NO. 39104-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES AARON WENNER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to a speedy trial under CrR 3.3 when it granted a state's motion to continue that was not supported by any evidence of necessity.

2. The trial court violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it gave Instruction No. 14, which implied that the defendant had a duty to retreat prior to defending himself.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to a speedy trial under CrR 3.3 if, over defense objection, it grants a state's motion to continue beyond the time for speedy trial when that motion is not supported by any evidence of a necessity to continue the trial?

2. Does a trial court violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it gives a jury instruction implying that the defendant had a duty to retreat prior to defending himself in a case in which the state has charged assault and the defendant has claimed self defense?

STATEMENT OF THE CASE

Factual History

During the evening of September 13, 2008, Longview resident Phillip Bruechert met with his ex-fiancé Elizabeth Neves and loaned her money to pay for food and rent. RP 63-67. A few weeks prior to this day, Ms Neves had broken off their lengthy engagement. *Id.* After Mr. Bruechert loaned Ms Neves the money, the two went out to dinner at a local gambling establishment called the Cadillac Ranch. *Id.* The two then went to Kessler's Bar for dancing and drinks. *Id.* While at the bar, Mr. Bruechert drank beer and Ms Neves drank Bloody Marys. According to Mr. Bruechert, he only drank two beers and was not intoxicated. *Id.* However, Ms Neves remembered him drinking seven or eight beers and getting intoxicated. RP 154-155. Indeed, a police officer who interviewed Mr. Bruechert that evening at the hospital believed him to be drunk. RP 125-126.

At some point during their drinking and dancing at Kesslers, Ms Neves called a number of friends to join them. RP 68-71. Once these people arrived, Ms Neves paid more attention to them that she did to Mr. Bruechert, who became upset and sullen at Ms Neves' actions. *Id.* One of the people socializing with Ms Neves and her friends was the defendant James Aaron Wenner, who remembered seeing Mr. Bruechert staring at Ms Neves and her companions. RP 176-177. Although both Mr. Bruechert and the defendant

had attended the same high school a few years apart, the defendant did not remember Mr. Bruechert. *Id.*

As the evening progressed and Ms Neves continued to ignore him, Mr. Bruechert decided to leave. RP 73-74. Once he made this decision, he walked out the back door of Kessler's Bar, which opens onto an alley and large parking lot where patrons from Kesslers go to smoke and cool off. RP 73-75. When Mr. Bruechert walked out the back door, there were about 20 to 25 Kessler's patrons milling about smoking and talking. *Id.* Seeing two women he knew, he walked over to them, sat on a curb, and started smoking a cigarette. *Id.* A few minutes later, Ms Neves came out, as did the defendant. RP 76-77. Once the defendant walked out the back of the bar, he saw Mr. Bruechert sitting smoking and went over and told him that he had "nothing to worry about him," meaning that he was not interested in Ms Neves. RP 76-77, 179-184.

Apparently, Mr. Bruechert interpreted the defendant's statement as some type of slight or challenge. RP 76-81, 179-184. In any event, within a few minutes of conversation, the two of them were in an argument with raised voices. *Id.* What happened next was later hotly in dispute among the witnesses to the events. *Id.* On the one hand, Mr. Bruechert, the owner of the bar, one of his bouncers, and a woman nearby, all claimed that during the argument, Mr. Bruechert stood up and as he did, the defendant hit him once

in the head with a closed fist, knocking Mr. Bruechert down. RP 28-34, 48-54, 76-81, 98-101. As Mr. Bruechert was in the process of getting back up, the defendant hit him a second time, again knocking him to the ground. *Id.* According to the state's witnesses, Mr. Bruechert did not swing at the defendant or make any physically aggressive moves toward him. *Id.*

By contrast, the defendant and Ms Neves both stated that during the argument, Mr. Bruechert stood up very quickly and took a swing at the defendant's face with a closed fist, and came within inches of hitting the defendant, who was able to lean back away from the blow. RP 155-157, 179-185. In immediate response, the defendant swung at Mr. Bruechert, knocking him to the ground. *Id.* Mr. Bruechert then "popped back up," and "came at" the defendant, who hit Mr. Bruechert a second time. *Id.* According to the defendant, the incident happened in a few seconds, and he only hit the defendant in self-defense. *Id.*

While both sides disagreed on who was the aggressor and who swung at or hit whom, all of the witnesses agreed that after the defendant knocked Mr. Bruechert down to the ground, the Kessler's bouncer who was with the owner tackled the defendant, and ordered him to produce some identification. RP 28-34, 48-54, 76-81, 98-10, 155-157, 179-185. The defendant did not resist, and willingly handed his driver's license over to the owner of Kesslers, who went in and made a copy. *Id.* Once he finished, he returned to the

parking lot and gave the defendant his license back. *Id.* The defendant then left. Mr. Bruechert had previously left with two off-duty fireman, who took him to the hospital. *Id.* Once at the hospital, an ER doctor examined him and found that he had sustained a facial laceration, a broken jaw, and a fracture to the bone around his eye. RP 130-150.

