to inflict bodily injury on another”) (quoting State v. Bland, 71 Wn.App. 345, 353, 860 P.2d 1046 (1993)).

b. The State did not disprove that Walters did not act in defense of himself or of Chappelle. “A self-defense claim is ‘predicated upon the right of every citizen to reasonably defend himself against unwarranted attack.’” State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (quoting Whipple v. State, 523 N.E.2d 1363, 1366 (Ind. 1988)). The jury was instructed that Walters was permitted to act in defense of himself or another person if (1) he reasonably believed he or another person were about to be injured by Washington and (2) Walters did not use more force than was necessary to prevent the assault. CP 36 (Instruction 10). In making this determination, the jury was to consider the conditions as they appeared to the defendant at the time of the incident. Janes, 121 Wn.2d at 128; State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984); State v. Warrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977); CP 36-38.

Washington armed himself with a shotgun and two friends drove him to the gas station on Rainer and Graham, where he found Mr. Chappelle and Mr. Walters. 1RP 120. Washington and Chappelle circled each other as if they were going to fistfight, but Washington retreated to his friend's car and emerged with a shotgun. 1RP 122-23, 132. Washington then fired the shotgun at least one time and walked rapidly toward Chappelle and Walters. After Washington fired the shotgun, Walters fired at Washington with a handgun. 1RP 132.

The State asserted that Walters was initially acting in defense of himself but was guilty of assault because he continued to fire after Washington stumbled and dropped his shotgun. The State claimed Walters' use of force was no longer lawful because (1) Walters should have known that he and Chappelle were no longer in danger, (2) reasonable alternatives to the use of force existed, and (3) the force Walters used was not reasonable. 2RP 127-36. These contentions, however, were not proved beyond a reasonable doubt.

The incident in question lasted less than three minutes and was obviously very frightening to all involved. Ex. 105; 1RP 157-58 (Harris excused her false statements to the detective because the

incident happened so fast and was so traumatic). Walters did not have the same opportunity the prosecutor did to review surveillance tapes before acting. Moreover, in Washington a person may act in reasonable belief he is in imminent danger even if he has not been assaulted. Janes, 121 Wn.2d at 241-42. "Imminence does not require an actual assault. A threat, or its equivalent, can support self-defense if there is a reasonable belief that the threat will be carried out." Id. at 241 (internal citations omitted).

The only eyewitness to testify, Harris, was unaware that Washington was hit, let alone seriously injured, until Washington was in her car. 1RP 137, 142-43; 2RP 8. Moreover, Washington ran "really fast" away from the gas station. 1RP 139. Like Harris, a reasonable person in Walters' position would not know that Washington was injured and therefore less of a threat.

Additionally, just because a man has been hit in the groin does not mean he cannot fire a weapon. A reasonable person in Walters' shoes would not know how many weapons Washington had grabbed and if he had another weapon that he could use to shoot at Chappelle. Washington easily could have hidden a handgun in his clothing but utilized the shotgun because of its formidable appearance and sound. 2RP 74; Ex. 51-52. A

reasonable person also may not be expected to wait for Washington to go to his car and obtain another weapon, as Walters and Chappelle had nowhere to hide near the gas pumps.⁷ Given the stress and fear of the situation, Walters may not have even known that Washington was no longer holding the shotgun. Thus, the State did not establish beyond a reasonable doubt that Walters did not reasonably believe he was preventing Washington from shooting Chappelle throughout the entire incident.

To prevail in a defense of others claim, the defendant may not use more force than is necessary, given the circumstances known to the defendant. CP 37 (Instruction 11). Washington is the person who began the incident by pointing and firing a shotgun. Walters could hardly defend against the shotgun without using a weapon himself. He was thus reasonable in firing a handgun in order to prevent an assault on Chappelle and to protect himself.

