

NO. 44219-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TODD JOHNSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-00777-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to preserve his claim regarding the trial court's failure to give a defense of property jury instruction where defendant failed to propose such an instruction and failed to object to the refusal to give such an instruction?
2. Whether defendant affirmatively waived any objection to a defense of property jury instruction where he informed the trial court that the jury instructions provided him everything he wanted to argue?
3. Whether the trial court abused its discretion in refusing to give a defense of property jury instruction where defense of property was not defendant's theory of the case and there was insufficient evidence to warrant such an instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On March 6, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with assault in the second degree. CP 1. On September 20, 2012, the State corrected the information as to the name of the victim, from "Charles Leon Halton" to "Charles Haltom."

CP 46 (Corrected Information). The case was assigned to the Honorable Kathryn J. Nelson for trial, which began on September 11, 2012. 1 RP 1.¹

The jury acquitted defendant on the second degree assault charge and found defendant guilty of the lesser included offense: fourth degree assault. CP 39–44 (Judgment and Sentence included with Notice of Appeal).

On October 19, 2012, the court sentenced defendant to 364 days confinement with 334 days suspended and 20 days converted to community service. CP 39–44.

Defendant filed this timely notice of appeal on November 16, 2012. CP 39–44.

¹Appellant provided only a Narrative Report of Proceedings and a transcription of jury instructions for this appeal. The State's objection to the narrative report of proceedings was overruled as being untimely made. The State then filed a supplemental statement of arrangements. The Report of Proceedings now contains eight separate volumes, which will be referred to as follows:

Narrative Report of Proceedings.....	NRP
Trial on 9-11-12 (W: Charles Haltom).....	1 RP
Trial on 9-12-12 (W: Ray Readwin).....	2 RP
Trial on 9-17-12 (W: Valerie Johnson).....	3 RP
Trial on 9-18-12 (a.m.) (W: Thomas Halsey; Thomas Halsey III).....	4 RP
Trial on 9-18-12 (p.m.) (W: Todd Johnson).....	5 RP
Trial on 9-19-12 (Jury Instructions).....	6 RP
Trial on 9-19-12 (W: Ray Readwin; Richard Folden; Todd Johnson; Closing Arguments).....	7 RP

2. Facts

a. Substantive Facts from Trial

Mr. Charles Haltom lives in one of 22 to 24 homes that surround Bay Lake in Lakebay, Washington. 1 RP 16–17; 5 RP 21. The 62-year-old man has a hernia that limits the amount of physical activity he can perform, but finds that floating in the water helps "take the weight off things." 1 RP 19–20; 21.

In the early afternoon of August 11, 2011, Mr. Haltom loaded his canoe with a weighted buoy, an inner tube, and a cooler containing three cans of beer. 1 RP 23–24. Mr. Haltom then canoed to a part of the public lake on which he lived, cast his inner tube into the water, and began to float. 1 RP 23–24.

Three hours later, on his return home, Mr. Haltom heard dogs barking as he passed a boat dock. 1 RP 30–31. Just after passing, one of the two dogs entered the water and approached Mr. Haltom in his canoe. 1 RP 32. Mr. Haltom heard an agitated woman yell, "You white trash. Get out of here. You don't belong around people like us." 1 RP 32–33. Mr. Haltom informed the woman, later identified as defendant's wife, Ms. Valerie Johnson, that he was canoeing on a public lake and did not have to comply with her demands to leave. 1 RP 44, 93. Mr. Haltom also informed Ms. Johnson that his stepfather had recently been bitten by a

different dog and expressed concern that her dogs were becoming more aggressive. 1 RP 70, 94. Ms. Johnson told Mr. Haltom that she was going to call the police, and Mr. Haltom remained in his canoe and waited for their arrival. 1 RP 44–45.

Ms. Johnson re-emerged from the house with a gun in her hand and claimed to have called the police. 1 RP 46. Mr. Haltom did not see the dogs at any point after Ms. Johnson went to her house to call the police. 1 RP 47, 128, 130–131. Ms. Johnson continued to yell at Mr. Haltom and then left a second time. 1 RP 47–48.

