

NO. 226093 – III

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON

*Respondent,*

vs.

JERRY L. VANDERHOUWEN

*Petitioner.*

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REPLY BRIEF TO BRIEF OF RESPONDENT

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Submitted by:

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## ARGUMENT

1. **The Trial Court's Instruction No. 15 Did Not Allow The Petitioner To Argue His Theory Of The Case.**

The trial court's Instruction No. 15 (the necessity instruction) (CP 207-230) took from Petitioner VanderHouwen the presumption of innocence in that it put the Petitioner in the position of having to admit:

1. The commission of a crime.
2. To prove that the harm sought to be avoided was greater than the harm resulting from the violation of the law.
3. That the threat and harm were not brought about by the Petitioner.
4. No reasonable legal alternative existed.

The elements of this defense had to be proven by a preponderance of the evidence; thus, shifting the burden of proof to the Petitioner. For the State to claim the necessity instruction allowed the Petitioner to argue his theory of the case misses the point of Petitioner's argument. Petitioner claims that he had a constitutional right to defend his property. State vs. Burk, 114 Wash. 370, 195 P. 16 (1921). In doing so he does not carry a burden of proof.

In State vs. Bailey, 77 Wn. App. 732, 893 P.2d 681 (1995) this court while acknowledging in dictum a "necessity defense" was not using the phrase

“necessity defense” in the context of WPIC 18.02. The Court’s reference was most likely to the constitutional defense of necessity validated in State vs. Burk, *supra*.

The State relies on State vs. Diana, 24 Wn. App. 908, 604 P.2d 1321 (1979). There the Appellant first raised the issue of necessity on appeal. The court entertained an argument on necessity pursuant to RAP 12.2. The Petitioner argued that medical use of marijuana by necessity was a defense. At the time, medical use of Marijuana as a defense was a novel theory and the Court of Appeals allowed argument at the Appellate level. State vs. Diana is inapplicable.

Petitioner VanderHouwen submitted his proposed Instruction No. 1 (CP 181) (later modified as proposed Instruction No. 7) (CP 236) based on his constitutional right to protect his property. It was not an instruction based on necessity. Since the trial court did not give Petitioner’s proposed Instruction No. 1 the Petitioner was forced to argue his defense under WPIC 18.02 (RP – Defendants Exceptions to Jury Instructions – p. 2). As such he bore the burden of proving each element of the instruction. No burden of proof existed for Petitioner under his proposed Instruction No. 1.

In State vs. Long, 98 Wn. App. 669, 991 P.2d 102 (2000) the defendant Long was charged with killing dogs who were chasing deer on his property. The court held the state’s right to regulate wild life to be superior to Long’s right.

The defendant had no right to kill dogs as a public nuisance as long as the dogs were not “specifically injurious to him”. However, a property owner’s right to protect his property from destruction by wildlife was not at issue for the court. State vs. Long is likewise not applicable.

In Cook vs. State 192 Wash. 602, 611, 74 P.2d 199 (1937) our court in quoting State vs. Burk, *supra*, stated at Page 611:

Furthermore, this court in 1921 held squarely, in the case of State v. Burk, 114 Wn. 370, 195 P. 16, 21 A.L.R. 193, that one has the constitutional right to defend and protect his property, against imminent and threatened injury by a protected animal, even to the extent of killing the animal, in that case an elk. We are not advised that the legislature has in any way sought to abrogate or modify the rule laid down in that case, or that it has attempted to give the game commission, or anyone else, the authority to prevent one from protecting his property under such circumstances. Under the facts shown by the appellants' pleadings in this case, there can be no doubt that they would have been justified in removing the animals in order to protect their business, and we think, under the facts and circumstances pleaded in their complaint, if that could not be successfully done, that they would have been justified in killing them.

Here, the State points out that a statutory scheme to compensate landowners for damages of private property by deer and elk was enacted under the laws of 1947, Chapter 275, Section 4 codified under RCW 77.36.

