

679643

679643

COA NO. 67964-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BRIGGS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Linda Krese, Judge

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 SEP 14 PM 4:10

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issue Pertaining to Assignments of Error	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Participants.....	2
2. Nelson's Version of Events	2
3. Cassel's Version Of Events	3
4. 911 Recording.....	5
5. Police Investigation.....	6
6. Self-Defense Instructions: Argument and Ruling.....	8
C. <u>ARGUMENT</u>	13
THE COURT VIOLATED BRIGGS'S RIGHT TO PRESENT HIS DEFENSE IN FAILING TO INSTRUCT THE JURY ON SELF- DEFENSE.....	13
1. In Addressing A Claim Of Self-Defense, Briggs's State Of Mind Must Be Assessed In Light Of All The Facts And Circumstances Known To Him. ...	13
2. The Trial Court Wrongly Determined The Evidence Did Not Support A Subjective Belief In Imminent Harm.	15
3. Failure To Instruct The Jury On Self-Defense Requires Reversal Of The Conviction.	25
D. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Allen v. Hart</u> , 32 Wn.2d 173, 201 P.2d 145 (1948).....	17
<u>Dix v. ICT Group, Inc.</u> , 160 Wn.2d 826, 161 P.3d 1016 (2007).....	20
<u>State v. Adams</u> , 31 Wn. App. 393, 641 P.2d 1207 (1982).....	17
<u>State v. Barstad</u> , 93 Wn. App. 553, 970 P.2d 324, <u>review denied</u> , 137 Wn.2d 1037, 980 P.2d 1284 (1999).....	22
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	16
<u>State v. Callahan</u> , 87 Wn. App. 925, 943 P.2d 676 (1997).....	16
<u>State v. Cole</u> , 74 Wn. App. 571, 874 P.2d 878, <u>review denied</u> , 125 Wn.2d 1012, 889 P.2d 499 (1994), <u>overruled on other grounds</u> , <u>Seeley v. State</u> , 132 Wn.2d 776, 940 P.2d 604 (1997).....	16
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	22
<u>State v. Douglas</u> , 128 Wn. App. 555, 116 P.3d 1012 (2005).....	24

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	16, 20
<u>State v. George</u> , 161 Wn. App. 86, 249 P.3d 202, <u>review denied</u> , 172 Wn.2d 1007, 259 P.3d 1108 (2011)	16
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	25
<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	19
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	14, 18, 23, 24
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	13
<u>State v. L.B.</u> , 132 Wn. App. 948, 135 P.3d 508 (2006).....	14
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996), <u>abrogated on other grounds</u> , <u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	14, 17
<u>State v. Lewis</u> , 6 Wn. App. 38, 491 P.2d 1062 (1971).....	25
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	16, 18, 20
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. R.H.S.</u> , 94 Wn. App. 844, 974 P.2d 1253 (1999).....	17
<u>State v. Rafay</u> , 167 Wn.2d 644, 222 P.3d 86 (2009).....	20, 25
<u>State v. Read</u> , 147 Wn.2d 238, 53 P.3d 26, 29 (2002).....	15
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	24
<u>State v. Rice</u> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	22
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	14, 18
<u>State v. Southard</u> , 49 Wn. App. 59, 741 P.2d 78 (1987).....	21
<u>State v. Theroff</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	15
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	20
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	15, 17
<u>State v. Werner</u> , 170 Wn.2d 333, 241 P.3d 410 (2010).....	26
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	25

