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COA NO. 50992-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JORDIN BOGAR-JOHNSON,

Appellant.

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

The Honorable Stephen Brown, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The court erred in refusing to instruct the jury on self-defense and defense of property, in violation of due process.

2. The $200 criminal filing fee imposed as part of the sentence is unauthorized by statute. CP 66.

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault. Where appellant denied striking the complaining witness but when some evidence from multiple sources, looked at in the light most favorable to appellant, supported instruction on self-defense and defense of property, did the court err as a matter of law in refusing such instruction?

2. Where the new statute prohibiting imposition of a criminal filing fee against indigent defendants applies to cases pending on direct appeal, whether the $200 criminal filing fee must be vacated?

B. STATEMENT OF THE CASE

Jordin Bogar-Johnson appeals from her third degree assault conviction. CP 40-41. At trial, witnesses gave differing versions of what happened.

Johnson testified that Michael Englund raped her at her home. 1RP[1] 180-81. Afterwards, she started receiving harassing messages from him, saying that he was going to come over again and posting about it on Facebook. 1RP 181. He gave people her address. Id. He told "people to come to my house and do all this stuff to me." 1RP 182. Johnson told him to stop. Id.

Johnson and her boyfriend, Travis Durham, were asleep in her house on the night in question when loud bangs woke them. Id. Johnson thought she was going to have a heart attack. 1RP 183. She realized people were pounding on her front door. Id. She was scared. 1RP 191. Then those people went around to the back of her residence and started banging there. 1RP 183. She initially did not know who they were. 1RP 184. Then Heather Englund, Michael's mother, announced her presence. Id.

Johnson is African-American. 1RP 184, 204. Englund screamed Johnson's name, demanding she come out, swearing at her and calling her a "nigger." 1RP 183. Englund told Johnson to leave her son alone. Id. She kept calling Johnson a "nigger" and a bitch. 1RP 183-84. Johnson repeatedly told them to get off her property. 1RP 184. They refused to

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[1] This brief cites to the verbatim report of proceedings as follows: 1RP - two consecutively paginated volumes consisting of 8/29/17, 8/30/17; 2RP - one volume consisting of 9/25/17, 9/26/17.

leave. Id. Johnson called her mother, hoping she could intervene, "so I wouldn't have to personally make . . . contact with her, especially if she is trying to get into my apartment and get to me, call me a nigger and threatening and all this stuff." 1RP 186.

Englund and those with her returned to Johnson's front porch. 1RP 185. Johnson at first thought they left, but then she heard them pounding on the front door again. Id. She opened the door and screamed at them to leave. Id. Englund, who was on her phone, said she was going to sue her and put her in jail. 1RP 187. Johnson was standing in her doorway. Id. They started yelling "and then she lunged at me." Id. The lunge was "pretty quick." 1RP 194. Johnson felt threatened. Id. Johnson put her arms out because "she acted like she was going to attack me, or run in my apartment." 1RP 187, 189. Johnson told Englund she was not coming inside. 1RP 187. Englund then said she was calling the police to say that Johnson hit her. Id. Johnson and Durham went back inside and shut the door. 1RP 188.

Heather Englund presented a different version of events. Englund used to be friends with Johnson's mother, but the relationship fell apart after the latter did not attend Englund's wedding. 1RP 129. Her son Michael was in the hospital with a blood clot on the night in question. 1RP 130. He received what Englund called "harassing" messages from

Johnson and Durham. 1RP 130-31. She knew about the rape accusation against her son, but claimed the harassment had nothing to do with it. 1RP 140, 142. Her son was upset. 1RP 144. She called 911. 1RP 131. Then she and her parents went over to Johnson's residence. 1RP 131-32. She thought it was "perfectly okay" to confront Johnson at 11:30 at night. 1RP 142.