Mr. Haltom was waiting for the police—trying to maintain his canoe's position despite the wind—when he heard footsteps and a big splash. 1 RP 48, 51, 99. Mr. Haltom turned his canoe and saw someone rapidly swimming toward him. 1 RP 53. The man, later identified as defendant, reached the canoe, grabbed its bowline, and began to bring the canoe to shore. 1 RP 54. Once defendant brought the canoe close enough to shore so that he could stand up, he immediately flipped Mr. Haltom out of the canoe and began to beat him. 1 RP 55, 104. Mr. Haltom pled for his life as defendant held him underwater with one hand and continued to punch him with the other. 1 RP 56–57. 15 to 20 punches later, defendant stopped beating Mr. Haltom and told him to "Get out of here." 1 RP 56, 66.

Although he could barely hold the paddle, Mr. Haltom managed to canoe home and call the police. He was admitted to the hospital and learned that he had suffered broken ribs and had blood in his urine, among other injuries. 1 RP 56, 63–65, 68.

Pierce County Sheriff's Deputies Ray Readwin and Richard Folden responded to Mr. Haltom's 911 call and then drove to defendant's residence to investigate the alleged assault. 2 RP 6, 14; 7 RP 4. Upon arriving at defendant's residence, Deputy Readwin observed several adults near the dock and was met only by defendant's wife.² 7 RP 5–6. Ms. Johnson told Deputy Readwin that a man had paddled near the shore and was threatening her and her dogs. 7 RP 9–10. The "threat" consisted of an accusation that her dogs bit one of the man's relatives at an earlier date. 7 RP 10–11. Ms. Johnson told Deputy Readwin that, after being threatened, she took the dogs and the kids and went into her house. 7 RP 11. She told Deputy Readwin that she called her husband, who instructed her to load her gun and call the police. 7 RP 11–12. Ms. Johnson ended her conversation with Deputy Readwin by telling him that defendant confronted Mr. Haltom in the water. 7 RP 14.

² Ms. Johnson met Deputy Readwin between his car and the water and "made clear that the children and the out-of town guests had nothing to do with [the incident]." 7 RP 30. The out-of-town guests testified at trial and allegedly witnessed the altercation.

At no point during her verbal conversation with Deputy Readwin did Ms. Johnson mention that Mr. Haltom claimed to have a gun or that Mr. Haltom hit her dogs. 7 RP 14, 86–87; 3 RP 95–96.

Deputy Readwin also spoke with defendant regarding the incident. Defendant told Deputy Readwin that, upon arriving home, he went to the water's edge and told Mr. Haltom to leave. 7 RP 18. Defendant jumped into the water because Mr. Haltom continued to be aggressive towards him. 7 RP 19. After he jumped into the water, the canoe began to float away so defendant grabbed it and brought it towards the shore. 7 RP 20. Defendant also told Deputy Readwin that Mr. Haltom began swinging at him once they got to the shore, and that Mr. Haltom never got out of the canoe. 7 RP 20.

At no point during his verbal conversation with Deputy Readwin did defendant mention that Mr. Haltom claimed to have a gun or that Mr. Haltom hit his dogs. 7 RP 21. Defendant did not tell Deputy Readwin that he was injured, nor did Deputy Readwin observe any injuries on defendant. 7 RP 26, 28. Defendant did not tell Deputy Readwin that Mr. Haltom struck him with an oar or paddle of any sort. 7 RP 28–29.

At trial, Ms. Johnson explained that, after calling defendant and 911, she went outside and told Mr. Haltom that police were on the way. 3 RP 22. Another verbal altercation with Mr. Haltom ensued, with Mr.

Haltom allegedly stating his intention to "come up and show you how tough I really am." 3 RP 22. Startled, Ms. Johnson frantically called her husband a second time and was instructed to retrieve a firearm. 3 RP 23. Ms. Johnson returned outside and informed Mr. Haltom that she was armed and that he needed to leave her property.³ 3 RP 23.

