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I. ISSUE

1. Should a jury's special verdict entitling a defendant to reimbursement be vacated when the facts do not objectively prove by the preponderance of the evidence that the defendant's actions were justified and the jury was erroneously instructed on the law pertaining to reimbursement?

II. SHORT ANSWER

1. Yes, a jury's special verdict entitling a defendant to reimbursement should be vacated when the facts do not objectively prove by the preponderance of the evidence that the defendant's actions were justified and the jury was erroneously instructed on the law pertaining to reimbursement.

III. FACTS

On March 31, 2009, the appellant was charged with four counts of assault in the second degree with a firearm enhancement for each count. CP 1-2, 4-5. The appellant retained Duane Crandall for a flat fee of seventy thousand dollars to represent him and asserted self defense as a defense to all charges. CP 7-8, 9, 10-14, RP 1-664, 686-709. On January 12, 2010, the Honorable James Warne, Cowlitz County Superior Court Judge, presided over the appellant's jury trial. RP 1.

The State's evidence indicated that on March 28, 2009, the appellant went to Kesler's Bar and Grill to visit his friend, Brandon Kesler. Brandon is the co-owner of Kesler's. RP 102-103. Kesler's had a \$5.00 cover charge that night and the appellant entered Kesler's without paying the cover charge. RP 101-102. Phillip Church, a security staff for

Kesler's, contacted and told the appellant that he had to pay the cover charge or leave. RP 100-102, 163. The appellant stated that he was a friend of Brandon and did not have to pay. Brandon was not present to confirm the appellant's claim. Phillip told the appellant to pay the cover charge and that the cover charge would be refunded once Brandon confirmed the appellant's claim. RP 102-103. The appellant refused to pay the cover charge and stated that he was "going to wait until Brandon gets here." RP 103, 104, 164.

Dominador Daniel, another security staff for Kesler's, assisted Phillip to make sure there were no problems with the appellant. Initially, the appellant cooperated and walked towards the back hallway, but as he got towards the back hallway, he pulled away and refused to leave. Phillip and Dominador proceeded to grab and physically escort the appellant through the back hallway and out of the back entrance. RP 104-106, 164-168, 222-225. No threats were made to the appellant as he was escorted through the back hallway and out the back entrance. RP 107, 168.

Once outside, Phillip released the appellant and told him to leave. RP 107, 169, 226. Upon being released, the appellant spun around and pointed a black semiautomatic pistol at Phillip. RP 108, 170, 201, 226. Shortly thereafter, Brandon and Kirk Turya, another security staff for Kesler's, appeared at the back entrance. The appellant proceeded to do a

sweeping motion with the pistol, point the pistol at Phillip, Dominador, Kirk, and Brandon, and try to squeeze the trigger. RP 109-110, 202, 206, 226-227. Phillip, Dominador, Kirk, and Brandon all feared being shot by the appellant. RP 108-109, 172, 174, 207, 227. Brandon told the appellant to put the gun away and leave. The appellant got into his vehicle and left the area. RP 109, 206. Security cameras caught the incident on videos and the videos were played for the jury. RP 120-131. Phillip subsequently called the police to report the incident. RP 110. Officer Danielle Jenkins of the Longview Police Department located and stopped the appellant's vehicle. RP 250-253. The appellant was arrested and the gun was retrieved from inside his vehicle. RP 261-264, 268, 270.

The appellant's evidence indicated that Brandon and he are friends. RP 196-199. On March 28, 2009, the appellant and his finance, Nicole Hewitt, were out with three friends for the evening. RP 352-353. During that evening, the appellant called and texted Brandon about some business opportunities and Brandon invited the appellant to Kesler's to talk about those business opportunities. RP 196-199, 354-356, 406-408, 438-440.

The appellant was initially hesitant to go to Kesler's because he was aware that the staff at Kesler's had a reputation for violence. RP 342-351, 354-356, 396-398, 404-408. Don Barnd, the appellant's father, told the appellant many times about the violent reputation of the Kesler's staff.

RP 396-398. Mr. Holt, the appellant's friend, told the appellant about an incident when the bouncers at Kesler's asked him to leave and proceeded to beat him and break his cheek bones and one of his eye sockets. RP 406-407. Ross Van Johnson, the appellant's friend, told the appellant about an incident when he went to pick up a friend at Kesler's, witnessed his friend being beaten up by Kesler's bouncers, and was himself beaten unconscious for intervening on his friend's behalf. RP 196-199.

