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No. 38692-5-II
Lewis County Superior Court No. 07-1-00798-3

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

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

GARY WERNER,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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DIVISION II
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A. ASSIGNMENTS OF ERROR

The trial court erred in failing to give Werner's proposed instructions numbers 10, 11 and 12 (and related definitional instructions) regarding self-defense.

Issue Relating the Assignment of Error

Did the trial judge err when he failed to give Werner's proposed self-defense instructions when Werner testified that he was frightened when confronted by 7 aggressive and threatening dogs (including a pit bull and a rottweiller) and a 19 year old man with whom he had a previous argument and where Werner was not a trespasser and where the 19 year old man argued with Werner and did not restrain or leash the dogs?

B. STATEMENT OF THE CASE

Werner was charged with committing one count of first-degree assault with a firearm and one count of malicious harassment. CP 96-97. Both crimes were alleged to have occurred on November 16, 2007 and the named victim was Cory Gilpin. *Id.*

The charges were tried twice. At the close of the first trial the jury could not agree and a mistrial was declared. At the close of the second trial, the jury agreed that Werner was guilty of first-degree assault, but acquitted him of malicious harassment.

Daniel Barnes testified that he moved into the property adjacent to Werner's in September 2007. II RP 60. When Barnes first moved in, he approached Werner and told him he had two male dogs. II RP 63. Because he knew Werner had a dog, he suggested they put up a fence between the two properties. *Id.* One dog, a Boxer named Tony, weighed 50 pounds. II RP 79. Barnes admitted that on a previous occasion, when Tony approached Werner, he asked Barnes to get the dog away from him. II RP 80

Almost immediately after Barnes moved in, he and Werner began an ongoing property dispute regarding the ownership and use of an easement that separated their adjacent properties. II RP 64-66, 91. Barnes also took issue with "junk" Werner had stored on his property. II RP 68. Eventually, both Barnes and Werner placed items on the easement in an effort to stake their claims. II RP 68-70.

Werner testified that he lived on his property since 1997. After Barnes moved in, he had three experiences with Barnes' dogs before November 16, 2007. First, the dogs previously entered his property and barked at him. II RP 136-37. On a second occasion Barnes' pit bull charged at him as he was getting out of his vehicle. II RP 139-40. On a third occasion, the pit bull came to the door of his bus and started barking, jumping and trying to enter the bus. II RP 141-42. Werner testified that

in November, 2007, he began carrying a gun on his property because he was afraid of the dogs. II RP 145.

Werner stated that he had previously been bitten twice by other dogs. III RP 10. He said that both experiences were painful. III RP 11. He repeated that Barnes' dogs were not friendly and were aggressive towards him. *Id.* He said: "I'm very scared of pit bulls." *Id.*

On November 3, 2007, Werner was on his own property target practicing with his gun. II RP 148. He was approached by two young males, Barnes' friends, who told him to stop shooting because it was scaring Barnes' pigs. When Werner refused, one of the two, Colby Gilpin, told Werner that "there was two of them, they're both 19, and that they can kick the shit out of me." II RP 149. Gilpin then told Werner that Barnes believed he owned the easement. II RP 150.

When asked how he felt about this exchange, Werner replied:

> Nervous. I was confused. I didn't know how they got the idea that the easement belonged to him and I was trespassing on it.

Id. The exchange lasted about ten minutes. *Id.* Both parties were "hollering" during the encounter. II RP 152.

On November 14, 2007, after discovering that Barnes put a fence on the easement, Werner put his own fence up. II RP 163-65. He also

took pictures of the easement. II RP 165, Exhibit 32, 33, 35. He also had his cell phone and his gun with him. II RP 169.

On November 16, 2007, Werner was on the property when he saw the pit bull walking towards him with his hair up and his teeth showing. II RP 174. Eventually, there were seven dogs in the group. *Id.* He took his gun out and pulled the trigger back. *Id.* At that point, Werner was confronted with a pack of threatening dogs. When asked why he pulled his gun, he testified:

> I was afraid for my safety and I felt that a gunshot would scare the dogs.