Ms. Johnson heard a car pull up in the driveway and went to greet defendant and the out-of-town visitors traveling with him. 3 RP 24–25. Defendant was not there, but went to the side of the house and down to the lake to confront Mr. Haltom. 3 RP 25. Ms. Johnson and the visitors went to a deck and observed a "scuffle." 3 RP 25. According to Ms. Johnson, defendant had apparently fallen, then got up, and "they started fighting." 3 RP 25. Ms. Johnson clarified that Mr. Haltom was actually standing up with his canoe oar, said "What took you so long to get here?" and then swung "like a tomahawk" at defendant. 3 RP 26–27. The canoe tipped over, sending Mr. Haltom into the water. 3 RP 28. Then, Mr. Haltom jumped up out of the water and came after defendant. 3 RP 28. The fight ended with Mr. Haltom surrendering, motioning with his hands that he no longer wanted to fight. 3 RP 29.

³ It is unclear from Ms. Johnson's testimony as to Mr. Haltom's exact location during this part of the encounter, but he was still in his canoe. 3 RP 23–24, 63.

Defendant testified and provided additional information regarding the four phone calls he received from his wife. Defendant had never heard his wife exude such a scared and upset demeanor as she did after informing him that Mr. Haltom allegedly had a gun. 5 RP 30–31. Ms. Johnson feared for her life. 5 RP 31.

When defendant arrived home, he opened the door and "it sounded like a dog fight." 5 RP 31. Defendant saw a canoe, half beached on the grass of the Johnson property and half in the water, with a man standing toward the front tomahawking defendant's puppy and dog. 5 RP 35. Defendant ran full speed toward Mr. Haltom and screamed, "Hey, hey, hey, hey." 5 RP 35. Defendant's dogs saw defendant running and separated—Fritzie went one direction and Diesel went another. 5 RP 36.

Defendant face-planted right in front of the canoe. 5 RP 36. Defendant grabbed the side of the canoe with one hand in an attempt to stand up and blocked a blow from the oar with the other. 5 RP 37. Defendant "got ahold" of the oar, twisted his body, and flipped the canoe over—sending Mr. Haltom into the water. 5 RP 40. Defendant hoped that "that would be it" but, Mr. Haltom "jumped up and started roundhousing" defendant. 5 RP 41. The fight ended with a blow to Mr. Haltom's midsection, after which defendant helped Mr. Haltom into his canoe and sent him on his way. 5 RP 43.

Defendant's step-father, Thomas Halsey, testified in defendant's behalf. 4 RP 4. Mr. Halsey recalls that defendant picked him up from the airport and observed that, on the drive home, defendant became concerned about what was occurring at his residence. 4 RP 6–7. When Mr. Halsey arrived at defendant's house, he was greeted with a hug by a smiling Ms. Johnson and then walked out to the deck to see the view and also to watch what his son was doing. 4 RP 7–8, 29, 32. He saw his son slip as he approached the canoe and then saw Mr. Haltom swing the oar down on defendant. 4 RP 9. Mr. Haltom shifted his weight in the canoe and fell out of the canoe and into the ankle-deep water. 4 RP 10. Mr. Haltom then stood up out of the water and threw the first punch at defendant. 4 RP 10. Defendant responded with punches of his own, and Mr. Haltom eventually surrendered. 4 RP 10–11.

Mr. Halsey's son (and defendant's step-brother), Thomas Halsey III testified in defendant's behalf. 4 RP 47. Like his father, Mr. Halsey III was also picked up from the airport by defendant. 4 RP 49. Mr. Halsey III recalls that he went to the deck and saw defendant "trying to regain his footing." 4 RP 52. He testified that Mr. Haltom was standing in the canoe, bringing an oar down onto defendant. 4 RP 54. Defendant blocked the attack with his right hand and grabbed the canoe with his left hand in an attempt to regain his footing. 4 RP 55, 78. The canoe tipped over and

Mr. Haltom fell out. 4 RP 55. Mr. Haltom regained his footing and came at defendant, swinging his fists. 4 RP 55. Defendant returned punches and Mr. Haltom surrendered. 4 RP 56.

b. Jury Instruction Discussion

In anticipation that defense counsel was going to raise a defense of property claim, the State prepared a defense of property instruction. CP 2–9 at 4; 6 RP 8. The first page of the packet of instructions contains the following typed notation: "Supplemental instructions and verdict forms pertaining to affirmative defenses are supplied without prejudice to the State's objections to such items as appropriate." CP 2–9 at 2. The defense of property instruction is labeled: "Self-Defense etc. (IF APPLICABLE)." CP 2–9 at 4 (emphasis in original).

