

84388-1

No. 38692-5-II

Lewis County Superior Court No. 07-1-00798-3

FILED
APR -2 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

GARY WERNER,

Defendant/Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 MAR 31 PM 1:06
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 8

Review should be granted because the Court of Appeals’ opinion
conflicts with the opinions in State v. Janes, 121 Wn.2d 220, 238, n.7,
850 P.2d 495 (1993) State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d
1064 (1983) and State v. Callahan, 87 Wash. App. 925, 943 P. 2nd 676
(1997).. In addition, it deprives Mr. Werner of his state and federal
constitutional right to present a defense. RAP 13.4(b)(1)(2) & (3)..... 8

F. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

State v. Bell, 60 Wash.App. 561, 567, 805 P.2d 815 (1991) 10

State v. Callahan, 87 Wash. App. 925, 943 P. 2nd 676 (1997)..... 8

State v. Hoeldt, 139 Wash.App. 225, 160 P.3d 55 (2007)..... 11

State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495 (1993)..... 10

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 8

State v. LeFaber, 128 Wash.2d 896, 899-900, 913 P.2d 369 (1996);..... 10

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 8

State v. Painter, 27 Wash.App. 708, 711-12, 620 P.2d 1001 (1980), review
denied, 95 Wash.2d 1008 (1981) 10

Toledo v. Tellings, 114 Ohio St.3d 278, 871 N.E.2d 1152 (2007) 10

Rules

RAP 13.4(b)(1)(2) & (3)..... 8

A. IDENTITY OF PETITIONER

Petitioner Gary Werner asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Werner seeks review of the unpublished opinion filed in *State v. Werner*, No. 38692-5, filed March 9, 2010. See Exhibit 1.

C. ISSUE PRESENTED FOR REVIEW

Where Werner was confronted with 7 aggressive and threatening dogs (including a pit bull and a rottweiler) under the control of 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, may a trial court refuse to give the defendant's proposed self-defense instructions solely on the basis that the man and his dogs presented separate threats and that Werner's instructions referred only to "general self-defense" ?

D. 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 rottweiler. 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.

On appeal, the Court of Appeals, Division II determined that the trial judge properly declined to give Werner's proposed self-defense instructions because:

Werner was faced with two distinct threats: the dogs and Galpin.

Werner was entitled to instructions that would allow him to argue that the force he used against the dogs (drawing his gun and pulling the hammer back) was reasonable. But Werner did not offer self defense instructions concerning the dogs; he offered general self defense instructions so that he could argue self defense in his actions toward Galpin. The State is correct that Werner was not entitled to instructions that the force he allegedly used against Galpin (firing the gun in Galpin's direction) was reasonable. There was no evidence that Galpin presented any direct threat to

Werner in that circumstance and, certainly, Werner was not entitled to fire toward Galpin because of what the dogs were doing. Thus, we find no error in the trial court's refusal to instruct on self defense

Slip Opinion at 8-9.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted because the Court of Appeals' opinion conflicts with the opinions in State v. Janes, 121 Wn.2d 220, 238, n.7, 850 P.2d 495 (1993) State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) and State v. Callahan, 87 Wash. App. 925, 943 P. 2nd 676 (1997).. In addition, it deprives Mr. Werner of his state and federal constitutional right to present a defense. RAP 13.4(b)(1)(2) & (3).

The Court of Appeals' opinion in this case is significantly out of step with this State's self-defense jurisprudence. It is based upon the unsupported notion that Werner faced "two" threats. But Werner faced only one threat - Galpin and seven aggressive dogs that were under his control. His proposed instructions properly addressed the totality of the danger he faced.

On November 16, 2007, Werner was on his own 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.

Thus, 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.

Washington case law has established a standard for self-defense that is both objective and subjective in nature. The jury must stand in the shoes of the defendant and consider all of the circumstances known to that defendant. In using such information, however, the jury must determine what a reasonably prudent person in a similar situation would have done. *State v. Janes*, 121 Wash.2d 220, 238, 850 P.2d 495 (1993). See also *State v. LeFaber*, 128 Wash.2d 896, 899-900, 913 P.2d 369 (1996); *State v. Painter*, 27 Wash.App. 708, 711-12, 620 P.2d 1001 (1980), review denied, 95 Wash.2d 1008 (1981). With both subjective and objective aspects taken into account, the trial judge must determine whether the defendant produced any evidence to support his claimed good faith belief that deadly force was necessary and that this belief, viewed objectively, was reasonable. *State v. Bell*, 60 Wash.App. 561, 567, 805 P.2d 815 (1991).

