No: 43702-3-II
Jefferson County Superior Court No: 12-1-00005-6

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

STATE OF WASHINGTON,

Petitioner,

v.

MARK FRANCIS OWENS,

Respondent.

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

The Honorable Craddock Verser, Superior Court Judge

RESPONDENT'S BRIEF

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INTRODUCTION

This matter comes before this Court following its February 12, 2013, ruling granting the State's Motion for Discretionary Review. Mr. Owens offers the following Response to the State's Opening Brief, confident that the Court will see that the Jefferson County Superior Court was correct when it reversed Mr. Owens' conviction for Aiming or Discharging a Firearm under RCW 9.41.270 and vacated the Order of Forfeiture for the firearm from the incident.

RESPONDENT'S ASSIGNMENTS OF ERROR

The State's Opening Brief offers a single narrow assignment of error related to the superior court's decision reversing Mr. Owens' conviction. The superior court reversed Mr. Owens' conviction and forfeiture order on the narrow ground of the district court's erroneous refusal to instruct the jury on the statutory defense to RCW 9.41.270.

As set forth in Mr. Owens' first brief on RALJ appeal, he argued several errors related to his conviction and the resulting forfeiture order. These issues are set out below in the event that this Court searches beyond the instructional error for a basis to affirm the superior court's decision.

ISSUES AND BRIEF ANSWERS TO ASSIGNMENTS OF ERROR

I. Did the Superior Court Correctly Reverse the District Court Because it Failed to Instruct the Jury on the Statutory Defense to a Charge of Unlawful Carrying or Handling of a Weapon under RCW 9.41.270(1)?

YES. *The trial court abused its discretion because its refusal was based upon untenable grounds and because Mr. Owens adduced sufficient evidence to receive an instruction.*

II. Is RCW 9.41.270 Unconstitutionally Vague and Overbroad on the Basis of its Failure to Adequately Define "Place of Abode"?

YES. *The definition of abode is demonstrably vague, both on its face and in light of the disparate decisions flowing from cases considered by other divisions of the Washington Court of Appeals.*

III. Is RCW 9.41.270 Unconstitutional As-Applied to Mr. Owens?

YES. *RCW 9.41.270 infringes upon Mr. Owens' fundamental right to keep and bear arms for personal defense because it reaches protected conduct in the home and beyond the scope of the government interest advanced by the statute.*

IV. Did the Superior Court Properly Reverse the District Court's Order Forfeiting the Firearm?

YES. *Reversal of the forfeiture order was proper both on the basis of the Superior Court's prudent decision to reverse Mr. Owens' conviction and on the independent basis that the forfeiture order was improper independent of the conviction because the firearm forfeited was property of a different innocent owner.*

STATEMENT OF THE CASE

Mark Owens was charged by criminal citation dated September 6, 2011, with two counts of Fourth Degree Assault against a family or household member, one count of Obstructing a Law Enforcement Officer, and one count of Unlawful Display of a Weapon. At jury trial on December 20, 2011, district court judge pro tempore Shane Seaman denied Mr. Owens' request for an instruction on the statutory defense to Unlawful Display of a Weapon. Following trial by jury, Mr. Owens was convicted of a single violation of RCW 9.41.270: Unlawful Display of a Weapon. He was acquitted on the remaining three charges. Eight days later, sentence was imposed and stayed by the court pending an appeal to Superior Court. An order of forfeiture was entered regarding the firearm associated with the charge. Following the Jefferson County Superior Court's reversal of Mr. Owens' conviction and vacation of the order of forfeiture, the State filed a Motion for Discretionary Review.

The facts below were adduced at Mr. Owens' jury trial. On September 3, 2011, at approximately 9:00 p.m., Cole Owens, one of two sons of the Appellant Mark Owens, placed a call to 911 to report an alleged assault upon himself and his mother. (VRP 47; CP 103). Deputies from the Jefferson County Sheriff's Office responded. (VRP 100, 141; CP 156, 197). The property to which the officers responded

was in rural Jefferson County along Center Road between Chimacum and Quilcene. (VRP 100; CP 156). The five-acre property was surrounded on all sides by forest such that it was not possible to see any neighbors or adjoining property. (VRP 85; CP 141). Members of the family routinely carried a firearm on the property for protection due to past encounters with wild animals, including bears, cougars, and coyotes. (VRP 70, 84, 155, 192; CP 126, 140, 211, 248). Mr. Owens' property was behind a locked gate about one-eighth of a mile from Center Road along his driveway. (VRP 102; CP 158). This locked gate prevented vehicular access to the home which was one-quarter mile further up the driveway from the locked gate. (VRP 101; CP 157). In order to approach Mr. Owens' house, law enforcement had to abandon their vehicles, and circumvent the locked gate on foot by going through the woods. (VRP 100, 102; CP 156, 158).