Defense counsel responded to the State's inclusion of the defense of property instruction, and, when asked if he had any case law to help the Court rule on the matter, responded "I don't because it was just an issue that was raised a second ago." 6 RP 5. Defense counsel then summarized the State's argument and offered argument for a defense of property instruction as follows:

"What the State is trying to do is trying to say that the actual hitting is only in self-defense to himself. That may or may not be true, and the jury can make that determination. But it is clear that the confrontation occurred for a number of

different reasons, not just—but for the trespass on his property, but for the assault against the dog, but for the threats against Ms. Johnson, the confrontation that occurs at the water line where fists are thrown and paddles are raised is—would never have occurred. So it's a question of that the jury is allowed to be instructed upon. So..." 6 RP 6.

The court responded, "I want a reply, and also, if you have any case law that would be instructive to the Court." 6 RP 6.

In an initial ruling, the trial court refused to give the defense of property instruction, stating:

My answer at this time is that that is the instruction I would give. I believe the instruction properly allows the defense to argue its entire case, and to put in additional information about preventing a malicious trespass or a malicious interference with real or personal property would be confusing and mislead the jury because, *at least to this time, there is no evidence that the assault occurred based on that.* That does not exclude Mr. Smith from arguing all of the circumstances known to the person at the time of the incident. And clearly, there's evidence in the record.

6 RP 10–11 (emphasis added).

The court then followed its ruling with the following statement:

"So unless there's some case law to give me more instruction, this is what I believe is the proper instruction. 6 RP 11. Defense counsel responded, "I will prepare—if we need to, I'll address the issue at lunchtime and have something at 1:30." 6 RP 11. Thereafter, the court included "the self-defense instruction [...] as we've revised it" (omitting defense of property). 6 RP 14; CP 15–38 at 32. The court concluded the jury instruction

discussion by stating that, "And again, if somebody gets me case law that I need to look at, we can take up my prior ruling." 6 RP 16.

After going over the jury instructions, defense counsel recalled defendant to the stand.⁴ 7 RP 42. Midway through direct examination by defense counsel, the court dismissed the jury for a late morning break and to address an unrelated objection raised by the State. 7 RP 45–46. After the court ruled on that objection, the following exchange took place regarding the jury instructions:

DEFENSE COUNSEL:

And Your Honor, I've been thinking about it. I actually don't think -- I think that I'm fine with the instructions the way that the Court has rewritten the self-defense instruction. It allows me to get what I want. I don't think it's that --

THE COURT:

Okay. So you're withdrawing your objection.

DEFENSE COUNSEL:

I'll withdraw my -- I just want to make -- I am actually happy to move along. I don't think the case law is going to give me anything. It gives me everything I want to argue. It's -- we're prepared to go, and I think I'd rather just have that ready to go. So I just want to make sure the Court's aware.

7 RP 48–49.

⁴ The jury instruction discussion occurred in the morning of September 19, 2011. NRP 7; 6 RP 3. While defense counsel suggested that he would return after the lunch hour with case law regarding a defense of property jury instruction, he actually addressed the issue during a late morning break and *before* breaking for lunch. 7 RP 48. After the lunch hour, both parties proceeded directly into closing arguments. 7 RP 57.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE HIS CLAIM REGARDING THE TRIAL COURT'S FAILURE TO GIVE A DEFENSE OF PROPERTY INSTRUCTION.

a. Defendant failed to propose a defense of property instruction.

