

NO. 49105-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FERNANDO JACA-ORTIZ,

Appellant.

RESPONDENT'S BRIEF

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I. REPLY TO ASSIGNMENTS OF ERROR

- A. The trial court did not err in refusing to give the self-defense jury instruction.
- B. Jaca-Ortiz was able to present his theory of the case.

II. STATEMENT OF THE CASE

On October 12, 2014, Juan Wandestrand Ledesma was at Morenita Tacos with his girlfriend and friends. RP 35. They were singing karaoke, drinking beer, and socializing. RP 35. After Ledesma sang a song, Ciro Aguilar confronted him. RP 37. He was angry and upset, and told Ledesma that they should go outside. RP 38. Fernando Jaca-Ortiz was with Aguilar when they went outside, but walked away. RP 39–40.

Aguilar hit Ledesma, then Ledesma hit Aguilar back. Then, Jaca-Ortiz returned, walking across the parking lot swinging a car jack in his hand. RP 39; RP 68; RP 140. Juvento Manzano Quiroz, Ledesma's friend, tried to separate him from Aguilar but Jaca-Ortiz hit him with the car jack and everything went black. RP 142. Jaca-Ortiz then hit Ledesma with the jack. RP 41; RP 68. Jaca-Ortiz hit Ledesma from behind, in the back of the head. RP 72. Ledesma fell to the ground and Jaca-Ortiz hit him again with the jack. RP 106. Dr. Dulabon testified at trial that Ledesma was hit at least twice. RP 194.

Jaca-Ortiz was charged with two counts of Assault in the first degree with a lesser included of Assault in the second degree. CP 22. At trial, Jaca-Ortiz testified that Ledesma and Quiroz hit him with their fists, and then another person hit Ledesma and Quiroz with the car jack. RP 348–49. He testified that he did not hit anyone and he did not assault anyone. RP 355–57. Based in part on this testimony, the judge declined the defense’s request to give the self-defense jury instruction. RP 368. Jaca-Ortiz was found guilty of one count of Assault in the first degree and one count of Assault in the second degree. CP 46.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A SELF-DEFENSE JURY INSTRUCTION.

Jury instructions, read as a whole, must correctly inform the jury of the law, not be misleading, and allow a defendant to present his theory of the case. *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). Constitutional due process is satisfied when the jury is instructed on each element of the crimes charged and that the State has the burden to prove each element beyond a reasonable doubt. *Id.*

Jury instructions also must be supported by the evidence. An instruction about an issue or theory that is not supported by the evidence is improper. *State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d 683 (1986).

In *Gogolin*, the defendant was charged with assaulting his ex-wife. *Id.* at 641. He testified that he raised his hand to push the victim away and she fell down the stairs. He did not know if he had even touched her. *Id.* at 642. He also denied telling the officer that he pushed the victim too hard, causing her to fall, claiming that she had fallen accidentally. *Id.* The Court of Appeals found that there was no evidence to support the theory that the defendant had acted in self-defense, and the trial court properly refused to give the jury instruction. *Id.* at 644.

Similarly, Miguel Barragan was convicted of Assault in the First Degree for stabbing a fellow inmate with a pencil. 102 Wn. App. 754, 756, 9 P.3d 942 (2000). At trial, he testified that the victim had started the fight and denied striking the victim at all. *Id.* at 762. He argued on appeal that he received ineffective assistance of counsel because his attorney did not propose a self-defense instruction. *Id.* The Court found that the evidence did not support a self-defense instruction because a defendant “cannot deny striking someone and then claim to have struck that person in self-defense.” *Id.*, quoting *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977).