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Williams</u> , 81 Wn. App. 738, 916 P.2d 445 (1996).....	25
<u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	13
<u>State v. Woods</u> , 138 Wn. App. 191, 201, 156 P.3d 309 (2007).....	14
 <u>FEDERAL CASES</u>	
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	13
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	13
 <u>OTHER JURISDICTIONS</u>	
<u>Ault v. State</u> , 950 N.E.2d 326 (Ind. Ct. App. 2011)	22
<u>Hilbert v. Commonwealth</u> , 162 S.W.3d 921 (Ken. 2005)	22
<u>People v. Hoskins</u> , 403 Mich. 95, 267 N.W.2d 417 (Mich. 1978)	22
<u>Williams v. State</u> , 915 P.2d 371 (Okla. 1996).....	22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER</u>	
U.S. Const. amend. V	13
U.S. Const. amend. VI	13
U.S. Const. amend. XIV	13
Wash. Const. art. 1, § 22.....	13
Webster's Third New Int'l Dictionary (1976)	24
WPIC 5.01	23
WPIC 16.05	8
WPIC 17.02	8

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to present a defense.
2. The court erred in refusing to instruct the jury on self-defense.

Issue Pertaining to Assignments of Error

Appellant was charged with assault. Evidence demonstrated appellant's roommate punched appellant during a heated argument, opening up a bloody gash near appellant's eye. Appellant responded by chasing his attacker out of the house with a machete, cutting him in the process. Was the evidence, looked at in the light most favorable to appellant, sufficient to support a claim of self-defense and did the court commit reversible error in refusing to instruct the jury on that defense?

B. STATEMENT OF THE CASE

The State charged John Briggs with committing first degree assault with a deadly weapon against Jameson Nelson. CP 52.

1. Participants

Nelson lived in a house with Briggs. 3RP¹ 49-50. Each had a separate bedroom. 3RP 49. Michael Cassel stayed at the house in some capacity as well. 2RP 89, 104-06.

2. Nelson's Version of Events

Nelson testified that he and Briggs argued the night of June 11, 2011. 3RP 58-59. Briggs believed someone had stolen things from his room and held Nelson responsible. 3RP 59. Briggs was drunk and belligerent. 3RP 60. The two men had a number of verbal arguments and were yelling at one another. 3RP 80, 86. Nelson put his hands on Briggs and more than once directed him to his room and told him to calm down. 3RP 76-77. Nelson denied hitting, kicking or shoving Briggs while directing Briggs to his room. 3RP 77.

Cassel called 911 before there was any physical contact between the two. 3RP 81. Nelson went into the kitchen two or three minutes after Cassel called 911. 3RP 69, 76, 81. Cassel was in the living room. 3RP 86. Nelson heard Briggs tell Cassel "I suggest you leave." 3RP 87.

Briggs came into the kitchen with a machete in his hand. 3RP 70. Briggs said "What, what" and raised the machete from about four or five

¹ The verbatim report of proceedings is referenced as follows: 1RP - 9/30/11; 2RP - 10/3/11; 3RP - 10/4/11, 10/5/11 and 10/25/11.

feet away. 3RP 70. Nelson stared at him. 3RP 70. Briggs approached. 3RP 70. Nelson lifted his arm. 3RP 71. The machete hit him on the left arm. 3RP 71. Nelson "reacted and hit him back in self-defense." 3RP 71. Nelson hit Briggs in the face with his fist. 3RP 71-72. He then ran past Briggs and felt pain on his back. 3RP 72. Cassel was not in the house by this point.² 3RP 84. Nelson ran out of the house and saw a police officer within seconds of leaving. 3RP 72, 88.

In an effort to establish Nelson's motive to lie about what happened,³ defense counsel elicited testimony that Nelson's probation for a previous offense could be revoked and he could spend the rest of his life in prison if he were found to have violated the law. 3RP 91-92.

3. Cassel's Version Of Events

Cassel was present the night of June 11, 2011 when Nelson and Briggs started arguing. 2RP 90-91. The topic of dispute involved the loss of Briggs's possessions after Nelson let people into Briggs's room. 2RP 92.

Cassel was in a bedroom playing Scrabble with his girlfriend and Nelson's girlfriend when he heard Nelson and Briggs argue and "banging against the walls." 2RP 92, 108. Cassel came out and saw Nelson and Briggs screaming and yelling at one another. 2RP 92. The two were

² On redirect, Nelson said he was not sure if Cassel was still in the house. 3RP 94.

