

FILED
Court of Appeals
Division II
State of Washington
11/13/2018 4:22 PM

NO. 50800-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge
The Honorable David Edward, Judge

BRIEF OF APPELLANT

ERIC BROMAN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Related to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>To Defend his small dog, Wilson shot one arrow at a large dog that was chasing and biting his small dog.</u> ...	2
2. <u>The Defense consistently sought to raise an available statutory defense, from pretrial motions through proposed instructions.</u>	8
3. <u>The trial court adopted the state’s erroneous claim that the statutory defense included additional common law ements.</u>	12
4. <u>Closing Argument</u>	14
5. <u>Sentencing</u>	15
C. <u>ARGUMENT</u>	16
1. WILSON’S CONDUCT IN DEFENDING “LITTLE BIT” WAS STATUTORILY AUTHORIZED. THE COURT ERRED IN DENYING THE MOTION TO DISMISS AND IN REFUSING TO PROPERLY INSTRUCT THE JURY OF HIS DEFENSE.	16
a. <u>Because this case raises questions of law, this Court owes no deference to the trial court.</u>	17
b. <u>Little Bit is a domestic animal.</u>	18
c. <u>Wilson was the only member present and in control.</u>	21

TABLE OF CONTENTS (CONT'D)

	Page
d. <u>Wilson had the right to proper instructions on his theory of the case</u>	24
e. <u>The common law does not add elements to the statutory defense</u>	28
f. <u>The state cannot show the error was harmless</u>	30
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Cook v. State</u> 192 Wash. 602, 74 P.2d 199 (1933)	29
<u>Drolet v. Armstrong</u> 141 Wash. 654, 252 P. 96 (1927)	11, 14, 28, 29, 30
<u>Halme v. Walsh</u> 192 Wn. App. 893, 370 P.3d 42 (2016)	28
<u>In re Pers. Restraint of Hopkins</u> 137 Wn.2d 897, 976 P.2d 616 (1999)	24
<u>Oliver v. Cook</u> 194 Wn. App. 532, 377 P.3d 265 (2016)	19
<u>State v. Burk</u> 114 Wash. 370, 195 P. 16 (1921)	11, 28, 29
<u>State v. Edwards</u> 104 Wn.2d 63, 701 P.2d 508 (1985)	30
<u>State v. Knapstad</u> 107 Wn.2d 346, 729 P.2d 48 (1986)	18
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009)	24, 25
<u>State v. Larson</u> 184 Wn.2d 843, 365 P.3d 740 (2015)	23
<u>State v. LeFaber</u> 128 Wn.2d 896, 913 P.2d 369 (1996)	25
<u>State v. Linville</u> ___ Wn.2d ___, 423 P.3d 842 (2018)	23

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. McCreven</u> 170 Wn. App. 444, 284 P.3d 793 (2012) <u>review denied</u> , 176 Wn.2d 1015 (2013)	25
<u>State v. Montano</u> 169 Wn.2d 872, 239 P.3d 360 (2010).....	18
<u>State v. O Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009).....	25
<u>State v. Vander Houwen</u> 163 Wn.2d 25, 177 P.2d 93 (2008).....	11, 28
<u>State v. Walden</u> 131 Wn.2d 469, 932 P.2d 1237 (1997).....	25, 30
<u>State v. Werner</u> 170 Wn.2d 333, 241 P.3d 410 (2010).....	24
<u>State v. Woods</u> 138 Wn. App. 191, 156 P.3d 309 (2007).....	25

FEDERAL CASES

<u>In re Winship</u> 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	17
--	----

OTHER JURISDICTIONS

<u>Chase v. State</u> 448 S.W.3d 6 (Tex. Crim. App. 2014).....	25, 26, 27
<u>People v. Campbell</u> 4 Parker Cr.R. 386 (1859).....	20, 21
<u>People v. Scher</u> 55 Misc.2d 754, 286 N.Y.S.2d 770 (N.Y. Crim. Ct. 1968).....	20, 21

<u>State v. Leonard</u>	
470 A.2d 1262 (Me. 1984)	19, 20

RULES, STATUTES AND OTHER AUTHORITIES

CrR 8.3	9
RCW 16.08.020	1, 8, 10, 12, 17, 21, 23, 28
RCW 16.52.205	8, 10, 16, 17, 24
RRS § 3107	30
Tex. Health & Safety Code Ann. § 822.013 (West).....	27
U.S. Const. amend. VI	25
U.S. Const. amend. XIV	17, 25
Const. art. I, § 3	17

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's pretrial motion to dismiss the charge. RP 8; see also CP 91 (referencing the trial court's denial).

2. The trial court erred in refusing to instruct the jury on the statutory defense established in RCW 16.08.020.

3. The trial court erred in refusing the following defense proposed instruction:

It is a defense to a charge of Animal Cruelty that the dog was chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or leased by, or under the control of, such person.

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.

CP 99-100; Appendix A.

4. The trial court erred in instructing the jury with instruction No. 3, attached as Appendix B.

Issues Related to Assignments of Error

1. Where appellant produced evidence showing his actions fell within an express statutory exception to the criminal charge, did the trial court err in denying his motion to dismiss the charge?

