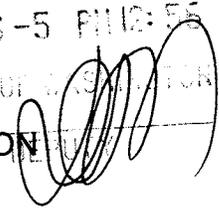


COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: 

No. 38692-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GARY WERNER,

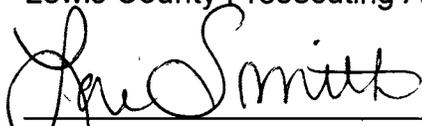
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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By:


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RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

The trial court did not err when it denied Werner's request to instruct the jury on self defense.

COUNTER STATEMENT OF THE ISSUE

Should Werner's argument that the trial court should have instructed the jury on self defense be rejected where the trial court correctly denied Werner's request for such instructions because Werner's use of deadly force under these facts was not objectively reasonable?

STANDARD OF REVIEW

A trial court's refusal to grant jury instructions is reviewed for either abuse of discretion or de novo, depending on whether the refusal was based on a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). "A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." Id. at 771-72. "[A] trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo." Id. at 772. "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, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

STATEMENT OF THE CASE

Except as otherwise cited in the argument below, Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED WERNER'S REQUEST TO INSTRUCT THE JURY ON SELF DEFENSE.

Werner claims that the trial court erred when it refused to allow his proposed instructions on self defense. This argument is not persuasive. Werner misstates the test for determining whether sufficient evidence has been presented to warrant a self-defense instruction as being a "subjective standard" only. Brief of Appellant 8, 9. This is not correct, and represents a fatal flaw in Werner's argument, as further discussed below.

“A claim of self-defense is available only if the defendant first offers credible evidence tending to prove that theory or defense.”

State v. Haydel, 122 Wn.App. 365, 370, 95 P.3d 760

(2004)(emphasis added); State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986)(the trial court should give the instruction if

there is credible evidence supporting the defendant's claim).

When, as here, a defendant uses deadly force, the evidence must show that he had a reasonable apprehension of great bodily harm.

Walker, 136 Wn.2d 767, 966 P.2d 883 (1998). But a defendant may exercise no greater force than was reasonably necessary.

State v. Hendrickson, 81 Wn.App. 397, 400, 914 P.2d 1194 (1996).

This rule is set out by statute. RCW 9A.16.020 states, in pertinent part that:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . .
(3) 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."

Id(emphasis added).

Furthermore--and contrary to what Werner claims--when determining whether sufficient evidence exists to warrant a self-defense instruction, the trial court must apply a mixed subjective and objective analysis. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997)(emphasis added)(evidence of self-defense is evaluated under both subjective and objective standards). Indeed, "[t]he importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably

prudent person, a defendant's subjective beliefs would always justify the [use of force]." State v. Walker, 136 Wn.2d at 885, 886 (1998)(emphasis added)(internal citations omitted), quoting State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993),

The subjective analysis requires the court to "view the defendant's acts in light of all the facts and circumstances known to the defendant." Id. at 772. The objective analysis requires the court to determine "what a reasonably prudent [person] similarly situated would have done." State v. Janes, 121 Wn.2d at 238, quoting State v. Wanrow, 88 Wn.2d 221, 236, 559 P.2d 548 (1977)). While the defendant must show that he subjectively feared imminent danger of death or great bodily harm¹ and that his fears were objectively reasonable, a finding of actual danger is not necessary, so long as a reasonable person could have believed that such a threat was present. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999); State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

Thus, in circumstances such as those presented in Werner's case, a court must consider what a reasonable person in the

¹ Deadly force may only be used in self-defense if the defendant reasonably believes he is threatened with death or great personal injury. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

defendant's situation would have done (Janes, 121 Wn.2d at 238; Walker, 136 Wn.2d at 772), and must also determine whether the defendant provided any evidence to show that his use of deadly force was objectively reasonable. Walker, 136 Wn.2d at 773; State v. Bell, 60 Wn. App. 561, 567, 805 P.2d 815 (1991). For example, "[i]f the trial court finds no reasonable person in the defendant's shoes could have perceived a threat of great bodily harm, the court does not have to instruct the jury on self-defense. Bell, 60 Wn.App. at 567-68. In other words, "[i]f any one of the elements of self-defense is not supported by the evidence, the self-defense theory is not available to a defendant, and the defendant cannot present the theory to a jury." Walker, 136 Wn.2d at 773, citing State v. Griffith, 91 Wn.2d 572, 575, 589 P.2d 799 (1979).