RCW 77.36.005 states in part:

. . . It is in the best interests of the state for the department of fish and wildlife *to respond quickly to wildlife damage complaints and to work with these landowners and tenants to minimize and/or prevent damages* and conflicts while maintaining deer and elk populations for enjoyment by all citizens of the state. (emphasis added)

Elk migration began on Petitioner's property in 1998 and through the fall of 1999. (FF No. 3) In 1998 and 1999 Petitioner VanderHouwen took steps on his own to stop and/or minimize the damage to his orchard. These steps included among other things feeding hay and repairing Department game fences. (FF No. 4). The migration of elk continued from the fall of 1999 into the winter of 2000. (FF No. 5). During the month of January 2000, the elk migrating into the Petitioner's orchard reached populations from 40 up to 70 animals. (FF No. 8) As a result of the constant pressure and economic damage to his orchard Petitioner VanderHouwen testified he contacted the Department on four (4) separate occasions during the winter of 1999 – 2000 to notify them of migrating elk and to seek their assistance to stop the damage occurring to his orchard. (FF No. 6) (See CP 200, 203, 204)

The Petitioner VanderHouwen contacted the Fish and Wildlife Department on Wednesday, January 12, 2000. The Petitioner informed Officer Beireis that there had been about 40 elk in his orchard on January 10<sup>th</sup> and 11<sup>th</sup>.

He explained for the second time it was no longer working to shoot over the elk because it was not scaring them or preventing them from eating his trees. Officer Beireis said he would attempt to organize a drive but he could do nothing for about a week because the next Monday was Martin Luther King holiday. (Supplemental FF) (Appendix A-1)

Petitioner VanderHouwen suffered over \$236,000 in economic damages during the two years of elk migration into his orchard. (RP p. 23)

The State's lack of addressing Mr. VanderHouwen's elk damage was neglectful at best. Certainly it was not in compliance with RCW 77.36.005. Over the two-year period, the State did little or nothing to minimize the severe economic loss suffered by the Petitioner. Even at the height of the elk migration, the State put the Petitioner off because of an upcoming federal holiday. Under the circumstances, the Petitioner had no alternative but to defend his property or suffer greater losses. Petitioner's right to do so was established by our Supreme Court in State vs. Burk, 114, Wash. 370. Cross vs. State, *infra*, reviewed other jurisdictions holding similarly.

It is noteworthy to point out that under the scheme of compensation allowed in Washington State the maximum damage fund from which all claims can be paid by the Department of Fish and Wildlife per fiscal year is \$120,000.

RCW 77.36.040.<sup>1</sup> The maximum amount a claimant is entitled to is Ten Thousand dollars. RCW 77.36.040. Such statutory authority excludes claims for “lost profits, consequential damages, or any other damages whatsoever.”

In Cross vs. State, 370 P. 2d 371, 378, 93 A.L.R. 2d 1357 (Wyo) (1962) the Wyoming court responded to the State’s argument that a remedy is available to a landowner by filing a claim for property damage:

Section 23-117, W. S. 1957, provides that a person whose property is damaged by wild animals may file a claim with the Game and Fish Commission for the amount of damages sustained. It is argued by the state that this gives such landowner an adequate remedy. We hardly think that a landowner should be compelled to waive his constitutional rights by filing a claim for damages, perhaps every month, every two months, every year, or at other intervals, and recover damages perhaps after protracted litigation. The argument of the state carried to its logical conclusion would mean that a person must, before killing a wild animal, permit his property, even his own home, to be invaded and destroyed. It would mean a relinquishment of his constitutional rights for money which may be recovered by a claim filed with the commission. Counsel for the state have cited us no authority  
.....

The trial court impermissibly shifted the burden of proof to the Petitioner by giving Instruction No. 15 requiring the Petitioner to prove the defense of

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<sup>1</sup> RCW 77.36.080 Appears to allow for an additional Thirty Thousand (\$30,000) dollars per fiscal year from the general fund unless the legislature declares an emergency to increase such sum.

necessity. The court should have given Petitioner's requested Instruction No. 1 which would not have placed a burden upon the Petitioner to prove the defense of necessity but would have allowed him to argue his constitutional right to protect his property.

State vs. McCullum, 98 Wn. 2d 484, 488, 656 P.2d 1064 (1983) is of consequence. There, our court adopted the holding of the U. S. Supreme Court in Sandstrom vs. Montana, 442 U.S. 510, 61 L. Ed. 2d. 39, 99 S. Ct. 2450 (1979):

. . . instructional errors which tend to shift the burden of proof to a criminal defendant are of a constitutional magnitude because they may implicate a defendant's rights of due process.

Since the error infringed upon a constitutional right of the petitioner, the error is presumed prejudicial, and the State has the burden of proof of proving the error was harmless". McCullum, *supra*, at 497.

The Petitioner VanderHouwen was entitled to his constitutional defense as given him by Burk. Failure to give the instruction is presumed prejudicial.

In State vs. Stephens 93 Wn. 2d 186, 191, 607 P.2d 304 (1980) the court quoted from State v. Burri, 87 Wn. 2d 175, 550 P. 2d 507 (1976):

Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.' . . . Such a determination is made from an examination of the record from which

it must affirmatively appear the error is harmless

.....

In Cross vs. State, 370 P. 2d 371 (Wyo. 1962) the court dealt with a fact pattern quite similar to the situation here. In ruling on the defense of necessity the Wyoming Court stated at Page 377:

If any further authorities were necessary to show that counsel for the state are utterly wrong in the contention above mentioned, we need only to refer to the Washington cases above cited [Burk and Cook] which hold that a person has a right to protect his property against the depredations of wild animals if reasonably necessary. We have examined the Constitution of Washington. It contains no such wording as the Constitution of Pennsylvania above quoted, but it contains the same provision as our Constitution; that no person shall be deprived of life, liberty or property without due process of law. If he cannot be deprived thereof, he necessarily must have the right to protect it . . .

2. **The Jury's Verdicts of Guilty were Inconsistent with the Findings of Not Guilty and the Evidence Presented.**

The Petitioner VanderHouwen does not challenge the State's decision to charge the alleged killing of each elk as a separate account. The charging of multiple counts – one count as to every elk – is by itself not offensive to due process. On the contrary it supports the concept of due process. What the Petitioner does challenge is the failure of the State to tie each numbered Complaint to a particular elk. This would have been a simple process. The enforcement officers could have given an arbitrary designator to each elk carcass found e.g. A, B, C or D, map where each

carcass was found and then attribute each dead elk to a specific numbered Complaint. This was not done.

Even assuming the jury decided to convict the Petitioner of the two counts they did because of the .270 caliber slugs found in two of the elk there is no way that the Petitioner or the jury would know which complaint cause number applied to the dead elk whose bodies contained the slugs. It then becomes tempting to say, as does the State, “So what!” The reason for tying each elk to a specific numbered Complaint is as follows:

Dead elk were in or near the orchard on January 18th or 19th when Sgt. Kohls drove past the Petitioner VanderHouwen who was then in his orchard. (FF 9) The complaint charged the elk were killed on January 27, 2000. The dead elk were brought to the attention of the Department by way of report. As a result of that report, Sgt. Kohls and Officer Beireis went to Petitioner’s orchard on January 27th. (FF 10) It was after the officers came out of the orchard on January 27th that the Petitioner admitted to shooting *at the elk*. There was no evidence given to the jury to show whether the two elk found with slugs in them were elk who were dead in the orchard on January 18th or 19th or whether they were elk found in the orchard on January 27th.