Procedural History

By information filed September 26, 2008, the Cowlitz County Prosecutor charged the defendant with one count of second degree assault, alleging that he had "intentionally assaulted Phillip W. Bruechert" and that he had thereby "recklessly inflicted substantial bodily harm" on him. CP 5-6. The defendant pled "not guilty" to this charge on October 1, 2008. CP 90. At that point, and all during the proceedings, he was out of custody. *Id.* After accepting the defendant's plea, the court set a trial date of December 15, 2008, and an omnibus for November 19, 2008. *Id.*

At the omnibus hearing, the defense endorsed an affirmative claim of self-defense. CP 8. The defense also moved for a continuance, and filed a waiver of speedy trial accepting December 1, 2008, as the new commencement date. CP 13-14. That waiver noted that "the last allowable date for trial pursuant to CrR 3.3" was February 28, 2009. *Id.* The court granted the continuance, struck the old trial date, and set a new trial for February 25, 2009, along with a pretrial review for January 28, 2009. CP 91.

At the January 28th pretrial review, the court ordered all parties to appear on February 19th for a readiness hearing. CP 92.

Pursuant to the court's order, the parties again appeared on February 19th, at which time the defense moved to reset the trial date for March 11th. CP 93. Although the defense did not execute a new speedy trial waiver, the court granted the motion and reset the case for trial on March 11, 2009. *Id.* However, on March 3, 2009, prior to this new trial date, the parties again appeared and the trial court reset a new trial date of March 16, 2009, based upon the fact that there were other trials set for the 11th that "had preference." RP 1-2. Although the record does not reveal how these other cases had "preference" over a criminal case that was already set beyond the time for speedy trial, the defense did not lodge a specific objection to this request. *Id.* As a result, the court reset the trial to March 16, 2009. *Id.*

Four days prior to this new trial date, the parties appeared for a readiness hearing, at which time the state moved to continue the trial date to March 17, 2009, because of a "conflict" with other trials. RP 3-7; CP 94. The state did not file an affidavit in support of this request. *Id.* Neither did the state make a specific claim as to what this "conflict" was. *Id.* This time the defense specifically objected to any continuance of the trial date. RP 7-8. In spite of this objection, the trial court granted the state's request and reset the trial for March 17, 2009. CP 95

Finally, on March 17th, the court called the case for trial before a jury. RP i. During its case-in-chief, the state called six witnesses, including Phillip Bruechert, the ER doctor who treated him, an investigating officer, as well as the owner of the bar, the bouncer, and a woman who saw the incident. RP 28, 42, 62, 92, 106, 130. The defense then called three witnesses: Elizabeth Neves, the defendant, and a friend of the defendant. RP 151, 167, 173. These witnesses testified to the facts set out in the preceding factual history. *See Factual History*.

Following the presentation of evidence, the court instructed the jury on the charge of second degree assault and upon the state's burden of proving the lack of self defense. CP 28-45, RP 209-216. These instructions included the following statement to the jury proposed by the state:

INSTRUCTION NO. 14

> Self-defense is an act that must be necessary. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 43, 86.

In fact, during cross-examination, the prosecutor repeatedly asked the defendant why he had not done something other than strike back when Mr. Bruechert had tried to hit him. RP 197-199. This question was repeated during rebuttal argument when the prosecutor stated the following to the jury:

> And, even – even if for some reason you want to credit his version, you know, we will just – maybe Phil threw the first punch although really it is only the defendant saying that and he has an obvious reason to say that. Even – let's – even if you want to think that Phil, against all the evidence, did throw the first punch, is what he did reasonable – is what the defendant says he did reasonable? Did he have to hit him? Did he have to punch him twice? Did he have to knock him down like that? Couldn't he have just pushed him away? Couldn't he have shoved him? Couldn't he have done what Rudy Lopez did? Does Rudy Lopez come over here and deck him? Knock him out? Beat him up? No. Rudy tackles him. Rudy restrains him.

RP 257.

After this argument, the jury retired for deliberation and later returned a verdict of guilty. CP 46. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 49-60, 62.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL UNDER CrR 3.3 WHEN IT GRANTED A STATE'S MOTION TO CONTINUE THAT WAS NOT SUPPORTED BY ANY EVIDENCE OF NECESSITY.