³ 2RP 36-40.

"right up in each other's faces." 2RP 94. Cassel did not see either one hit the other at this point. 2RP 95, 109. They possibly had their hands on each other and might have been pushing each other. 2RP 109-10. Cassel did not yet see any blood or weapons. 2RP 95.

Cassel intervened by getting in between them. 2RP 94-95. The two men yelled some more. 2RP 95. Briggs then went to his bedroom and Nelson went into the kitchen. 2RP 95. Cassel returned to the other bedroom and closed the door. 2RP 95. Women that were in the house became scared and left. 2RP 95, 100, 110.

Cassel acknowledged he was absolutely confused about the sequence of events. 2RP 121. He first said he called 911 on Briggs's phone "in-between them first arguing and the machete incident." 2RP 99. He gave inconsistent answers on whether he called 911 before or after the women left. 2RP 100, 114.

He later said he called 911 while in the living room during their argument. 2RP 111-12, 122. Cassel did not actually speak with the 911 operator but left the line open. 2RP 100, 112. He put the phone down on a living room table. 2RP 100. Cassel then went back to his bedroom at some point. 2RP 112. He heard a sound like a person hitting the door with his fist and the walls with his fist or feet. 2RP 103.

A short time later, Cassel heard screaming, a door slam, and footsteps going out the door. 2RP 95. Cassel went out into the living room and saw Briggs standing there with a machete. 2RP 96. Nelson was nowhere to be found. 2RP 102, 122.

Cassel asked Briggs what he was doing. 2RP 97. Briggs said Cassel needed to leave. 2RP 97. Briggs was upset and looked like he had been crying. 2RP 98. Briggs had a gash next to his eye, which Cassel described as "pretty big" and bleeding. 2RP 98. Cassel left the house. 2RP 98.

4. 911 Recording

The 911 recording was admitted into evidence. 2RP 101; Ex. 30. During the call, Cassel can be heard saying, "take this" and "clean yourself up." 2RP 102. Cassel also said "John, take it and put it on your eye." 2RP 114-15. At trial, Cassel claimed not to remember why he said that or what he put on Briggs's eye.⁴ 2RP 115. A voice on the recording can also be heard saying, "you're bleeding, man." 2RP 117-18. Cassel initially claimed at trial that he was unsure who was bleeding. 2RP 118-19. He then acknowledged he saw Briggs bleeding from the face while holding the machete. 2RP 119, 122-23.

⁴ Cassel has a prior conviction for second degree attempted theft. 2RP 120-21.

At the 1:37 mark of the 911 recording, Nelson acknowledged hearing someone say "John, take this, and put it on your eye." 3RP 88-89. Nelson claimed not to know what that remark was about. 3RP 89.

At the 2:35 mark, Nelson acknowledged hearing "you're bleeding, man" and that the voice was probably his. 3RP 90-91. But Nelson insisted on the stand that no one was bleeding. 3RP 91.

5. Police Investigation

The 911 call went out at about 22:18. 2RP 48, 71; 3RP 100; Ex. 34. Officer Rossi responded to the scene at 22:23 and saw Nelson running within 30 seconds of arrival. 2RP 47-49, 71-72. Nelson looked scared and was yelling for help. 2RP 47. Nelson told Rossi that he had been in an argument with Briggs and that Briggs attacked him with a machete "in the middle of the argument." 2RP 49.

Rossi noticed a cut on Nelson's left arm and a cut on his back. 2RP 49. The cut on his arm was a couple inches long and bleeding but not very deep. 2RP 65-66. Rossi described the cut on the back as about the same as the cut on the arm in terms of severity, with the one on the arm being a little bit worse.⁵ 2RP 76. Nelson's cuts did not require stitches and he did not seek medical attention at a hospital. 3RP 75.