"No error can be predicated on the failure of a trial court to give an instruction when no request for an instruction was ever made." *State v. Proctor*, 71 Wn.2d 882, 431 P.2d 703 (1967). "If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it." *State v. Jacobson*, 74 Wn. App. 7715, 724, 876 P.2d 916 (1994); *see also State v. Mounsey*, 31 Wn. App. 511, 518, 643 P.2d 892 (1982) (although defendant may have been entitled to receive jury instruction at trial, defendant's failure to request instruction precluded him from raising issue on appeal).

Here, defendant has assigned error to the failure of the trial court to give a defense of property instruction that he never requested. Brief of Appellant, 1. The only instructions offered by defendant at trial are represented by "Defendant's Proposed Supplemental Instructions to the Jury." CP 10–14. These instructions lack a defense of property instruction. If defendant proposed other instructions, they have not been designated as part of the record on appeal.

Moreover, while defendant's brief states that "[d]efense counsel requested the court give a 'defense of property' jury instruction" (Brief of Appellant, 3), defendant fails to cite to a corresponding instruction. Presumably, this refers not to any instruction defendant *requested*, but rather, an instruction the Prosecutor *prepared* with the following caveats: (1) the defense of property instruction clearly indicates "(IF APPLICABLE)" at the top; and, (2) the first page of the packet of proposed instructions contains the following statement, in boldface type: **"Supplemental instructions and verdict forms pertaining to affirmative defenses are supplied without prejudice to the State's objections to such items as appropriate."** CP 2–9 at 2, 4 (emphasis in original).

Defense counsel had the opportunity to adopt the Prosecutor's prepared instruction, and even stated that "We're entitled to argue all of that." 6 RP 5. Regardless of whether defendant was "entitled to argue" the evidence before the jury, the issue of whether that same evidence supports the giving of a jury instruction is a separate inquiry—one not adequately addressed by defense counsel. Indeed, when asked to provide the court with case law to assist in making a decision regarding the defense of property instruction, defense counsel could not because "it was just an issue that was raised a second ago." 6 RP 6. Importantly, defense

counsel never advised the court that he was adopting or requesting the defense of property instruction as prepared by the Prosecutor.

Because defendant failed to propose a defense of property instruction, he cannot complain on appeal that the trial court failed to give it.

- b. Defendant failed to object to the trial court's refusal to give a defense of property instruction.

"It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court. That rule is not a mere technicality." *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990); *see also State v. Smith*, 174 Wn. App. 359, 363, 298 P.3d 785 (2013) ("Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal."); *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). "Any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review." *State v. Sublett*, 176 Wn.2d 58, 75–76, 292 P.3d 715 (2012). "Counsel has duty to lodge formal objections even if instructions [were] discussed during informal hearing." *Id.* at 76 *citing Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 615–17, 1 P.3d 579 (2000).

CrR 6.15(c) explains the manner for objecting to the trial court's refusal to give a requested instruction as follows:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to *object to the giving of any instructions and the refusal to give a requested instruction* or submission of a verdict or special finding form. *The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.* The court shall provide counsel for each party with a copy of the instructions in their final form.

Id. (emphasis added).

"An exception to the rule that a jury instruction must be excepted to exists in the case of 'manifest error affecting a constitutional right.'" *Bailey* at 347. "[T]he constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Id.* at 348. Indeed, "criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms." *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992).

Division One offered the following insight as to why the constitutional error exception of RAP 2.5(a)(3) should be narrowly construed on appeal:

Limiting the constitutional claims that may be raised for the first time on appeal places responsibility on trial counsel to properly prepare their cases and will reduce claims that are discovered solely for purposes of appeal. An expansive reading of *manifest* sends a message to trial counsel not to worry about overlooking constitutional claims, since such claims can always be asserted on appeal. Indeed, sophisticated defense counsel may deliberately avoid raising issues which have little or no significance to the jury verdict but may be a basis for a successful appeal.

[...]

[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts.

Id. at 343–44 (emphasis added).

Here, defendant failed to object or except to the trial court's refusal to give a defense of property instruction. Indeed, when the trial court ruled that it would not give the defense of property instruction, defense counsel responded, "I will prepare—if we need to, I'll address the issue at lunchtime and have something at 1:30." 6 RP 11. This statement does not meet the criteria of CrR 6.15(c) to qualify as a valid objection. Rather, it appears that defense counsel was informing the court that he might voice an objection at some point in the future. The record reflects that defendant decided not to pursue the defense of property instruction and later

affirmatively waived it. The failure to object precludes review of this issue.