Ultimately, the appellant and Nicole decided there should be no problem going to Kesler's because it was only 9:00 p.m. and they were going there as Brandon's invited guests. RP 354-356, 406-408. They drove to Kesler's back parking lot, entered Kesler's through the back entrance, and left their friends in the car. RP 354-356, 406-408. The appellant has a concealed weapon's permit to carry a firearm and always does so for personal protection. RP 352-353, 420-421. Upon entering Kesler's, the appellant encountered Phillip and Dominador, and was told he had to pay the \$5.00 cover charge. RP 356-358, 409-412. Phillip is 6'1" tall and weighs 215 pounds. RP 96-100. Dominador is 6'5" tall and weighs 340 pounds. RP 156-158, 176-178.

The appellant told Phillip and Dominador that he was a guest of Brandon and was there to speak to Brandon. Phillip insisted that the appellant pay the cover charge and the appellant indicated that he was only

going to be in Kesler's for a few minutes to speak with Brandon. RP 356-358, 409-412. When the appellant turned to look for Brandon, Phillip grabbed the appellant and placed him in a full nelson, and Dominador grabbed one of the appellant's hands. Phillip and Dominador proceeded to force the appellant down the back hallway where two more bouncers were located and Phillip or Dominador stated that they were going to take the appellant outside and get the money out of him. RP 359-360, 409-412, 443-444. Phillip and Domindor, now joined by one or two of the other bouncers located at the back entrance, took the appellant out the back entrance, did not throw him onto the street, brought him to the middle of the alley, and released the appellant. RP 420-421, 447-448.

Upon being released, the appellant quickly pulled his gun from his waistband and turned to face the bouncers because he feared being beaten up by them. RP 426, 447-452, 491. The appellant did not waive the gun and did not try to pull the trigger. RP 420-426, 446. The bouncers did not approach the appellant and Brandon came out of the back entrance and told the appellant to leave. RP 420-421, 450-452. The appellant and Nichole got into their vehicle and left the area. RP 360-363, 456.

On January 15, 2010, the appellant's trial concluded and the jury found the appellant not guilty of all charges. RP 649-650. The appellant sought self defense reimbursement and both sides indicated that they did

not need to present additional evidence for the reimbursement hearing. RP 633-634.

The jury received oral instructions as follow:

“The next phase of the trial differs in several ways from the phase you have already completed. First, the burden of proof is on the defendant.” RP 650-651.

“In order to receive reimbursement, the defendant must prove, by a preponderance of the evidence, that his use of force was lawful. When it is said that a claim must be proved by the preponderance of the evidence, it means that you must be persuaded, considering all of the evidence in this case, that the claim is more probably true than not true.” RP 651.

“Second, the definition of lawful force is different for this phase of the trial. This time you will apply an objective rather than a subjective standard. This means that the issue is whether a reasonably prudent person, under the same or similar conditions existing at the time of the incident, would have used the same degree of force as the defendant.” RP 651.

The jury received written instructions as follow:

“You must decide whether the defendant has proved the claim of lawful force by a preponderance of the evidence. When is it said that a claim must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all of the evidence in the case, that the claim is more probably true than not true.” RP 652.

“For this part of the trial, you will use the following definition of lawful force: the use of force or the offer -- offer to use force is lawful when a person appears about to be injured. In determining if the defending person’s perceptions are reasonable, you must use an objective standard. If a reasonably prudent person, under the same or similar circumstances existing at the time of this incident, would have used the same degree of force as the defendant, then the force was lawful.” RP 652.

In arguing for reimbursement, Mr. Crandall stated “you don’t stand next to the shoes in this one. You stand back as a person watching a video. All the videos and all the evidence and listen to all the witnesses, and you decide, from a subjective standpoint, if it was reasonable. I suggest to you that you have already answered that question but you need to answer it again, in writing for the judge.” RP 655. “He pulled the gun, he was in reasonable fear of his life or at least of taking a beating.” RP 655. “He just has to have fear of a beating because there are four of them and one of him. He pulled a gun.” RP 655. In rebuttal, the appellant stated “he was concerned. And now, ‘Huh, I guess we didn’t win. What’s on Monday?’ He gets his money back. Thank you.” RP 660.

The jury returned a special verdict finding the appellant did prove by a preponderance of the evidence that his use of force was lawful and the appellant was not engaged in criminal conduct substantially related to the events giving rise to the crime with which he was charged. RP 661.