The incident took place between Mr. Owens' back door and a detached garage a very short distance away from the home. (VRP 103; CP 159 "[W]e were walking up the driveway. We came around the back corner of the house where the other door is ..."); VRP 106; CP 162 ("We were right at the corner of the house when [Mark Owens] emerged out his back door. ... He came from the house towards the garage ..."); VRP 69; CP 125 ("Q: About how far away is [the garage] from the house? A: 20,

30 feet."). The deputies encountered Mr. Owens walking from the rear porch of his house toward his detached garage with a rifle in his hand. (VRP 103, 106; CP 159, 162). Upon seeing the officers and hearing their order to drop the weapon, Mr. Owens moved behind a vehicle in the driveway and waited there for a brief time before putting down the weapon and surrendering to the officers. (VRP 149-50; CP 205-06).

Mr. Owens was arrested for assault, and subsequently charged, by complaint submitted by the Jefferson County Prosecutor, with two counts of Fourth Degree Assault, one count of Obstructing an Law Enforcement Officer, and one count of Unlawful Display of a Weapon. At trial, the court refused to instruct the jury regarding the statutory defense, as requested by one of defendant's proposed instructions. Mr. Owens was acquitted at trial of all charges, except for the final count of Unlawful Display of a Weapon.

On appeal, the Jefferson County Superior Court reversed Mr. Owens' single conviction and vacated the related order of forfeiture solely on the basis of the trial court's failure to instruct on the statutory defense to Unlawful Carrying or Handling of Weapons, RCW 9.41.270(1). Having reversed the conviction on the instruction error, the superior court did not reach Mr. Owens' constitutional arguments, or the argument that the forfeiture order was independently invalid.

STANDARD OF REVIEW

A trial court's conclusions of law are reviewed *de novo*. *State v. Johnson*, 128 Wash.2d 431, 443, 909 P.2d 293 (1996). "A trial court's evidentiary rulings are reviewed for abuse of discretion." *In re Personal Restraint of Duncan*, 167 Wn.2d 398, 403, 219 P.3d 666, 669 (2009) (citing *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999)). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on 'untenable grounds, or for untenable reasons.'" *Id.* (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). "A decision is based upon untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.*

"Alleged errors of law in jury instructions are reviewed de novo." *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (en banc) (citing *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004)). "A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (en banc) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996)).

ARGUMENT

This Court should affirm the Jefferson County Superior Court's reversal of Mr. Owens' conviction for a violation of RCW 9.41.270 – Unlawful Carrying or Handling of Weapons Apparently Capable of Producing Harm, and the order of forfeiture which flowed from that conviction. Although the instructional error was sufficient by itself to justify the Jefferson County Superior Court's reversal, Mr. Owens presents constitutional arguments, which were not ruled upon by the superior court, demonstrating how infirmities of the relevant statute and its application result in unconstitutional abrogation of fundamental rights. While the superior court correctly reversed the order of forfeiture when it reversed Mr. Owens' underlying conviction, the order was independently improper because of notice issues and its effect on an innocent owner.

The trial court abused its discretion when it relied on the fact that no pattern jury instruction sets forth the statutory defense to RCW 9.41.270 as justification for its denial of Mr. Owens' request for an instruction on the defense. Despite the confusion flowing from disparate holdings of Divisions One and Three of the Court of Appeals on the applicability of the statutory defense, Mr. Owens adduced sufficient evidence to submit the question to the trier of fact.

I. The Superior Court Correctly Reversed Mr. Owens' Conviction on the Basis of the Trial Court's Failure to Properly Instruct the Jury.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d (2006). "A defendant in a criminal case is entitled to have the jury fully instructed on the defendant's theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1983) (en banc) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)).