On appeal, defendant broadly asserts that his "due process right to have all defense theories presented was violated." Brief of Appellant, 7. Defendant fails to allege that the trial court's failure to give a defense of property instruction is a constitutional issue that may be considered for the first time on appeal pursuant to RAP 2.5(a)(3). Even if the issue were considered for the first time on appeal, there was insufficient evidence to warrant a defense of property instruction (discussed *infra*). And, defendant's due process was not violated where he affirmatively waived the defense of property instruction (also discussed *infra*).

2. DEFENDANT AFFIRMATIVELY WAIVED A DEFENSE OF PROPERTY INSTRUCTION.

Black's Law Dictionary defines *waiver* as "The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage." *Black's Law Dictionary*, 1611 (8th ed. 1999); see also *State v. Thompson*, 73 Wn. App. 122, 127, 867 P.2d 691 (1994).

Even if defendant did have a right to a defense of property jury instruction, he waived such a right by informing the court of the following:

- (1) I'm fine with the instructions the way the Court has rewritten the self-defense instruction;
- (2) It allows me to get what I want;
- (3) I'll withdraw my -- I am actually happy to move along;
- (4) I don't think the case law is going to give me anything;
- (5) It gives me everything I want to argue;
- (6) It's -- we're prepared to go, and I think I'd rather just have that ready to go.

7 RP 48–49.⁵

Prior to defense counsel's decision to proceed without the instruction, the Court *three times* invited defendant to provide case law to assist in making a decision as to whether to give a defense of property instruction. *See* 6 RP 6 ("I want a reply, and also, if you have any case law that would be instructive to the Court"); 6 RP 11 ("So unless there's some case law to give me more instruction, this is what I believe is the proper instruction"); 6 RP 16 ("And again, if somebody gets me case law that I need to look at, we can take up my prior ruling"). Defense counsel failed to provide the court with any case law, and instead, chose to proceed without a defense of property instruction.

⁵ Notably, the Narrative Report of Proceedings—prepared by defendant's trial attorney—does not contain anything regarding the above waiver of the sole issue raised on appeal.

Defense counsel's statements serve as an unequivocal waiver of any right to present a defense of property jury instruction.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A DEFENSE OF PROPERTY JURY INSTRUCTION.

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewed for an abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds* by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); *see also State v. Winnings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it “is outside the range of acceptable choices, given the facts and the applicable legal standard.” *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A discretionary decision “is based on ‘untenable grounds’ or made for ‘untenable reasons’ if it rests on facts unsupported in the record or was reached in applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Here, the trial court refused to give the defense of property instruction and stated as follows:

My answer at this time is that that is the instruction I would give. I believe the instruction properly allows the defense to argue its entire case, and to put in additional information about preventing a malicious trespass or a malicious interference with real or personal property would be confusing and mislead the jury because, at least to this time, *there is no evidence that the assault occurred based on that*. That does not exclude Mr. Smith from arguing all of the circumstances known to the person at the time of the incident. And clearly, there's evidence in the record.

6 RP 10–11 (emphasis added).

Whether the record contained sufficient evidence that defendant assaulted Mr. Haltom to prevent a malicious trespass or a malicious interference with real or personal property is a factual matter reviewed for an abuse of discretion.

- a. The trial court's failure to give a defense of property instruction was reasonable and within the range of acceptable choices given that defendant neither requested nor objected to the instruction and affirmatively waived the issue before the trial court.

As a preliminary matter, the trial court did not abuse its discretion by refusing to give a defense of property instruction when it accepted defendant's decision that he no longer sought such an instruction and was happy to proceed without it. 7 RP 48–49. As defense counsel was

expressing his willingness to proceed without a defense of property instruction, the trial court interjected, "Okay. So you're withdrawing your objection."⁶ 7 RP 48. Accepting this waiver was not "outside the range of acceptable choices" or "based on untenable grounds" or reasons. *Lamb*, 175 Wn.2d at 128; *Rohrich*, 149 Wn.2d at 654.

b. Defense of property was not defendant's theory of the case.