On January 29, 2010, Judge Warne ordered a transcript of the reimbursement arguments because he was “not sure that any part of either [the appellant’s] argument, the State’s argument or [the appellant’s] rebuttal argument, any part of any of those arguments, addressed the issues in the information.” RP 665. The appellant inquired if it was the

“Court’s belief or inclination that perhaps the jury did not follow the second set of instructions.” RP 666. Judge Warne indicated that “this essentially is my concern now, without having reviewed the transcript, the arguments did not address the issues of the supplemental instructions at all. They just didn’t. And, in fact, they may have been highly inappropriate and inflammatory.” RP 666.

On February 26, 2010, Judge Warne noted “that the last twenty minutes of this trial was mistake after mistake after mistake. The first mistake: The prosecutor never made any motion concerning this matter not going to the jury or there being any factual basis to support the claim. Second mistake: I don’t think there is any factual basis to support the claim and I let it go to the jury. Third mistake: Your argument was totally not directed to the issues in this case. So, at this point, before we get to attorney’s fees, I’m asking myself, and this is the first question, do I sua sponte have any authority without any motion from the other side to enter a judgment N.O.V.” RP 669. “I don’t want to be in the position of suggesting to the prosecutor, here is a motion you ought to make or ought to have made. And, I’m very – I’m very concerned about proceeding in this fashion because it is sua sponte. This is my own issue.” RP 710.

The trial court nevertheless conducted a hearing to determine the reimbursement award. Mr. Crandall sought reimbursement for his fees in

the amount of seventy five thousand dollars per his flat fee agreement with the appellant. RP 686-709. Mr. Crandall called John Hays and Randy Furman to testify to the reasonableness of his fees. RP 686-707. Mr. Hays testified that the appellant's case required an estimated twenty to thirty hours to speak to an investigator and interview witnesses, RP 687-688, thirty hours to research the facts of the case, RP 688, thirty hours to prepare the case and witnesses, RP 689-690, and forty five hours to try a four and a half day trial. RP 691. Mr. Hays also indicated that it would have been reasonable to charge the appellant "\$300.00 an hour for someone of Mr. Crandall's ability and for this type of case." RP 692. Mr. Furman testified that he believe the flat fee of seventy five thousand dollars was reasonable and did not provide an analysis of what would be required to represent the appellant on his case. RP 700-707.

Judge Warne held that Mr. Crandall was entitled to a premium for his expertise and carefully considered "Mr. Hays' discussion and Mr. Furman's discussion of the amount of time that is involved in preparation, the amount of stress that is involved in preparation." RP 717. Judge Warne preliminarily held that Mr. Crandall was entitled to a reasonable fee of fifteen thousand dollars for his trial work and twenty five thousand dollars for his trial preparations for a total of forty thousand dollars. RP

717-722, 738-739. Judge Warne reserved rendering a sua sponte ruling on a judgment N.O.V. RP 722-725, 740.

On March 12, 2010, Judge Warne entered an order awarding the appellant forty thousand dollars for Mr. Crandall's attorney fees and again expressed concern about the appellant being entitled to reimbursement. RP 738-7. "If, in fact, the [appellant] was defending himself -- was defending himself from a real attack, he is entitled -- and he ends up subsequently being charged, he is entitled to be reimbursed for all of his attorney's fees. There is no question your client, according to the jury, at least had a reasonable doubt about whether he was being assaulted or not. On the other hand, as far as I understand the evidence, he was escorted out of the building and released. And, objectively, nobody ever assaulted him." RP 741. "The issue is, though, [the appellant] was never touched once he was sent out the door. He was never touched. They sent him out the door. It was all on video and regardless of what his mental state was, I didn't see any evidence that anybody attacked him at that point or was involved in attacking him or involved in assaulting him in any way." RP 742.

On March 15, 2010, judge Warne issued an order denying the appellant reimbursement because the facts, as a matter of law, do not support any finding that the defendant acted lawfully and the jury was

wrongfully instructed on the law. CP 188-190. The appellant appealed the order to deny him reimbursement and challenged the trial court's forty thousand dollars assessment for attorney's fees.

IV. ARGUMENT

THE JURY'S SPECIAL VERDICT ENTITLING THE APPELLANT TO REIMBURSEMENT WAS PROPERLY VACATED BY THE TRIAL COURT BECAUSE THE FACTS DO NOT OBJECTIVELY PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT THE APPELLANT'S ACTIONS WERE JUSTIFIED AND THE JURY WAS ERRONEOUSLY INSTRUCTED ON THE LAW PERTAINING TO REIMBURSEMENT.

Pursuant to RCW 9A.16.110(1), “[n]o person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.” RCW 9A.16.110(1).

Pursuant to RCW 9A.16.110(2), “[w]hen a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an

independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self defense, the judge shall determine the amount of the award." RCW 9A.16.110(2).