Additionally, to assert self defense the defendant must have no effective alternative to the use of force. CP 37. The prosecutor argued that Walters could have picked up the shotgun, yelled at Washington, or driven away. Again, the prosecutor assumed that Walters had the information the prosecutor had – that Washington

⁷ There was fencing around the entire gas station. 1RP 71.

was severely injured and did not have another weapon. The State's argument also assumes Walters was required to go to his car and leave. Not only would this action fail to protect Chappelle, it was not legally required, as Walters was under no duty to retreat from a business establishment where he, unlike Washington, was a paying customer. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); Allery, 101 Wn.2d at 598; CP 38 (Instruction 12).

Unlike the jury, Walters had no way to know that Washington had been hit and injured and was not armed and able to harm Chappelle. From Walters' perspective, Washington was still fully capable of continuing his assault on Chappelle. Given the circumstances as they appeared in those brief seconds, a reasonable person in Walters' shoes would have used a firearm to protect Chappelle and himself from Washington. The State did not disprove defense of others beyond a reasonable doubt.

c. The State did not prove beyond a reasonable doubt that Walters acted with the intent to commit great bodily harm. A person acts intentionally when he acts with the purpose of accomplishing a result that constitutes a crime. RCW 9A.08.010(1)(a). "Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that

produces the result.” Elmi, 166 Wn.2d at 215. Thus, the trier of fact may look at the manner of committing the assault as well as the prior relationship between the parties. Id.

Specific intent cannot be presumed, but it may be inferred “as a logical probability from all the facts and circumstances.” Wilson, 125 Wn.2d at 217. This includes the manner of inflicting the injury as well as the nature of the relationship between the parties and any prior threats. Id.

Here, the evidence, viewed in the light most favorable to the State, does not establish Walters’ intent to inflict great bodily harm. Walters fired a gun several times after Washington fell, but Walters did not hit or injure Washington. The surveillance tapes from the gas station show Walters firing slightly over a person’s head, thus the manner in which Walters used the weapon does not lead to the conclusion that he acted with intent to inflict great bodily harm.

In addition, the relationship between Walters and Washington does not support intent to inflict great bodily harm. Walters did not know why Washington and Chappelle were fighting and believed that the two men were friends. 1RP 130, 156. Walters did not express any animosity towards Washington, who he described as “somewhat of an acquaintance.” Ex. 130 at 3; 1RP

156-57. Thus, the facts of the case do not demonstrate Walters had the specific intent to commit great bodily harm.

d. Mr. Walters' conviction for first degree assault must be reversed and dismissed. A conviction for first degree assault cannot stand if the State does not prove beyond a reasonable doubt that the defendant did not act in self-defense. Walters fired at Washington only in an attempt to defend himself and Chappelle from being shot by Washington.

In addition, the State was required to prove beyond a reasonable doubt that Walters intended to inflict great bodily harm. State v. Ferreira, 69 Wn.App. 465, 469, 850 P.2d 541 (1993).

Walters fired towards Washington, but slightly above his head, and the relationship between the parties does not demonstrate Walters acted with the intent to inflict great bodily injury. His conviction for assault in the first degree must be reversed and dismissed.

2. THE TRIAL COURT'S REFUSAL TO GIVE
WALTERS' PROPOSED NECESSITY DEFENSE
INSTRUCTION VIOLATED HIS CONSTITUTIONAL
RIGHT TO PRESENT HIS DEFENSE

While a person with felony a conviction is legally prohibited from possessing a firearm, he does have the right to use a firearm if necessary to defend himself or another person. The trial court

denied Walters' request for a jury instruction explaining the defense of necessity to the unlawful possession of a firearm charge.

Walters, however, was acting in defense of himself and Chappelle, and the court's ruling violated Walters' constitutional right to present his defense. His conviction for unlawful possession of a firearm in the first degree must be reversed and remanded for a new trial.

a. The accused is entitled to have the jury instructed on his theory of the case. The federal and state constitutions provide the accused the right to present a defense.⁸ U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "Whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)).

