

FILED

29647-4-III
COURT OF APPEALS

NOVEMBER 23, 2011
Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER J. GARDNER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in refusing to instruct the jury on self defense.

B. ISSUES

1. A defendant presents evidence that if he struck the alleged victim he did so either by accident or in self-defense. Does the court err in refusing to instruct the jury on self-defense because that defense is inconsistent with a claim of accident?
2. A defendant who is charged with second degree assault presents evidence that any injuries sustained by the alleged victim were the result of the defendant's attempts to repel an assault by the victim. Does the court err in refusing to instruct the jury on self-defense because defense counsel failed to assert that claim in the omnibus application?

C. STATEMENT OF THE CASE

Christopher Gardner and Ronnie Quintana had been friends for eight years. (RP 54) Mr. Quintana and his wife, Amy Quintana, separated and shortly thereafter, Mr. Quintana discovered that Ms. Quintana and Mr.

Gardner were having an affair. The relationship between the two men became strained. (RP 54-55) They nevertheless tried to be civil to each other knowing they would have continuing contact because of the Quintanas' daughter. (RP 55)

On March 17, 2010, Mr. Quintana had several heated telephone and text-message exchanges with Mr. Gardner and Ms. Quintana regarding the Quintanas' daughter. (RP 73-74) After Mr. Quintana got off work, he visited a friend, Angelina Raber, who lived in his apartment building. (RP 56) Ms. Raber saw Mr. Quintana pacing and angrily talking on the telephone with Mr. Gardner. (RP 100, 111) Then he left the apartment to confront Mr. Gardner. (RP 110-11) Mr. Quintana claims that he turned around before reaching the Gardner residence. (RP 59-60) Mr. Gardner and Ms. Quintana both assert that they saw Mr. Quintana by Mr. Gardner's home, revving his engine a few times before he sped back to Ms. Raber's apartment. (RP 177, 218)

Mr. Quintana called Mr. Gardner and invited him to Ms. Raber's apartment to talk about their issue. (RP 75-76, 172) When Mr. Gardner arrived, Mr. Quintana stepped out of Ms. Raber's apartment to speak to him and closed the door. (RP 61, 81)

Mr. Quintana claims Mr. Gardner hit him a number of times. (RP 64) He told several people different accounts of the incident—that he

was “sucker punched”, he “got hit”, he was “punched in the face”, or he was “assaulted”. (RP 103, 141, 150, 159, 129)

But according to Mr. Gardner, he shoved Mr. Quintana into the wall after Mr. Quintana had chest-butted him several times. (RP 173, 175) Mr. Gardner said that Mr. Quintana was in such a state of agitation that Mr. Gardner felt threatened by him. (RP 173-78, 188-89)

Ms. Raber said that she heard something hit her door hard and found Mr. Quintana on the ground next to the door. (RP 101-02) She heard Mr. Quintana yelling after Mr. Gardner, “[W]hat, that’s all you have?” (RP 101) Within minutes, Mr. Quintana also text-messaged Mr. Gardner, “LOL, [l]ooks like your bark is bigger than your bite.” (RP 83) Although Mr. Quintana insisted that he was not hurt, Ms. Raber got him a cold pack for his face. (RP 103) She was angry at Mr. Quintana for provoking and escalating the confrontation with Mr. Gardner. (RP 113, 117)

Mr. Quintana called the police and reported that he had been assaulted. (RP 67) The police determined that because Mr. Quintana did not appear to be injured, the matter would not go forward. (RP 87, 130) Two days later, Mr. Quintana went to the doctor and was diagnosed with a broken jaw. (RP 70) He had Ms. Raber call police to supplement the

report, and as a result Mr. Gardner was charged with second degree assault. (RP 89, 106)

The trial judge refused to instruct the jury on self-defense because Mr. Gardner did not assert a general defense of self-defense in response to the State's omnibus application, and therefore he could not raise it at trial. (RP 192-98) The court also ruled Mr. Gardner was not entitled to a self-defense instruction because the second degree assault charge was based on allegations that he punched Mr. Quintana in the face, Mr. Gardner could not raise self-defense under the facts he asserted, *i.e.*, that the jaw might have been broken when Mr. Gardner shoved Mr. Quintana into the door. (RP 202-09)

While deliberating, the jury sent an inquiry to the judge that read, "Please expand 'Instruction #8' and provide additional clarification to the definition of intent." (CP 71) The trial judge instructed the jury to re-read and follow the instructions already given. (CP 71)

The jury found Mr. Gardner not guilty of second degree assault, but convicted him of the lesser included offense of fourth degree assault. (CP 49) He was sentenced to 365 days in jail, with 305 days suspended, and two years of supervision, and ordered to pay restitution of \$16,256.82 for Mr. Quintana's medical expenses. (CP 64, 105)

D. ARGUMENT

1. FAILURE TO INSTRUCT THE JURY ON THE DEFENSE THEORY OF THE CASE WAS ERROR.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Even a defendant's own testimony, standing alone, is sufficient to raise the issue of self-defense. *State v. Adams*, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982). The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004).

The trial court refused the self-defense instruction for two reasons, both based on its understanding of the law. Because the refusal to give the self-defense instruction was based on matters of law rather than factual disputes, review is *de novo*. *State v. George*, 161 Wn. App. 86, 94, 249 P.3d 202 (2011) (*citing State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). The factual evidence is considered in the light most

favorable to Mr. Gardner. *George*, 161 Wn.2d at 95 (citing *State v. Jelle*, 21 Wn. App. 872, 873, 587 P.2d 595 (1978)).

a. A Claim Of Self-Defense Is Not Inconsistent
With A Defense Of Denial Of Intent To
Commit Second Degree Assault.