"The statute does not set out the specific procedure to be followed in determining whether a defendant qualifies for the reimbursement. The Supreme Court of Washington devised such a procedure when the need arose in State v. Manuel, 94 Wash.2d 695, 619 P.2d 977 (1980)." State v. Watson, 55 Wash.App. 320, 321 (1989).

"First, the jury must be instructed that the burden is upon the defendant to prove by a preponderance of the evidence that his acts were reasonably necessary to defend himself or another against an attack which he did not provoke or invite. Manuel, 94 Wash.2d at 700, 619 P.2d 977. Second, the statute requires an objective determination that the defendant's actions were justified. Manuel, 94 Wash.2d at 699, 619 P.2d 977. Third, the statute requires a full determination of the facts by considering evidence which may have been inadmissible at trial. Manuel, 94 Wash.2d at 699, 619 P.2d 977." Id. at 321-323.

When the objective evidence indicates that the defendant's actions were not justified or the procedures set out by Manuel are not followed,

the defendant is not entitled to reimbursement under RCW 9A.16.110. Id. at 323. In State v. Sims, 92 Wash.App. 125 (1998), the defendant was charged with two counts of assault in the second degree for allegedly threatening Jason Smith and Lance Marshall with a rifle. Id. at 127. The alleged assaults occurred when the defendant “had a confrontation with Smith and Marshall on a dead-end, logging road used by hunters. During the confrontation, Marshall allegedly told [the defendant], ‘I’ll kick your ass, old man.’ [The defendant] then retrieved his rifle from the truck he had been riding in, pointed the rifle at the ground in Marshall’s direction, and said, ‘You are not going to kick my ass. I’ll blow your legs off.’” Id. at 127. The defendant, a 56 year old retired tree feller, suffered from degenerative arthritis in his knees and back, and the victim, Marshall, was 25 years old, 6’3” tall, and weighed 250 pounds. Id. at 127. The trial court refused to give the defendant’s self-defense instruction and the jury found the defendant not guilty of both charges. Id. at 127. The defendant appealed and asked the appellate court to reverse the trial court’s decision to disallow a self-defense instruction and to remand with instructions to impanel a new jury to determine the issue of self-defense. Id. at 127-128. The appellate court did not decide whether the trial court erred in failing to give the self-defense instructions and held that the defendant’s remedy is limited to the “sundry claims process” under RCW 4.92.040. Id. at 128.

In Watson, the defendant claimed self-defense to a charge of second degree murder and the jury found the defendant not guilty. Id. at 322. Subsequently, the defendant sought reimbursement and the trial court submitted “an interrogatory to the same jury enquiring whether the not guilty verdict was based on justifiable homicide or self-defense. Based on the jury’s affirmative response, the trial court entered judgment against the State.” Id. at 322. The judgment against the State was set aside and the defendant had to pursue his reimbursement in a civil action because the trial court did not instruct the jury “that the defendant had the burden to prove that he was justified by the preponderance of the evidence or that an objective rather than a subjective standard was to be followed in determining whether the defendant was justified,” id. at 323, and “refused to hold a separate evidentiary hearing.” Id. at 323.

In State v. Park, 88 Wash.App. 910 (1997), the defendant claimed self-defense to assault charges and the jury found the defendant not guilty. Id. at 912. The defendant sought reimbursement under RCW 9A.16.110. The trial court developed a procedure without letting the parties submit additional evidence to the jury, consulted an obsolete 1989 version of RCW 9A.16.110(2), and submitted a special interrogatory to the jury without argument. The special interrogatory asked the jury whether the defendant proved his claim of lawful force by a preponderance of the

evidence and the jury returned a special verdict of “No.” Id. at 913. After being advised of the current operative statutory language, the trial court expressed concern about the flaw procedure confusing the jury and prejudicing the defendant. Id. at 914. The trial court vacated the jury’s special verdict and ordered a new hearing. The appellate court noted that “when an order to vacate a judgment and grant a new trial is based solely on an issue of law, there is no exercise of discretion, and this court reviews the record de novo for error in application of the law.” Id. at 914. The appellate court held that “the special verdict was based on an erroneous construction of a repealed statute, and this procedural irregularity certainly justifies vacation of that verdict,” id. at 915, and “the court did not abuse its discretion in setting the special verdict aside.” Id. at 916. The defendant was not entitled to a new hearing because “the old jury, once discharged, can never again function as a jury,” id. at 917, and he must seek reimbursement through the sundry claims process. Id. at 917-918.

