

NO. 49105-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

FERNANDO JACA-ORTIZ,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on self-defense.
2. Appellant was denied his due process right to present his theory of the case.

Issues Presented on Appeal

1. Did the trial court err in refusing to provide a self-defense instruction where the state's witnesses testified that Jaca-Ortiz acted in defense of his friend?
2. Was appellant denied his due process right to present his theory of the case where there was testimony that he was defending a friend during the incident?

B. STATEMENT OF THE CASE

Morenitos Taco Restaurant becomes a karaoke club on weekend nights. RP 34, 138. Many of the attendees know each other from playing soccer together. RP 36-37, 53, 104, 126, 151-42. Ciro Aguilar accompanied Mr. Jaca-Ortiz and others to the club

the night of the incident. RP 343. Mr. Juan Ledesma drank 3-5 beers that evening and sang karaoke. RP 55, 138. His girlfriend Maria Santa Cruz described Mr. Ledesma's singing as bad. RP 64. Late in the evening Mr. Aguilar confronted Mr. Jaca-Ortiz because he did not like the song Mr. Ledesma was singing. RP 36-37, 56. During cross examination, Mr. Ledesma indicated that Mr. Jaca-Ortiz did not like the song either. RP 56.

Mr. Aguilar confronted Mr. Ledesma, took his shirt off and asked Mr. Ledesma to step outside to settle matters. RP 38. Mr. Jaca-Ortiz was not present outside when Mr. Aguilar and Mr. Ledesma engaged in a fist fight. RP 39. Mr. Ledesma never saw Mr. Jaca-Ortiz with a metal bar, but someone struck him in the head causing fractures to his skull and intracranial bleeding. RP 186, 203-04.

Ms. Santa Cruz testified that she thought Mr. Ledesma was dead after she saw Mr. Jaca-Ortiz retrieve a jack from his car and strike Mr. Ledesma. RP 68-70. Misael Ledesma, Mr. Juan Ledesma's cousin "Misael" testified that he saw Mr. Jaca-Ortiz strike Mr. Ledesma with a car jack. RP 106-09. Misael testified that he grabbed the car jack from Mr. Jaca-Ortiz during the fight. RP

109, 130. Mr. Jaca-Ortiz testified that Misael grabbed the car jack from Mr. Jaca-Ortiz's car and struck Mr. Ledesma and Juventio Manzano by accident while trying to hit Mr. Jaca-Ortiz. RP 347-49, 354-55.

Mr. Manzano was under the influence of methamphetamines and opiates the night of the fight. RP 323-33, 429. Mr. Manzano testified that he tried to remove Mr. Ledesma from the fight with Mr. Aguilar because Mr. Jaca-Ortiz was coming to defend Mr. Aguilar against Mr. Ledesma. RP 141. Mr. Manzano was struck by an object and fell to the ground in a state of blackness. RP 142. While Mr. Ledesma was fighting Mr. Aguilar, there were six people surrounding Mr. Aguilar. RP 161-62.

C. ARGUMENT

THE TRIAL COURT VIOLATED MR. JACA-ORTIZ'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE.

- a. A criminal defendant has a constitutional due process right to a jury instruction on self-defense whenever there is **some** evidence, from whatever source, to support the instruction.

The right to assert a defense of self-defense in a criminal trial stems from the unequivocal right of every citizen in Washington

State “to reasonably defend himself against unwarranted attack.”  
*State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

Additionally, the constitution mandates that, “[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.” Wash. Const. art. I, § 24.1 This “quite explicit language about the ‘right of the individual citizen to bear arms in defense of himself’” set forth in article I, section 24 “means what it says.” *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 99 (2010).

The federal constitution likewise guarantees the right to act in self-defense; “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S.Ct. 3020, 3036, 177 L.Ed.2d 894 (2010); U.S. Const. Amends. II, XIV. The right to bear arms in self-defense is “deeply rooted” and “fundamental” to our concept of liberty. *McDonald*, 130 S.Ct. at 3036-37; *Sieyes*, 168 Wn.2d at 292.

The right to a jury instruction on self-defense when the

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<sup>1</sup> Wash Const. art. I, § 24 states in full, “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”

evidence supports it is guaranteed by the accused's constitutional due process right to fully defend against the charges. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

The right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that supports the defense theory as long as the instruction is an accurate statement of the law and is supported by the evidence. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

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).

