

NO. 42943-8-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ALFRED V. APODACA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Paula Casey, Judge  
Cause No. 11-1-01527-4

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to give the necessary definition instruction based on WPIC 16.05 as proposed by Apodaca.
02. The trial court erred in failing to give the no duty to retreat instruction based on WPIC 16.08 as proposed by Apodaca.
03. The trial court erred in failing to give the lawful force instruction based on WPIC 17.02 as proposed by Apodaca.
04. The trial court erred in failing to give the actual danger not necessary instruction based WPIC 17.04 as proposed by Apodaca.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether Apodaca was entitled to his proposed instructions on the use of lawful force?  
[Assignment of Error Nos. 1-4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Alfred V. Apodaca (Apodaca) was charged by first amended information filed in Thurston County Superior Court on December 6, 2001, with assault in the second degree (domestic violence), count I, and harassment (domestic violence), count II, contrary to RCWs 9A.36.021(1)(g), 10.99.020 and 9A.46.020(1), respectively. [CP 9].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced on December 7, the

Honorable Paula Casey presiding. The jury returned verdicts of not guilty as charged but guilty of the lesser-included offense of assault in the fourth degree. [CP 46-49]. Timely notice of this appeal followed sentencing. [CP 53-56].

02. Substantive Facts<sup>1</sup>

On the evening of September 27, 2011, at approximately 10:30, Officer Bryan Houser was dispatched to the scene of a reported assault. [RP 22, 47, 116-17].<sup>2</sup> According to Amy Peapaelalo, Apodaca, her boyfriend of three months, had strangled her following an argument concerning how she disciplined her two sons, ages six and ten. [RP 101-08]. When she initially confronted Apodaca in the master bedroom, he told her she was taking a tone he didn't appreciate. [RP 107]. "I did not touch him or try to manipulate him in any way. I simply moved my head so that he would try to meet my eyes." [RP 152].

A. I - - leaned in to try to get him to look at me, and I said what are you gonna do? What does that mean is what I said to him.

Q. Now you said to get him to look at you and you made kind of a hand gesture. Besides leaning in, did you do anything else physical to get his attention?

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<sup>1</sup> The facts are limited to the offense of assault in the fourth degree for which Apodaca was convicted.

<sup>2</sup> All references to the Report of Proceedings are to the transcripts entitled Volumes I-II.

A. No. I just - - I was just trying to maybe meet eyes with him, so I leaned forward because he was leaning and I was standing and he was looking at the ground.

Q. And when you asked him that question, essentially what do you mean by that, what happened next?

A. I said are you gonna hit me with the kids in the house?

Q. Did he respond?

A. Yes.

Q. What did he say?

A. He didn't say anything. He put his hand around my throat.

[RP 107-08].

Peapaelalo went on to explain that Apodaca squeezed “hard enough to make it so that I couldn't - - I couldn't scream, I couldn't breathe, I couldn't talk.” [RP 109]. This lasted “20, 30 seconds maybe.” [RP 118]. “(H)e looked right at me and he was saying I'm gonna squeeze the fucking life out of you ....” [RP 111]. As a result of the incident, Peapaelalo sustained “red marks around her neck or along her jaw line.” [RP 24; State's Exhibits 11-15, 19-23]. “(T)he marks around her neck were red like she'd been grabbed onto.” [RP 39]. She declined medical attention. [RP 43, 163-64].

Apodaca told a different story.

Q. Okay. Well, let's get back to when she's standing in front of you. Did it ever get physical at that point when she was standing in front of you?

A. It did.

Q. How so?

A. I was, like I said, sitting on the bed, looking at the ground. She kept making comments to me. I continued just to kind of not I guess give any reaction at her comments. I wasn't - - to tell you the truth, I really felt the argument was ridiculous.

Q. Okay. Did she ever put her hands on you?

A. She did.

Q. How so?

A. She wanted me to look up and make eye contact with her, so she put her finger and just kind of pushed my head like to look up at her.