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). Clearly in this case, if Galpin has been armed with a firearm, the Court of Appeals would not have concluded that the firearm presented a threat separate from Galpin. 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. In fact in *State v. Hoeldt*,

139 Wash.App. 225, 160 P.3d 55 (2007), Judge Armstrong and Judge Penoyar agreed with Judge Hunt, that a dog can be a “deadly weapon” under Washington’s statutory definition. Werner reasonably reasonable viewed the dogs and Galpin as a single, formidable threat.

There was substantial credible evidence to support Werner’s claim of self-defense against Galpin and his dogs. The trial court erred in failing to give the proper instructions so that the jury could decide the issue on the facts.

F. CONCLUSION

For the reasons stated above review should be granted.

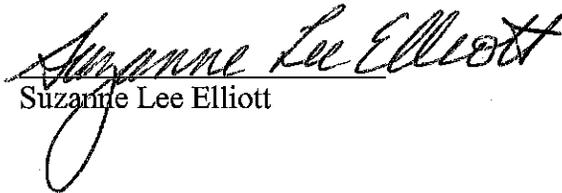
Respectfully submitted this 30th day of March, 2010.


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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 38692-5-II

Respondent,

v.

GARY MICHAEL WERNER,

UNPUBLISHED OPINION

Appellant.

Penoyar, J. — Gary Michael Werner appeals his conviction of second degree assault with a firearm enhancement, claiming the trial court erred in refusing to give the jury his proposed self defense instructions. We disagree. Because Werner claimed that he discharged his weapon accidentally, the trial court properly refused his proposed self defense instructions. Thus, we affirm.

Facts

Werner and Daniel Barnes own abutting rural lands in Lewis County. Ongoing disputes developed between these neighbors involving their boundary line, pigs, dogs, and target shooting.

On November 16, 2007, Colby Galpin was at Barnes's property building a doghouse when he heard Barnes's dogs barking. Galpin went down an easement running between the two properties and saw all seven dogs barking at Werner. Galpin yelled at the dogs to stop and six of them walked away, but a pit bull-cross puppy stayed. Werner told Galpin to move the fence Barnes had erected on the easement because it was his easement not Barnes's.

In response to Barnes's fence building, Werner had placed a makeshift wooden fence across the easement to prevent Barnes from using it. He told Galpin that he would "kick [their]

ass if [they] took down these boards he put up across the bridge.” 1 Report of Proceedings (RP) at 103. Galpin said that Werner then pulled a gun from his holster and a “split second” later, it went off, striking the ground two to three feet in front of Galpin. 1 RP at 104. Werner then tossed the gun to the ground and exclaimed, “see what you made me do” and said he was going to call the sheriff. 1 RP at 106. Galpin explained that Werner fired his gun long after the dogs had stopped barking at him.

Barnes was in his living room when he heard the gunshot. He said that preceding it, he heard Warner yelling, “You SOB, if you move my boards again” Then he heard a gunshot and Werner saying, “I’ll kill you.” 2 RP at 74.

Werner left, contacted the police, and met Detective Timothy English at a nearby convenience store. There, Werner told English that Barnes was trying to steal his property, that Barnes’s dogs were very threatening, and that he pulled out a gun and was trying to dial 911 when his gun discharged. English testified that Werner was unsure about why his gun had discharged. Werner admitting pulling back the hammer but claimed that he did not pull the trigger. He said that he was juggling his telephone, camera, and the gun to call 911 when his gun went off, shooting straight down into the ground.

The State charged Werner with harassment¹ and second degree assault with a firearm enhancement.²

Werner testified at trial that he had several incidents with Barnes’s dogs and was concerned about his safety when near them. He described one instance where Barnes was with a

¹ A violation of RCW 9A.46.020(2)(b)(ii).

² A violation of RCW 9A.36.021(1)(c); 9.94A.510 (firearm enhancement).