2. Appellant produced evidence and proposed an instruction accurately stating the parameters of a factually supported statutory defense. Did the trial court err in rejecting the proposed defense instruction, and in adopting the state's instruction which added non-statutory common law restrictions to appellant's statutory defense?

3. Were both errors clearly prejudicial?

B. STATEMENT OF THE CASE¹

1. To defend his small dog, Wilson shot one arrow at a large dog that was chasing and biting his small dog.

The parties produced the following evidence at trial. The Grays Harbor Bowmen Club is an archery practice facility about five miles southwest of Aberdeen on SR 105. There is a 40-yard indoor range and a 20- to 100-yard outdoor range for arrows with small target tips. There are 42 outdoor targets. 3RP 40-41. A separate area with Styrofoam targets is the only place members can shoot hunting arrows with broadhead-tips. 3RP 40-41.

The Club is open to members who pay the \$100 fee. Members have a key to open the road gate and a key to the building. They can

¹ This brief references the three transcript volumes as: RP – July 6 and 13, 2017 (pretrial); 2RP – July 18, 2017 (pretrial); 3RP – July 18 and 31, 2017 (trial and sentencing).

camp at the Club and cut brush or cut wood. 3RP 41-42, 59-60. According to Club president, Steven Love, “[a]ll members have the same privileges.” 3RP 40. In contrast, non-members on the property would be trespassing, because it is private property. 3RP 46-47.

Delbert Franks and his family live across the highway from the Club with their 70- to 80-pound dog “Dozer,” a “Red Heeler” breed. 3RP 7-8, 17, 21, 108; EX 3. They let Dozer run around the area unleashed. 3RP 8-9.

The Franks house is “kind of secluded back in there,” up a “long gravel driveway” from SR 105. 3RP 9, 21, 36. The house cannot be seen from the highway, although there is a mailbox at the highway end of the driveway. 3RP 9, 15-16, 36.

Dozer had a history of leaving the Franks property and going to the Bowmen Club uninvited. Franks admitted there had been “issues” with Dozer; Club members had been forced to take him back to the Franks home. 3RP 16, 18. Love, the Club president, said Dozer had peed on expensive archery equipment. Love spoke to Franks after that incident and had also chased Dozer off the property. 3RP 44-47.

Scott Melton, the range captain, confirmed that Dozer had been at the range quite a few times. Melton took him home once. Melton was concerned about safety in addition to Dozer’s habit of peeing on

the equipment. Although the Franks family had assured Melton they would keep Dozer home, the dog still came to the Club. 3RP 52-54.

On May 14, 2017, Franks saw Dozer run down his driveway toward the highway and the Club. Franks planned to walk down the driveway and “just kind of holler for him.” 3RP 9. But Franks first went inside to get his shoes and a drink. Before Franks had finished getting himself ready, Dozer ran back up on the porch, whining, with a target arrow that had pierced through the skin over his rear legs. 3RP 10-11; EX 4-5.

Dozer was still wagging his tail but appeared to be in pain. 3RP 10-11. Franks pulled the arrow out that night, gave Dozer some antibiotics, and took him to the vet the next day. No lasting injury resulted. 3RP 13-14; EX 6.

That same day appellant Robert Wilson went to the Club range for archery practice. He had been a member about a year and had keys to the gate, range and clubhouse. He brought “Little Bit” with him. She is a small dog - a Chihuahua/Dachshund mix - whom he had rescued from bad situation about two years before. Little Bit is far smaller than Dozer. 3RP 56-60; EX 7.

Wilson is very fond of Little Bit and she generally went everywhere with him. 3RP 58. For a while, however, he stopped

bringing her to the range because Dozer had been running around unleashed and Little Bit previously had been attacked by a big dog. After other club members told him the Dozer issue had been dealt with, Wilson decided he could bring her to the Club again. 3RP 58-59, 72-73.

May 14 was the first time Wilson brought her back. Wilson parked his pickup truck near the 50-yard range marker and left the door open. Little Bit was standing on a picnic table bench watching Wilson, a few yards from the truck. 3RP 61. She was wearing a small sweater vest and a jacket. 3RP 61-62, 72-73; EX 2, 8, 11.

Wilson was about to take aim when he heard a “heart-wrenching scream” from Little Bit. 3RP 62. Dozer had appeared out of the shaded brush near the road. Dozer ran straight toward Little Bit. She tried to run to the truck but Dozer got to her before she could get inside. Wilson raced toward them but Dozer still was able to grab Little Bit in his jaws and was shaking her. Little Bit’s coat was torn by Dozer’s teeth. She banged her head on the truck before Wilson got close enough to scare Dozer into dropping her. Wilson felt the incident happened very quickly. 3RP 62-63, 66, 72; EX 2,² 11.

² Exhibit 2 is a 03:54 video of the Club road and parking lot that shows Wilson’s parked truck. The picnic bench is off camera to the right.

Despite Wilson's effort to scare him off, Dozer did not run far. About six seconds after Wilson chased him from the truck, Dozer stopped to urinate and mark the grass near the parking lot. EX 2, at 01:08-01:19. Wilson watched Dozer continue to run around the area and thought Dozer was waiting for another chance to attack Little Bit. Wilson nocked an arrow and drew his bow. When Dozer started back toward the road Wilson released the arrow. The arrow hit Dozer in the skin above his rear legs. Dozer ran home. 3RP 64, 69-70; EX 2, at 02:27-02:54.