Under CrR 3.3(b), the time for trial for a person not held in jail is "90 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." CrR 3.3(b)(1)(i)&(ii). The "[t]he initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

> (f) Continuances. Continuances or other delays may be granted as follows:
>
> . . .
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the

> defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra,* a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the court of appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

> The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the defendant was out of custody during the entirety of the proceedings and the initial commencement date for speedy trial was his arraignment on October 1, 2008. The defendant subsequently signed a

speedy trial waiver that accepted December 1, 2008, as the new commencement date. As was noted on the waiver, "the last allowable date for trial pursuant to CrR 3.3" was February 28, 2009. On February 19th, the defense moved to reset the trial to March 11, 2009. Although the defense did not execute a new speedy trial waiver, the court granted the motion and reset the case for trial on March 11, 2009. However, on March 3, 2009, prior to this new trial date to which the defendant consented, the parties again appeared and the trial court reset a new trial date of March 16, 2009, based upon the fact that there were other trials set for the 11th that "had preference." RP 1-2. Although the record does not reveal how these other cases had "preference" over a criminal case that was already set beyond the time for speedy trial, the defense did not lodge a specific objection to this request and the defense does not argue now that the court abused its discretion when it reset the trial to March 16, 2009.

However, four days prior to this new trial date, the parties appeared for a readiness hearing, at which time the state moved to continue the trial date to March 17, 2009, because of a "conflict" with other trials. RP 3-7. The state did not file an affidavit in support of this request. Neither did the state make a specific claim as to what this "conflict" was. This time the defense specifically objected to any continuance of the trial date. In spite of this objection, the trial court granted the state's request and reset the trial for

March 17, 2009. By granting the state's request, the trial court abused its discretion because the state presented no affidavit, testimony, or facts to support its claim that the trial had to again be continued. In so doing, the court denied the defendant his right to speedy trial under CrR 3.3, and this court should reverse the defendant's conviction and remand for dismissal with prejudice under CrR 3.3(h).

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT GAVE INSTRUCTION NO. 14, WHICH IMPLIED THAT THE DEFENDANT HAD A DUTY TO RETREAT PRIOR TO DEFENDING HIMSELF.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to argue his or her theory of the case without hindrance from instructions that misstate the applicable law. *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000).

For example in *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), the defendants from separate trials appealed their convictions (one for first degree assault and one for first degree murder) arguing that the trial court

had erred when it gave a jury instruction on accomplice instruction that allowed the jury to find that the defendants were guilty as accomplices if they knew that their actions or words would promote the commission of "a" crime as opposed to knowledge that their actions or words would promote the commission of the "the" crime that the principle committed. Relying upon its decision in *State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000), the court held this instruction to be error because the accomplice liability statute required that the accomplice have knowledge that his or her actions will promote the commission of the crime with which the defendant is charged as an accomplice. In both of these cases the court reversed because the defendants had offered theories of the case that admitted the defendants' commission of a number of crimes but disavowed any knowledge that the principle was going to commit the crime charged.

In the case at bar, appellant argues that the trial court erred when it gave Instruction No. 14, which misstated the law on self defense. This instruction stated as follows:

INSTRUCTION NO. 14

> Self-defense is an act that must be necessary. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 43.

In order to properly raise the issue of self-defense in the State of Washington, a defendant need only produce "any evidence" supporting the claim that the defendant's conduct was done in defense of self, others, or property. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982); RCW 9A.16.020. This evidence need not even raise to the level of sufficient evidence "necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense." *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, a court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* The defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

> The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

State v. Tyree, 143 Wash. at 317.

The court also stated the following concerning the level of force that a defendant is entitled to employ in self defense:

> [T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what, under the circumstances, appeared reasonably necessary to the appellant.

State v. Tyree, 143 Wash. at 316.

Once the defendant has met his burden of production of some evidence to support the claim of self-defense, the state then bares the burden of proving the lack of self-defense beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Put another way, once the burden of production is met on the claim of self-defense, the lack of self-defense becomes an element of the crime that the state must prove beyond a reasonable doubt along with the other elements of the offense alleged. *State v. Graves*, 97 Wn.App. 55, 982 P.2d 627 (1999).

Finally, in Washington there is no duty to retreat before the law allows a person to act in self-defense. *State v. Allery*, 101 Wn.2d 591, 682

P.2d 312 (1984). Specifically, the law holds that one who is assaulted in a place he has a right to be has no duty to retreat and has a right to respond with force no matter how reasonable flight may be. *State v. Williams*, 81 Wn.App. 738, 916 P.2d 445 (1996).