In the present case, Werner's request for self-defense instructions was denied mainly because Werner could not meet the objective prong of the self-defense analysis. 12/12/08 RP 7; Walker, supra.² The trial court explained at the motion for new

² Werner infers that the trial court did not make a record of its reasons for denying Werner's request for self-defense instructions. Brief of Appellant 6,7. This is misleading. While it is true that the report of the trial proceedings does not indicate why the trial court rejected Werner's request for self-defense instructions (the jury instructions were discussed in chambers, III RP 26), the fact of the matter is that the trial court did explain its reasons for denying Werner's self-defense claim on the record at the December 12, 2008, sentencing/motion for new trial hearing. 12/12/08 RP 7(Court explains why it denied Werner's request

trial/sentencing hearing why it had denied Werner's request for instructions on self-defense at trial:

[B]y the defendant's own admission, this is not a self-defense case. He denied doing any action which would constitute an assault or any action that can be considered in self-defense. This was his own testimony which I noted when he said it. But even if he claimed to have acted in self-defense, which I feel he did not, such a subjective belief must be objectively reasonable and as a matter of law under the facts of this case, his belief was not objectively reasonable.

12/12/08 RP 7(emphasis added). The trial court's reason for denying the self-defense claim was correct under the law as applied to the facts of this case. See, e.g., Walker, supra. The trial court correctly determined that the evidence presented in this case did not warrant a self-defense instruction because Werner's conduct was not objectively reasonable. State v. Griffith, at 575(if any one of the elements of self defense is not supported by the evidence, the defendant cannot present the theory to the jury).

Here, the facts show that Werner assaulted the victim on an easement that both Werner and his neighbor, Daniel Barnes, thought they owned. 11/13/08 RP RP 64-66l. Although it was later clarified that Werner did indeed own the land on which the assault

for self-defense instructions). Indeed, Werner's motion for new trial was based upon Werner's claim that the trial court committed reversible error when it failed to instruct the jury on self defense. 12/12/08 RP 3-6.

occurred, Werner knew that Mr. Barnes also claimed that he (Barnes) owned the easement. Id. at 150. Moreover, Werner was on notice that Mr. Barnes thought he owned the easement because Mr. Barnes erected a fence on the easement, and because the victim, Colby Gilpin, a friend of Mr. Barnes, had previously told Werner that Mr. Barnes believed he owned the easement. Id. at 150, 163-65. Although several dogs entered the easement near Werner on the date of the assault, the victim, Mr. Gilpin, also arrived on the easement. Id. at 150, 163-65, 175. There was no evidence that Mr. Gilpin could not control the dogs. Additionally, although Werner claims he was in imminent fear of death or great personal injury, he testified that he dialed 911 before firing the gun. Id. at 176-77.

In sum, Werner's claim that he was acting in self defense was not objectively reasonable because a reasonable person would not have used deadly force under the circumstances presented here. Accordingly, the trial court's decision to deny Werner's request for self-defense instructions was proper, and Werner's claim that it was reversible error to deny such instructions is without merit. Werner's conviction should be affirmed.

CONCLUSION

Contrary to Werner's argument, in determining whether sufficient evidence exists to warrant a self-defense instruction, the trial court must apply a mixed subjective and objective analysis. If any one of these elements of a self-defense claim is not supported by the evidence, the defendant cannot present the theory to the jury. Here, the trial court found that Werner was not entitled to instructions on self-defense because Werner's decision to use deadly force under these facts was not objectively reasonable. The law and the facts support the trial court's decision denying Werner's request for instructions on self defense. Accordingly, Werner's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

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Attorney for Respondent

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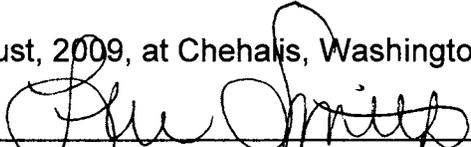
DECLARATION OF
SERVICE BY MAIL

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COURT OF APPEALS
DIVISION II

The undersigned declares under penalty of perjury of the laws of the State of Washington that the following is true and correct: On this 4th day of August, 2009, I served a copy of the State's Response Brief by depositing same in the United States Mail, postage pre-paid, to the attorney(s) for Appellant at the name and address indicated below:

Suzanne L. Elliott, Esq.
1300 Hogue Building
705 Second Ave.
Seattle, WA 98104

DATED this 4th day of August, 2009, at Chehalis, Washington.


Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent