

34903-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN L. McDERMOTT, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

---

LAWRENCE H. HASKELL  
Prosecuting Attorney

Larry Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

**I. APPELLANT’S ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PRESENTED ..... 1**

**III. STATEMENT OF THE CASE ..... 1**

    Substantive facts. .... 2

**IV. ARGUMENT ..... 4**

    A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT ON THE DEFENSE OF NECESSITY AS THE DEFENDANT FAILED TO PRODUCE SUBSTANTIAL EVIDENCE FOR SEVERAL ELEMENTS OF THE DEFENSE OF NECESSITY. .... 4

        Standard of review. .... 4

            1. There was not sufficient evidence to establish the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury. .... 9

            2. The defendant had reasonable alternatives other than grabbing and possessing the shotgun under the third element of necessity. .... 10

    B. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR SECOND DEGREE ASSAULT. .... 11

        Standard of review regarding sufficiency of the evidence. .... 11

        Argument. .... 12

**V. CONCLUSION ..... 14**

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>In re Pers. Restraint of Martinez</i> , 171 Wn.2d 354, 256 P.3d 277 (2011).....	12
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	5
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995) .....	5
<i>State v. Brooks</i> , 45 Wn. App. 824, 727 P.2d 988 (1986).....	12
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969) .....	13
<i>State v. Collins</i> , 76 Wn. App. 496, 886 P.2d 243 (1995).....	13
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	12
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	5
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	11
<i>State v. Hagen</i> , 55 Wn. App. 494, 781 P.2d 892 (1989).....	13
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014) .....	11, 12
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972) .....	6
<i>State v. Jeffrey</i> , 77 Wn. App. 222, 889 P.2d 956 (1995) .....	6
<i>State v. Niemczyk</i> , 31 Wn. App. 803, 644 P.2d 759 (1982).....	5
<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	6
<i>State v. Parker</i> , 127 Wn. App. 352, 110 P.3d 1152 (2005) .....	6
<i>State v. Pete</i> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	5
<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994) .....	14
<i>State v. Stockton</i> , 91 Wn. App. 35, 955 P.2d 805 (1998) .....	6

*State v. Walker*, 136 Wn.2d 767, 966 P.2d 863 (1998)..... 4

*State v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992)..... 12

**FEDERAL CASES**

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781,  
61 L.Ed.2d 560 (1979)..... 12

**STATUTES**

RCW 9.41.040 ..... 13

RCW 9A.04.110..... 9

RCW 9A.08.010..... 13

**OTHER**

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1136  
(11th ed. 2006)..... 9

## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in declining to give McDermott's proposed instruction on the defense of necessity.
2. Insufficient evidence supports the element of possession.

## **II. ISSUES PRESENTED**

1. Did the trial court abuse its discretion when it refused to instruct the jury on the defense of necessity?
2. Whether, after viewing the evidence in a light most favorable to the State with all reasonable inferences, any rational trier of fact could have found each element of second unlawful possession of a firearm was proven beyond a reasonable doubt?

## **III. STATEMENT OF THE CASE**

The defendant/appellant, Justin McDermott, was charged by information in the Spokane County Superior Court with second degree unlawful possession of firearm. CP 3. He subsequently proceeded to a jury trial and was convicted as charged. CP 52; RP 159. With a standard range sentence of one to three months, the trial court imposed an exceptional sentence downward of four days, with four days credit for time served. CP 89, 101-04. This appeal timely followed.

Substantive facts.

During the noon hour on March 26, 2016, Spokane police responded to 2417 North Addison in Spokane on a disturbance call. CP 47, 52-53, 65. There had been a report of a firearm involved. RP 53-54.

Christina Duhamel was residing at the North Addison address on the day of the incident. RP 72. The defendant is her brother. RP 72. At the time, Ms. Duhamel, her children, and the defendant resided at the address. RP 105. The siblings' mother arrived unannounced at the house with two unidentified males. RP 73. The mother had not resided at the residence for approximately six months. RP 83. Prior to the males' entry into the home, Ms. Duhamel asked one of the men not smoke in the house because of her newborn, and he complied. RP 73, 75. The other male became angry and started cursing at Ms. Duhamel. RP 76. Ms. Duhamel told the male he did not need to be hostile, and she would call the police. RP 77. The male said he was in some kind of gang, and he would not hesitate to kill them.<sup>1</sup> RP 77, 85. Ms. Duhamel "mouthed" back at the male, and said "you don't know who I am." RP 77. She requested the males leave the residence. RP 77. The male then pointed his finger at Ms. Duhamel, suggesting it was a gun, informing her that she was "not going to ruin their weekend." RP 77, 80,

---

<sup>1</sup> Ms. Duhamel believed the male showed a gang sign. RP 84.

84.<sup>2</sup> Ms. Duhamel maneuvered herself and her children toward one of the bedrooms, advising the male she was calling the police. RP 79.<sup>3</sup>

Toward the end of the encounter, the defendant armed himself with a shotgun, which belonged to his brother, from the bedroom and “flashed” it at the two males as they exited the residence. RP 81-82, 86, 88, 104. Neither male was observed with a firearm or a knife during the incident. RP 80. The males fled the scene prior to the officers’ arrival and were unidentified. RP 69.

After the males left, the defendant returned the firearm to the bedroom. Police executed a search warrant on the residence and found a loaded, functional 12-gauge shotgun in the closet area of a bedroom. RP 49, 54-56, 60-61, 66.<sup>4</sup> Shotgun shells were located in the vicinity of the firearm. RP 59-60. At trial, the parties stipulated that the defendant had been previously convicted of a felony charge in the State of Washington. RP 97.

---

<sup>2</sup> The other male remained composed during this time. RP 77. He attempted to calm down the other male before they left the house. RP 88, 113.

<sup>3</sup> The mother apparently had exited the residence and also called 911. RP 79.

<sup>4</sup> After the event, no useable fingerprints were identified by forensic personnel on the firearm. RP 62, 67.

The defendant testified and asserted that after the two males entered the home, one male stated: “that they were there to keep an eye on these MF’ers.” RP 111. The defendant also claimed the male made threats at everyone inside the home, and fidgeted with his waistline, indicating he had a weapon. RP 112. The defendant alleged that the male paced back and forth, and at times lunged toward Ms. Duhamel. RP 113. The defendant admitted he grabbed the shotgun from a bedroom, and took it into the living room to intimidate the unknown males. RP 114-15.

#### IV. ARGUMENT

##### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT ON THE DEFENSE OF NECESSITY AS THE DEFENDANT FAILED TO PRODUCE SUBSTANTIAL EVIDENCE FOR SEVERAL ELEMENTS OF THE DEFENSE OF NECESSITY.**

The defendant first asserts the trial court erred when it refused to instruct the jury on the defense of necessity. App. Br. at 5-8.

##### Standard of review.

The standard of review on this issue depends on whether the trial court’s refusal to give the jury instruction was based on law or fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 863 (1998). An appellate court reviews a denial of a jury instruction for abuse of discretion if based on a factual dispute, but de novo if based on a ruling of law. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based

on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated otherwise, an abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

A defendant is entitled to have the court instruct the jury on its theory of the case if evidence supports the particular instruction.<sup>5</sup> *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). Failure to do so is reversible error. *Id.* at 849. In evaluating a defendant's evidence in support of an instruction, the trial court must view it in the light most favorable to him or her. *Id.* at 849. With regard as to whether a judge should instruct on an affirmative defense:

“The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].” In short, the defendant has the burden of production and, if met, the burden of persuading the jury by a preponderance of the evidence that she has met the four required elements.

*Id.* at 849 (citation omitted).

Necessity is an affirmative defense. *State v. Niemczyk*, 31 Wn. App. 803, 807, 644 P.2d 759 (1982) (necessity is an affirmative defense and should not be considered by the jury unless the defendant has

---

<sup>5</sup> A defendant is not entitled to an instruction that is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

submitted substantial evidence to support it); *see State v. O'Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015) (the trial court should view the evidence in the light most favorable to the defendant when determining whether substantial evidence supports a jury instruction on an affirmative defense); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972) (substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed”).

A defendant can assert the affirmative defense of necessity to the charge of unlawful possession of a firearm. *See State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); *State v. Stockton*, 91 Wn. App. 35, 44, 955 P.2d 805 (1998).

To establish a necessity defense for unlawful possession of a firearm, there must be substantial evidence that:

(1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*State v. Parker*, 127 Wn. App. 352, 354-55, 110 P.3d 1152 (2005); *see* defendant’s proposed instruction number five. CP 17.

In the lower court, the defense attorney argued:

[DEFENSE ATTORNEY]: Yes, Your Honor. I proposed Instruction Number 5, which is essentially a self-defense, defense of others instruction<sup>6</sup> and Instruction 9, which is a necessity instruction. I do know that there's a couple of cases that apply here. One of them is *State vs. Parker*, which is 127 Wn. App. 352, and it cites *State vs. Jeffrey*, which is 77 Wn. App. 222.

Essentially the unlawful possession of a firearm defense would be admissible when the defendant reasonably believed he or another was under lawful imprisonment, threat of death or serious injury. He did not recklessly place himself in a situation where he would be forced to engage criminal conduct. He had no reasonable alternative, and there was a direct causal relationship between the criminal action and the avoidance of the threat or harm. I believe that would be jury issues, factual issues for the jury to determine and that the instructions that I proposed as it should be used.

RP 127-28.

The trial court ruled insufficient evidence supported giving a necessity defense for possession of the firearm. In so doing, the court stated:

Looking over the statute when you proposed these, I was looking through the actual statute. It's a strict liability. You are a felon. You can't possess a firearm, period. I don't show that there's anything.

I'll go back and read this *Parker* case, but I didn't show anything that says you can use it. It's a defense to the charge. It's if you're a felon, and I have a firearm strict liability.

---

<sup>6</sup> The defendant has not assigned error to the trial court's refusal to instruct on self-defense or defense of others, so only the refusal to instruct on necessity will be discussed.

So I don't know that even necessity would work in this case. I mean, the defendant testified he went to the bedroom, dug around looking for a shotgun when he could have gone in and used his cell phone and called the police. So I'm not sure even the necessity fits.

I'm going to go read the *Parker* case because the facts sound different than what we have here, too. I want to kind of see what the facts say, but as far as self-defense instruction reading it, it's a strict liability. A felon can't possess a firearm, and self-defense is not an option. At least that's how I read it under the RCWs.

RP 131-32.

I had a chance to read *State vs. Parker*. One of the paragraphs in here specifically says that in order to give a necessity, it says here that the Court would have to find that the defendant reasonably believed he was under an unlawful and present threat of death or serious bodily injury when he was in possession and had no reasonable alternative.

Based on that, I can't find that based on the evidence that was presented that he was under threat of death or serious bodily injury, especially since he ran out, got the gun, came back. There's no firearms. In fact, one of the other people was trying to calm the other guy.

So based on that, the Court can't find necessity is wanted for the instruction. So the Court's not going to give the necessity instruction.

RP 132-33.

Here, the trial court did not abuse its discretion when it denied instructing the jury on the defense of necessity based on insufficient evidence to support the first and third elements listed above.

1. There was not sufficient evidence to establish the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury.

The criminal activity was not justified because there was no credible evidence that the defendant or family member was faced with a present threat of death or serious physical injury.<sup>7</sup> The defendant testified that the unknown male allegedly threatened to kill everyone, RP 112-13; the male lifted up his shirt, which caused the defendant to believe the male may have had a weapon, RP 113; and, the male ran toward Ms. Duhamel several times making threatening gestures, RP 113.

Significantly, the unknown male never produced a firearm or any other weapon or verbally stated he had one, nor did the unknown male cause *any* physical injury to anyone in the home. The fact that the unknown male allegedly raised his shirt suggesting he had a weapon, and ostensibly made threatening gestures toward Ms. Duhamel did not rise to the level of a threat of death or serious physical injury. Nothing claimed by the defendant was inherently suggestive of such a risk. The fact that Ms. Duhamel and the unknown male engaged in verbal jousting and the unknown male may have

---

<sup>7</sup> Serious physical injury is not defined by statute, but physical injury is. RCW 9A.04.110(4)(a). “Physical injury” is “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). In this context the word “serious” is defined as “having ... dangerous possible consequences.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1136 (11th ed. 2006).

been verbally abusive is not substantial evidence that there was a necessity for the defendant to possess the shotgun to usher the suspects out of the home. The first element of necessity has not been met.

2. The defendant had reasonable alternatives other than grabbing and possessing the shotgun under the third element of necessity.

At the time of trial, the defendant alleged he had no alternative to possessing the firearm.

I thought about the physical fighting or whatever. My niece and nephew were right there. I thought they might be injured. I thought about going out the back door, but the nature of our gate on the back fence it's wrapped with several bungee cords and a chain or whatever. It's not just a simple latch and walk right through the gate or whatever. It kind of makes it a chore to pass through the back gate and to safety off the property or whatever.

RP 116-17.

It is paradoxical that the defendant believed it was imminently necessary to arm himself with a firearm to intimidate the unknown male, yet, contemporaneously, he did not wish to physically engage the unknown male because the small children could have been injured. He could have lawfully, physically engaged the unknown male to escort him out of the home.

Second, the defendant had a reasonable, legal alternative to possessing the gun. There is no evidence he attempted or actually called 911 to summon the police, or that he had knowledge that his mother and sister

called 911. Certainly, if the defendant's sister had the opportunity to call 911, the defendant also had that same opportunity and chose not to do so.

Third, there was no evidence that the defendant, his sister, or the children would have been shot or injured had they exited the residence by either the front door or the rear door of the residence, or locked themselves in a room until police arrived. At most, the defendant could have reasonably believed that if he or his sister exited the home, the unknown male could have followed and attempted to physically strike him or his sister, although the unknown male did not physically touch either during the encounter. The defendant did not produce substantial evidence to meet the third element of necessity.

Accordingly, the trial court did not abuse its discretion when it refused to give the necessity instruction based on a lack of evidence.

**B. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR SECOND DEGREE ASSAULT.**

Standard of review regarding sufficiency of the evidence.

Evidence is sufficient to convict if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency of evidence challenge is reviewed de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The standard of review for a sufficiency of the

evidence claim in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Homan*, 181 Wn.2d at 106. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Homan*, 181 Wn.2d at 106. In a sufficiency challenge, an appellate court's review is "highly deferential to the jury's decision." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

#### Argument.

The defendant next contends the State failed to carry its burden of proof regarding the unlawful possession of a firearm in the second degree. App. Br. at 9-11.

As charged, the State was required to prove beyond a reasonable doubt that, on the day that the defendant was arrested, he knowingly had a firearm in his possession or control. *See* RCW 9A.08.010(2)(a)(i); CP 45; RP 141. “Possession of property may be either actual or constructive.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession is defined as “personal custody” over an item.<sup>8</sup> *Id.* Knowledge is defined as a person “is aware of a fact, facts, or circumstances or result described by a statute defining an offense;” or “... has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b)(ii); CP 46; RP 146.

Here, the defendant’s possession of the shotgun was more than just momentary, fleeting, or merely handling the weapon and it was not

---

<sup>8</sup> Constructive possession is established when a person possesses something that is not in his or her physical custody but is still within his or her dominion and control. *Callahan*, 77 Wn.2d at 29. “Evidence of temporary residence, personal possessions on premises, or knowledge of presence of [contraband], without more, [are] insufficient to show dominion and control.” *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). Dominion and control need not be exclusive to establish constructive possession, but a showing of more than mere proximity to the contraband is required. *State v. Hagen*, 55 Wn. App. 494, 498-99, 781 P.2d 892 (1989). Constructive possession is established by examining the totality of the circumstances and determining if there is substantial evidence from which a jury can reasonably infer the defendant had dominion and control over the item. *Collins*, 76 Wn. App. at 501. “In determining dominion and control, no one factor is dispositive.” *Id.*

unwitting. He exercised an intended degree of control over the shotgun to achieve a specific purpose. *See State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (actual possession occurs when the goods are in the personal custody of the person charged with possession). The defendant sought out the shotgun and took affirmative steps to take actual possession of the shotgun by entering the bedroom, removing the shotgun, transporting it to the living room, and waving it at the unknown males for the intended purpose of alarming the males. Indeed, the defendant did so to “intimidate them into leaving.” RP 114. After his objective was reached, he returned the shotgun to the bedroom closet before the officers’ arrival. Sufficient evidence supported the jury’s finding that the defendant unlawfully possessed the shotgun. His claim fails.

## V. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court affirm the judgment and sentence.

Dated this 12 day of July, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney



---

Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN L. McDERMOTT,

Appellant.

NO. 34903-9-III

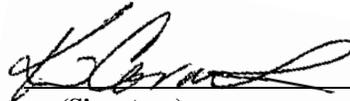
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 12, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@burkhartandburkhart.com

7/12/2017  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**July 12, 2017 - 3:39 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34903-9  
**Appellate Court Case Title:** State of Washington v. Justin L. McDermott  
**Superior Court Case Number:** 16-1-01205-2

**The following documents have been uploaded:**

- 349039\_Briefs\_20170712153845D3699089\_3091.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was McDermott Justin - 349039 - Resp Br - LDS.pdf*

**A copy of the uploaded files will be sent to:**

- Andrea@BurkhartandBurkhart.com
- bobrien@spokanecounty.org

**Comments:**

---

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

**Filing on Behalf of:** Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:  
1100 W Mallon Ave  
Spokane, WA, 99260-0270  
Phone: (509) 477-2873

**Note: The Filing Id is 20170712153845D3699089**