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Barnes*, 153 Wn.2d at 382. "Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (en banc) (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). "If the jury instructions either incorrectly define or are silent on an element of a crime, the State is impermissibly relieved of its burden to

prove beyond a reasonable doubt that the defendant committed all the essential elements. *State v. Gordon*, 153 Wn.App. 516, 532, 223 P.3d 519 (2009), fn. 11. overruled on other grounds (citing *State v. Williams*, 136 Wn.App. 486, 492-93, 150 P.3d 111 (2007)).

a. The Trial Court Abused its Discretion by Denying Mr. Owens' Proposed Instruction Because of a Mistaken Belief that the Pattern Jury Instructions Limited its Authority.

The Washington Pattern Jury Instructions (hereinafter "WPIC" or "WPICs" if plural) are intended to "assist the trial judge and the attorneys in preparing clear, accurate, and balanced jury instructions for individual criminal cases," and "are examples that apply to a general category of cases, rather than an exact blueprint for use in every individual case." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (3d. Ed.). The WPICs are not intended as authoritative primary sources of the law and are not approved in advance by any court. *Id.* (citing *State v. Mills*, 116 Wn.App. 106, 64 P.3d 1253 (2003), reversed on other grounds, 154 Wn.2d 1, 109 P.3d 415 (2005). The WPIC instructions are considered persuasive sources of the law. *Id.* "The pattern instructions are not binding on trial courts; they are intended to guide trial courts in drafting appropriate instructions for individual cases." *Id.*; *see also Gordon*, 153 Wn.App. at 536, fn. 11.

The trial court based its refusal to instruct on the fact that the pattern jury instructions had not yet explicitly accounted for the statutory defense to RCW 9.41.270:

> THE COURT: ... my general tendency is not to ... go beyond what the Supreme Court has indicated. And since it's not an element that is in the WPIC that the State has to prove that ... I'm not going to add it in as a jury instruction.

(VRP 233-34; CP 289-90).

The trial court's aforementioned justification for denying Mr. Owens' request for an instruction on RCW 9.41.270(3) mistakenly characterized the WPICs as binding recitations of the Washington Supreme Court's position on the current state of Washington law. Our Washington Supreme Court has clarified the manner in which the pattern jury instructions should be understood:

> Washington has adopted pattern jury instructions to assist trial courts. Our pattern instructions are drafted and approved by a committee that includes judges, law professors, and practicing attorneys. Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court.

Bennett, 161 Wn.2d at 307 (citing *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)).

The trial court abused its discretion when it based its refusal to grant Mr. Owens an instruction on the defense of RCW 9.41.270(3)(a) on this untenable ground. The Jefferson County Superior Court properly reversed on the basis of this abuse of discretion, and found that the instruction error was not harmless because Mr. Owens adduced sufficient evidence to receive an instruction and place the question before the jury.

b. Cases Interpreting RCW 9.41.270(3) from Coordinate Divisions of this Court Create Uncertainty as to the Applicability of the Statutory Defense.

Coordinate divisions of this Court have produced two reported decisions[1] interpreting the concept of "abode" in the context of the defense set forth in RCW 9.41.270(3). The first, arising out of Division Three, is *State v. Haley*, 35 Wn.App. 96, 665 P.2d 1375 (1983). The second, chronologically, came out of Division One: *State v. Smith*, 118 Wn.App. 480, 93 P.3d 877 (2003). Counsel has been unable to locate any additional reported decisions on this specific subject.

By the statute's express terms, the prohibitions of RCW 9.41.270(1) do not apply to a person who is "in his or her abode or fixed

[1] A third decision involves the defense, but did not result in a holding related to its application. In *State v. McKinlay*, 87 Wn.App. 394, 942 P.2d 999 (1997), Division Three considered a case where the trial court held that a person's yard was part of the curtilage of the home, and that the curtilage was within the meaning of the "abode" triggering the exclusion of RCW 9.41.270(3)(a). The Court of Appeals did not address the issue because it resolved the matter on a different basis. *Id.* at 399, fn. 4 ("There was no prosecution for violation of RCW 9.41.270. It is unnecessary to decide whether the terms "curtilage" and "abode" are synonymous for determining whether the exclusion of RCW 9.41.270(3)(a) applies to prevent prosecution for the firearms offense.").

place of business." RCW 9.41.270(3)(a). Courts interpreting RCW 9.41.270(3)(a) agree that the statute fails to define the critical concept of "place of abode." *Haley*, at 98; *Smith*, at 484. Divisions One and Three of the Washington Court of Appeals agree that a court interpreting the statute should look to the ordinary and usual meaning of abode because it is not otherwise defined in the statute, but the holdings which flow from this superficially congruous approach differ significantly.

