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

STATE OF WASHINGTON,
Respondent,

v.

JORDIN M BOGAR-JOHNSON,
Appellant.

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

THE HONORABLE STEVEN BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

On May 11, 2017 Heather Englund's son Michael was in Summit Pacific Medical Center in Elma, Washington for treatment of a blood clot. Late in the evening Michael was receiving "messages, harassing messages from Jordin and Travis" on his phone. Verbatim Report of Proceedings, Volume 1 (IRP) 112, 130. These messages contained "a lot of hateful words and threats from (Jordin and Travis)" and Michael was talking as if he was going to go over and talk to them if he was not in the hospital. This went on until Michael got to the point where he wanted to leave the hospital to stop the harassment. Englund testified that she called 911 from the hospital to report the harassment. She was worried about Michael leaving the hospital as she testified that the hospital staff informed her he could die if he did so. IRP 112, 131.

Englund "opted instead to go over there and ask them to please knock it off." IRP 131. Englund's father Leo, also known as "Slim," and her mother Cecilia Mattox drove her to Jordan Bogar-Johnson's apartment in Elma. They parked in a parking space at the end of the building, "a couple doors down from where her apartment was." IRP 113, 132. The trio went to Bogar-Johnson's front door and Englund knocked. IRP 112, 132. While she was knocking, she heard what she thought to be Travis'

very distinct giggle,” which made her think they were in the back yard.
1RP 132.

The trio then went around the back of the building and Englund knocked on the back door. Bogar-Johnson slid open the upstairs window. Englund said “hi” and that she needed to talk to Travis. Travis appeared in the window and waved. 1RP 113, 133. Englund then said to Travis that she needed to talk to him about “what’s going on with Michael right now.” 1RP 133. At this point, according to the testimony of Englund and Cecelia Mattox, Bogar-Johnson started swearing at Englund, saying things like “Hey, you coming here to fight your son’s battles?” 1RP 114. Then she yelled “who the fuck are you? Why are you here?” to Cecelia. 1RP 133.

Bogar-Johnson then began throwing things out the window. One item was described as a vase, or votive candle holder, others as pens and makeup brushes. 1RP 114, 133-4. Englund and her parents turned to leave and Leo Mattox said “Heather, it’s assault when someone throws things at you,” so Englund called 911. 1RP 115, 134. At this point the trio headed back to the front of the building to the car to leave. Englund was talking to 911 while she walked. 1RP 115, 134. Englund testified that about the time they got back to the front of the building, the 911 dispatch operator was asking her which apartment number she was referring to. Because of this

she walked down the sidewalk, past Bogar-Johnson's apartment, and was telling the operator the number as Bogar-Johnson was outside screaming at her in her front yard. 1RP 116, 134-5. Cecelia testified that aside from knocking earlier, the trio were never closer to Bogar-Johnson's apartment than the sidewalk that runs in front of the building. 1RP 116. She also testified that as they reached the front of the building, Bogar-Johnson was yelling at them from her apartment, calling them "bitches" and saying "get your asses over here – I wanted to talk to you!" 1RP 115.

As Englund walked back in front of Bogar-Johnson's apartment, Bogar-Johnson continued to yell at her. As she began to walk away from Bogar-Johnson's apartment she heard her mother yell "Heather!" 1RP 135. Cecelia testified that she saw Bogar-Johnson run out of her apartment carrying the pipe or pole and Cecelia thought at first she was coming to attack her. But Bogar-Johnson ran past her and that was when she yelled to warn Englund. 1RP 117. As Englund turned, Bogar-Johnson struck her in the front of her head with the pole. Englund turned again and was struck in the side of her head behind her ear. 1RP 136. Officer Goffena later examined Englund and observed that she had "fresh swelling, red marks behind her left ear." 1RP 93. These marks were not present prior to the

night of May 11, 2017. 1RP 136. Englund was wearing a “C-Collar,” as she had three disks in her neck fused two months prior. 1RP 137.