Englund knocked on Johnson's front door, admitting on cross-examination that it was more than once. 1RP 132, 151. No one answered. 1RP 151. She heard noise from inside. 1RP 133, 151. She went around back and knocked on the sliding door, admitting on cross examination that she knocked more than once. 1RP 133, 151. She denied yelling Johnson's name. 1RP 152. Johnson and Durham opened the window. 1RP 133, 146, 153. Englund said she wanted to talk to Durham. 1RP 133. Johnson started swearing at her and threw things out the window. 1RP 133-34, 146.[2] Nothing hit her. 1RP 134. Englund called 911. Id. Englund denied yelling at Johnson and did not admit to using racial slurs. 1RP 146.

Englund returned to the front of Johnson's apartment, walking fast. 1RP 134, 148. Johnson came out the front door, telling Englund that she was on her property. 1RP 135. Englund denied it, saying she was on the sidewalk. Id. Englund's mother yelled "Heather." Id. She turned and

[2] Johnson denied throwing anything out the window. 1RP 185.

Johnson hit her twice, once in the front of the head and once on the back of her head. 1RP 135-36. It felt like a pipe hit her. 1RP 136. She was wearing a sturdy C-Collar at the time because she had her discs fused two months before. 1RP 137. She was on the sidewalk when she was hit. 1RP 150. The sidewalk is very close to Johnson's front door. Id. Englund insisted she was "never" on Johnson's property while acknowledging she knocked on Johnson's door. 1RP 151. She told Johnson "you are going to jail, honey, and I am suing you." 1RP 154.

Officer Goffena arrived at the scene in response to Englund's 911 call. 1RP 92-93. Englund told him that she was struck from behind with an object while she was walking away. 1RP 93. Goffena observed fresh red marks and swelling behind Englund's ear. Id. Goffena identified a wooden doorstop in the sliding door as the possible object used to strike Englund. 1RP 98, 105-06. At trial, Englund identified the doorstop as the object that hit her. 1RP 137.

Cecelia Mattox, Englund's mother, testified for the State as well. 1RP 110. Mattox's story mostly aligned with her daughter's: they went over to Johnson's house late at night to make Durham stop harassing her grandson, they knocked on the front and back door multiple times, words were exchanged, and Johnson threw things out the window. 1RP 111-15, 121-25. Mattox did not admit that Englund used racial slurs or swore at

Johnson. 1RP 123. She conceded that Englund yelled at Johnson. 1RP 123. Johnson told them not to step on her porch. 1RP 124.

They headed toward the front, on the way to their vehicle, as Englund called 911. 1RP 115. Johnson yelled at them, telling them to get their "asses over here" because she wanted to talk to them. 1RP 116. They headed in her direction, getting no further than the sidewalk in front of her apartment, facing Johnson's porch. Id. Johnson started talking "badly" to Englund, calling her names. 1RP 116-17, 126. Englund told her that she was talking to 911. 1RP 117. The three turned to head down the sidewalk. Id. Mattox looked back and saw Johnson run out of the apartment and twice hit Englund with what looked like a pipe, striking the side of her head where her C-collar was located. 1RP 117, 125-26. Mattox identified the doorstop as resembling the pipe. 1RP 118. Johnson ran back into her residence. 1RP 119.

Travis Durham's testimony, on the other hand, was consistent with Johnson's version of events. They were sleeping that night when they were awakened at 11:30 by repetitive knocking on the front door. 1RP 160, 167-68. Someone was jiggling the door handle "like they were trying to get in." 1RP 160, 168-69. The people then went around back and repetitively banged on the glass sliding door. 1RP 160. Englund was not just knocking on the glass door, she was "hitting" it. 1RP 161. They were

trying to get inside the house. 1RP 161, 169. Englund shouted a racial slur at Johnson. 1RP 160. Durham opened the window and saw them outside. Id. Johnson told them to leave but they wouldn't. Id. Englund called for Johnson, shouting in a "pissed" tone. 1RP 161-62. Durham did not see Johnson throw anything out the window. 1RP 168.