Q. Okay. How did you react to that?

A. I was upset. I reacted. I stood up. It was kind of a quick movement. She was here. The wall is here. The vanity is here. The couch with the laundry is at the door. I stood up. I had my left hand on her collar, like her collar bone here, and I rotated her pushed her onto the couch. That's what I did.

[RP 186-87].

During cross-examination, Apodaca explained that his action "was in response to her putting her finger on my face and then opening her hand

and pushing my face up to make eye-contact with her.” [RP 205]. “I think it was appropriate. I was sitting down, she pushed my face, and you know what? I don’t even want to say it was appropriate. It was a reaction to an action.” [RP 205]. He denied ever strangling or threatening Peapaelalo. [RP 219].

D. ARGUMENT

THE TRIAL COURT IMPROPERLY REFUSED  
TO GIVE APODACA’S PROPOSED  
JURY INSTRUCTIONS ON LAWFUL USE  
OF FORCE.

Based on the evidence and testimony presented, Apodaca proposed, and the trial court declined to give [RP 221, 225], the following instructions taken from WPICs 16.05, 16.08, 17.02 and 17.04, which were not individually numbered.

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 affect the lawful purpose intended.

[CP 60; WPIC 16.05].

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.<sup>3</sup>

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<sup>3</sup> This instruction is identical to the first paragraph in WPIC 17.05.

[CP 60; WPIC 16.08].

It is a defense to the charge of Assault in the Fourth Degree that the force offered was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

[CP 60-61; WPIC 17.02].

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although afterwards it might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

[CP 61; WPIC 17.04].

In declining to give these instructions, the trial court summarily stated: “There is no basis for a self-defense instruction based upon the testimony that has been presented.” [RP 221].

The proponent of a proposed jury instruction is entitled to have the instruction given to the jury if it is supported by sufficient evidence. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). In making this determination, the trial court must consider the evidence and inferences drawn therefrom in the light most favorable to the proponent of the instruction. State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990). Failure to give a defendant’s proposed instruction where there is supporting evidence constitutes reversible error. State v. Williams, 132 Wn.2d at 260.

It is undeniable that self-defense may be asserted as a complete defense to assault. State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). A defendant is entitled to jury instructions regarding the law of self-defense or lawful force whenever the record contains “some evidence” tending to establish the defense. State v. Roberts, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977); State v. Modica, 18 Wn. App. 467, 569 P.2d 1161 (1977). A trial court may deny a request for a self-defense instruction “...only where no credible evidence appears in the record to

support the defendant's claim..." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (citing State v. Roberts, *supra*, at 345-46).

A defendant's testimony need not be corroborated by other evidence to create a jury issue on self defense.

The issue is properly raised if the defendant produces 'any evidence' tending to show self-defense...[His] testimony alone is sufficient to raise the issue...(Citations Omitted).

State v. Negrin, 37 Wn. App. 516, 523-24, 681 P.2d 1287 (1984).

Apodaca testified that he reacted by turning or rotating Peapaelalo and pushing her onto the couch only after she had initiated the contact by pushing her finger and open hand in his face while he was sitting on bed. [RP 186-87]. A jury could certainly reject this testimony or, alternatively, use it as a basis for inferring that Apodaca used reasonable force in defending himself, given that he had no duty to retreat. These issues were for the jury to decide, and Apodaca was entitled to his proposed instructions on lawful use of force. The trial court erred in failing to give these instructions.

E. CONCLUSION

Based on the above, Apodaca respectfully requests this court to reverse and dismiss his conviction for assault in the fourth degree.

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DATED this 25th day of July 2012.

*Thomas E. Doyle*

THOMAS E. DOYLE  
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne  
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Alfred V. Apodaca  
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DATED this 25th day of July 2012.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE  
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WSBA NO. 10634

# DOYLE LAW OFFICE

July 25, 2012 - 2:42 PM

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