When asked by defense counsel why they went to Bogar-Johnson’s house at 11:30 at night, Englund testified that “I know these kids, I thought I could just talk to them. I have known them their entire lives. I thought I could just ask them to knock it off.” 1RP 154.

In the main, the testimony of Travis Durham and Jordin Bogar-Johnson was consistent with that of Englund and Mattox, but with important differences. Travis first testified that at about 11:30 on May 11, 2017 he was “sleeping.” 1RP 159. He testified that Slim, Cecelia, and Englund were knocking on the front door. He then said that they were just going to bed as someone was jiggling the handle as if they were trying to get in. 1RP 160. They then went around back and were banging on the door “repetitively.” 1RP 160. He heard the word “nigger” and opened the window. 1RP 160. When he did the trio were “just standing out there with a flashlight, and I was, like, what are you doing here, like – it’s like 11:30 at night.” 1RP 160. After that he started getting dressed and he and Bogar-Johnson headed downstairs. 1RP 160. Both Durham and Bogar-Johnson testified that Bogar-Johnson threw nothing out the window. 1RP 168, 185.

Officer Goffena did not walk around to the back of the apartment to investigate the issue further. 1RP 106.

According to Durham, Bogar-Johnson then went downstairs and opened the front door. She and Englund began “going at it,” which according to Durham was not physical, but “just talking.” 1RP 162. During the time they were “going at it,” Durham stated that Englund “lunged” at Bogar-Johnson. 1RP 162, 163, 171. Bogar-Johnson also testified that Englund “lunged” at her, but was able to stop short of contact. Nobody else testified about a “lunge” and both Durham and Bogar-Johnson denied any physical contact with Englund whatsoever. 1RP 187. When asked about whether Englund was “walking around okay” with a “neck brace” on, Bogar-Johnson stated “Yeah, she was, like, sprinting more like it, I guess. She was on a mission that night for sure.” 1RP 188.

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The Court properly refused to instruct the jury regarding self-defense and defense of property, as the evidence was insufficient to justify such an instruction.**

Appellants claim that the trial court improperly refused to give a self-defense instruction in denial of her due process rights is not supported by the evidence.

ARGUMENT

- 1. The Court properly refused to instruct the jury regarding self-defense and defense of property, as the evidence was insufficient to justify such an instruction.**

Standard of review.

The standard of review where a trial court refuses to give a self-defense instruction “depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion.” State v. Walker, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998). “A trial court’s refusal to give an

instruction based on a ruling of law is reviewed de novo.” Id. at 772. If the refusal to give the self-defense instruction is based on a lack of evidence, then it is a question of law and is reviewed de novo. State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

In this case the trial court first ruled that it did not “see any evidence of self-defense.” 1RP 207. The court then ruled that “She – Mr. Durham and Ms. Bogar-Johnson both testified they didn’t do anything, and so – and so either it occurred, or it didn’t. If it was in self-defense, they would have to say so. So, you know, there is no self-defense here.” 1RP 207. Therefore, the standard of review is de novo.

There must be some evidence, from whatever source, that justifies the giving of a self-defense instruction.

Bogar-Johnson contends that the trial court denied her due process rights in refusing to give a self-defense instruction, arguing that while she denied any physical contact with Englund, including an assault, she should be allowed to base her instruction on the evidence of assault produced by the State.

“A defendant cannot present a self-defense instruction to the jury without first ‘producing some evidence which tends to prove that the (crime) occurred in circumstances amounting to self-defense. Walker, 136 Wn.2d at 885. The defendant “need only produce ‘any evidence’ of self-

defense, State v. Adams, 31 Wash.App. 393, 395, 641 P.2d 1207 (1982), and only where no credible evidence appears in the record to support such a claim is the trial court justified in denying a request for an instruction. State v. Gogolin, 45 Wash.App. 640, 643, 727 P.2d 883 (1986), citing State v. McCullum, 98 Wash.2d 484, 488, 656 P.2d 1064 (1983). An instruction not supported by the evidence is improper. Gogolin at 643, citing State v. Gibson, 32 Wash.App. 217, 223, 646 P.2d 786 (1982).