Compounding this issue is the fact that Count 1 of each complaint has two subsections. Those subsections were charged in the disjunctive (CP 190-191 and CP 205-206) The State did not elect which subsection of RCW 77.15.410 (1) it would rely upon. In the alternative, the trial court did not instruct the jury that all of them must agree upon the same act and such act had to be proven beyond a reasonable doubt. State vs. Marco, 107 Wn. App. 215, 220, 27 P.3d 228 (2001).

As a result a verdict was rendered by the jury finding the Petitioner guilty of killing two (2) elk under two (2) specific cause numbers without any evidence as to which dead elk were included in those cause numbers or upon which subsection of RCW 77.15.410 (1) the Petitioner had violated. State vs. Ng, 110 Wn. 2d 32, 750 P.2d 632 (1998) is cited by the State for the proposition that a jury's verdict will not be reversed on the grounds that a guilty verdict is inconsistent with a acquittal on another count. The language relied upon in Ng at p. 48:

where the jury's verdict is *supported by sufficient evidence* from which it could rationally find the defendant guilty beyond a reasonable doubt . . .  
(emphasis added)

It is a requirement that the verdict be based upon *sufficient evidence*. Here, how could the jury without more evidence rationally decide whether the elk whose bodies contained the slugs were killed on January 17<sup>th</sup> or 18<sup>th</sup> or 26<sup>th</sup> or 27<sup>th</sup>? If the elk whose bodies contained the slugs were the animals dead on January 17<sup>th</sup> or 18<sup>th</sup> then they were outside the charge contained in the Complaints and there was no evidence of who shot them. The testimony showed the Petitioner shot over the head of the elk before the officers arrived on the 27<sup>th</sup>. That does not mean that he shot *at the elk* on the 17<sup>th</sup> or 18<sup>th</sup>. Further, without more evidence how would the jury know which of the alternate means of committing RCW 77.15.410 (1) should apply. There was no compliance with State vs. Marko, *supra*.

3. **Multiple Acts were Presented to the Jury Requiring a Separate Unanimous Instruction.**

In State vs. Stephens, 93 Wn. 2d 186, 607 P. 2d 304 (1980) defendant Stephens was charged with 2<sup>nd</sup> Degree Assault as to two defendants. Instruction No. 6A given by the court stated inter alia that the jury must find “the defendant knowingly assaulted Richard Heieck *or* Norman Jahnke”.

The Court of Appeals found the instruction impermissible because it allowed conviction if, for example, six jurors believed Stephens assaulted Heieck and the other six jurors believed Stephens assaulted Jahnke. The Supreme Court agreed.

Washington requires assurance of unanimous jury verdicts in criminal cases. State v. Badda, 63 Wn. 2d 176, 183, 385 P. 2d 859 (1963).

Mr. VanderHouwen was charged with two (2) means of violating RCW 77.15.410 (1). The court’s Instruction No. 6 (the element instruction) (CP 207-230) speaks to one crime committed two alternate ways. Therefore, like Stephens the jurors could have been split for which subsection of RCW 77.15.410 (1) Petitioner committed or for which elk they were finding the Petitioner guilty.

Even if the instruction was proper was it harmless? In State vs. Stephens the Court of Appeals and the Supreme Court found it so applying the standard for prejudicial error as set forth in State vs. Wanrow, 88

Wn. 2d 221, 237, 559 P. 2d 548 (1977).

A harmless error is an error which is *trivial*, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in *no way affected the final outcome of the case*.

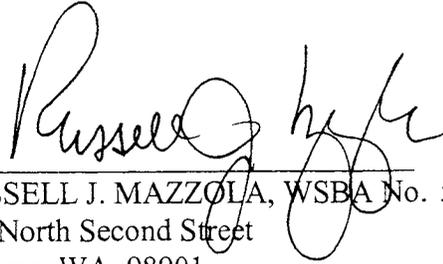
Here, the appellant's constitutional rights to a jury trial like Stephens is indeed infringed. There is no specificity or certainty in the charges for which the Petitioner was convicted.