Like the defendant in Sims, the appellant should not have been allowed to seek reimbursement because his evidence does not support, as a matter of law, any finding that he acted lawfully in pointing the gun at the staff of Kesler’s. Pursuant to RCW 9A.16.020(3), the use, attempt, or offer to use force upon or toward the person of another is not unlawful whenever used by a party about to be injured and the force is not more

than is necessary. When evidence of the appellant's subjective belief is not considered, there is no objective evidence to indicate that the appellant was about to be injured to justify him pulling his gun on the staff of Kesler's.

The appellant's case indicated that he entered Kesler's without paying the cover charge and was rightfully confronted by the staff of Kesler's. After being confronted about the cover charge, the appellant told Phillip and Dominador that he did not have to pay because he was a friend and guest of Brandon. Brandon was not available to verify the appellant's claim and Phillip and Dominador rightfully proceeded to physically remove the appellant from Kesler's. Phillip placed the appellant in a full nelson and Dominador grabbed one of the appellant's hands as they forced the appellant to exit Kesler's. Phillip and Dominador took the appellant out the back entrance, did not throw him onto the street, brought him to the middle of the alley, and released the appellant. At no time did the staffs of Kesler's kick, punch, or beat the appellant and the evidence does not indicate that the appellant was about to be injured. Therefore, the special interrogatory concerning reimbursement should not have been put to the jury and the trial court was correct to vacate the jury's special verdict.

Furthermore, the jury's special verdict should be vacated because it was based on an erroneous statement of the law. As in Watson and in Park, the jury was not properly instructed and erroneously told, "the following definition of lawful force: the use of force or the offer -- offer to use force is lawful when a person appears about to be injured." RP 652. The instruction was proposed by the appellant and the appellant argued for reimbursement by stating that "you don't stand next to the shoes in this one. You stand back as a person watching a video. All the videos and all the evidence and listen to all the witnesses, and you decide, from a subjective standpoint, if it was reasonable. I suggest to you that you have already answered that question but you need to answer it again, in writing for the judge." RP 655. "He pulled the gun, he was in reasonable fear of his life or at least of taking a beating." RP 655. "He just has to have fear of a beating because there are four of them and one of him. He pulled a gun." RP 655.

The jury instruction and the appellant's reimbursement arguments called for the jury apply a subjective standard because they required the jury to consider the appellant's subjective belief and fear. While the appellant's subjective belief and fear was relevant to the determination of self-defense in the criminal case, it runs contrary to the objective standard relevant to the determination of reimbursement in the civil hearing under

RCW 9A.16.110. Therefore, the special verdict was properly vacated and the appellant needs to seek reimbursement through the sundry claims process.

In the event that this court believes there was objective evidence to indicate that the appellant was about to be injured and the jury was properly instructed on the law, the State ask that this court reinstate Judge Warne's order granting the appellant attorney's fees in the amount of forty thousand dollars. The recognized standard for awarding attorney fees in Washington is the lodestar method.

This court has previously applied the lodestar method when the fee shifting statute at issue fails to indicate how the attorney fees award should be calculated. Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 675 P.2d 193 (1983). A court arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 149-50, 859 P.2d 1210 (1993). The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case. Bowers, 100 Wash.2d at 597, 675 P.2d 193. See also Rules of Professional Conduct (RPC) 1.5(a).

Brand v. Department of Labor and Industries, 139 Wn.2d 659, 666, 989 P.2d 1111(1999).

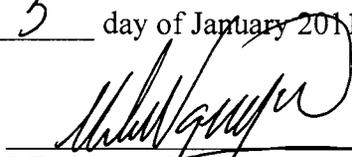
In the present case, Judge Warne heard testimonies from Mr. Crandall's witnesses and concluded the reasonable attorney's fees to be forty thousand dollars. Judge Warne's award was based on Mr. Hay's testimony that it was reasonable for Mr. Crandall to charge \$300.00 per hour and that the appellant's case required an estimated twenty to thirty hours to speak to an investigator and interview witnesses, thirty hours to research the facts of the case, thirty hours to prepare the case and witnesses, and forty five hours to try a four and a half day trial. Judge Warne did not abuse his discretion in determining the reasonable amount of attorney's fees.

V. CONCLUSION

The appellant's appeal should be denied because the facts do not objectively prove by the preponderance of the evidence that the appellant's actions were justified and the jury was erroneously instructed on the law pertaining to reimbursement

Respectfully submitted this 5 day of January 2011.

By:


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I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 5 day of January, 2011.

A handwritten signature in cursive script that reads "Michelle Sasser". The signature is written in black ink and is positioned above a horizontal line.

Michelle Sasser