Englund and her parents returned to the front of Johnson's residence. 1RP 162. Durham and Johnson went downstairs. 1RP 160. Johnson opened the front door. Id. Englund and her parents were already in front. 1RP 170. Durham described Englund and Johnson as "going at it" verbally, yelling at each other. 1RP 162, 171. Then Englund "lunged at her . . . she was going at her," as if "she was going to grab her." 1RP 162-63, 172. Englund could have made physical contact. 1RP 175. And then Johnson "stood up for herself." 1RP 172. "Jordin came up, like, what are you going to do, like, she is going to protect herself." 1RP 175. He did not see Johnson with a metal pipe, the doorstopper, or anything she could have used to assault Englund. 1RP 164, 177. He did not see Johnson strike Englund. 1RP 165.

Johnson's stepfather, Chad Searls, testified that Johnson called that night because there was "something that she considered a threat in her home." 1RP 199. Searls considered Englund and her parents to be a threat to his daughter because Johnson is African-American. 1RP 204.

Searls had known the Englund family his entire life and described them as harboring "heavily, racially motivated hatred toward African Americans." 1RP 205-06.

Johnson testified that Englund and those with her were not on the sidewalk; they were on her back porch and at her front door. 1RP 184. She saw that Englund had a neck brace on, but Englund walked around fine, "sprinting more like it." 1RP 188. "She was on a mission that night for sure." Id. Johnson denied striking Englund. 1RP 188, 197. She was asked "If you were to have touched her, at some point, even if accidentally, would you have felt justified?" 1RP 198. Johnson answered, "I would have felt like I did the necessary thing." Id. And "I would have felt like it was the necessary procedure to get her off my property, because she was not leaving, on my private property." 1RP 198-99.

Defense counsel raised a two-pronged theory of defense: (1) general denial and (2) self-defense and defense of property. CP 8. Counsel proposed pattern instructions on self-defense and defense of property. CP 18-19[3] (WPIC 17.02, 17.04, 17.05).

After both sides rested their cases, the court said, "I don't see any reason to give an instruction on self-defense since the defendant said it didn't happen." 1RP 207. Defense counsel responded that if the jury

[3] Attached as appendix A.

believed the State's evidence "that it did happen, that it would still be considered self-defense." 1RP 207. The prosecutor argued there was no showing for self-defense because "there is an outright denial." 1RP 207. The court ruled as follows: "I don't see any evidence of self-defense. She -- Mr. Durham and Ms. Bogar-Johnson both testified they didn't do anything, and so -- and so 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.

Without instruction on self-defense or defense of property, the jury found Johnson guilty of third degree assault. CP 36. The court sentenced Johnson as a first-time offender to 45 days in jail, with 30 days converted to community restitution. CP 63-64. At sentencing, the court reiterated Johnson was not entitled to self-defense instructions because "I don't know how you can raise self-defense when you said you didn't hit anybody" and "[t]here was . . . simply no evidence of self-defense." 2RP 9. This appeal follows. CP 40-41.

C. ARGUMENT

1. THE COURT VIOLATED JOHNSON'S RIGHT TO DUE PROCESS IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE AND DEFENSE OF PROPERTY.

Some evidence from whatever source, when looked at in the light most favorable to Johnson, allowed the jury to find Johnson used force to defend herself based on a subjective, reasonable fear of imminent injury. The evidence also allowed the jury to find Johnson used force in an attempt to prevent a malicious trespass. The court refused to instruct the jury on these defense theories based on its belief that Johnson was not entitled to such instruction unless she admitted to striking Englund. The court misunderstood the law. Johnson had the right to present inconsistent defenses. Some evidence supports instruction on self-defense and defense of property under established legal requirements. The court's refusal to instruct the jury on self-defense and defense of property requires reversal.

a. The standard of review is de novo.