⁸ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

In order to honor this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the trial court's failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1062 (1997). If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his theory of the case. Redmond, 150 Wn.2d at 493.

“[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). When a defendant raises an affirmative defense, such as necessity, he is entitled to have the jury instructed as to the defense if he produces sufficient admissible evidence to support the instruction. State v. Ginn, 128 Wn.App. 872, 878-79, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006). In evaluating whether the evidence is sufficient to support a jury instruction, the court must “interpret the evidence most strongly in favor of the defendant” as it is the job of the jury, not the court, to weigh the evidence and evaluate witness credibility. Id. at 879.

This Court reviews a trial court's decision not to give a defendant's proposed instruction de novo if the refusal is based on a ruling of law, but reviews for an abuse of discretion if the decision is based upon factual reasons. State v. White, 137 Wn.App. 227, 230, 152 P.3d 364 (2007). A denial of the right to present a defense, however, is reviewed under the constitutional harmless error rule. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The State must demonstrate a constitutional error is harmless beyond a reasonable doubt. Id.

b. Walters requested the court instruct the jury on necessity.

Walters asked that the jury be instructed on the defense of necessity to the crime of unlawful possession of a firearm in the second degree, and excepted to the court's failure to give a necessity instruction. 2RP 110-11, 116. He argued that necessity is a valid defense to unlawful possession of a firearm and that the evidence supported the giving of the instruction. 2RP 110-11.

The trial court refused to give a necessity instruction, finding the case was similar to State v. Jeffrey, 77 Wn.App. 222, 889 P.2d 956 (1995). 2RP 112-13. Looking at the surveillance tapes of the incident, the court found "there is just no evidence that [Walters]

was not in possession of the gun before the incident – before the shooting arose from Mr. Washington.” 2RP 113.

When the prosecutor later told the jury the State did not have to prove that Walters had the gun before he arrived at the gas station, the court called for a sidebar and required the deputy prosecutor to clarify that the jury had to find Walters possessed the firearm before the incident began. 2RP 171-72, 174. The court explained her ruling on the instruction was based upon her understanding “that there really was no question at all that Mr. Walters had that gun when he got out of the car.” 2RP 174. Walters later moved for a new trial based upon this error, but the motion was denied. CP 57-58; 2RP 178-79.

While the instruction proposed by Walters is not in the record, the parties all understood what law would be explained in a necessity instruction. Walters may have proposed the pattern instruction on necessity, WPIC 18.02, which reads:

Necessity is a defense to the charge of (fill in appropriate offense) if

(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

(2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and

(3) the threatened harm was not brought about by the defendant; and

(4) no reasonable legal alternative existed.

This defense must be established 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].

11A Washington Practice: Washington Pattern Jury Instructions Criminal, 18.02 (3rd ed.) (WPIC).

The “reasonable legal alternative” requirement is based upon Jeffrey, 77 Wn.App. at 224-26. WPIC 18.02, Note on Use. In Jeffrey, the defendant proposed the following instruction:

It is a defense to the charge of unlawful possession of a short firearm or pistol that the unlawful possession was necessary under the circumstances.

Unlawful possession of a short firearm or pistol is necessary when all of the following elements are present:

1. The Defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and

2. The Defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
3. The defendant had no reasonable alternative; and
4. There was a direct causal relationship between the criminal action and avoidance of the threatened harm.

This defense must be established 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.

Jeffrey, 77 Wn.App. at 224. The instruction was based upon United States v. Lemmon, 824 F.2d 763 (9th Cir. 1987). The test is now utilized in some form in all federal circuits that have addressed whether the defense of “justification” is available for a possession of a firearm offense. United States v. Alston, 526 F.3d 91, 94 n.4, 95 (3rd Cir. 2008) (and cases cited therein); United States v. Gomez, 92 F.3d 770, 774-75 (9th Cir. 1996); see United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) (“We do not believe Congress intended to make ex-felons helpless targets for assassins.”).

c. The trial court erred by refusing to instruct the jury on the defense of necessity because Walters acted in defense of himself or another. Necessity is a common law defense that excuses

otherwise criminal conduct when it is necessary to avoid a greater harm. Jeffrey, 77 Wn.App. at 224; Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. 1527 (2005).