II RP 175. Two or three times Werner yelled "call your dogs off!" When Gilpin showed up, he lowered his gun. *Id.*

Gilpin stated that "if I do anything to the dog I'm going to have to deal with him." II RP 176. Werner then hollered to the neighbor across the street to call the sheriff. Then:

> Colby did not call the dogs off. He made another step or two towards me and the pit bull took some steps with him, out in front of him. That's when I panicked and I felt I needed to call 911. And I took the camera and put on top of the gun and had it to my side and I dialed 911. But I have arthritis in my thumb, I couldn't push the talk button because it is too close to my finger. I set the gun and camera down so I would have both arms and hands. As I was attempting to let go of it, it went off next to - - into the ground. It burnt the palm of my hand because I didn't have ahold of the grip or the trigger.

II RP 176-77.

Exhibit 34 is a picture of Werner's phone with 911 dialed at 2:22 p.m. on November 16, 2007.

Gilpin testified that he was a friend of Barnes. He stated that on November 3, 2007, he and Werner exchanged words about the easement, Barnes' pig barn and Werner's shooting. I RP 85-89. Gilpin was accompanied by his friend, James Baker, who was carrying a rifle. I RP 90.

On November 16, 2007, Gilpin was at Barnes house and heard "the dogs" barking "aggressively" at Werner "down on the easement." I RP 98, 99, II RP 20, 21. When asked how many dogs there were, he said seven, including a pit bull and a rottweiller. II RP 10. At first, he did not go down to the easement, he simply yelled at the dogs. II RP 20. When he went down to see what was happening, he yelled at the dogs again, but he admitted that the pit bull remained near Werner. I RP 101. According to Gilpin, Werner seemed upset and threatened "to kick my ass." I RP 103. Twice, he asked Gilpin to get the dogs away from him. I RP 109.

Gilpin told the investigating officers that the dogs were "threatening" Werner. I RP 110. He also admitted that he began arguing with Werner about the property line and whether the dogs were on Werner's property. II RP 23. Gilpin also told the investigating officers that Werner did not own the easement and that he didn't think that Werner

had a right to be on the easement. II RP 23. He stated that had he known Werner actually had a right to be on the easement, he would "have got the dogs off the easement completely." II RP 24.

Gilpin saw Werner pull out his gun and seconds later the gun went off. I RP 104-05. The bullet went into the ground. I RP 106. Gilpin never saw Werner aim the gun at anyone. II RP 26. After the gun fired, Werner dropped it and said he was going to call the sheriff. *Id.* Gilpin said he never saw a camera. I RP 107.

At the close of trial, the judge asked: "Is there any need for delay before coming into chambers to talk about instructions?" III RP 26. Both parties said no and the record states: "(Recess taken)." *Id.* When the parties returned, the judge stated: "The record should reflect we had an in chambers conference on the jury instructions, we now have a set of jury instructions." *Id.*

When he asked if there were any objections, defense counsel stated:

> Defense . . . objects to the court not giving all of the instructions relating to self-defense. Defense has proposed instructions 10, 11, and 12 as well as the additional instructions in the pattern instructions that correlate to those instructions. And it is the defense position that since the pivotal issue in this matter is the purpose for which Mr. Werner drew his weapon, that those instructions are applicable to this case under the pertinent case law that is cited in the defendant's pretrial brief.

III RP 27-28. The defense jury instructions included the pattern instructions regarding self-defense. CP 77-95. The trial judge, without saying anything further about the objections, recalled the jury. *Id.*

Werner was acquitted of the harassment charge, but convicted of first degree assault with a firearm. CP 23-24. Judgment and sentence were entered. CP 13-22. Werner was sentenced to 39 months in prison. This timely appeal followed. CP 1-12.

C. ARGUMENT

Each party is entitled to instruct the jury on its theory of the case if evidence presented supports the instruction. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Instructions to the jury are constitutionally sufficient if they allow each party to argue its theory of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

To convict a defendant for first-degree assault, the State must prove that a defendant "intentionally" assaulted another. RCW 9A.36.021(1)(a). An act performed in self-defense negates the intent element of a crime and the State has the burden to disprove that a defendant acted in self-defense. *State v. McCullum*, 98 Wn.2d 484, 494,

656 P.2d 1064 (1983). Use of force is lawful when "used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person," as long as no more force is used than is necessary. RCW 9A.16.020(3).