The courts apply a mixed subjective and objective analysis when determining the sufficiency of the evidence necessary to support the giving of a self-defense instruction. Subjectively, the trial court must put itself in the defendant's shoes and view the defendant's acts in light of all of the facts or circumstances known to the defendant at the time. State v. Walker, 136 Wash.2d at 772. Objectively the court must determine what an objectively reasonable person would have done in the defendant's situation. Id. Once the court has taken the subjective and objective aspects into consideration, the court must then "determine whether the defendant produced any evidence to support his claimed good faith belief that...force was necessary and that this belief, viewed objectively, was reasonable. Id. at 773, citing State v. Bell, 60 Wash.App 561, 567, 808 P.2d 815 (1991).

One of the elements of self-defense is the person relying on the self-defense claim must have had a reasonable apprehension of...bodily harm.” Walker, 136 Wash.2d at 772. “It is the perceived imminence of danger, based on the appearance of some threatening behavior or communication, which supplies the justification to use...force under a claim of self-defense.” Id. at 665.

“One cannot deny that he struck someone and then claim that he struck them in self-defense.” State v. Aleshire, 89 Wash.2d 67, 71, 568 P.2d 799 (1977). See also State v. Barragan, 102 Wash.App. 754, 762, 9 P.3d 942 (2000).

Neither the State’s, nor the Defendant’s evidence supported the giving of a self-defense instruction.

The evidence adduced at trial that Bogar-Johnson struck Heather Englund came from the testimony of Heather Englund, the victim, Cecelia Mattox, her mother, and Officer Goffena, who observed physical evidence consistent with their accounts. Both Englund and Mattox testified that Englund was walking away from Bogar-Johnson’s residence when Bogar-Johnson ran out of the apartment, past Mattox, and then struck Englund twice in the head with a pipe or pole. While Bogar-Johnson and Travis Durham testified about a “lunge” on the part of Englund, they also both testified that Bogar-Johnson made no reaction to the “lunge” other than to

put her hands out. Because of her denial of physical contact with Englund, these two accounts are the only evidence the Court has available with which to make a decision. Both accounts are insufficient to support a self-defense instruction.

The State's evidence.

The State's evidence is that Heather Englund, along with Cecelia and Leo Mattox, went to Bogar-Johnson's apartment at around 11:30 at night to ask Durham to stop harassing Englund's son, Michael, who was hospitalized at the time. Englund testified that she felt justified in going to the apartment so late because "I know these kids, I thought I could just talk to them. I have known them their entire lives. I thought I could just ask them to knock it off." 1RP 154.

Every witness present at the scene who testified agreed that Englund first knocked on the front door of the apartment. Englund and Mattox testified that Englund heard what she thought was Travis laughing, which led her to believe they were around back. Every witness present at the scene testified that the trio then went around back and knocked on the sliding glass door. Englund and Mattox testified that Bogar-Johnson opened the upstairs window and that introductions or greetings were exchanged until Englund told Bogar-Johnson that she needed to speak to

Durham about his harassment of Michael. Then, according to Englund and Mattox, Bogar-Johnson threw objects out the window while yelling and calling names.

Bogar-Johnson's response to this was to call her mother. Englund's response to this was to call 911 and to turn and begin to leave. She stayed on the phone with the 911 operator throughout the assault and described it as it was occurring. Englund and Mattox testified that Englund went in front of Bogar-Johnson's apartment to find the number for the 911 operator. Mattox also testified that Bogar-Johnson was yelling at them to come over and talk.

All testified that Bogar-Johnson and Englund exchanged words in front of Bogar-Johnson's apartment. Englund and Mattox testified that Englund never got closer to the apartment than the sidewalk in front of the building.