## CONCLUSION

The giving of Instruction No. 15 (the necessity instruction) did not negate the failure to give Petitioner VanderHouwen's proposed Instruction No. 1 (or in the alternative Instruction No. 7) which supported Petitioner's constitutional right to defend his property.

An unanimity instruction should have been given to the jury to eliminate confusion as to which elk were killed on what day and to inform the jury on what basis they could convict Petitioner of RCW 77.15.410 (1). The jury's finding of guilt on two (2) counts was inconsistent with the evidence presented. For these reasons the conviction should be reversed.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of January 2005.

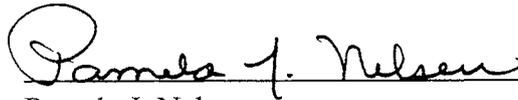
A handwritten signature in cursive script, appearing to read "Russell J. Mazzola". The signature is written in black ink and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury that on July 6, 2004, I deposited into the U.S. Mail, postage prepaid for First Class delivery, a true copy of Petitioner's Brief to the Clerk of the Court of Appeals, Division III, P.O. Box 2159, Spokane, WA 99201; and to Deputy Prosecuting Attorney, Kenneth L. Ramm, Yakima County Courthouse, 3rd Floor, Yakima, WA 98901.

**DATED** this 18<sup>th</sup> day of January 2004.5

  
Pamela J. Nelsen

# APPENDIX

A-1

1  
2  
3 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
4 IN AND FOR THE COUNTY OF YAKIMA

5 STATE OF WASHINGTON, )  
6 ) NO: Y00-00045 YDP  
7 Respondent, ) NO: Y00-00046 YDP  
8 )  
9 ) SUPPLEMENTAL AGREED  
10 v ) FINDINGS OF FACT  
11 )  
12 JERRIE VANDER HOUWEN, )  
13 Appellant. )  
14 \_\_\_\_\_ )

15  
16 This matter coming on regularly upon stipulation of the parties to set forth  
17 Supplemental Findings of Fact pursuant to RALJ 6.1 in order to present issues for the  
18 appeal filed herein NOW, THEREFORE, the parties do agree to the following:

19 Mr. Vander Houwen contacted the fish and Wildlife Department on Wednesday,  
20 January 12, 2000. There were about fifteen (15) inches of snow on the ground by  
21 January 12, 2000. Mr. Vander Houwen told Officer Beireis that there had been  
22 about forty (40) elk in his orchard on January 10 and January 11. He explained  
23 for the second time it was no longer working to shoot over their heads because it  
24 was not scaring them or preventing them from eating his trees. Officer Beireis  
25 said he would attempt to organize a drive, but he could not do anything for about  
26 a week because the next Monday was Martin Luther King holiday. Mr. Vander  
27 Houwen told Officer Beireis he couldn't wait that long and that he would have to  
28 lower his sights and shoot them.

29 At the time of trial, Mr. Vander Houwen testified that Officer Beireis indicated  
30 that if he did shoot them, he must let them lay. (The state disputes this latter  
31 statement was made by Officer Beireis.)

32 Dated this 8th day of September, 2002.

33 [Signature]  
34 JUDGE RUTH REUKAUF

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1 The foregoing Findings of Fact have been agreed to by Counsel as indicated by their  
2 signatures below. Both counsel reserve the right to supplement the record by additional  
3 Agreed Finding of Fact or pertinent portions of the trial transcript.

4 Agreed to this 6<sup>th</sup> Aug 2003 day of ~~September~~, 2002.

5  
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7   
8 RUSSELL J. MAZZOLA WSBA #5440  
9 Attorney for Jerrie Vander Houwen

10 Agreed to this 6<sup>th</sup> Aug 2003 day of ~~September~~, 2002.

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14 Kenneth Ramm, WSBA # 16500  
15 Deputy Prosecuting Attorney  
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