38692-5-II

county inspector and the dogs approached him barking (a Rottweiler, a pit bull, and two mixed breed pit bulls). Werner claimed that he yelled for at least 10 minutes at Barnes before Barnes finally called off his dogs. In another incident, in the late evening, a pit bull charged his car as he was letting his dog out of the car. He explained that he quickly jumped back into the car with his dog, closed the door, and the pit bull ran into his car. He described a third incident where he was in his bus cleaning it out when a pit bull approached, began barking, and tried to jump up into the bus. This continued until he heard someone call the dog back. Werner also explained that more than once when he was working on his property, the dogs had approached him, barking and surrounding him.

According to Werner, Barnes had told him that he needed to put up a fence to contain his dogs, explaining on one occasion that his large dogs could kill Werner's dog. After these incidents, Werner began carrying a gun on his property, planning to use it to scare the dogs away if necessary. He said that the dogs were getting "more notably aggressive to me and I didn't feel safe around them anymore." 2 RP at 146.

On November 16, Werner arrived at the property about three o'clock in the morning and noticed that Barnes had put a fence up across the easement. Later that morning, rather than taking down Barnes's fence, Werner decided to put his own fence up, blocking a bridge that Barnes used to access his pig barn. He had hoped that this would cause Barnes to see that they needed to resolve the property dispute before anyone put up a permanent fence. When he returned about an hour later to take pictures, someone had moved his fence. About that same time, a pit bull arrived and several other barking dogs followed. Werner explained that the pit bull "had its hair up and teeth showing and it was slowly walking towards me taking slow steps." 2

38692-5-II

RP at 174. He said he then took his gun out of its holster, held the gun in the dog's direction, and pulled the hammer back. Werner explained that he only wanted to scare the dogs off and would fire the gun to do so if necessary. He yelled out to Galpin to call off his dogs and when Galpin appeared, he lowered his weapon, but Galpin and the pit bull continued toward him:

That's when I panicked and I felt I needed to call 911. And I took the camera and put it 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, hands. As I was attempting to let go of it, it went off next to the -- into the ground I reached up, hit the talk button, it registered on the phone but didn't connect. There was no service at that point so it didn't connect to anybody I picked up my gun and camera, ran to the other end of the property where my car was parked.

2 RP at 176-77.

Werner asked the trial court to instruct the jury on self defense. The trial court refused his proposed instructions, explaining later:

And by the defendant's own admission, this is not a self-defense case. He denied doing any action which would constitute an assault or any action that can be considered in self-defense. This was his own testimony which I noted when he said it. But even if he claimed to have acted in self-defense, which I feel he did not, such a subjective belief must be objectively reasonable and as a matter of law under the facts of this case, his belief was not objectively reasonable.

RP (12/12/08) at 7.

The jury found Werner not guilty of harassment but guilty of second degree assault, returning a special verdict that he was armed with a firearm at the time he committed the assault.

analysis

I. Self Defense

Werner argues that the trial court erred in refusing his proposed self defense instructions 10, 11, and 12 (and related definitional instructions).³ He argues that the evidence supported this defense and thus the court had an obligation to provide the instructions.

Jury instructions must allow the parties to argue their case theories and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). Each party may instruct the jury

³ These proposed instructions provided:

Self defense or defense of another person is a complete defense to assault.

If there is evidence of self defense or defense of another, the State must prove beyond a reasonable doubt that defendant was not acting in self defense. If the State fails to carry this burden of proof, then you must return a verdict of not guilty.

Clerk's Papers (CP) at 88 (proposed instr. 10).

A person is entitled to act on appearances in defending himself; if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP at 89 (proposed instr. 11).

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP at 91 (proposed instr. 12).

on its case theory as long as evidence exists to support that theory. Failure to instruct on a defense theory when evidence supports it constitutes reversible error. *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

A trial court may refuse to give a self-defense instruction only where no credible evidence supports the claim. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). When deciding this issue, the trial court reviews the entire record in the light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

Proving self defense requires evidence that (1) the defendant subjectively feared imminent danger of death or great bodily harm, (2) the defendant's fears were objectively reasonable, (3) the defendant used no greater force than reasonably necessary, and (4) the defendant was not the aggressor. *Callahan*, 87 Wn. App. at 929. Imminent danger need not actually exist as long as a reasonable person in the defendant's situation could have believed it existed. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Imminence does not require an actual physical assault; a threat can support a finding of imminence where the defendant actually and reasonably believed the threat would be carried out. *State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). If some evidence supports all elements of self defense, then the court must permit the presentation of self defense instructions to the jury. *Walker*, 136 Wn.2d at 772-73; *Williams*, 132 Wn.2d at 259-60.