The standard of review "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, 771-72, 966 P.2d 883 (1998). "The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo." Id. at 772. A trial court's refusal to give the requested jury instruction based on lack of evidence supporting the defense is also

reviewed de novo. State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

Here, the trial court did not refuse to give a self-defense instruction to the jury because of a factual dispute. Rather, the court ruled as a matter of law that instruction could not be given because Johnson denied striking Englund. 1RP 207. Further, the trial court refused to give the instruction based on lack of evidence to support the defense. Review is therefore de novo. This means the trial court's ruling receives no deference on appeal. State v. Kunze, 97 Wn. App. 832, 854, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404 (2000).

b. Some evidence, looked at in the light most favorable to Johnson, supported instruction on self-defense and defense of property.

"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), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); U.S. Const. amend XIV; Wash. Const. art I, § 3. Due process also requires the State prove all elements of a criminal offense beyond a reasonable doubt. That includes

proving the absence of self-defense. State v. Acosta, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984).

"A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction." State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). To raise a claim of self-defense, there need only be some evidence admitted in the case from any source. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983). The threshold burden of production is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The evidence does not even need to create a reasonable doubt. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202, review denied, 172 Wn.2d 1007, 259 P.3d 1108 (2011).

Where nondeadly force is at issue, "a person is entitled to act in self-defense when he reasonably apprehends that he is about to be *injured.*" State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). "Self-defense requires only a 'subjective, reasonable belief of imminent harm from the victim.'" State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 95, 217 P.3d 756 (2009)). "[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under

the conditions as they appeared to the defendant." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

A defense of property instruction is warranted where there is some evidence that the defendant used force in an attempt to prevent a malicious trespass, and when that force is not more than necessary. RCW 9A.16.020(3). In the defense of property context, the use of force may be lawful even though the defendant does not reasonably believe she is about to be injured. State v. Bland, 128 Wn. App. 511, 513, 116 P.3d 428 (2005).

Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." Janes, 121 Wn.2d at 238. This approach incorporates both subjective and objective characteristics. Id. It is subjective in that the jury is "'entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" Id. (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Id. The evaluation is objective in that "the jury is to use this information in determining 'what a reasonably prudent [person]

similarly situated would have done.'" Id. (quoting Wanrow, 88 Wn.2d at 236) (internal quotation marks omitted).

In determining whether there is sufficient evidence to instruct the jury on self-defense, the trial court must view the evidence in the light most favorable to the defendant. George, 161 Wn. App. at 95-96. "A challenge to the sufficiency of the defendant's evidence admits the truth thereof and all inferences that can reasonably be drawn therefrom." State v. Cole, 74 Wn. App. 571, 578, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994), overruled on other grounds, Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997).

The trial court cannot weigh the evidence in deciding whether to give self-defense instructions. Id. at 579. It is established that "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (quoting State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)). As a result, "[i]t is not the trial court's prerogative to resolve the question of whether a defendant in fact acted in self-defense." George, 161 Wn. App. at 100. "Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the

case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of fact.'" State v. Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982) (quoting Allen v. Hart, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)).

Some evidence from multiple sources, looked at in the light most favorable to Johnson, supports a theory that she acted in self-defense or to prevent a malicious trespass. Johnson was raped by Englund's son at her home, and then Englund came over to her home, banging on her doors late at night, waking her from sleep. 1RP 180-83. Johnson was scared. 1RP 191. The atmosphere was tense, with Englund yelling racial epithets at Johnson, an African-American woman. 1RP 160, 183-84, 186, 204. Englund, or someone in her group, pounded on the doors and jiggled the door handle, trying to get inside Johnson's home. 1RP 160-61, 167-69, 182-83. Johnson screamed at them to get off her property and leave, but they refused. 1RP 160, 184-85. Johnson and Durham testified Englund lunged at her during a heated argument after Englund returned to the front of the house. 1RP 162-63, 172, 187, 194. Johnson thought Englund was going to attack her or try to get inside her home. 1RP 186-87, 189. Johnson testified that she felt threatened. 1RP 194. Johnson denied striking Englund. 1RP 188, 197. But she also testified that if she had hit her, even accidentally, it was justifiable to protect herself and to prevent

Englund from trespassing. 1RP 198-99. Englund and her mother, meanwhile, testified that Johnson in fact struck Englund with a pipe-like object, which formed the basis for the assault charge. 1RP 117, 125-26, 135-36.