"A defendant is entitled to present his theory of the case to the jury in the form of appropriate instructions only where the theory is supported by substantial evidence in the record." *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815 (1991) citing *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979). "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Although "a defendant is entitled to present his theory of the case" here, defendant's theory could not have been defense of property where he informed the court that the current instructions (lacking defense of property) gave him "everything [he] want[ed] to argue." *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815 (1991) citing *State v. Griffith*, 91

⁶ Defense counsel's earlier statement, "I will prepare—if we need to, I'll address the issue at lunchtime and have something at 1:30" was ambiguous, but the court characterized it as an objection. 6 RP 11; 7 RP 48.

Wn.2d 572, 575, 589 P.2d 799 (1979); 7 RP 48. In other words, even if defense of property was defendant's theory of the case at some point, he abandoned the theory once he told the court that he only wanted to argue self-defense.

Furthermore, defense counsel seemed surprised by the defense of property instruction; given that, when asked for relevant case law, he was unprepared for it. He responded that "I don't because it was just an issue that was raised a second ago." 6 RP 5. Also, given the opportunity to raise it, defense counsel failed to ask Ms. Johnson, Mr. Halsey, or Mr. Halsey III, any questions regarding whether or not they observed the dogs at the waters edge during or immediately prior to defendant's use of force.

- c. There was insufficient evidence to warrant a defense of property instruction at trial and defendant fails to identify sufficient evidence on appeal that would warrant such an instruction.

On appeal, defendant claims that he presented sufficient evidence to "support this theory of the case." Brief of Appellant, 6. It is unclear whether "this theory" refers to a "defense of property (his dogs)" (Brief of Appellant, 5); or, a theory "to prevent malicious trespass with real property" (Brief of Appellant, 6). Whether evidence supports each theory will thus be addressed separately.

- i. **To the extent that defendant argues that he presented sufficient evidence to receive a defense of property instruction based upon an alleged malicious trespass, he fails to support his claim with argument or accurate facts.**

“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 667, 266 P.3d 229 (2011) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

On appeal, defendant offers only the following evidence in support of his claim that sufficient evidence supports a defense of property instruction regarding 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.

Brief of Appellant, 6.

This interpretation does not comport with the record. The cited NRP (3:15–19) indicates as follows:

A female began to yell at him telling him to leave. He did not. She told him that she would call the police, he still didn't leave. She told him that she was arming herself. He did not leave. She told him that she had the gun, but he did not leave.

Defendant's interpretation of the NRP presumes that Mr. Haltom stated he was on defendant's property. One line above the cited NRP is the statement: "One dog came at him [Mr. Haltom] *in the water.*" NRP 3:14–15 (emphasis added). The evidence in the record does not reflect that the water in front of defendant's home is defendant's real property. Furthermore, Mr. Haltom adamantly insisted at trial that he was on a public lake. 1 RP 44. There is simply no evidence that "Mr. Haltom himself testified that despite repeated requests [...] to leave the Johnsons' property, he did not." Brief of Appellant, 6.

Because defendant's limited support for a defense of property claim based upon real property is factually inaccurate, it cannot be used to support his claim on appeal. Defendant fails to identify any other evidence or offer argument that would support a defense of property instruction regarding real property.

ii. A defense of property instruction regarding defendant's dogs is not supported by the evidence.

Under RCW 9A.16.020, the use, attempt, or offer to use force upon or toward another person is not unlawful when:

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) (emphasis added).

Here, evidence in the record indicates that defendant used force not to protect his dogs, but to protect himself.

Mr. Haltom testified that he did not see the dogs at any point after Ms. Johnson went to her house the first time to call the police. 1 RP 47, 128, 130–131.

Ms. Johnson's testimony contains several references to Mr. Haltom allegedly assaulting her dogs. 3 RP 13–14, 21, 44, 50. Each reference to the assault, however, indicates that it occurred prior to defendant's arrival at defendant's house. No part of Ms. Johnson's testimony indicates that defendant used force to prevent malicious interference with the dogs. And, when Ms. Johnson spoke with Deputy Readwin, she did not state that defendant hit her dogs. 3 RP 95–96.