Mattox and Englund testified that as Englund was walking away from Bogar-Johnson's apartment, Bogar-Johnson ran out of the apartment with a pole or pipe, past Mattox, and struck Englund twice in the head.

The Defendant's evidence.

The evidence produced by the defense is similar in broad strokes to the State's. However, Bogar-Johnson and Durham described "repetitive"

knocking and banging on both doors. Durham testified that somebody was jiggling the door handle as if trying to enter the residence. No other witness testified to this. Both described Englund using racial slurs. Both denied Bogar-Johnson threw objects out the window at Englund and her parents. But the main difference lies in what did or did not happen in Bogar-Johnson's front yard. Both Bogar-Johnson and Durham testified repeatedly that Englund "lunged" at Bogar-Johnson but stopped short and that Bogar-Johnson's only response, if any, was to put her hands out. Both Bogar-Johnson and Durham repeatedly denied that Bogar-Johnson hit, struck, or even touched Englund.

Denial of use of force with assertion of self-defense.

In State v. Aleshire, the "[d]efendant then explicitly and expressly denied that he had hit anyone with a pool cue or with his fists." The Supreme Court succinctly stated that "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense. 89 Wash.2d at 71.

In her brief, Bogar-Johnson argues that the Supreme Court's reasoning in Aleshire "only makes sense if the defendant bears the burden of producing evidence to justify instruction on self-defense and cannot present inconsistent defenses." Brief of Appellant 17. This reading of

Aleshire appears in part to be based on a mischaracterization on the part of Bogar-Johnson. In her brief, Bogar-Johnson repeatedly refers to her denials as if she were simply “not admitting” to any assaultive behavior. The difference is important in that one who “does not admit” to particular conduct has essentially remained silent and can still logically and in good faith avail themselves of whatever evidence of that conduct is adduced. However, one who offers an outright denial of the evidence of the conduct is not remaining silent and intentionally foregoes logic when they then attempt to rely on evidence directly contrary to their own denial. It is akin to the difference between asserting that the State cannot prove a fact as opposed to denying that the fact exists at all. That such a state of affairs somehow improperly shifts the burden to the defense to prove self-defense makes no sense.

Inconsistent Defenses.

The other assertion Bogar-Johnson makes – that the reasoning in Aleshire somehow prohibits her from mounting inconsistent defenses – also makes no sense. The State readily concedes that inconsistent defenses are not prohibited. See, e.g. State v. Fernandez-Medina, 141 Wash.2d 448, 6 P.3d 1150 (2000), and State v. McClam, 69 Wash.App. 885, 850 P.2d 1377, review denied, 122 Wash.2d 1021, 863 P.2d 1353 (1993). McClam

was about instructions on lesser included offenses. The Court in that case noted that “an inconsistent defense goes to the weight of, but does not entirely negate” the evidence necessary to support the lesser included instruction. Here, Bogar-Johnson’s outright denial of any physical contact between her and Englund does not merely go to the weight of the relevant evidence of Bogar-Johnson striking Englund, it categorically negates any such striking occurred at all. While Bogar-Johnson is entitled to mount the inconsistent defenses of a general denial and self-defense, assuming some evidence exists, she is not entitled to a self-defense instruction where she herself denies an essential element of that defense. The issue is thus not whether her general denial and her proposed claim of self-defense are inconsistent with each other, but whether her proposed claim of self-defense is inconsistent with itself.

CONCLUSION

Appellant’s assignment of error is without merit. The trial court was within its discretion to deny the self-defense instruction based on a lack of evidence and a denial of an essential element of self-defense by the Appellant. She was afforded a fair trial and was convicted. This court

should reject the assignment of error and affirm the decision of the trial court.

DATED this 28th day of December, 2018.

Respectfully Submitted,



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RKP / rkp

GRAYS HARBOR COUNTY PROSECUTOR'S OFFICE

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