The jury is not required to accept the testimony of a witness in toto or reject it all. State v. Carothers, 84 Wn.2d 256, 261, 525 P.2d 731 (1974), disapproved on other grounds, State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984). Rather, the jury has the power to accept part and reject part of a witness's testimony. Id.; State v. Henry, 143 Wash. 39, 43, 254 P. 460 (1927). Thus, the jury, had it been presented with the self-defense and defense of property options, was free to accept Englund's testimony that Johnson struck her while rejecting Johnson's testimony that she did not strike her. Conversely, the jury was also free to accept testimony that Englund lunged at Johnson and was trying to get inside her home. And the jury, having made those credibility determinations, could make the further determination that Johnson struck Englund in self-defense or to prevent a malicious trespass.

To ensure due process, a trial court must provide considerable latitude in presenting the defense theory of her case. Specifically, the court can deny a requested jury instruction that presents a defendant's theory of self-defense "only where the defense theory is completely

unsupported by evidence." George, 161 Wn. App. at 100. Some evidence allowed the trier of fact to find Johnson had a subjective, reasonable belief of imminent harm from Englund and that the degree of force used was reasonably necessary. Some evidence allowed the trier of fact to find Johnson acted to defend against a malicious trespass. The court erred as a matter of law in refusing to instruct the jury on these defense theories.

c. There is no categorical rule that a defendant who does not admit to striking someone is precluded from receiving instruction on self-defense; the established requirements for the defense remain the dispositive test.

The Supreme Court in State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) affirmed the denial of self-defense instruction on the ground that "[a]n instruction not warranted by the evidence need not be given." In reaching that holding, the Court stated, without citation to authority, "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense." Id.

This observation only makes sense if the defendant bears the burden of producing evidence to justify instruction on self-defense and cannot present inconsistent defenses. Aleshire, however, was decided before McCullum, where the Supreme Court clarified "there need only be some evidence admitted in the case from whatever source" to properly raise the issue of self-defense. McCullum, 98 Wn.2d at 488, 500. It is

now settled that the defendant has no burden of production whatsoever; evidence of self-defense can come solely from the State's evidence. State v. Thysell, 194 Wn. App. 422, 422-23, 374 P.3d 1214 (2016). This means a defendant need not admit to assaulting someone in order to receive instruction on self-defense.

Citing the unexplained and unsupported statement in Aleshire, the Court of Appeals has nonetheless embraced on occasion the proposition that a defendant cannot receive self-defense instructions when denying committing the act underlying the charged crime. See 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). This is not an accurate statement of the law insofar as it purports to deviate from the established test for when self-defense instruction is available. The defendant has no burden of production, which means she has no burden of admitting an assault occurred before self-defense instruction is available.

The observation in Aleshire cannot be treated as an absolute rule divorced from the larger analytical framework for self-defense instruction. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676, 680 (1997), for example, held a defendant may support his request for self-defense instructions with evidence that contradicted his own testimony. In that case, the defendant was entitled to self-defense instruction where he

denied intentionally aiming his gun or firing at the victim but the victim testified that defendant aimed the gun at his head. Id. at 928, 933-34.

Callahan interpreted Aleshire as a case where the dispositive issue was the absence of evidence supporting the necessary elements for self-defense rather than inconsistent defenses. Id. at 932. That is the correct interpretation of Aleshire and the only one that is consistent with the established test for self-defense instruction. It has never been explained why a defendant cannot deny she struck someone and claim self-defense at the same time so long as some evidence, from whatever source, supports a self-defense instruction when looked at in the light most favorable to the defense. If there is evidence to satisfy the requirements for a self-defense instruction, the defendant is entitled to the instruction, regardless of whether the defendant denies committing the criminal act that provoked the need for self-defense.