⁵ Another officer described the cut on Nelson's back as a "good wide gash." 3RP 11.

Five minutes after Nelson left the residence, Cassel walked out. 2RP 50-51, 73-74. Briggs subsequently left the house. 2RP 52. Briggs complied with police commands and was placed in handcuffs without incident. 2RP 52-53. He was intoxicated but cooperative throughout the investigation. 2RP 57. Briggs gave police consent to search his room for the machete used in the altercation. 2RP 55. Two machetes were initially recovered. 2RP 55-57. Nelson identified one machete as the object used in the incident whereas Briggs identified the other. 2RP 56-57; 3RP 13-14, 20-21. A third machete was later found on the eve of trial, which Nelson identified as the one used during the incident. 2RP 58, 84.

Briggs gave his account of what happened to Officer Rossi. 2RP 54, 81. According to Briggs, he had been in a loud verbal argument with Nelson over "normal roommate issues." 2RP 54. Nelson suddenly punched him in the face and then continued to punch him over his body several times. 2RP 54. After he was punched, Briggs left the main living room area and went back to his bedroom, obtained a machete, came out and chased Nelson off along with Cassel. 2RP 54-55.

Briggs had an injured face. 2RP 57. He was bleeding from a cut to the left side of his face. 2RP 64. He was also bleeding from his eye. 2RP 65. An aid car transported Briggs to Swedish Hospital for treatment.

2RP 57. At the hospital, Briggs inquired multiple times why he was being arrested when he was the one who was assaulted. 3RP 33.

6. Self-Defense Instructions: Argument and Ruling

The State's proposed instructions included instructions on self-defense. 3RP 109; Supp CP __ (sub no. 61, Plaintiff's Proposed Instructions, 4/19/12). One proposed instruction, based on WPIC 17.02, provided:

It is a defense to a charge of Assault in the First Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he [sic] she is about to be injured.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Supp CP __ (sub no. 61, supra).

The State also proposed this instruction based on WPIC 16.05:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

Supp CP __ (sub no. 61, supra).

At the outset of discussion on jury instructions, by which time it had been determined Briggs would not testify, defense counsel said she was fine with the State's proposed instruction on self-defense. 3RP 109. The prosecutor, however, argued the evidence was insufficient to give self-defense instructions. 3RP 115-18. Defense counsel disagreed, contending facts showed the house was small, Nelson assaulted Briggs in the living room by punching him in the face, Briggs went to his bedroom a few feet away, grabbed a machete, and used it to chase Nelson off. 3RP 120-21.

The court argued Nelson's assault was already completed by the time Briggs used the machete. 3RP 121. The court also pointed out Briggs's bedroom door had a lock, which he could control.⁶ 3RP 121. According to the court, "the fact that a person has been injured, doesn't privilege them to come back and assault somebody after the assault is over." 3RP 123. Defense counsel argued there was only a matter of minutes between Nelson's assault and use of the machete. 3RP 123. The court opined there was not enough evidence to show Briggs's state of mind,

⁶ Testimony at trial showed Briggs had a lock on his bedroom door. 3RP 59-60.

and that he would not allow the jury to speculate about Briggs's state of mind. 3RP 123.

The defense began to say that the court had created a standard where the defendant would always need to testify to get instruction on self-defense. 3RP 123. The court interjected "that is pretty much – In fact, I can't think of a reported decision where the defendant did not. Most of the time it is going to be necessary to create that evidence on the state of mind. There may be exceptions, but I think it's going to be a rare case where that would be true, where that would be sufficient." 3RP 123-24.

The court continued: "I'm not saying that there are no circumstances, but I don't think in this situation there's enough for me to get there. Because we're really asking the jury to speculate about what might be going on in Mr. Briggs['s] mind or what was actually going on at the time he did this." 3RP 124. According to the court, there was no evidence that Briggs "was defending himself against an assault or even a threatened assault at the time that he used the machete." 3RP 124.

