

No. 44219-1-II

In the Washington State Court of Appeals, Division II

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State of Washington, Respondent,

vs.

Todd R. Johnson, Appellant.

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Brief of Appellant

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### Assignments of Error

I. The trial court erred when it denied Mr. Johnson's request for "defense of property" language in jury instruction #15.

### Issues Pertaining to Assignments of Error

I. In a prosecution for assault, where there is evidence that Mr. Johnson acted in defense of his property (dogs), is Mr. Johnson entitled to a "defense of property" jury instruction?

### Statement of the Case

On August 11, 2011, Todd Johnson was picking up family members from SeaTac Airport. Verbatim Report of Proceedings (Sept. 18, 2012) (VRP) at 24.<sup>1</sup> On the way home, Mr. Johnson received a phone call from his wife Valerie at 3:58PM. *Id.* at 25. His wife told him that there was a man (later identified as Charles Haltom) who had arrived by water in a canoe to their property who was "jabbing at the dogs and trying to bait the dogs." *Id.* at 26. A short time later, Valerie called Mr. Johnson again and stated that Mr. Haltom was beating the dogs. *Id.* at 28.

Upon arriving at his house, Mr. Johnson proceeded around the side of his house towards the shoreline where his property meets Bay Lake. *Id.* at 33. From a distance, he saw Mr. Haltom standing on Mr. Johnson's

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<sup>1</sup> Mr. Johnson is aware RAP 10.4(f) states that the report of proceedings should be abbreviated as "RP." Because this brief will cite to both the Verbatim Report of Proceedings and the Narrative Report of Proceedings, VRP and NRP will be used respectively as abbreviations to distinguish between the two types of reports.

property near a beached canoe at the shoreline. *Id.* at 33-34. He was “tomahawking” Mr. Johnson’s dogs. *Id.* at 34. Mr. Johnson described “tomahawking” as the act of “[h]olding a stick with two hands on the oar, and . . . [chopping] overhead with both hands.” *Id.* At that point, Mr. Johnson screamed at Mr. Haltom to stop hitting the dogs, and began running at full speed to the scene. *Id.* at 35. As Mr. Johnson was running toward the scene, he tripped and “faceplanted” right next to the canoe. *Id.* at 36. As Mr. Johnson tried standing back up, Mr. Haltom attacked Mr. Johnson with the oar. *Id.* at 37. A struggle ensued over the oar and subsequent swinging and punching by both men. *Id.* at 40-42. The fight eventually ended by mutual decision and Mr. Haltom left Mr. Johnson’s property by canoe. *Id.* at 42-44.

On cross examination, the State elicited further testimony from Mr. Johnson regarding the injuries to the dogs. *Id.* at 49-51. According to Mr. Johnson, Mr. Haltom had struck Mr. Johnson’s dogs “as hard as he could” with the canoe paddle. *Id.* at 55. One dog suffered injuries to her snout, and the other has walked with a hitch since then. *Id.* at 55-56. Valerie Johnson also testified that Mr. Haltom was attacking their dogs. Narrative Report of Proceedings (NRP) at 5:4-6.

Mr. Haltom testified that on that day, he had been canoeing home to his house on the lake after floating and drinking beer for some time. *Id.*

at 3:11-13. As he floated past the Johnson household, one dog came at him in the water. *Id.* at 3:13-15. Despite repeated requests from Valerie Johnson to leave, Mr. Haltom did not. *Id.* at 3:15-19. Eventually, Mr. Johnson swam out to Mr. Haltom's canoe that was twenty feet from shore, and dragged the canoe toward shore. *Id.* at 3:19-22. According to Mr. Haltom, Mr. Johnson then caused the canoe to tip in a manner that caused Mr. Haltom to fall out of it. *Id.* at 3:22-24. Mr. Johnson then proceeded to punch and beat Mr. Haltom. *Id.* at 3:24. Finally, Mr. Johnson stopped, helped Mr. Haltom into the canoe, and told Mr. Haltom to leave. *Id.* at 3:25, 4:1. Mr. Haltom complied. *Id.* The State then presented testimony from medical professionals about Mr. Haltom's injuries. *Id.* at 4:5-20.

Prior to closing argument, the court below heard argument on jury instructions. Defense counsel requested the court give a "defense of property" jury instruction under the theory that Mr. Johnson acted in defense of his dogs and that there was sufficient evidence introduced by way of Valerie and Todd Johnsons' testimony to allow the jury to consider it. VRP (Sept. 19, 2012) at 4-10. It should be noted that while the State opposed the instruction, it did include it in its supplemental instructions proffered to the court. Clerk's Papers (CP) at 4. The court ultimately denied the instruction, finding that the instruction "would be confusing and mislead the jury," although the court permitted defense counsel to

argue “all of the circumstances known” because “there’s evidence in the record” to support the instruction. VRP (Sept. 19) at 11. The court’s final instructions included a self-defense instruction, but omitted a defense of property instruction. CP at 32. The jury found Mr. Johnson guilty of the lesser included assault in the fourth degree. NRP at 9:1.