A contrary rule would not only warp the established test for self-defense instruction but also run counter to decades of case law on when a defendant is entitled to instruction in support of a defense. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 887, 99 L. Ed. 2d 54 (1988). "A plea of not guilty permits *all*

defenses, excepting insanity and prior conviction or acquittal." State v. Conklin, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971) (emphasis added). Thus, "it is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence." State v. Frost, 160 Wn.2d 765, 772, 161 P.3d 361 (2007), cert. denied, 552 U.S. 1145, 128 S. Ct. 1070, 169 L. Ed. 2d 815 (2008).

Further, there is "no requirement in Washington case law that a defendant's testimony be consistent with the rest of the evidence presented at trial." Fernandez-Medina, 141 Wn.2d at 458. Trial courts have no power "to deny a request for an instruction on the basis that the theory underlying the instruction is 'inconsistent' with another theory that finds support in the evidence." Id. at 460. "Because the defendant is entitled to the benefit of all the evidence . . . her defense may be based on facts inconsistent with her own testimony." Fisher, 185 Wn.2d at 849.

The only true requirement for self-defense instruction is that there be some evidence to support the instruction. That evidence can come from any source. It need not come from the defendant. There are cases where a defendant denies committing the criminal act and would not be entitled to self-defense instruction, but the denial of instruction stems from the lack of evidence supporting the instruction, not the inconsistency in the defendant's position.

In Werner, the defendant was entitled to a jury instruction on self-defense in his prosecution for first degree assault after claiming he accidentally discharged a firearm when confronted by a pack of dogs. Werner, 170 Wn.2d at 335. The Supreme Court recognized "[t]he defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both." Id. at 337. By the same reasoning, the defenses of general denial of assault and self-defense are not mutually exclusive so long as there is evidence of both.

Under Washington law, a defendant must produce some evidence demonstrating self-defense from "whatever source" and that evidence "does not need to be the defendant's own testimony." State v. Walker, 164 Wn. App. 724, 729 n.5, 265 P.3d 191 (2011), remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012), affirmed, 173 Wn. App. 1027 (2013), review denied, 177 Wn.2d 1026, 309 P.3d 504 (2013) (quoting State v. Jordan, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010), aff'd, 180 Wn.2d 456, 460, 325 P.3d 181 (2014)). "The facts in support of such an instruction, such as the defendant's state of mind, can come from a number of sources, including State and defense witnesses and police testimony." Id.

The notion that a defendant cannot receive self-defense instruction as a matter of law unless the defendant testifies that she assaulted someone is thus contrary to the established analytical framework for deciding when

instruction is warranted. The trial court cannot "ignore evidence produced by the State that would warrant a self-defense instruction." Thysell, 194 Wn. App. at 426. *All* of the evidence must be considered. Id. And if some of that evidence, looked at in the light most favorable to the defense, meets the standard for self-defense instruction, then instruction must follow. McCullum, 98 Wn.2d at 500; George, 161 Wn. App. at 95-96.

In fact, the defendant is not even required to testify in order to get a self-defense instruction. Fisher, 185 Wn.2d at 850; Walker, 164 Wn. App. at 729 n.5. Why would the result be any different for a defendant who chooses to testify but denies committing the assault? In both situations, the defendant is not admitting to striking anyone. In both situations, there is no testimony from the defendant that she assaulted someone in self-defense. So long as other evidence supports the defense, due process requires the instruction be given.

Johnson denied assaulting Englund. But Englund testified Johnson assaulted her. The evidence of assault comes from Englund, and her mother, who corroborated Englund on this point. In deciding whether Johnson was entitled to the instruction, the court must look to the evidence, whatever the source, to determine whether the instruction is supported. Here, the evidentiary source that an assault took place came from the State's witnesses. The evidentiary source that Johnson had a subjective,

reasonable fear of being injured, or that Englund was attempting to maliciously trespass, came from Johnson and Durham, the defense witnesses. There is no requirement that the defenses be consistent in order to obtain instruction on self-defense or defense of property.