Though Wilson admitted he was not thinking clearly from the traumatic experience of seeing Dozer attack Little Bit, he instinctively "knew it was the owner's fault, not the dog's fault." 3RP 67. "But still, I had to do something and I felt bad." 3RP 67. Wilson put his gear in his truck and drove toward the highway. He went one direction to see if he could see the dog, then he turned around and drove back towards town. He admitted he was not in a very good state of mind. 3RP 67.

Dozer came out of the shade on the edge of the road at 01:00, and by 01:08 had closed the entire distance in reaching Little Bit. EX 2. The video was played for the jury during trial and the state's closing argument. 3RP 53, 109-10.

On cross examination Wilson confirmed he had not tried to kill Dozer. He shot the arrow broadside because a straight-on shot would likely have been fatal. The arrow hit where it was aimed. 3RP 70-71. The arrow had a narrow target tip, not a deadly broadhead hunting tip. 3RP 22.

Grays Harbor County Sheriff's Deputy Sean McKechnie responded to the call from the Franks family. He drove up their long driveway to the house, where he met with Franks and saw the target arrow in Dozer. 3RP 20-22; EX 4, 5.

McKechnie secured video footage from cameras at the Club. 3RP 24-25, 50-53. After determining Wilson was the man in the video, he met with and arrested Wilson. 3RP 24-27. Wilson provided a written statement, which confirmed he had been shooting at targets near the clubhouse when a large dog ran toward and grabbed Little Bit in its jaws. He chased the dog, but it did not run far. He nocked an arrow and shot it. "Right when the dog got hit, I felt remorse and bad about what I did. I left the range and drove up and down the highway but was unsuccessful in finding it." EX 8;³ 3RP 29. Wilson showed McKechnie Little Bit's torn jacket. 3RP 33-34.

³ The defense stipulated to the admission of Wilson's statement. CP 54.

2. The Defense consistently sought to raise an available statutory defense, from pretrial motions through proposed instructions.

On May 16, the day after Wilson's arrest, the Grays Harbor prosecutor charged Wilson with first degree animal cruelty. CP 1; RCW 16.52.205(1).⁴ On June 16, 2017, defense counsel moved to dismiss the charge. Counsel's motion briefly summarized the facts. Relying on the statutory defense codified in RCW 16.08.020,⁵ the

⁴ The amended information, filed July 17, 2017, charged Wilson with animal cruelty in the first degree,

committed as follows: That the said defendant, Robert Ernest Wilson Jr. in the county of Grays Harbor, State of Washington, on or about May 14, 2017, did intentionally (a) inflict substantial pain on, and/or (b) cause physical injury to an animal, to-wit: a dog named "Dozer"; contrary to RCW 16.52.205(1)[.]

CP 24.

⁵ RCW 16.08.020 provides:

Dogs injuring stock may be killed.

It shall be lawful for any person who shall see any dog or dogs chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or leased by, or under the control of, such person, or on any public highway, to kill such dog or dogs, and it shall be the duty of the owner or keeper of any dog or dogs so found chasing, biting or injuring any domestic animal, including poultry, upon being notified of that fact by the owner of such domestic animals or poultry, to thereafter keep such dog or dogs in leash or confined upon the

motion argued Wilson's conduct was lawful because Dozer was running loose and chasing Little Bit, a "domestic animal." CP 6-8.

The state opposed the motion on procedural grounds, pointing out it was not supported by a sworn declaration as envisioned by CrR 8.3(c). The state also disputed what it contended were "material facts." CP 55-63.

At the pretrial hearing held July 6, defense counsel further explained the statutory defense did not require Wilson to act with reasonable necessity. The sole factual issue was whether Dozer was chasing Little Bit. RP 2-3. Judge David Edwards denied the motion, deciding it was procedurally deficient in that it lacked a supporting sworn declaration. RP 4-5.

On July 10, defense counsel filed Wilson's sworn declaration (CP 10-23, 68-81) in support of another motion to dismiss. CP 65-68. The declaration stated that Wilson had been at the Club with Little Bit when he heard her screaming and saw a large dog, Dozer, shaking her. Dozer had previously been at the club and had been marking it

premises of the owner or keeper thereof, and in case any such owner or keeper of a dog or dogs shall fail or neglect to comply with the provisions of this section, it shall be lawful for the owner of such domestic animals or poultry to kill such dog or dogs found running at large.

as his territory, but Wilson had been told that Club officers had addressed the Dozer issue. CP 10-11, 68-69. The motion to dismiss was further supported by the police report filed by Deputy McKechnie, part of which described the video that showed Dozer chasing Little Bit. CP 16-23, 74-81.

The state filed a memorandum in response. Unlike the amended information, the memorandum recognized the elements of animal cruelty criminalize certain actions but have an express exception for conduct “authorized by law.” CP 86 (citing RCW 16.52.205(1)).