When analyzing a trial court's refusal to permit jury instructions on self defense, the standard of review depends on whether the trial court based its decision on a matter of law or of fact. *Walker*, 136 Wn.2d at 771. If the refusal is based on a matter of fact, we review for an abuse of discretion. *Walker*, 136 Wn.2d at 772. If the refusal is based on a matter of law, we

38692-5-II

review de novo. *Walker*, 136 Wn.2d at 772. We review de novo a trial court's finding that no reasonable person in the defendant's shoes would have acted as the defendant acted. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Werner relies heavily on *Callahan*, where this court found that the defendant was entitled to a self defense instruction even though the actual shooting was accidental. We distinguish *Callahan* here because Werner was facing a threat from the dogs, not Galpin.

While driving to work, Callahan became incensed when another driver cut in front of him. Callahan pulled beside the vehicle and a hostile exchange ensued between Callahan, the other driver, and the other driver's two passengers. 87 Wn. App. at 928. Eventually, the two cars pulled into a parking lot and when the three men exited their car, Callahan pulled out a handgun and got out of his car. *Callahan*, 87 Wn. App. at 928. Callahan cocked the gun and he and the victim approached each other. When the victim tried to grab the gun, it discharged into his hand. *Callahan*, 87 Wn. App. at 928.

The trial court refused Callahan's request for a self defense instruction and this court reversed, holding that a claim that a shooting is accidental does not preclude a defendant from claiming self defense if there is evidence of both. The court found persuasive an Illinois court explanation that if the defendant's actions preceding the shooting were intentional but the shooting was unintentional, the defendant could claim self defense. On the other hand, the court held that if all of the alleged acts prior to the shooting were accidental or nonforcible, a defendant could not claim self defense. *Callahan*, 87 Wn. App. at 931 (quoting *People v. Robinson*, 163 Ill. App. 3d 754, 762, 516 N.E.2d 1292, 1298 (1987)).

This court reasoned that Callahan presented evidence to support his subjective fear for his

38692-5-II

own safety and that he displayed the weapon in order to deescalate the situation. This court found this subjective belief objectively reasonable and because the force he used was no greater than necessary and he was not the aggressor, Callahan was entitled to self defense instructions. *Callahan*, 87 Wn. App. at 933.

Here, there was ample evidence presented at trial that Barnes's seven dogs were uncontained, that they barked at Werner on several occasions, and that at least one of the dogs was a pit bull. Werner testified that he did not feel safe working on his own property and began carrying a gun to protect himself. He testified that on November 16, Barnes's dogs again approached and surrounded him, barking and acting aggressively, and that he took out his gun, pulled back the hammer, and intended to fire the weapon if Galpin did not call off the dogs or the dogs attacked. These fears were objectively reasonable, he exhibited no more force than was necessary, and he was not the first aggressor. Taking the evidence in a light most favorable to him, Werner was entitled to have instructions explaining his right to defend himself against an attack by the dogs. *Callahan*, however, carries Werner no further.

Werner was faced with two distinct threats: the dogs and Galpin. In *Callahan*, 87 Wn. App. 925, and *Robinson*, 163 Ill. App. 3d 754, the defendants accidentally assaulted the same person they were defending themselves against. Those defendants were entitled to argue that their actions preceding the assault were proper self defense.

Similarly, as we stated above, Werner was entitled to instructions that would allow him to argue that the force he used against the dogs (drawing his gun and pulling the hammer back) was reasonable. But Werner did not offer self defense instructions concerning the dogs; he offered general self defense instructions so that he could argue self defense in his actions toward Galpin.

38692-5-II

The State is correct that Werner was not entitled to instructions that the force he allegedly used against Galpin (firing the gun in Galpin's direction) was reasonable. There was no evidence that Galpin presented any direct threat to Werner in that circumstance and, certainly, Werner was not entitled to fire toward Galpin because of what the dogs were doing. Thus, we find no error in the trial court's refusal to instruct on self defense.⁴

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.

⁴ As this case illustrates, counsel must be clear about what threat the proposed self defense instructions apply to and why those instructions are necessary. Had the court given Werner's proposed instructions, the jury would no doubt have been confused about how to apply them.