In *Haley*, Division Three held that a person standing on an open and uncovered back deck on property up a hill from the Spokane River was in "an extension of the dwelling and therefore part of the abode." 35 Wn.App. at 98. Division Three considered the ambiguity in RCW 9.41.270(3)(a)'s use of the term "abode" in the context of the rule of lenity. 35 Wn.App. at 98. Division Three's interpretation construed the ambiguity against the state, as the concept of lenity mandates when interpreting a penal statute. Confronted with interpreting the same ambiguous concept of "abode" in *Smith*, Division One proceeded with its interpretation of the statute without open or documented reliance upon the rule of lenity. 118 Wn.App. at 480.

With its disparate interpretation approach, Division One reached a broader conclusion when it held that "[a] backyard does not satisfy the place of abode exception under RCW 9.41.270." 118 Wn.App. at 485. In

Smith, the Court of Appeals addressed a man who was "on the outskirts of his backyard where only a fence with breaks in it separated him" from people in a church parking lot in the adjacent property. *Id.* at 485. In *Smith*, the defendant's "behavior was not contained to an audience on his property; he *intended that his behavior traverse the fence to communicate threats*." *Id.* (emphasis added).

In both cases, the person asserting the defense of RCW 9.41.270(3)(a) was in an area of the property which was not technically inside the physical structure of the home. Division One distinguished its *Smith* ruling from Division Three's *Haley* decision in the following manner:

> In *State v. Haley* ... Division Three had to decide whether a deck fell within "the place of abode" exception. It held that Haley's deck was an extension of his dwelling and therefore a part of his abode. We question that holding but need not decide the issue. ... While Haley's deck was on the inner part of his property and attached to his residence, yards typically abut neighboring properties. This means a person's conduct in his or her yard may extend beyond his or her property. Here, Smith's conduct occurred on the outskirts of his backyard where only a fence with breaks in it separated him from the tow operators in the church parking lot. His behavior was not contained to an audience on his property; he intended that his behavior traverse the fence to communicate threats. There is nothing to indicate Smith's

> yard is similarly situated to the deck in Haley.

Smith, at 485, fn. 8.

The broad holding of *Smith* notwithstanding, *Haley* can be read for the proposition that a person does not have to be "inside" his or her home to qualify for the defense set forth in RCW 9.41.270(3). Pursuant to longstanding principles of lenity, the concept of "abode" should be interpreted against the State. Abode, as cited in *Haley*, includes "one's home, place of dwelling, residence, and/or domicile." 35 Wn.App. at 98 (citing Black's Law Dictionary 20 (4th rev. ed. 1968). This concept of "abode" should be understood in the context of the purpose of RCW 9.41.270, which the State acknowledges is "to prevent someone from displaying dangerous weapons so as to reasonably intimidate members of the public." (State's Brief, p. 4-5) (citing *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984)). Reading *Haley* and *Smith* together, mindful of the purpose of RCW 9.41.270, the rational conclusion is that it does not apply to areas of a person's abode or fixed place of business wherein he or she has a reasonable expectation of privacy because they are concealed from the view[2] of the public.

[2] The statute's stated purpose of protecting the public from displays of firearms or other dangerous weapons is irrelevant and inapplicable in those areas of the abode or fixed place of business which cannot be accessed or seen by a member of the public.

The State argues that Mr. Owens had no privacy interest in the area where he displayed the weapon because it was part of a driveway. (State's Brief, p. 3-4). The State appears to expect this Court to conclude that, if Mr. Owens had no privacy interest in the area where he was found carrying the firearm, then a statute intended to protect the public from intimidating displays of firearms can reach his conduct in that location.