The state recognized Wilson’s reliance on the RCW 16.08.020 statutory defense, which authorizes the use of force against a marauding dog that is “chasing, biting, injuring or killing any ... domestic animal ... belonging to such person, on any real property owned or leased by, or under the control of, such person, or on any public highway[.]” CP 86-87. But the state claimed Wilson could not rely on this statutory defense because the conduct did not take place on property owned by, leased by, or under Wilson’s control. CP 87. The state also claimed the statutory defense was not an “absolute bar” to prosecution, and that Wilson instead bore the burden to produce prima facie evidence that his “actions were of ‘reasonable

necessity.” CP 87. The state properly conceded that once such evidence was produced, the state bore the burden to prove the use of force was not “reasonably necessary” to prevent harm to Little Bit. 3RP 78; CP 84; see also CP 87 (state bears burden to prove the absence of the “reasonable necessity” justification).

In making this claim, the state did not rely on the statute, but rather on three cases that had recognized a common law right to use force to defend property from other animals. Unlike the statute, however, the common law defense required the force used to be both reasonable and necessary. CP 83-87 (citing State v. Burk, 114 Wash. 370, 195 P. 16 (1921); Drolet v. Armstrong, 141 Wash. 654, 252 P. 96 (1927); State v. Vander Houwen, 163 Wn.2d 25, 177 P.2d 93 (2008)).

The second motion to dismiss was heard by Judge Edwards on July 17, 2017. Defense counsel relied on the statutory defense. CP 6. The court peppered counsel with questions regarding whether Wilson was the property owner, and whether his status as a member allowed him to “control” the property. Counsel responded that Wilson was there alone, and until someone with superior authority appeared, Wilson was the Club member in charge. RP 6-7.

Defense counsel also clarified that the statute was addressed to the public nuisance that occurs when dog owners allow dogs to run

loose and attack other domestic animals. The statute carried no requirement of “reasonability or necessity.” RP 7-8. Although counsel for the state made no argument, Judge Edwards denied the motion to dismiss without explanation. RP 8.

3. The trial court adopted the state’s erroneous claim that the statutory defense included additional common law elements.⁶

Shortly thereafter, trial started before Judge F. Mark McCauley. Consistent with the prior motions to dismiss, defense counsel proposed the following instruction based on RCW 16.08.020:

It is a defense to a charge of Animal Cruelty that the dog was chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or leased by, or under the control of, such person.

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.

CP 99-100; App. A.

In response, counsel for the state argued Wilson should be precluded from raising the statutory defense because he did not own the property or have it under his control. 2RP 2-3. The state further

⁶ The trial evidence is summarized in section 1, supra.

argued common law allowed the use of force only as a “reasonable necessity.” RP 2-3. According to the state, “the case law adds to the statute a requirement of reasonable necessity.” RP 8 (emphasis added). The state went so far as to claim the defense analysis was “specifically rejected by the cases that I’ve cited.” 2RP 3.

Defense counsel pointed out that the evidence would show that Wilson was the Bowmen’s Club member in control because no other member was there. Counsel argued against the state’s claim that the court could make this determination as a matter of law. 2RP 3-4, 6.

Judge McCauley called the statute an “affirmative defense,” but also recognized that the common law would allow a dog owner to use force to protect a dog from another animal’s attack. The court delayed ruling, stating it would address instructional questions depending on what evidence was produced. 2RP 4-5, 7-9.

After the parties rested, the court discussed the proposed instructions. The court listed “sheep, swine, or other domestic animal, including poultry,” and stated it believed the statute was “really kind of a ranch or farmland protection statute from the way I – I read it.” 3RP 75. The court then refused the offered defense instruction. 3RP 75-76. The court instead relied on the state’s assertion that common law

required any force used in defense of Little Bit to be justified as “reasonably necessary.” 3RP 76 (mentioning Drolet v. Armstrong).

Ultimately the court provided this “to-convict” instruction proposed by the state:

INSTRUCTION No. 3

To convict the Defendant of the crime of Animal Cruelty in the First Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 14, 2017, the Defendant did intentionally:
 - (a) Inflict substantial pain on an animal; or
 - (b) Cause physical injury to an animal; and
- (2) That the Defendant’s actions were not in defense of his dog, and were not reasonably necessary; and
- (3) That this act occurred in the State of Washington.

CP 31 (emphasis added).

4. Closing Argument

In closing, counsel for the state focused on the state’s theory that Wilson’s actions were not in defense of Little Bit and were not reasonable or necessary because, under the state’s theory, any altercation between the dogs had passed before Wilson aimed his bow. 3RP 101-04; 109-10. These were, of course, the added common law requirements that would not have been an issue under the statutory defense.

Defense counsel contrarily argued that Wilson did act in Little Bit's defense, and that Dozer had not left the area and appeared to be circling back for another run at Little Bit. Wilson knew that Dozer was a constant pest and his owners had made no real effort to keep him away from the range. He took reasonable action and aimed a target arrow, not a hunting arrow, at Dozer's rear end. 3RP 104-08.

5. Sentencing

The jury reached a guilty verdict. CP 34. At sentencing the state recommended a nine-month term. The state also noted that Wilson's federal probation was set to expire the day the state filed this charge, and as a result of this conviction, he could face up to 60 months of time in the federal system. 3RP 116.