Finally, in *State v. Aleshire*, the defendant was convicted of second degree assault and assigned error to the trial court’s refusal to give a self-defense instruction. 89 Wn.2d 67, 71, 568 P.2d 799 (1977). At trial, Aleshire explicitly denied that he had hit anyone. *Id.* The Supreme Court

held that a person cannot deny striking someone and then claim that he struck them in self-defense. *Id.*

Here, Jaca-Ortiz testified that Misael Ledesma hit Juan Ledesma and Juvento Manzano Quiroz with the car jack, and Jaca-Ortiz then ran back to his truck and left the scene. RP 348–350. He furthered testified that he did not assault or hit anyone on that day in Cowlitz County. RP 355; RP 356. Just as in *Aleshire*, *Barragan*, and *Gogolin*, Jaca-Ortiz denied striking anyone. A person cannot deny striking someone and then claim that he struck them in self-defense. The trial court properly refused to give a self-defense instruction.

The cases cited by Jaca-Ortiz all have something in common that this case lacks. Those cases all involved the defendant arming himself with a firearm, but testifying at trial that the assaultive act was accidental or unintentional. *See State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997); *State v. Redwine*, 72 Wn. App. 625, 627, 865 P.2d 552 (1994); *State v. Werner*, 170 Wn.2d 333, 241 P.3d 410 (2010). Specifically, in *Callahan*, the defendant armed himself and displayed a firearm because he was afraid. 87 Wn. App. at 928. The firearm discharged and hit the alleged victim in the hand. *Id.* Callahan denied pointing the firearm at anybody, and testified that the discharge was accidental. *Id.* The Court of Appeals found that a self-defense instruction was warranted because the alleged victim testified

that Callahan aimed the gun at his head; these two facts together supported the inference that Callahan intentionally exercised force in self-defense. *Id.* at 933. Similarly, in *Redwine* and *Werner*, the defendants exercised force by arming themselves with a firearm. Therefore, self-defense instructions were appropriate.

In this case, Jaca-Ortiz did not testify that he was armed in any way. He testified that Misael Ledesma had the car jack. RP 348. The evidence here does not support an inference that Jaca-Ortiz intentionally exercised force. Because Jaca-Ortiz expressly denied using any force, the State respectfully requests that this Court follow the precedent set in *Aleshire*, *Barragan*, and *Gogolin*, and affirm Jaca-Ortiz's convictions.

B. JACA-ORTIZ WAS ABLE TO ARGUE HIS THEORY OF THE CASE.

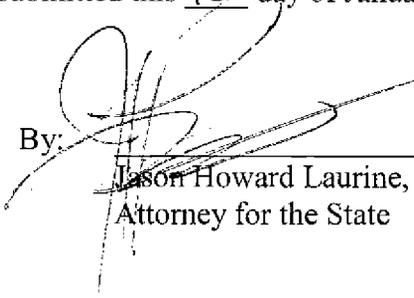
Jaca-Ortiz further argues that the trial court's refusal to give the self-defense instruction impaired his ability to argue his theory of the case. This claim fails. An appellate court reviews jury instructions as a whole. *State v. Benn*, 120 Wn.2d 631, 655, 845 P.2d 289 (1993). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011).

The instructions that were given in this case allowed the defense to argue his theory of the case. Jaca-Ortiz's testimony and the trial attorney's closing argument show that their theory of the case was that Misael Ledesma committed the crime, not Jaca-Ortiz. Their argument was not one of self-defense – instead, it was that another person committed the crime. The defense attorney argued in closing, “Ciro alone approached Juan not Fernando [Jaca-Ortiz].” He also highlighted that one of the victims had drugs in his system that could impair his ability to remember who had hit him, as well as the confusion and chaos that was present during the assault. RP 428; RP 427. The jury instructions informed the jury that, in order to find Jaca-Ortiz guilty they had to find that Jaca-Ortiz committed an assault. Therefore, the instructions allowed trial counsel to argue his theory of the case – that Misael Ledesma committed the assaults, not Jaca-Ortiz.

IV. CONCLUSION

Jaca-Ortiz's convictions for Assault in the First Degree and Assault in the Second Degree should be affirmed, as the jury was properly instructed and the trial court did not violate Jaca-Ortiz's constitutional rights.

Respectfully submitted this 12 day of January, 2017.

By: 

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Jan 13th, 2017.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 13, 2017 - 9:51 AM

Transmittal Letter

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