The trial court held, as a matter of law, that Mr. Gardner could not advance what the court deemed to be conflicting theories: that he did not assault Mr. Quintana and, if he did, it was in self defense. But these theories were not necessarily conflicting.

“The defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citing *State v. Callahan*, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997)). Reckless infliction of serious bodily injury is an essential element of second degree assault. RCW 9A36.021. Any intentional offensive touching, regardless whether the defendant acted recklessly, constitutes misdemeanor assault. *State v. Parker*, 81 Wn. App. 731, 737, 915 P.2d 1174 (1996); *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992). But a claim of self-defense, rather than negating the intent to touch, renders the otherwise unlawful act lawful. RCW 9A.16.020(3).

Here, Mr. Gardner testified that he shoved Mr. Quintana away when he chest-butted Mr. Gardner. There was evidence that Mr. Gardner fell hard against Ms. Raber's door. While Mr. Gardner denied having punched Mr. Quintana, this did not eliminate the possibility that Mr. Quintana was accidentally injured when Mr. Gardner intentionally shoved Mr. Quintana away into the door. An intentional pushing would be fourth degree assault, as the jury apparently found. Such an assault is not a crime, however, if it is justified under a claim of self-defense. Thus, these theories are not in conflict. The trial court erred by denying the defense's proffered self-defense instruction.

b. Failure To Give The Self-Defense Instruction Cannot Be Predicated On The Defendant's Failure To Disclose A Claim Of Self-Defense Before Trial.

The trial court held, as a matter of law, that Mr. Gardner waived a self-defense instruction because he failed to disclose that defense in response to the omnibus order. The trial court signed the State's omnibus application, requiring Mr. Gardner to state the general nature of his defense. CP 106. *See* CrR 4.7(b)(2)(xiv) (authorizing the trial court to require the defendant to state the general nature of the defense).

No appellate court has determined whether CrR 4.7(b)(2)(xiv), the rule requiring disclosure of the general nature of the defense, requires

disclosure of a self-defense claim. A general defense of denial incorporates the defendant's claim that the State will be unable to prove an essential element of the offense.

The rule may be reasonably interpreted to require disclosure of affirmative defenses, such as duress or insanity: "An affirmative defense is a set of facts that entitle the defendant to acquittal, even though the State has proved every element of the crime charged." 13A Wash. Prac., Criminal Law § 105 (2010-11), *citing State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994).

Proof of self-defense, however, negates the intent element. *State v. Acosta*, 101 Wn.2d 612, 615, 618, 683 P.2d 1069 (1984); *State v. Hanton*, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980). A claim of self defense provides grounds for acquittal because, if successful, it prevents the State from successfully proving an essential element of the offense. 13A Wash. Prac., Criminal Law § 105 (2010-11). Such a "defense" has been termed a "quasi-defense." *Id.*

In view of the absence of case law clearly requiring disclosure of a self-defense claim under CrR 4.7, and in view of the ambiguity of the rule with respect to a claim of self-defense, the court erred in finding the alleged failure to disclose was a sanctionable violation of the rule.

c. Refusal To Instruct The Jury On Self-Defense
As A Sanction For Failure To Disclose
Defendant's General Defense Was An Abuse
Of Discretion.

Even if CrR 4.7(b)(2) required Mr. Gardner to disclose his self-defense claim, the sanction of barring the defense for failing to disclose it is an abuse of discretion. CrR 4.7(h)(7)(i) provides that the trial court may grant a continuance, dismiss the action, or enter another appropriate order as a sanction for failure to comply with a discovery order or discovery rule. The rule affords the trial court wide latitude when imposing sanctions for discovery violations. *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799, review denied 120 Wn.2d 1016, 844 P.2d 436 (1992).

But a trial court's imposition of discovery sanctions must be consistent with constitutional mandates. CrR 4.7(b)(2) (permitting the imposition of a discovery order "subject to constitutional limitations"); *See* CrR 1.1 ("These rules shall not be construed to affect or derogate from the constitutional rights of any defendant."); *State v. Grant*, 10 Wn. App. 468, 474-75, 519 P.2d 261 (1974). Even in jurisdictions in which there is a statutorily mandated disclosure of the intention to rely on self defense, courts have held that barring presentation of such a defense is an abuse of discretion when other, less severe sanctions are not

considered. *E.g., People v. Foster*, 648 N.E.2d 337, 341-42 (Ill. App. 4 Dist., 1995).

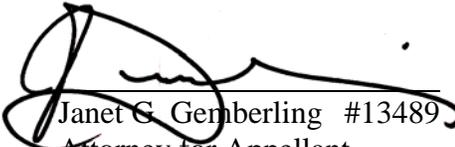
A criminal defendant has a right under the Sixth Amendment, Const. article I, § 22 (amendment 10) to compulsory process to compel the attendance of witnesses. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). That guarantee includes “the right to present a defense” and the right to a jury trial. *Maupin*, 128 Wn.2d at 924 (*quoting Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). Refusing to instruct the jury on the defendant’s theory of the case violates the constitutional right to present a defense.

E. CONCLUSION

The conviction should be reversed and the matter remanded for retrial on the charge of misdemeanor assault.

Dated this 23rd day of November, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29647-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
CHRISTOPHER J. GARDNER,)	
)	
Appellant.)	

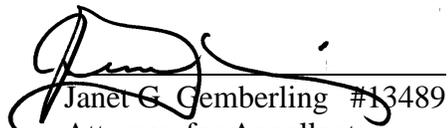
I certify under penalty of perjury under the laws of the State of Washington that on November 23, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
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I certify under penalty of perjury under the laws of the State of Washington that on November 23, 2011, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on November 23, 2011.


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