The determination of the trial court of whether a defendant produces sufficient evidence to raise a claim of self-defense is a matter of law. *State v. Janes*, 121 Wn.2d 220, 238, n.7, 850 P.2d 495 (1993). In order to properly raise the issue of self-defense, there only needs to be *some* evidence that tends to prove that the allegedly defensive crime was done in self-defense. *McCullum*, 98 Wn.2d at 488; *State v. Arth*, 121 Wn. App. 205, 210, 87 P.3d 1206 (2004). To determine whether sufficient evidence was produced to justify the instruction, the trial court applies a subjective standard and views the evidence from the defendant's point of view as conditions appeared to him at the time of the act. *McCullum*, 98 Wn.2d at 488-89.

The threshold burden of production of the evidence is low. The defendant is not required to present the evidence that would be sufficient to create a reasonable doubt. *State v. Janes*, 121 Wn.2d at 237; *McCullum*, 98 Wn.2d at 488; *State v. Adams*, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). The defendant is entitled to the benefit of all the evidence presented in the case and not merely upon evidence presented

through defense witnesses. For example, in the case of *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996), the Court held that the defendant was entitled to a self-defense instruction based on evidence presented that was inconsistent with the defendant's testimony. In that case, the defendant did not recall striking a fatal blow, but other evidence gave rise to the inference that the defendant acted in self-defense. *Id.*

The trial judge provided no guidance to this Court as to the reasons for his ruling. He simply did not give the proposed instructions. But, viewing the above described evidence in the light most favorable to the defendant, and from defendant's subjective point of view, the trial court erred.

The trial judge's ruling cannot be justified on the basis that Werner failed to present evidence that he believed he was in imminent danger of substantial harm. Werner testified that he was confronted with seven aggressive dogs and a younger man with whom he had a previous unpleasant encounter. When he asked Gilpin to call off the dogs, Gilpin refused because he wrongly believed that Werner had no right to be on the property.

The trial judge's ruling cannot be justified by the argument that it was the dogs, not Gilpin, who presented the threat. First, pit bulls are a

breed so well known for their aggressive tendencies that some cities have regulated their presence in urban areas. *See e.g.*, *Toledo v. Tellings*, 114 Ohio St.3d 278, 871 N.E.2d 1152 (2007). Werner could reasonably conclude that by refusing to call off the dogs, Gilpin was, in essence, armed with a formidable group of "canine weapons" that he would not remove or leash.

Moreover, although self-defense traditionally focuses on the other person present, nothing in the law precludes the application of self-defense to a situation where the defendant is presented with aggressive animals. In *People v. Lee*, 131 Cal. App. 4th 1413, 32 Cal. Rptr.3d 745 (2005), the defendant was charged with unlawful discharge of a firearm. She testified that she fired her gun after she was challenged by two aggressive dogs. *Id.* at 1419-20. The trial court refused to instruct the jury on self-defense.

The appellate court reversed, however. The court stated that nothing in the self-defense statute "requires the threat to come from human agency." *Id.* at 1427.

> For self-defense, the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury. The focus is on the nature of the threat, rather than its source. It serves no public policy, and is neither logical nor fair, to deprive appellant of the defense of self-defense because the threat of imminent harm came from a dog and not from a person. The use of force in defense of oneself should be legitimate,

> whether or not the source of the threat is a human being. In other words, the use of force in self-defense should not be illegitimate because the source of the threat is not a human being.

Id. (citation omitted).