The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. at 1727-28. The necessity defense is a long-standing component of the Anglo-American criminal law that has been adopted in every American jurisdiction. Id. at 1532-33, 1535-36; Laura Schulkind, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L.Rev. 79, 83 (1989).

Moreover, both the federal and the state constitutions guarantee citizens the right to bear arms. U.S. Const. amends. II, XIV; Const. art. I, § 24.⁹ Article I, section 24 of Washington's Constitution provides, in pertinent part, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . ." The right to arm oneself in self-defense has been

⁹ The Second Amendment applies to the states through the Fourteenth Amendment. McDonald, 2010 WL 2555188 at * 28.

recognized as a basic right from ancient times to the present, and this right is particularly important in Washington. McDonald v. City of Chicago, ___ U.S. ___, 2010 WL 2555188 at *16-22 (6/28/10); State v. Sieves, 168 Wn.2d 276, 292, 225 P.3d 995 (2010) (art. I, § 24 “means what it says. From time to time, people of the West had to use weapons to defend themselves and were not interested in being disarmed”) (quoting Hugh Spitzer, Bearing Arms in Washington State 9 (Proceedings of the Spring Conference of Municipal Attorneys (4/24/97))). The State, however, may reasonably regulate the right to bear arms to protect the public safety or welfare. State v. Spiers, 119 Wn.App. 85, 93, 79 P.3d 30 (2003).

Walters was charged with unlawful possession of a firearm in the second degree, RCW 9.41.040(2)(a)(i). CP 1-2. The elements of the crime are that (1) the defendant knowingly had a firearm in his possession or control, (2) in the State of Washington, and (3) the defendant had a prior felony conviction. RCW 9.41.040(2)(a)(i); State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000); CP 41 (Jury Instruction 15). Walters stipulated that he had a prior felony conviction, and there could be no question that he knowingly possessed the weapon he admitted firing. 2RP 34, 39,

63-64. Walters, however, used a firearm in order to protect Chappelle because Washington was walking rapidly towards Chappelle firing a shotgun. Thus, his defense to the charge of unlawful possession of a firearm was that of necessity.

Necessity is an available defense to the crime of unlawful possession of a weapon. State v. Stockton, 91 Wn.App. 35, 43-44, 955 P.2d 805 (1998); Jeffrey, 77 Wn.App. at 225-26. This defense applies when the defendant acts in defense of another as well as when he acts in self-defense. United States v. Newcomb, 6 F.3d 1129, 1135-36 (6th Cir. 1993); United States v. Paoello, 951 F.2d 537, 542 (1991) (defendant knocked gun out of man's hand to prevent him from attacking defendant's stepson, retained gun to prevent being shot himself). Thus, in Newcomb, the defendant's conviction for possession of an unregistered firearm and being a felon in possession of ammunition were reversed because the district court did not instruct the jury it could find the possession was justified. The defendant's witnesses established that he was watching television in his girlfriend's home when she informed him her son, Louis, had grabbed a gun and was threatening to kill someone. Newcomb, 6 F.3d at 1131. Because Louis had harmed people in the past, Newcomb, his girlfriend, and Louis's brother

were afraid Louis would actually harm someone. Id. When they found Louis in a nearby alley, Newcomb unloaded Louis's weapon and put the weapon in abandoned couch. Id. Newcomb's conviction for possession of the weapon in the couch was reversed because the jury should have been instructed on the justification, or necessity, defense. Id. at 1139.