Defense counsel theorized Nelson initially assaulted Briggs before the 911 call. 3RP 125. The court said there was no evidence of that. 3RP 125. Defense counsel pointed out statements made in the 911 recording allowing for the inference that Briggs was already bleeding before the 911 call occurred. 3RP 125-26.

The court backed down on this point, but maintained there was no evidence that Briggs was afraid at the time he came back out of the bedroom and chased "people" with the machete. 3RP 126. The court argued there was six minutes between when the 911 call came in and the officer's arrival on the scene. 3RP 127. Defense counsel maintained the dispatch report showed a physical altercation again occurred during that period, which could include Nelson's punching Briggs in the body. 3RP 127-28. The court said there was no evidence that Nelson punched Briggs during that period and declined to give instructions on self-defense. 3RP 128-29.

Defense counsel objected to the trial court's decision not to give instruction self-defense, which were contained in the State's proposed instructions. 3RP 131. Defense counsel submitted a memorandum on the issue after the close of day, arguing the fact that Briggs briefly left the living room and entered the bedroom mere feet away did not negate a claim of self-defense. CP 49-51.

The court took up the issue again the next day, stating, "I think I'm still persuaded that there's insufficient evidence to justify giving the instruction. And it's largely because of the fact that the defendant hasn't produced any evidence showing that he or she had a good faith belief in the necessity of the use of force at the time it was used. And that is

pointed out in Ms. Trueblood's brief that arguably a jury could find that Mr. Briggs was afraid he would continue to be beaten by Mr. Nelson if he didn't continue to protect himself. The problem is, there's no evidence to support that. It would require speculating about what his state of mind was." 3RP 133.

Referencing the previous day's discussion about the necessity of a defendant's testimony to raise self-defense, the judge said she could envision two circumstances where the defendant's state of mind could be established without his testimony: Briggs either needed to make a statement to Officer Rossi that included some statement about being afraid or needing to protect himself or a third person needed to testify to circumstances that would lead to an inference that immediate use of force was necessary for protection. 3RP 134. According to the court, neither circumstance existed in this case. 3RP 134.

The judge summed up by saying "I don't think there's enough evidence to raise the issue such that the State is now required to prove that Mr. Briggs did not have that state of mind and there's no evidence at all that he had such a state of mind, which is what is required, that as well as some circumstances that show that the belief was objectively reasonable. There's a lack of evidence at all of his state of mind at the time that the alleged assault occurred." 3RP 134.

In the absence of instruction on self-defense, the jury found Briggs guilty of the lesser offense of second degree assault while armed with a deadly weapon. CP 24, 26. The court sentenced Briggs to 25 months total confinement. CP 16. This appeal follows. CP 1-12.

C. ARGUMENT

THE COURT VIOLATED BRIGGS'S RIGHT TO PRESENT HIS DEFENSE IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE.

The evidence, when looked at in the light most favorable to Briggs, allowed a trier of fact to find a subjective, reasonable fear of imminent injury. The court's refusal to instruct the jury on self-defense requires reversal.

1. In Addressing A Claim Of Self-Defense, Briggs's State Of Mind Must Be Assessed In Light Of All The Facts And Circumstances Known To Him.

Briggs had the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, § 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

"Self-defense requires only a 'subjective, reasonable belief of imminent harm from the victim.'" State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009)). A person is therefore entitled to use force to defend himself if he reasonably believes he is about to be injured when the force used is not more than necessary. State v. Woods, 138 Wn. App. 191, 199, 201, 156 P.3d 309 (2007); State v. L.B., 132 Wn. App. 948, 952-53, 135 P.3d 508 (2006). The proposed instructions on self-defense in this case are in accord. Supp CP __ (sub no. 61, supra).

Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This approach incorporates both subjective and objective characteristics. Janes, 121 Wn.2d at 238.