Defense counsel recommended a three-month sentence. RP 117.

The court imposed a six-month sentence and followed the state's remaining recommendations. 3RP 118-19; CP 37-46. The state also requested the court to ban Wilson from ever owning a dog. Defense counsel noted that Wilson had rescued two dogs and nursed them back to health. Based on the state's assertion that the

permanent prohibition was statutorily required, the court reluctantly imposed that condition. CP 44; 3RP 119-20.⁷

The court made no real inquiry into Wilson’s ability to pay legal financial obligations (LFOs). 3RP 120. The court nonetheless imposed what amounted to \$2,862.51 in LFOs.⁸ CP 42. Several days later the court found Wilson indigent. CP 49-53.

C. ARGUMENT

1. WILSON'S CONDUCT IN DEFENDING “LITTLE BIT” WAS STATUTORILY AUTHORIZED. THE COURT ERRED IN DENYING THE MOTION TO DISMISS AND IN REFUSING TO PROPERLY INSTRUCT THE JURY OF HIS DEFENSE.

The elements of first degree animal cruelty required the state to prove that Wilson, “except as authorized in law,” did intentionally (a) inflict substantial pain on, and /or (b) cause physical injury to an animal. RCW 16.52.205(1) (emphasis added); CP 24 (information); CP 31 (to convict instruction 3). As Wilson repeatedly argued in the trial court, RCW 16.08.020 provides statutory authorization for the use

⁷ “THE COURT: Yeah, I don’t have authority. I probably would say, I’ll do away with that if I could, because I think you were – it’s not like you had an animal and were abusing your own animal at home, but I’m bound by the statute.” 3RP 120.

⁸ The math on the judgment and sentence was erroneous. Although the individual items totaled \$2,862.51, the judgment states the total is \$1,962.51. CP 42.

of force against a dog that is “chasing, biting, [or] injuring” any other “domestic animal” belonging to a person on any real property owned, leased by, or under the control of the person. Instead of recognizing this defense, however, the trial court denied Wilson’s motion to dismiss,⁹ and forced Wilson to raise a common law defense which added the element that his actions were not “reasonably necessary.” CP 31. These are reversible errors.

- a. Because this case raises questions of law, this Court owes no deference to the trial court.

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). While Washington criminalizes the intentional infliction of injury or substantial pain on an animal, it contains an express exception for actions “authorized in law.” RCW 16.52.205(1)(a), (b). One such express authorization is found in RCW 16.08.020, which makes it lawful to use force against marauding dogs in circumstances like those present here.

⁹ As noted supra, the trial court did not offer reasons for its denial of Wilson’s motion. RP 8.

A trial court should grant a motion to dismiss where there are no material disputed facts and no rational trier of fact could have found beyond reasonable doubt the essential elements of the crime. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). An appellate court owes no deference to a trial court's decision on this question of law. Montano, at 876 (“We review de novo a trial court's dismissal of a criminal charge under Knapstad.”)¹⁰

In the trial court, the undisputed video evidence showed Dozer chasing Little Bit. In addition, Wilson showed Deputy McKechnie Little Bit's torn jacket and stated that Dozer was biting Little Bit. The only remaining questions were questions of law: (1) was Little Bit a “domestic animal,” and (2) was the Club property under Wilson's “control” on May 14, 2017, when he was the only member present.

b. Little Bit is a domestic animal.

In the trial court, the state did not claim that Little Bit was not a “domestic animal” within the scope of the statutory defense. Cf. CP 87, 92. Nonetheless, this appears to be the trial court's reason for

¹⁰ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

refusing the proposed defense instruction.¹¹ The trial court's conclusion lacks merit for at least two reasons.

First, Little Bit was a Chihuahua-Dachshund mix. The state will be hard-pressed to locate any persuasive authority to suggest that a small pet dog is a wild animal. See Black's Law Dictionary 635 (defining "ferae naturae": "1. *adj.* (Of animals) wild; untamed; undomesticated"). Local authority instead reveals the Grays Harbor County Sheriff's recognition that Dachshunds are "domestic animals" under its own "dangerous dog" policy. See Oliver v. Cook, 194 Wn. App. 532, 536-37, 377 P.3d 265, 267 (2016) (Grays Harbor County Sheriff issued a "dangerous dog" notification to a Pit Bull's owner because the Pit Bull had attacked a "domestic animal," i.e. a Dachshund).

Second, several cases from other jurisdictions persuasively show why small pet dogs are "domestic animals." In State v. Leonard, 470 A.2d 1262 (Me. 1984), a bull mastiff escaped from its owner and attacked a neighbor's miniature poodle. The poodle was severely injured and died. The district attorney later petitioned the court under

¹¹ See 3RP 74 (stating court's belief that the statute was instead designed to be a "ranch or farm land protection sort of statute," and therefore did not protect pet dogs.)

a Maine statute to require the mastiff's owner to show cause why the mastiff should not be killed. 470 A.2d at 1262-63.