Here, Washington pointed a shotgun at Chappelle and fired it. Walters then fired a weapon in order to prevent Washington from shooting Chappelle. The State conceded that Walters acted in self-defense when he drew a weapon and shot at Washington. The trial court, however, refused to instruct the jury that necessity was a defense to unlawful possession of a weapon because the court believed the surveillance tapes showed Walters had the weapon before Washington displayed his shotgun and shot at Chappelle. 2RP 113, 174. The surveillance tapes, however, do not show every movement of Walters and cannot establish when Walters obtained the weapon.

The trial court's decision not to include a necessity defense instruction was also based upon the court's conclusion that Mr. Walters' case was similar to the facts of Jeffrey, supra. 2RP 112. In fact, the cases are dissimilar. In Jeffrey, the defendant's wife

saw someone outside their window in the evening, and the couple called the police who searched the surrounding area. Jeffrey, 77 Wn.App. at 223. Jeffrey called a friend who stayed at their home for an hour and then left a handgun under the Jeffrey's couch. Id. When Jeffrey heard noises and saw a silhouette outside the bedroom window, he retrieved his friend's gun, fired a shot, and directed his wife to call the police. Id. When the police arrived, Jeffrey was still holding the gun and was charged with unlawful possession of a firearm. Id. The Jeffrey Court found a necessity instruction was not appropriate because Mr. and Mrs. Jeffrey were not in danger and were capable of calling the police. Id. at 227. In so ruling, the court made it clear that a felon is not required to forgo the use of a weapon if he is threatened with immediate danger.

We agree it is clear that handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns. However, the statute does not address the unforeseen and sudden situation when an individual is threatened with impending danger. Certainly, the Legislature did not intend for a person threatened with immediate harm to succumb to an attacker rather than act in self-defense.

Id. at 226.

That was the situation facing Walters – Washington fired a shotgun and was walking rapidly toward the retreating Chappelle.

Despite his prior felony conviction, Walters was entitled to use force to protect his friend from death or serious injury in this situation. The trial court erred by failing to instruct the jury on necessity.

d. Mr. Walters' conviction for unlawful possession of a weapon must be reversed. By failing to instruct the jury on necessity, the trial court prohibited Walters from presenting his defense to the charge of unlawful possession of a firearm. The denial of a defendant's opportunity to present his defense is a constitutional issue, and the constitutional harmless error standard thus applies. Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and this Court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Id.; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976).

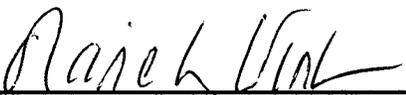
Because the jury was not provided with a necessity defense instruction, its hands were tied. The jury had to convict Walters of unlawful possession of a firearm even if the jurors believed Mr. Walters was permitted to temporarily defend himself and his friend despite his prior felony conviction. CP 41 (Instruction 15). This Court cannot be convinced beyond a reasonable doubt that the verdict would have been the same with the appropriate defense

instruction, and Walters' conviction for unlawful possession of a firearm must be reversed and remanded for a new trial. State v. Vander Houwen, 163 Wn.2d 25, 40, 177 P.3d 93 (2008) (reversing conviction because trial court did not give correct instruction concerning defendant's right to kill protected game when necessary to protect his property even though jury instructed on necessity); Redmond, 150 Wn.2d at 495 (reversing conviction due to failure to provide no duty to retreat instruction).

F. CONCLUSION

Johnnie Walters' conviction for assault in the first degree must be reversed and dismissed because the State failed to prove beyond a reasonable doubt (1) that Walters did not act in defense of himself and/or another person and (2) that Walters acted with intent to inflict great bodily harm. Walters' conviction for unlawful possession of a firearm in the first degree must be reversed and remanded for a new trial where the jury will be provided with an instruction on the defense of necessity.

Respectfully submitted this 14th day of July 2010.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64364-9-I
)	
JOHNNIE WALTERS, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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