It is subjective in that the jury is "entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Janes, 121 Wn.2d at 238. The

evaluation is objective in that "the jury is to use this information in determining 'what a reasonably prudent [person] similarly situated would have done.'" Id. (quoting Wanrow, 88 Wn.2d at 236) (internal quotation marks omitted).

The standard of review applied to the trial court's refusal to instruct the jury on self-defense depends on why the court refused instruction. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26, 29 (2002). The abuse of discretion standard applies when the trial court refused to give the instruction because it found no evidence supporting the defendant's subjective belief of imminent danger. Read, 147 Wn.2d at 243. The standard of review is de novo when the trial court determined no reasonable person in the defendant's shoes would have acted as the defendant acted. Id.

In this case, the trial court refused to instruct the jury on self-defense Briggs's self-defense claim on the subjective ground. 3RP 133-34. The court abused its discretion and violated Briggs's constitutional right to present a defense in refusing to instruct the jury on self-defense.

2. The Trial Court Wrongly Determined The Evidence Did Not Support A Subjective Belief In Imminent Harm.

A defendant is entitled to have the trial court instruct upon his theory of the case where there is evidence to support that theory. State v.

Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). To raise a claim of self-defense, there need only be some evidence admitted in the case *from any source*. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983).

In determining whether there is sufficient evidence to instruct the jury on self-defense, the trial court must view the evidence in the light most favorable to the defendant. State v. George, 161 Wn. App. 86, 95-96, 249 P.3d 202 (citing State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997)), review denied, 172 Wn.2d 1007, 259 P.3d 1108 (2011). "A challenge to the sufficiency of the defendant's evidence admits the truth thereof and all inferences that can reasonably be drawn therefrom." State v. Cole, 74 Wn. App. 571, 578, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994), overruled on other grounds, Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997).

The court cannot weigh the evidence in deciding whether to give self-defense instructions. Cole, 74 Wn. App. at 579. It is established that "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (quoting State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)). As a result, "[i]t is not the trial court's prerogative

to resolve the question of whether a defendant in fact acted in self-defense." George, 161 Wn. App. at 100. "Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of fact.'" State v. Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982) (quoting Allen v. Hart, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)).

The justification of self-defense must be evaluated in light of all the facts and circumstances known to the defendant. Wanrow, 88 Wn.2d at 236; State v. Allery, 101 Wn.2d 591, 593, 594-95, 682 P.2d 312 (1984). The trier of fact must "stand in the shoes" of the defendant. LeFaber, 128 Wn.2d at 899-900.

Evidence, looked at in the light most favorable to Briggs, shows Nelson punched Briggs in the face and repeatedly punched him in the body during the course of a heated altercation. 2RP 54, 57, 64-65, 90-92, 94, 98, 109-10. Nelson's punches caused Briggs to bleed from a gash near his eye. 2RP 64-65, 98. "Without question, any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm." State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). Briggs suffered serious harm.

The house, meanwhile, was described as "very small." 3RP 31. After being punched by Nelson, Briggs went to his bedroom, obtained a machete, and returned to interact with Nelson. 2RP 54-55. Tempers were still running high. 2RP 95. Briggs used the machete during "the middle of the argument" with Nelson. 2RP 49. There may have been further physical altercation between the two men, as shown by sounds heard on the 911 call and Cassel's description of hearing banging on the walls and door and screaming. Ex. 30, Ex. 34; 2RP 95, 103. Briggs chased and struck Nelson with the machete. 2RP 49, 54-55. The defense theory that Nelson's assault occurred before the 911 call took place is backed up by the 911 recording, which references Briggs's bleeding. Ex. 30; 2RP 102, 114-15, 117-18. The time between Nelson's assault and Briggs's use of force was a matter of minutes — at most six minutes, although it could have been shorter. 2RP 47-49, 71-72; 3RP 88; Ex. 30, 34.