A defendant is entitled to an instruction on self-defense when there

is “**some evidence admitted in the case from whatever source** which tends to prove a [use of force] was done in self-defense.” *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (emphasis added). *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010) (reversible error not to instruct on self-defense even though the accused asserted gun discharged on accident).

Accordingly, there need only be **some** evidence that (1) the defendant subjectively feared that he or a friend was in imminent danger of bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. *Werner*, 170 Wn.2d at 337.

This is a low threshold: “[t]he trial court is justified in denying a request for a self-defense instruction only where *no* credible evidence appears in the record to support a defendant’s claim of self-defense.” *Id.* (emphasis added).

The question of whether the defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168, *review denied*, 104 Wn.2d 1012 (1985).

It is a “well-settled principle in Washington” that the jury also consider what a reasonable person would have done if placed in the defendant’s situation. *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002); *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

A person need not be in actual danger of bodily harm in order to be justified in using force in self-defense. *McCullum*, 98 Wn.2d at 489. Instead, a person is entitled to act on appearances and, if he believes in good faith and on reasonable grounds that he is in actual danger of bodily harm, although it afterwards might develop that he was mistaken as to the extent of the danger, he is entitled to use a reasonable amount of force to defend himself. *Id.*

The prosecution bears the burden of disproving, beyond a reasonable doubt, that the defendant reasonably believed that force was necessary to defend himself against imminent bodily harm. *Walden* 131 Wn.2d at 473.

In *Walden*, the defendant was accused of stabbing several unarmed men. *Walden*, 131 Wn.2d at 472. The Supreme Court explained that self-defense applies even to the use of “of deadly force in self-defense against an unarmed assailant.” *Walden*, 131

Wn.2d at 474-75. The law of self-defense does not bar a person from using a weapon; instead, it rests on whether the degree of force was necessary and reasonable, based on how the defendant perceived the threat he faced. *Walden*, 131 Wn.2d at 477.

Here the trial court erred in denying the self-defense instruction because there was “some” evidence of self-defense from the state’s witnesses. RP 1141, 350, 353.

- b. The state presented evidence that Mr. Jaca-Ortiz feared for Mr. Aguilar’s life and came to defend him from serious harm.

The trial court ruled the defense-proposed self-defense instructions were not warranted because Mr. Jaca-Ortiz denied striking Mr. Ledesma. RP 355, 368. The trial court’s approach was incorrect and its ruling erroneous because the state produced evidence that Mr. Jaca-Ortiz acted in self-defense. RP 141. “[I]t was obvious he wanted to defend his friend that was fighting there.” *Id.* Mr. Jaca-Ortiz was afraid that Mr. Manzano and Misael were going to kill him. RP 350, 353. Mr. Jaca-Ortiz admitted that he approached the fight and struggled for control of the car jack with Misael. RP 348. This evidence satisfies the “some” evidence rule set forth most recently in *Werner*, sufficient for a threshold finding

that Mr. Jaca-Ortiz intentionally and justifiably used force in self-defense and defense of others. *Werner*, 170 Wn.2d at 337; *McCullum* 98 Wn.2d at 488.

A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). Because the defendant is entitled to the benefit of all the evidence, a defense of self-defense may be based upon facts that are even inconsistent with his own testimony. *Callahan*, 87 Wn. App. at 933; *Werner*, 170 Wn.2d at 337-38 (per curiam reversal for failure to instruct on self-defense even though the accused claimed accident); *Accord Callahan*, 87 Wn. App. at 933-34; *State v. Redwine*, 72 Wn. App. 625, 631, 865 P.2d 552 (1994); *State v. Fondren*, 41 Wn. App. 17, 20, 701 P.2d 810 (1985).