Comparison with a defense request for instruction on a lesser offense is instructive because, as a factual matter, a defendant is entitled to an instruction on a lesser-included or inferior degree offense only when there is evidence that the defendant committed the lesser offense. Fernandez-Medina, 141 Wn.2d at 454; State v. Speece, 115 Wn.2d 360, 362, 798 P.2d 294 (1990). As with self-defense instruction, courts view the evidence supporting a defendant's requested lesser offense instruction in the light most favorable to the defense. Fernandez-Medina, 141 Wn.2d at 455-56.

"Generally, inconsistent defenses may be interposed in a criminal case." State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377, review denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993) (quoting 21 Am. Jur. 2d Criminal Law § 191 (1981)). "[T]here must be a lesser included offense instruction if there is *any* evidence supporting an inference that only the lesser offense was committed, even in the face of a general denial by the defendant." Id. at 890. "The fact that the appellant gave an inconsistent defense goes to the weight of, but does not entirely negate the affirmative

evidence which requires the instruction in the first place." Id. "[T]here is no requirement in the case law that the evidence must come from the defendant or that the defendant's testimony cannot contradict this evidence." Id. at 889. In McClam, the defendant's requested lesser offense instruction "was completely inconsistent with another of his defense theories." Fernandez-Medina, 141 Wn.2d at 460. The Supreme Court in Fernandez-Medina embraced McClam as good law. Id.

If a defendant is entitled to a lesser offense instruction so long as evidence supports it even though the defendant's own testimony contradicts the defense, there is no sound reason why the same reasoning should not apply to self-defense instruction. Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to instruct on a defense theory supported by the evidence constitutes reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); Werner, 170 Wn.2d at 337. Johnson's conviction must therefore be reversed.

2. THE CRIMINAL FILING FEE MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON INDIGENCY.

The court imposed a $200 criminal filing fee against Johnson. CP 66. The fee must be stricken because the recently amended statute, which

prohibits imposition of the fee against indigent defendants, applies prospectively to Johnson's case on appeal.

The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018, states the $200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if he or she receives certain types of public assistance, such as food stamps, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. State v. Ramirez, __Wn.2d__, __P.3d__, 2018 WL 4499761 at *6-8 (slip op. filed Sept. 20, 2018). The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id.

Johnson's indigency is established in the record. The court determined Johnson was eligible for a public defender at no expense. CP 75-76. She was on food stamps, which qualifies her as indigent under

RCW 10.101.010(3)(a). CP 75. She did not have a job and received money from no other source. CP 75. She had no savings. CP 76. The trial court later entered an order of indigency for the appeal. CP 52-60. The declaration in support of indigency does not show Johnson's financial circumstances had changed. CP 42-45.

When legal financial obligations are impermissibly imposed, the remedy is "for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs." Ramirez, __Wn.2d__, __P.3d__, 2018 WL 4499761 at *8. The criminal filing fee must therefore be stricken from the judgment and sentence.

Johnson did not object to this cost below, which is understandable because HB 1783 was not yet in effect when Johnson was sentenced. The errors became extant only after HB 1783 became law and Johnson's case remained pending on appeal. Under these circumstances, RAP 2.5(a) is no hurdle to considering the LFO errors for the first time on appeal because "the purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Here, there was no error to correct at the time this fee was imposed because the new statutory provision had not yet taken effect. The failure to properly object may be excused where it would have been a

useless endeavor. State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996); see also State ex rel. Clark v. Hogan, 49 Wn.2d 457, 461, 303 P.2d 290 (1956) ("A fundamental rule in American jurisprudence is that the law requires no one to do a thing bain and fruitless.").

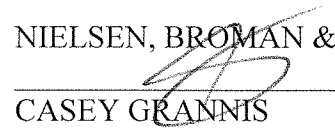
D. CONCLUSION

For the reasons stated, Johnson requests reversal of the conviction and removal of the criminal filing fee.

DATED this 2nd day of October 2018

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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