The threshold burden of production for a self-defense claim is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The evidence does not even need to be sufficient to create a reasonable doubt. McCullum, 98 Wn.2d at 488. The facts cited above allowed a trier of fact to infer Briggs had a subjective belief of imminent harm from Nelson. Rodriguez, 121 Wn. App. at 185. Briggs had just been brutally assaulted by his roommate in a small, enclosed space. The situation was fluid.

When Briggs retreated from the assault to grab his machete and returned to face Nelson, the two were still in the midst of argument.

Given the short period of time that had passed since Nelson's assault and Nelson's continued anger once Briggs returned from the bedroom, one reasonable inference is that Briggs subjectively feared Nelson as an imminent threat to inflict further harm. Nelson had already shown himself quite capable of attacking Briggs with his fist and inflicting serious damage. Threat of further harm still hung in the air.

"To ensure due process to a criminal defendant, a trial court must provide considerable latitude in presenting his theory of his case; more specifically, a trial court should deny a requested jury instruction that presents a defendant's theory of self-defense only where the defense theory is completely unsupported by evidence." George, 161 Wn. App. at 100. There is evidence in the record that a reasonable person in Briggs's circumstances, knowing what he knew and seeing what he saw, would believe that he was in imminent danger of injury at the time he used the machete on Nelson. Due process required the court to instruct the jury on self-defense. A court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." Fernandez-Medina, 141 Wn.2d at 455-56. The court abused its discretion in failing to take the evidence in the light most favorable to Briggs, including drawing all reasonable inferences in favor of establishing Briggs's state of mind. A trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

The trial court also misapprehended and misapplied the law on how a defendant's state of mind may be proven by inferences from circumstantial evidence. Briggs did not need to testify to raise a claim of self-defense. State v. Walker, 164 Wn. App. 724, 729 n.5, 265 P.3d 191 (2011). He was entitled to rely on evidence from any source. McCullum, 98 Wn.2d at 500.

The trial court, however, took an unduly narrow view of what evidence could suffice to show state of mind in the absence of Briggs's testimony. According to the court, it would be a rare case where a defendant's testimony would not be necessary to establish the state of

mind for a self-defense claim. 3RP 123-24. The court stopped short of proclaiming a categorical rule, but said in this case the jury could only speculate about Briggs's state of mind. 3RP 124, 133. To overcome speculation, the court believed Briggs needed to make a statement to Officer Rossi about being afraid or needing to protect himself or someone else needed to testify to circumstances that would lead to an inference that immediate use of force was necessary for protection. 3RP 134. The court believed there was a total lack of evidence for Briggs's state of mind at the time that "the alleged assault" occurred. 3RP 134.

The record does not support the court's belief that no evidence showed Briggs's state of mind. And what the court called speculation is really the process of inferring facts from the evidence, which is something that jurors are tasked with doing in nearly every criminal trial in which the defendant's state of mind is at issue.

It is settled law in Washington that a defendant's state of mind may be inferred from all the facts and circumstances surrounding the commission of an act. State v. Southard, 49 Wn. App. 59, 64, 741 P.2d 78 (1987) (in theft prosecution, holding a reasonable inference of deception arises from the State's evidence although appellant did not testify as to his state of mind). Given that there is often no direct evidence of a defendant's state of mind, the State may rely upon reasonable inferences drawn from the evidence to

establish it. State v. Barstad, 93 Wn. App. 553, 568, 970 P.2d 324, review denied, 137 Wn.2d 1037, 980 P.2d 1284 (1999); State v. Powell, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (intent refers to a person's state of mind when the person commits the offense and may be shown by inferences from the surrounding circumstances); State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996) (addressing proof of intent: "The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof.").