### Argument

**I. The trial court erred when it did not instruct the jury on defense of property where defense of property was argued as a theory of the case and there was sufficient evidence to support that theory. Therefore, this Court should reverse and remand for retrial.**

“Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). “A defendant ‘is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error.’” *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (quoting *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)) (alteration in original). “[T]he trial court should deny a requested jury instruction that presents a theory of the defendant's case

only where the theory is *completely* unsupported by evidence. At the very least, the instructions must reflect a defense arguably supported by the evidence.” *Koch*, 157 Wn. App. at 33, 237 P.3d 287 (internal citation omitted).

RCW 9A.16.020 defines when use of force upon another person is not unlawful:

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

RCW 9A.16.020(3). “It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly.” *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 506, 125 P.2d 681 (1942). “In defense of property, there is no requirement to fear injury to oneself.” *State v. Bland*, 128 Wn. App. 511, 513, 116 P.3d 428 (2005) (citing *Peasley*, 13 Wn.2d at 506, 125 P.2d 681).

Here, one of Mr. Johnson’s theories was defense of property (his dogs). Mr. Johnson testified himself that he saw Mr. Haltom “tomahawking” his dogs with a canoe paddle. VRP (Sept. 18) at 34. He

then ran to confront Mr. Haltom in order to protect his dogs from further injury. *Id.* at 35. The dogs were taken to a veterinarian, who documented injuries to the dogs. *Id.* at 55-56. Valerie Johnson also testified that Mr. Haltom had been beating the dogs with his canoe paddle and that she relayed this information to her husband. NRP at 5:4-6. The dogs were lawfully Mr. Johnson's property. *Cf State v. Mierz*, 127 Wn.2d 460, 470, 901 P.2d 286 (1995) (finding no error where trial court denied defense of property instruction because defendant did not lawfully possess his coyotes). Additionally, under RCW 9A.16.020, Mr. Johnson's use of force would be lawful when preventing malicious interference not only with his personal property, but also to prevent malicious trespass and interference with real property. Mr. Haltom himself had testified that despite repeated requests by Valerie Johnson to leave the Johnsons' property, he did not. NRP at 3:15-19.

Thus, there was sufficient evidence presented to support this theory of the case. The trial court even acknowledged so. VRP (Sept. 19) at 11. Because Mr. Johnson introduced sufficient evidence on this theory of the case, he was entitled to a defense of property jury instruction. The trial court's failure to instruct the jury appropriately is reversible error. Therefore, this Court should reverse and remand for a new trial.

**II. The trial court's error is not harmless and is prejudicial to Mr. Johnson.**

“To warrant reversal, an error must be prejudicial to a substantial right of the party convicted. Where, as here, a constitutional error—denial of [the defendant's] due process right to have his defense theory presented to the jury—benefitted the prevailing party, namely the State, there is a rebuttable presumption that the error was harmful.” *Koch*, 157 Wn. App. at 40, 237 P.3d 287 (internal citations omitted). “[T]he State must prove that the error was not prejudicial by showing, beyond a reasonable doubt, that the jury would have reached the same verdict even if the trial court had given the disputed instruction.” *Id.* (citing *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)).

Here, Mr. Johnson's due process right to have all defense theories presented was violated. The State cannot show beyond a reasonable doubt that the jury would have reached the same verdict. Although the jury had to have rejected Mr. Johnson's self-defense theory in order to convict, there is no indication that the jury would have also rejected a defense of property theory had it been properly instructed. This Court should reverse and remand for a new trial.

Conclusion

Mr. Johnson presented sufficient evidence to support a defense of property theory of the case. Despite this showing, the trial court rejected his request for such a jury instruction. Failure to give an instruction for which there is sufficient evidence is reversible error. The error deprived Mr. Johnson of his right to due process, which creates a presumption of prejudice. The State cannot overcome this prejudice. Therefore, this Court should reverse and remand for retrial.

Respectfully submitted,

Date: 4/29/2013

\_\_\_\_\_/s/\_\_\_\_\_  
Vitaliy Kertchen #45183  
Attorney for Mr. Johnson

# SMITH AND WHITE LAW OFFICE

**April 29, 2013 - 4:34 PM**

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<b>In the Washington State Court of Appeals, Division II</b>	
State of Washington, Respondent,  vs.  Todd R. Johnson, Appellant.	<b>No. 44219-1</b>  <b>Declaration of Service</b>

I am over eighteen years of age, am not a party to this proceeding, and, on 4/29/2013, I served a document titled "Brief of Appellant" on Todd R. Johnson by emailing said document to toddyj16@msn.com, which is known to me to be the correct email address.

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April 29, 2013 at Tacoma, WA  
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Signature

Vitaliy Kertchen  
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