In Instruction No. 14, the court informed the jury that the defendant's actions did not legally constitute self defense unless "(1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended." This instruction misstates the law as explained above because in Washington a defendant does not have to employ a "reasonably effective alternative to the use of force." Flight was certainly one "reasonably effective alternative to the use of force" in the case at bar. In addition, simply shoving the aggressor or tackling him would also be another "reasonably effective alternative" to striking a person who had just swung at your head with a closed fist. The problem is that the law of this state does not impose these requirements upon a person acting in self-defense. Rather, as the court in *Tyree* explained so many years ago, "the amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant." *Tyree, supra.*

In the case at bar, the state exacerbated the erroneous statement of law

found in Instruction No. 14 by specifically pointing out in cross-examination and in rebuttal argument that the defendant could have taken other alternatives to hitting the complaining witness after the complaining witness attempted to hit him. During cross-examination, the prosecutor repeatedly asked the defendant why he had not done something other than strike back when Mr. Bruechert had tried to hit him. RP 197-199. This question was repeated during rebuttal argument when the prosecutor stated the following to the jury:

> And, even – even if for some reason you want to credit his version, you know, we will just – maybe Phil threw the first punch although really it is only the defendant saying that and he has an obvious reason to say that. Even – let's – even if you want to think that Phil, against all the evidence, did throw the first punch, is what he did reasonable – is what the defendant says he did reasonable? Did he have to hit him? Did he have to punch him twice? Did he have to knock him down like that? Couldn't he have just pushed him away? Couldn't he have shoved him? Couldn't he have done what Rudy Lopez did? Does Rudy Lopez come over here and deck him? Knock him out? Beat him up? No. Rudy tackles him. Rudy restrains him.

RP 257.

In the case at bar, the state may argue that appellant herein is barred from arguing that Instruction No. 14 misstated the law because the defendant did not object to this instruction at the trial level. The error in any such argument is that since the defense met its burden to produce evidence sufficient to put self-defense at issue, the state was then encumbered with the burden of proving the lack of self-defense beyond a reasonable doubt as an

element of the offense charged. Thus, although the lack of self-defense was not included in the "to convict" instruction, it was still an element of the offense that the state had the burden of proving. Instruction No. 14 relieved the state of proving that element.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Thus, any instruction that relieves the state of this burden violates a defendant's right to due process and may be raised for the first time on appeal as a manifest error of constitutional magnitude. *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

In addition, since Instruction No. 14 constituted an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not "harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267,

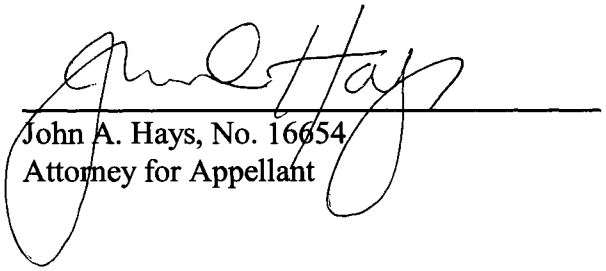
893 P.2d 615 (1995) (citations omitted). In the case at bar, the error found in Instruction No. 14 was not harmless, particularly given the fact that the prosecutor's cross-examination of the defendant included facts from which the jury could apply the error in the instruction, and the prosecutor specifically argue in rebuttal that the defendant was not acting in self-defense because he did not pursue other alternatives to hitting the complaining witness. Thus, the defendant is entitled to a new trial.

CONCLUSION

The defendant is entitled to a dismissal with prejudice of the charge against him because the trial court failed to bring the defendant to trial within the time required for trial under CrR 3.3. In the alternative, the defendant is entitled to a new trial based upon the court's use of Jury Instruction No. 14, which misstated the law on self-defense.

DATED this 15th day of January, 2010.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

CrR 3.3

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) 'Pending charge' means the charge for which the allowable time for trial is being computed.

(ii) 'Related charge' means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) 'Appearance' means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) 'Arraignment' means the date determined under CrR 4.1(b).

(v) 'Detained in jail' means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any

proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice--Objections--Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or

party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to Foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which

a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

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

STATE OF WASHINGTON, Respondent **vs.** **JAMES "AARON" WENNER,** Appellant	**NO. 08-1-01085-3** **COURT OF APPEALS NO: 39104-0-II** **AFFIRMATION OF SERVICE**

STATE OF WASHINGTON)
) : ss.
County of Cowlitz)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **January 15th , 2010** , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

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Dated this 15TH day of JANUARY, 2010 at LONGVIEW, Washington.

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