"If the State may prove a defendant's state of mind through circumstantial evidence, then common sense dictates that a defendant may attempt to prove his state of mind through circumstantial evidence as well." Williams v. State, 915 P.2d 371, 376 (Okla. 1996). In the absence of a defendant's testimony, a defendant's subjective state of mind may be inferred from the circumstances for purposes of establishing self-defense. Williams, 915 P.2d at 376; Ault v. State, 950 N.E.2d 326, 330-31 (Ind. Ct. App. 2011); Hilbert v. Commonwealth, 162 S.W.3d 921, 924-25 (Ken. 2005); People v. Hoskins, 403 Mich. 95, 96-97, 101, 267 N.W.2d 417, 419 (Mich. 1978).

Indeed, relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. State v.

Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). In fact, the jury here was instructed as follows:

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

CP 34 (based on WPIC 5.01).

The court, however, demanded either direct evidence of Briggs's state of mind or a heightened level of circumstantial evidence that the law simply does not require. The trial court misapplied the law on circumstantial evidence to show a defendant's state of mind in a self-defense case.

The court's faulty analysis primarily rested on the notion that Nelson's assault had ended when Briggs used the machete on him and therefore there was no evidence that Briggs feared for his safety when he used the machete shortly thereafter. 3RP 121, 123-24, 126, 133-34. The court misapprehended the law on imminence.

The Supreme Court in Janes emphasized the importance of distinguishing between "imminent harm" and "immediate harm." Janes, 121 Wn.2d at 241. "Imminent" means "ready to take place: near at

hand: . . . hanging threateningly over one's head: menacingly near." Janes, 121 Wn.2d at 241 (quoting Webster's Third New Int'l Dictionary 1130 (1976)). "Immediate," on the other hand, means "occurring, acting, or accomplished *without loss of time*: made or done at once." Janes, 121 Wn.2d at 241 (quoting Webster's Third New Int'l Dictionary 1129) (emphasis added).

The law of self-defense only requires imminent harm. Janes, 121 Wn.2d at 241. And even then, imminent danger need not actually exist as long as a reasonable person in the defendant's situation could have believed it existed. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). In this case, Nelson presented a danger of imminent harm because he had just assaulted Briggs minutes before and the two were in the midst of further confrontation when Briggs used the machete. The threat of further assault from Nelson remained "menacingly near" at that time. Janes, 121 Wn.2d at 241.

The trial court also suggested instruction on self-defense was unavailable because Briggs could have gone to his bedroom and locked the door after being assaulted by Nelson. 3RP 121. But "there is no duty to retreat when a person is assaulted in a place where he or she has a right to be." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Briggs had every right to be in the house. He lived there. 3RP 49-50. He

had no duty to retreat after being punched and bloodied by Nelson in his own home.

The legal requirement of using no more force than is "necessary" does not bar a claim of self-defense for a defendant who resists an attack in a place where he had a right to be rather than take an avenue of retreat. Even where flight is a reasonably effective alternative, the self-defense claim may still be raised where there is no duty to retreat. State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996); see also State v. Lewis, 6 Wn. App. 38, 41, 491 P.2d 1062 (1971) (self-defense instruction stating that the defendant must attempt to disengage and escape improperly suggested that the defendant had a duty to retreat).

To the extent the trial court relied on the fact that Briggs could have avoided use of force by staying in his room and locking the door, it misapplied the law on retreat and thereby abused its discretion. Rafay, 167 Wn.2d at 655; Dix, 160 Wn.2d at 833.

3. Failure To Instruct The Jury On Self-Defense Requires Reversal Of The Conviction.

Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to instruct on a defense theory supported by the evidence constitutes reversible error. State v.

Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); accord State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (reversing conviction where trial court wrongly failed to give self-defense instruction). Briggs's conviction must therefore be reversed and the case remanded for a new trial.

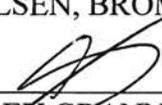
D. CONCLUSION

For the reasons stated, Briggs requests that this Court reverse the conviction and remand for a new trial.

DATED this 14th day of May 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67964-3-1
)	
JOHN BRIGGS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] JOHN BRIGGS
DOC NO. 336499
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY 2012.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 14 PM 4:10