The first issue in Leonard was whether the poodle fell within the statutory class of protected animals: "any domestic animal, livestock, poultry, fowl, or furbearing animal legally kept in captivity." The court held there could be no question the poodle "was domesticated within the common meaning of that term. ... With the possible exception of cats, dogs are now the most common of all domestic animals." 470 A.2d at 1263-64. "In particular, the poodle breed of dogs is domesticated to such an extent that it would be preposterous to contend that a pet poodle is a wild animal." Id., at 1264.

Another case, cited in Leonard, stated, "[a]s a matter of common sense and common usage this Court is of the opinion that a dog is included in included within the intent and meaning of the words 'domestic animal' as used in Section 933 of the Penal Law." People v. Scher, 55 Misc.2d 754, 286 N.Y.S.2d 770, 772 (N.Y. Crim. Ct. 1968). The Scher court relied on an earlier New York case, People v. Campbell, 4 Parker Cr.R. 386 (1859), which stated:

If by domestic is meant "belonging to the house," who can deny this attribute to dog? What animal is more domestic? What one appropriates a home more, shows stronger attachment to it, or if it strays from it, is more certain to return to it?

People v. Campbell (quoted in Scher, 286 N.Y.S.2d at 772).

This authority is, of course, “on all fours” with Wilson’s case. It would be equally preposterous for the state to claim that this Chihuahua-Dachshund mix is anything but a domestic animal. The trial court’s contrary conclusion is erroneous.

- c. Wilson was the only member present and in control.

The state’s main claim in the trial court was that Wilson was not in control of the Club and therefore could not rely on the statutory defense. See 3RP 2-3; CP 87, 92 (asserting that the Club property was not “owned or leased by, or under the control of” Wilson, citing RCW 16.08.020). The state’s claim lacks merit.

The record establishes Wilson was a Club member in good standing with the same privileges as all other members. 3RP 40. Like any Club member, he had a key to open the gate and a key to open the building. He could camp at the Club and cut brush or wood. He could practice archery and use his archery equipment on Club property. 3RP 41-42.

During the incident on May 14, Wilson was the only Club member present. At that time the property was factually under his control and he was presumptively authorized to exclude trespassers.

3RP 46-47. Dozer, in contrast, had no status but that of a marauding or trespassing dog who had been expressly excluded numerous times from Club property. On these facts, there is no legitimate reason to eliminate a statutory defense through an unwarranted narrowing of the term “control.”

In addition, as defense counsel noted below, the question of “control” often arises in drug possession cases. 2RP 6. If a Club member decided to store his or her illegal drugs at the Club, the state certainly would not argue the Club member lacked control. Club membership does not so easily extinguish or erase control. Similarly, if the state were prosecuting a trespasser or burglar, the state would not argue that a physically present Club member lacked sufficient control to exclude others who have been expressly and repeatedly notified by Club members they are not welcome.

This conclusion also follows from the statute’s plain language. In enacting the statute, the Legislature recognized the dangers arising when uncontrolled dogs chase and bite other domestic animals. The Legislature therefore listed broad areas where threats from such dogs may be lawfully neutralized: “on any real property owned or leased by, or under the control of, such person, or on any public highway[.]” RCW 16.08.020. If Dozer had attacked “Little Bit” slightly closer to SR

105 – which the state must concede is a “public highway” – there would be no doubt of Wilson’s statutory authority to use deadly force in responding to Dozer’s attack. It would be absurd for the state to argue that an obviously trespassing Dozer somehow had greater rights to attack Little Bit mere yards from the highway on private Club property where Wilson, as the only present member, was in control. Perhaps the state will go so far as to argue that Wilson could only defend his pet under the statute if he first received written Club permission from the Club President to respond to Dozer’s immediate attack. Thankfully, courts interpret statutes to avoid absurd results. State v. Larson, 184 Wn.2d 843, 851, 365 P.3d 740 (2015).¹²

Finally, if there is any potential merit to the state’s claim, the statute is, at most, ambiguous on this point. The rule of lenity requires ambiguous statutes be interpreted in Wilson’s favor and “compels the interpretation that is less punitive, not more punitive.” State v. Linville, ___ Wn.2d ___, 423 P.3d 842, 845 (2018) (citing In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616

¹² Then again, Club President Steven Love had in fact already chased Dozer off the property and informed Franks that Dozer was not allowed there. 3RP 44-47. So had range captain Scott Melton. 3RP 52-54. Dozer’s unlawful presence at the Club is not a disputed fact.

(1999)). Under the rule of lenity, Wilson was in control of the property and entitled to the statutory defense.

For these reasons, Wilson's actions were "authorized in law" and specifically excepted from criminal prosecution under RCW 16.52.205(1). The trial court therefore erred in denying Wilson's motion to dismiss the charge.

- d. Wilson had the right to proper instructions on his theory of the case.

If this Court determines that any factual questions remained for the jury, the trial court erred in refusing to instruct the jury on the statutory defense.

As the state properly conceded in the trial court, this statutory defense acts similarly to statutory self-defense, which the state bears the burden to disprove beyond a reasonable doubt. 3RP 78; Cf. RCW 9A.16.020. An accused is entitled to proper instructions on self-defense whenever there is "some" evidence of the lawful use of force. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). When self-defense is properly raised, the State is obligated to prove the absence of self-defense beyond a reasonable doubt. State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. McCreven, 170

Wn. App. 444, 462, 284 P.3d 793 (2012) review denied, 176 Wn.2d 1015 (2013).