In *Callahan*, the defendant engaged in a hostile verbal altercation with the driver and passengers of another car after the other car cut in front of him. *Callahan*, 87 Wn. App. at 928. The two cars pulled into a parking lot and the passengers of the other car

got out. *Id.* Callahan took a handgun from his car, got out, and approached the other men. *Id.* At trial, one of the passengers, Ben Manning, testified that Callahan pointed the gun at him during the altercation. *Id.* Callahan admitted displaying the gun, saying he did so because he feared for his safety, but denied intentionally pointing the gun at Manning. *Id.*

The Court of Appeals concluded that the evidence was still sufficient to warrant a jury instruction on self-defense. *Callahan*, 87 Wn. App. at 933-34. Manning's testimony, coupled with Callahan's admission that he displayed the weapon, supported the inference that he intentionally used force in self-defense. *Id.* Thus, the trial court erred in refusing to provide a self-defense instruction. *Id.*

Similarly, in *Redwine*, Darwin Hines testified that the defendant pointed a shotgun at him when he went to his home to serve him with legal papers. *Redwine*, 72 Wn. App. at 627. Redwine testified he displayed the shotgun but never pointed it at Hines. *Redwine*, 72 Wn. App. at 627-28. Two more witnesses also testified they saw Redwine carrying the gun but said he never pointed it at Hines. *Id.* Even on those facts the Court concluded the evidence was still sufficient for a factfinder to find Redwine

justifiably used force in self-defense and a self-defense instruction should have been provided. *Redwine*, 72 Wn. App. at 631.

The defendant in *Fondren*, grabbed a shotgun to protect himself. *Fondren*, 41 Wn. App. at 20. During a struggle, the gun accidentally went off, killing a person. *Id.* There too the Court rejected the State's argument that self-defense was not at issue because Fondren denied intentionally pointing the gun or pulling the trigger. *Id.*

More recently, in *State v. Werner*, the Supreme Court reversed the Court of Appeals when it departed from the above line of precedent. Werner claimed he accidentally discharged a firearm when confronted by a pack of his neighbor's dogs. *Werner*, 170 Wn.2d at 336. The trial court denied his proposed self-defense instruction and he was convicted of first degree assault. *Id.*

The Court of Appeals in *Werner* distinguished *Callahan* on the basis that Werner faced two distinct potential threats: the dogs and [his neighbor]. The court held that, viewing the evidence in a light most favorable to Werner, there was no evidence he was justified in acting in self-defense against [the neighbor], the person he was charged with assaulting. We disagree. *Werner*, 170 Wn.2d

at 337.

The Supreme Court observed that Werner “stated that he was afraid” and inferred that such a fear “was arguably reasonable,” because the dogs were dangerous and their owner, the neighbor, refused to call them off. *Id.* The Supreme Court further hypothesized that “Werner could reasonably have believed that [the neighbor] personally posed a threat through the agency of a formidable group of canines that were under his control.” *Werner*, 170 Wn.2d at 338. Despite the fact that Werner claimed the discharge was accidental, the Supreme Court turned to the direct and circumstantial evidence in the record to make its own reasonable inferences in the defendant’s favor. *Id.*

Long ago, our Supreme Court held that “[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense.” *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (denying defendant’s request for self-defense instructions where he expressly and consistently denied participating in the bar fight giving rise to his assault charge). Since then, Divisions One and Three have held that a defendant cannot receive self-defense instructions when denying committing the act underlying the

charged crime. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Gogolin*, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986), accord *State v. Pottorf*, 138 Wn. App. 343, 348, 156 P.3d 95 (2007) (“A defendant asserting self-defense is ordinarily required to admit an assault occurred.”).

This Court has held that a defendant may support his request for self-defense instructions with evidence inconsistent with his own testimony. *Callahan*, 87 Wn. App. at 933 (permitting defendant's self-defense claim where he denied intentionally aiming his gun or firing at the victim but victim testified that defendant aimed the gun at his head). In *Callahan*, Division Two interpreted *Aleshire* as a case where the defendant lacked evidence in support of a necessary element of self-defense rather than evidence that the defendant committed the underlying act. *Callahan*, 87 Wn. App. at 931-32.

Here, the state's witnesses said that Mr. Jaca-Ortiz struck Mr. Ledesma and Misael with a car jack. Mr. Jaca-Ortiz denied the striking but admitted to struggling with Misael to gain control of the jack. RP 353, 348. Mr. Jaca-Ortiz also admitted to being in the struggle and raising his hands to prevent Misael from striking Mr.

Aguilar. RP 348-48. This evidence similar to the analysis of *Aleshire* in *Callahan*, is a case where Mr. Jaca-Ortiz perhaps lacked evidence in support of the amount of force used, a necessary element of self-defense rather than evidence that he committed the underlying act. *Callahan*, 87 Wn. App. at 931-32.