Mr. Halsey testified that he observed the incident beginning with his step-son slipping as he approached the water. 4 RP 9. Mr. Halsey then saw Mr. Haltom swing the oar at defendant and follow it up with a punch. 4 RP 9–10. No part of Mr. Halsey's testimony references defendant's dogs.

Mr. Halsey III also testified that he observed the incident beginning with defendant regaining his footing. 4 RP 52. He then sees Mr. Haltom swing the oar at defendant. 4 RP 54. Mr. Halsey III did not reference defendant's dogs whatsoever.

Finally, defendant testified that he arrived home and heard what sounded like a dog fight. 5 RP 31. Once he could see the lake, defendant observed Mr. Haltom hitting his dogs and ran down toward the water. 5 RP 34–35. As defendant ran toward the water (and Mr. Haltom), "the dogs saw [defendant] coming and one went this way [indicating]." 5 RP 36. Defendant testified that one dog went to the left, the other went to the right, and "I was going to run into them, and I tried to slow down and I did a face plant, I mean right in front of the canoe." 5 RP 36. According to defendant, he then stood up and blocked Mr. Haltom's swinging of the canoe oar. 5 RP 37. When defendant spoke with Deputy Readwin immediately following the incident, he failed to mention anything regarding an alleged assault on his dogs. 7 RP 21.

Not only did Ms. Johnson, Mr. Halsey, Mr. Halsey III, and Mr. Haltom fail to testify that Mr. Haltom was attacking the dogs when defendant was present, even defendant testified that the dogs went their separate ways as defendant ran toward the water. 5 RP 36. Indeed, it is likely that, in light of the evidence, defense counsel strategically chose to

proceed without a defense of property instruction. Only defendant witnessed Mr. Haltom allegedly attack the dogs immediately prior to using force against Mr. Haltom. Defendant did not testify that he punched Mr. Haltom in response to an alleged assault against his dogs. Rather, defendant testified that he punched Mr. Haltom in response to Mr. Haltom swinging an oar and "roundhousing" him. 5 RP 41.

Accordingly, the record does not contain sufficient evidence to warrant a defense of property instruction based upon an alleged attack of defendant's dogs. And, because the record does not support a defense of property instruction regarding defendant's dogs, the trial court did not abuse its discretion in refusing to give a defense of property instruction.

d. Any error in refusing to give a defense of property instruction is harmless.

"Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party." *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. *State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550 (2002).

Here, because defense of property was not defendant's theory of the case (*see supra* § 2b), any error in refusing to give such an instruction is harmless. Simply put, defendant cannot be prejudiced by the trial

court's refusal to give an instruction that defendant neither requested nor objected to, and in fact, informed the trial court that he did not want.

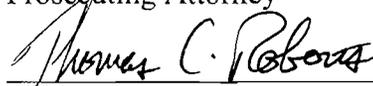
Finally, the evidence at trial overwhelming supports the jury's fourth degree assault guilty verdict, regardless of whether a defense of property instruction was given. Not surprisingly, defendant presented substantially more evidence that he beat Mr. Haltom in self-defense rather than defense of his property. Each of defendant's witnesses who claim to have witnessed the incident testified that defendant returned force after blocking Mr. Haltom's oar attack. None of these witnesses testified that defendant acted to protect his dogs. Despite defendant's heavy emphasis on defense of *self*, the jury still rejected defendant's self-defense claim and found him guilty of fourth degree assault. Defendant now claims that, had he been allowed to instruct the jury on defense of property, of which there is substantially less evidence, the same jury would return a different verdict. Defendant's claim is without merit.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction.

DATED: SEPTEMBER 12, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney



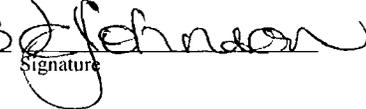
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Chris Bateman
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US mail~~ ^{file} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/12/13 
Date Signature