This Court's review of a challenged jury instruction is de novo. Self-defense instructions are subject to heightened scrutiny. State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). Jury instructions must more than adequately convey the law of self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Self-defense instructions as a whole must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (internal quotations omitted), *abrogated on other grounds by State v. O Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Instructions that misstate the law of self-defense affect an accused's Sixth and Fourteenth Amendment rights to due process and to a jury trial. Kyllo, 166 Wn.2d at 862; U.S. Const. amend. VI; U.S. Const. amend. XIV.

Although no Washington court has directly addressed this statutory defense, a Texas case provides guidance. Chase v. State, 448 S.W.3d 6, 8 (Tex. Crim. App. 2014). Chase was charged with and tried for killing a neighbor's dog who had attacked Chase and his dog. The facts are graphic.

Viewing the evidence in the light most favorable to the submission of a defensive instruction,¹³ the following occurred: On September 2, 2009, appellant and his wife were walking their two dogs—a ten-year-old dog named Maka and a puppy—when two other dogs, Zeus and Rocky, escaped from a neighbor's backyard and attacked the group. Zeus, a pit bull, sank his fangs into Maka's neck and began shaking Maka like a rag doll. Appellant's wife picked up the puppy and ran from the scene. For about five minutes, appellant struggled to remove Zeus's jaws from Maka's neck. A neighbor from a different house (not the owner of the attacking dogs) intervened and helped separate Zeus and Maka. During this incident, Zeus bit both appellant and the intervening neighbor.

After Zeus and Maka were separated, appellant took Maka home. Appellant quickly returned to the scene with a rope, looped the rope around Zeus's neck or collar, and dragged the dog to appellant's house, which was two doors down. During this time, Zeus bit appellant again. When appellant arrived at his house, he secured the dog by tying the rope to the bumper of one of his cars. After securing the dog, appellant slashed the dog's throat with a knife. This injury resulted in the dog's death.

Chase, 448 S.W.3d at 8 (note omitted).

The state charged Chase with animal cruelty and Chase sought to raise a statutory defense.¹³ The trial court denied the defense's request to instruct the jury on the defense. Chase, 448 S.W.3d at 9.

¹³ The Texas statute provides:

- (a) A dog or coyote that is attacking, is about to attack, or has recently attacked livestock, domestic animals, or fowls may be killed by:
 - (1) any person witnessing the attack; or

On appeal, Chase argued the trial court erred. The intermediate Texas appellate court agreed and reversed. The Texas Court of Criminal Appeals granted the state's request for discretionary review. After dispensing with several of the state's procedural claims, the Court reached the merits, agreed with the intermediate court, and affirmed the reversal of Chase's conviction. Chase, at 9-15.

The court recognized that the statute provided legal justification for Chase to kill Zeus, and therefore was a statutory defense to the charged crime. Chase, at 16-20. The trial court erred in refusing the requested instruction. Chase, at 28. The court affirmed the intermediate court of appeals decision that the error was prejudicial. Chase, at 28 (affirming Chase v. State, 418 S.W.3d 296, 301 (Tex. App. 2013)).

The same error occurred here when the trial court failed to instruct the jury on Wilson's offered statutory defense. The remaining questions are whether the common law can add an element to the statutory defense, and whether the state can show the error was harmless beyond a reasonable doubt.

(2) the attacked animal's owner or a person acting on behalf of the owner if the owner or person has knowledge of the attack.
Tex. Health & Safety Code Ann. § 822.013 (West) (emphasis added).

- e. The common law does not add elements to the statutory defense.

In the trial court, the state asserted that case law “adds to the statute a requirement of reasonable necessity.” 2RP 8; see also CP 83-88, 92-93. This is simply wrong, because the statutory defense exists separately from the common law defense. If the state has problems with the statute and believes “reasonable necessity” language should be added to it, the state’s remedy is with the Legislature, not the courts. Halme v. Walsh, 192 Wn. App. 893, 903, 370 P.3d 42 (2016) (courts do not add words to statutes in the guise of interpretation).

The state’s case law triad also wilts under factual scrutiny. State v. Burk, 114 Wash. 370, 195 P. 16 (1921); Drolet v. Armstrong, 141 Wash. 654, 252 P. 96 (1927); State v. Vander Houwen, 163 Wn.2d 25, 177 P.2d 93 (2008). Burk and Vander Houwen involved a property owner’s common law right to kill elk that were destroying crops and orchards. Because neither case involved a marauding dog or the terms of RCW 16.08.020, they need be discussed no further.

Although Drolet at least involved dogs, it still does not support the state’s proposition. That case was brought to recover damages by Drolet, who owned two bird dogs shot by Armstrong. One morning,

Armstrong saw the dogs kill several of his chickens. When the two dogs came back that day and killed another chicken, one was shot by Armstrong's son. The next morning the remaining dog came back, attacked the chickens again, and was shot. After Armstrong saw an advertisement for the missing dogs he informed Drolet of the circumstances and Drolet sued. 141 Wash. at 654-55.

