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Court of Appeals  
Division II  
State of Washington  
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No. 53505-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDRE TYRONE CROPPER,

Appellant.

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

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

While Andre Cropper was arguing with his girlfriend in their apartment, she grabbed a curtain rod and struck him in the groin as she left the apartment. In return, he struck her in the face breaking an orbital bone around her eye. Mr. Cropper was charged with a count of second degree assault. The jury was instructed on self-defense as well as initial aggressor. Mr. Cropper's convictions must be reversed as the State failed to disprove that he acted in self-defense.

B. ASSIGNMENT OF ERROR

The State failed to disprove beyond a reasonable doubt Mr. Cropper acted in self-defense.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State to disprove self-defense by the defendant beyond a reasonable doubt. While on trial for second degree assault, the State failed to disprove Mr. Cropper acted in self-defense where he struck his girlfriend in the face after she had taken a curtain rod, advanced on him, and struck him the groin. Is Mr. Cropper entitled to reversal of his conviction with instructions to dismiss?

#### D. STATEMENT OF THE CASE

In April 2018, Robyn Malgesini and Andre Cropper were living together in Kelso with Ms. Malgesini's seven year-old son. RP 129-31. Ms. Malgesini and Mr. Cropper had been dating since late 2017. RP 132.

On April 26, 2018, Mr. Cropper and Ms. Malgesini were drinking when an argument began. RP 133-34, 156. Ms. Malgesini demanded Mr. Cropper leave but he refused and remained. RP 134-35. Ms. Malgesini claimed Mr. Cropper punched her in the chest, which Mr. Cropper denied. RP 135, 245. Ms. Malgesini then went to bed. RP 135.

The next morning, Ms. Malgesini began the day by drinking two beers when she first awoke. RP 156. Mr. Cropper attempted to talk to Ms. Malgesini and apologize for the night before but she refused his apology, said the relationship was over, and demanded he leave. RP 137. Another argument ensued and Ms. Malgesini left the apartment. RP 137.

Ms. Malgesini decided to return when she noticed she had forgotten her keys and cellphone. RP 139. She and Mr. Cropper began their argument anew and Ms. Malgesini demanded Mr. Cropper leave.

RP 139-40. When he refused, Ms. Malgesini tried to leave and Mr. Cropper restrained her. RP 140. She ran towards the balcony of the second floor apartment, grabbed the curtain rod from the window, and advanced on Mr. Cropper while demanding he leave. RP 141, 246.

Ms. Malgesini claimed she tried to run past Mr. Cropper when he grabbed the curtain rod and punched her in the face with a clenched fist. RP 143-44. Conversely, Mr. Cropper stated he agreed to leave but he needed his cellphone, which Ms. Malgesini had and which she refused to return. RP 246, 248. Instead, Ms. Malgesini advanced on Mr. Cropper with the curtain rod and jabbed him in the groin, causing him to instinctively jab her in the eye. RP 246. Ms. Malgesini fell backwards and Mr. Cropper quickly left the apartment. RP 144.

Ms. Malgesini sought help from a neighbor who contacted 911. RP 146-47, 180. Ms. Malgesini refused aid at the apartment and opted to have the neighbor take her to the nearby hospital, where she was diagnosed with an orbital fracture. RP 194, 214, 222.

Mr. Cropper was charged with a count of second degree assault. CP 4. The court instructed the jury on self-defense, and at the State's request, instructed on initial aggressor. CP 22-25. During their deliberations, the jury sent out the following question:

Is it possible they are both the aggressor which negates self-defense, Instruction 14?

CP 30. In response, the court referred the jury back to the instructions.

CP 30. The jury subsequently convicted Mr. Cropper as charged. CP

31.

E. ARGUMENT

**The State failed to prove beyond a reasonable doubt Mr. Cropper did not act in self-defense.**

1. *The State bore the burden of disproving beyond a reasonable doubt that Mr. Cropper acted in self-defense.*

To prove second degree assault under RCW 9A.36.021(1)(a) as charged, the State was required to prove that Mr. Cropper intentionally assaulted Ms. Malgesini and recklessly inflicted substantial bodily harm. *State v. Esters*, 84 Wn.App. 180, 183, 927 P.2d 1140 (1996), *review denied*, 131 Wn.2d 1024 (1997).

It is a complete defense to the charge of second degree assault that the defendant acted in self-defense. *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984). The use of force is lawful when used by a person about to be injured, provided that the force used is not more than necessary. RCW 9A.16.020(3). Because self-defense is a lawful act, it negates the mental state and the “unlawful force” elements of

second degree assault. *Acosta*, 101 Wn.2d at 616-18. Self-defense requires only a subjective, reasonable belief of imminent harm from the victim. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

The State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *Acosta*, 101 Wn.2d at 615-16.

Although self-defense has both subjective and objective components, neither requires testimony from the defendant. Evidence of self-defense may come “from ‘whatever source’ and ... the 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) (quoting *State v. Jordan*, 158 Wn.App. 297, 301 n.6, 241 P.3d 464 (2010), *aff’d*, 180 Wn.2d 456, 325 P.3d 181 (2014)).

2. *The evidence established Mr. Cropper reacted to Ms. Malgesini’s assault in self-defense.*

Mr. Cropper and Ms. Malgesini were engaged in a verbal argument when Ms. Malgesini advanced on Mr. Cropper with a curtain rod. RP 143, 246. When she jabbed him in the groin with the curtain rod, he struck her with his fist. This was an act of self-defense the State did not disprove.

Initially, there was insufficient evidence to support the initial aggressor instruction. Ms. Malgesini started the argument and she struck Mr. Cropper in the groin, causing him to respond and strike her. The evidence at trial established that, in fact, Ms. Malgesini was the initial aggressor. The jury's question establishes that some members believed Ms. Malgesini to be the aggressor as well.

Further, Mr. Cropper had a right to be where he was and he did not have any duty to retreat. The law is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). He had agreed to leave but he needed his phone prior to leaving. Ms. Malgesini refused to return it and instead struck Mr. Cropper with the curtain rod.

Since the argument was only verbal until Ms. Malgesini struck Mr. Cropper, his act of striking her in response was justified. The State did not disprove that Mr. Cropper's action was a legal act. According, the State failed to disprove Mr. Cropper acted in self-defense.

3. *Double jeopardy requires dismissal of Mr. Cropper's conviction.*

If an appellate court has held that evidence is insufficient to support the conviction, then retrial for that offense is prohibited. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The unreversed finding of insufficient evidence by an appellate court is the equivalent of an acquittal. *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

This Court should reverse Mr. Cropper's conviction after finding he acted in self-defense with instructions to dismiss.

F. CONCLUSION

For the reasons stated, Mr. Cropper asks this Court to reverse his conviction with instructions to dismiss.

DATED this 30<sup>th</sup> day of October 2019.

Respectfully submitted,

*s/Thomas M. Kummerow*

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APPELLANT.	)	

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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