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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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NO. 38692-5-II

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

GARY WERNER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, LEWIS COUNTY

REPLY BRIEF

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A. REPLY ARGUMENT

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).

First, the trial judge never considered Werner's subjective state of mind. After trial the judge stated that "by the defendant's own admission this is not a self-defense case." 12/12/08 RP 7. That is wrong and perhaps explains why the trial judge erroneously denied Werner's request that the jury be instructed on self-defense.

The undisputed evidence was that Werner 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.*

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.*

Werner testified that:

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.

The State accepted Werner's statement of the case. Werner carefully documented Mr. Werner's testimony. Werner clearly stated that he felt threatened by Gilpin and his seven dogs. He did not "deny doing any action that could be considered an assault." In fact he admitted he had a gun and that it fired. It was simply not reasonable for the trial judge to conclude that Werner did not contend that he acted in self-defense.

It is clear that the judge did not find Mr. Werner credible. It is unclear why the judge so concluded. For the most part Mr. Werner's testimony corroborated that of Mr. Gilpin. In any event, in a jury case, the credibility of the witnesses is for the jury, not the judge.

Here Werner presented evidence that demonstrated a subjective, reasonable belief of imminent harm. See *State v. Kyllo*, - Wash. 2nd -, - P.3rd - (2009). The judge erred when he did not permit the jury to determine if Werner's defense was credible.

B. CONCLUSION

This Court should reverse the conviction and remand for a new trial.

Respectfully submitted this 8th day of September, 2009.


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I declare under penalty of perjury that on September 8, 2009, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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