The trial court entered judgment for Armstrong. The supreme court majority, relying solely on common law, found Armstrong was justified in killing the dogs "if there [was] reasonable and apparent necessity therefor". 141 Wash. at 656. The court concluded that the facts supported such a necessity. Id. The court's holding was not based on the statute, but on every person's "natural right to defend and protect his animate property". 141 Wash. at 657 (quoting State v. Burk, 114 Wash. At 379).¹⁴

Two of the seven justices in Drolet concurred on narrower grounds. Justice Fullerton concluded chickens were "domestic animals" under RRS § 3107, the precursor to RCW 16.08.020, and

¹⁴ See also Cook v. State, 192 Wash. 602, 74 P.2d 199 (1933), citing Burk for the proposition that a person "has the constitutional right to defend and protect his property, against imminent and threatened injury by a protected animal, even to the extent of killing the animal...." 192 Wash. at 611 (emphasis added).

therefore it was statutorily lawful for Armstrong to kill the dogs. 141 Wash. at 658-59.

Nothing in Drolet can support the state's claim that common law rewrites RCW 16.08.020 to add a "reasonable and apparent necessity" requirement before a marauding dog may be shot. Courts cannot add language to a statute unless an addition is imperative to make the statute rational. State v. Edwards, 104 Wn.2d 63, 68, 701 P.2d 508 (1985). RCW 16.08.020 is rational and specific and the defense met its requirements. The trial court therefore erred by adding common law elements to Wilson's statutory defense.

f. The state cannot show the error was harmless.

Where a trial court errs in failing to instruct a jury on an available statutory defense, the state bears the burden to prove the error harmless beyond a reasonable doubt. Walden, 131 Wn.2d at 478. The state cannot meet its burden.

The video confirms Dozer chased Little Bit and Wilson testified he acted in her defense. Wilson showed her torn jacket to Deputy McKechnie. Although Wilson shot Dozer with an arrow, he did so because Dozer chased and attacked Little Bit. As noted supra, Wilson was the only person in control of the Club property and therefore was entitled to assert the statutory defense. In addition, the

state's closing argument expressly directed the jury to focus on the state's theory that Wilson's actions were not "reasonably necessary" – the erroneously added common law element that should never have been at issue under the statute. 3RP 101-04, 108-11.

Although not particularly relevant to the statutory defense, Wilson's conduct was in no sense egregious: (1) he used a target arrow, not a hunting arrow, (2) the shot was not head-on (which almost certainly would have killed Dozer), (3) Dozer was shot once, and (4) Dozer required no treatment from a veterinarian.

On these facts, the state cannot show beyond a reasonable doubt that a rational jury, properly instructed with the available statutory defense, would have found that Wilson's limited actions were not "authorized in law" and would have inevitably convicted him on these facts. The conviction should be reversed and the case remanded for a fair trial with a properly instructed jury.

D. CONCLUSION

Because the trial court erred in denying Wilson's motion to dismiss, this court should vacate Wilson's conviction and remand for dismissal of the charge. In the alternative, based on the instructional error, this Court should vacate Wilson's conviction and remand for a new trial with a properly instructed jury.

DATED this 13th day of November, 2018.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read 'Eric Broman', is written over a horizontal line.

ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

No. 50800-1-II

Appendix A

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

vs

Robert Wilson

NO. 17-1-290-14

DEFENSE REQUESTED JURY
INSTRUCTIONS

DATED _____

Michael Nagle, WSBA #20657

Attorney for Defendant

Instruction No. _____

The defendant is charged with Animal Cruelty in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Animal Cruelty in the Second Degree..

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

Instruction No. _____

A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal..

Instruction No. _____

To convict the defendant of the crime of animal cruelty in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 15, 2017, the defendant knowingly, recklessly, or with criminal negligence inflicted unnecessary suffering or pain upon an animal, and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. _____

It is a defense to a charge of Animal Cruelty that the dog was chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or leased by, or under the control of, such person.

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.

No. 50800-1-II

Appendix B

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION No. 2.

The Defendant has been charged by Information with the crime of Animal Cruelty in the First Degree.

INSTRUCTION No. 3.

To convict the Defendant of the crime of Animal Cruelty in the First Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 14, 2017, the Defendant did intentionally:
 - (a) Inflict substantial pain on an animal; or
 - (b) Cause physical injury to an animal; and
- (2) That the Defendant's actions were not in defense of his dog, and were not reasonably necessary; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that elements (2) and (3), and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

INSTRUCTION No. 4.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION No. 5.

The Defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION No. 6.

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

NIELSEN, BROMAN & KOCH P.L.L.C.

November 13, 2018 - 4:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50800-1
Appellate Court Case Title: State of Washington, Respondent v. Robert E. Wilson, Appellant
Superior Court Case Number: 17-1-00290-1

The following documents have been uploaded:

- 508001_Briefs_20181113162134D2056051_0813.pdf
This File Contains:
Briefs - Appellants
The Original File Name was WilsRob.50800-1-II.brf.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us
- sloaneJ@nwattorney.net

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net

Filing on Behalf of: Eric Broman - Email: bromane@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20181113162134D2056051