Although the evidence of Mr. Jaca-Ortiz's participation in the fight is inconsistent, there is "some" evidence that he acted in self-defense. Accordingly, under *Werner*, *Callahan*, *Redwine*, and *Fondren*, Mr. Jaca-Ortiz, there was enough evidence in the record of Mr. Jaca-Ortiz's intentional use of force to justify the requested self-defense jury instruction. RP 140, 350, 353. *Werner*, 170 Wn.2d at 337-38; *Callahan*, 87 Wn. App. at 933-34; *Redwine*, 72 Wn. App. at 631; *Fondren*, 41 Wn. App. at 20.

In addition, there was sufficient evidence to support the other elements of a self-defense claim that: (1) Mr. Jaca-Ortiz subjectively feared he and his friend were in imminent danger of bodily harm; (2) this belief was objectively reasonable; and (3) Mr. Jaca-Ortiz exercised no greater force than was reasonably necessary to ward off the attack. *Werner*, 170 Wn.2d at 337.

The jury could have found that Mr. Jaca-Ortiz feared that both he and Mr. Aguilar were in imminent danger of bodily harm and that this belief was objectively reasonable. RP 35. Mr. Jaca-Ortiz was entitled to have the jury determine if Mr. Jaca-Ortiz's actions were reasonably necessary to defend himself and Mr. Aguilar.

The court misunderstood the law on self-defense and mistakenly believed that it could not rely on all of the evidence in the record to support the self-defense instruction. This is contrary to *Werner*, 170 Wn.2d at 336-37, which requires the self-defense instruction if there is *some* evidence demonstrating self-defense. *Id.*

“[O]nly where no plausible evidence appears in the record upon which a claim of self-defense might be based is an instruction on [self- defense] not necessary.” *State v. Adams*, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982). Here, Mr. Jaca-Ortiz's testimony that he was scared and raised his arms to block a hit to Mr. Aguilar, combined with the fact that Misael testified that Mr. Jaca-Ortiz was defending Mr. Aguilar, was sufficient to raise the issue of self-defense. “Once any evidence of self-defense is produced, the defendant has a due process right to have his theory of the case

presented under proper instructions.” *Adams*, 31 Wn. App. at 396; *Accord, Werner*, 170 Wn.2d at 336-37; *McCullum*, 98 Wn.2d at 488-89.

c. The conviction must be reversed.

A trial court’s refusal to provide a self-defense instruction when requested by the defense is reversible error if the defense is thereby prejudiced. *Werner*, 170 Wn.2d at 337. The error is prejudicial if there was evidence to warrant the instruction and the jury could have believed that version of events. *Id.* at 337-38; *State v. Riley*, 137 Wn.2d 904, 908 n.1., 976 P.2d 624 (1999).

Here, defense had given notice of its intent to rely on a lawful use of force defense and opened on self-defense. CP 8; 1RP 16. The State presented its case-in-chief and proposed a self-defense instruction. Supp. CP (State’s Proposed Jury Instructions February 2, 2016).

The State bears the burden of proving a constitutional error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this heavy burden here. Defense counsel correctly indicated that the combination of direct and circumstantial evidence

supported the inference that Mr. Jaca-Ortiz came to Mr. Aguilar's defense after Mr. Ledesma repeatedly struck him in a fist fight. RP 346.

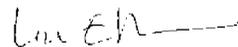
Without the self-defense instruction, Mr. Jaca-Ortiz was unable to argue his theory of the case to the jury, instruct it on that theory, inform it of the applicable law, or to give it the ability to decide the critical factual question, as required by due process. *Koch*, 157 Wn. App. at 33.

D. CONCLUSION

The State cannot show beyond a reasonable doubt that the outcome would have been the same had the jury been instructed on self-defense. This Court should accordingly reverse the convictions and remand for a new trial.

DATED this 21<sup>st</sup> day of October, 2016.

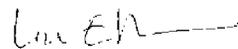
Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor's Office (at [appeals@co.cowlitz.wa.us](mailto:appeals@co.cowlitz.wa.us)) and Fernando Jaca-Ortiz/DOC# 390750, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on October 21, 2016. Service was made by electronically to the prosecutor and to Fernando Jaca-Ortiz by depositing in the mails of the United States of America, properly stamped and addressed.



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**ELLNER LAW OFFICE**

**October 21, 2016 - 4:27 PM**

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