Similarly, nothing in RCW 9A.16.020(3) requires that the threat come from a human agent. The statute simply provides that the use of force is not unlawful:

> Whenever used by a party about to be injured, or by another lawfully aiding him or her, ***in preventing or attempting to prevent an offense against his or her person,*** or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary

Emphasis added. Clearly, if Gilpin's dogs had attacked Werner, it would have constituted an "offense against his person." In fact, Gilpin was violating the law. The Lewis County Code § 6.05.030 Animals at large provides that:

> (1) It shall be unlawful for the owner or a person having control or custody of any animal to allow such animal to enter or trespass onto private property or another without the express permission of the owner or caretaker of said property; or to allow said animal to run at large onto any public property within Lewis County.
>
> (2) An owner, or controller or ***custodian*** of an at-large animal, under subsection (1) of this section, which due to its size, habits, or natural propensities or instincts represents a potential threat of substantial bodily injury to people or damage to property and is not muzzled and under the physical restraint of a person of suitable age, discretion

> and capability to control such animal shall ***be guilty of a gross misdemeanor*** under LCC 6.05.090 and the animal shall be a public nuisance; provided, however, this section shall not apply to police dogs as defined in RCW 4.24.410. [Ord. 1133C §1, 2006].

Emphasis added.

And, a claim of self-defense allows the jury to evaluate, from Werner's point of view, all of the circumstances he was facing. Those circumstances included seven aggressive dogs under the control and direction of Gilpin. As Werner testified, it was perfectly reasonable for him to assume that if Gilpin would not call off the dogs, a shot from his gun would scare them away and remove the threat to him.

The trial judge's ruling cannot be justified on the grounds that Werner fired the gun accidentally. A defendant who intentionally displayed a gun, but claimed that it fired accidentally, was entitled to a self-defense instruction in a second-degree assault prosecution. *State v. Callahan*, 87 Wn. App. 925, 930-32, 943 P.2d 676 (1997).

The Court's failure to instruct the jury regarding self-defense, when evidence establishes self-defense as discussed previously in this brief, effectively relieves the State of its burden of proof and denies the defendant's right to a fair trial. The failure to give self-defense instructions, when appropriate, cannot be deemed harmless error. An error is presumed prejudicial where jury instructions relieve the State of its

burden of proof. *State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002), *review denied*, 149 Wn.2d 1003, 67 P.3d 1096 (2003). Consequently, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict of the jury. *Id.* An error is harmless, as applied to the issue of a missing element, only if that element is supported by uncontroverted evidence. *Id.* Failure to give adequate instructions on a defense theory that is supported by the evidence is prejudicial error. *State v. Williams*, 132 Wn.2d at 259; *State v. Irons*, 101 Wn. App. at 549.

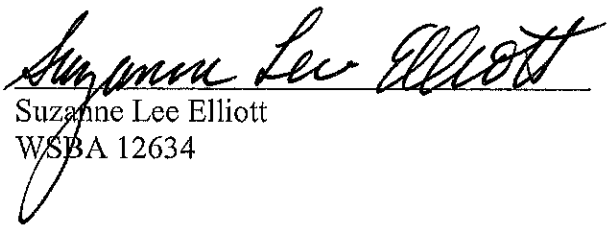
In this case, the State cannot prove that the error was harmless. The instructions did not inform the jury that the prosecution was required to prove the absence of self-defense beyond a reasonable doubt. The record in this case contains credible evidence from which a jury could have found that Werner acted in self-defense. Consequently, the absence of self-defense is not supported by uncontroverted evidence, and the error requires reversal.

D. CONCLUSION

The trial court denied Werner his right to a fair trial and his right to present a defense when it refused to give the jury his proposed self-

defense instructions. For that reason, his conviction should be reversed and the matter remanded to the trial court for a new trial.

Respectfully submitted this 4th day of June, 2009.



Suzanne Lee Elliott
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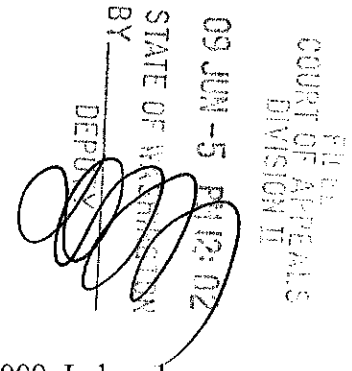

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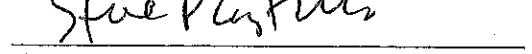

Steven Plastrik