In support of its argument, the State cites cases related regarding the parameters of privacy rights related to the home and curtilage. Mr. Owens agrees that the jurisprudence addressing privacy in the context of curtilage is valuable during this Court's analysis regarding whether Mr. Owens should have received an instruction on the statutory defense of RCW 9.41.270(3). The State's argument is premised upon the reasonable fundamental assumption that RCW 9.41.270's purpose of protecting the public is only relevant and applicable in areas which are open or accessible to the public. Mr. Owens believes that he and the State only disagree whether the area where Mr. Owens was contacted was open or accessible to the public and thus undeserving of privacy protections.

c. Concepts related to Curtilage and the Privacy Interests of the Home Militate in Favor of Applying the Defense of RCW 9.41.270(3) to the Facts of Mr. Owens' Case.

At its essence, this case poses the question whether the curtilage of the home part of the "place of abode" within the meaning of RCW

9.41.270(3)(a). The nexus between the fundamental right to keep and bear arms to defend the home and the privacy protections of the home and its curtilage militate in favor of defining the parameter of the "place of abode" exception to RCW 9.41.270(3)(a) to include the curtilage of the home, as understood in the context of Fourth Amendment and article I, section 7, jurisprudence.

"The curtilage is that area 'so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.' " *State v. Ridgeway*, 57 Wn.App. 915, 918, 790 P.2d 1263 (1990) (citing *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)). "The scope of the curtilage is determined with reference to facts as to 'proximity, use and expectation of privacy.'" *Id.* (citing *State v. Neidergang*, 43 Wn.App. 656, 660, 719 P.2d 576 (1986)). An access route is not impliedly open to the public where there is a "clear indication that the owner does not expect uninvited visitors." *State v. Jesson*, 142 Wn.App. 852, 858, 177 P.3d 139 (2008) (citing *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000)). Fences and closed gates can demonstrate a reasonable expectation of privacy. *Id.* (citing *State v. Chaussee*, 72 Wn.App. 704, 710, 866 P.2d 643 (1994)).

In *Jesson*, Division Three of the Court of Appeals considered whether property behind a closed, but unlocked[3] gate, in a sparsely populated and heavily forested area was deserving of Fourth Amendment protection. 142 Wn.App. 852, 177 P.3d 139. Division Three held that no reasonable respectful citizen could have believed he was entitled to enter the property where it was "located in a remote, sparsely populated and heavily forested area" where a person would be required to "drive down and long and rough, primitive driveway access" and "enter through a closed, but unlocked gate." *Id.* at 859.

In *State v. Ridgeway*, this Court held that the defendant had a reasonable expectation of privacy in the area behind his home under the following circumstances:

> Ridgway's house is not visible from the road, and neighboring houses cannot be seen from the property. The dwelling is at the end of a curving driveway approximately 200 yards long, blocked at the entrance by a gate. The deputies walked around the closed gate and up the drive to the house where they encountered two dogs positioned at the door nearest the driveway. They circled to the far door to avoid the dogs. There, the deputies observed potted marijuana plants growing next to the steps.

[3] The gate along Mr. Owens' driveway was closed *and* locked, whereas the gate in *Jesson* was only closed.

57 Wn.App. 915, 917, 790 P.2d 1263 (Div. II, 1990). Under the aforementioned circumstances, this Court held "[p]lainly, the area ... was within the curtilage." *Id.* at 918.

The area where Mr. Owens was found with his rifle is nearly identical to the area which was "plainly ... within the curtilage" in *Ridgeway*. Mr. Owens' home was in a rural, heavily forested area of Jefferson County. Completely surrounded by forest, Mr. Owens home was not visible from the road. The quarter-mile long private road approaching Mr. Owens' home was behind a locked gate preventing access from the public roadway. The public roadway, Center Road, was another one-eighth of a mile further down forested primitive roadway from Mr. Owens' locked gate. Even after bypassing the locked gate, the area where Mr. Owens was found was not visible from the long driveway approaching the home. The 20-30 foot long pathway between Mr. Owens' home and his detached garage, where he was found holding the rifle, was behind his home. The area behind his home was not in view from the long private road approaching the home. A person would have to ignore the front door to the home and walk or drive around to the rear of Mr. Owens' home to encounter anyone going between the home and the detached garage. Under facts nearly identical to these, the Court of Appeals has concluded that no reasonable member of the public would believe that he

or she could circumvent the gate and approach the residence. *Jesson*, at 859; *Ridgeway*, at 918.

Mr. Owens is mindful that the analysis in this case is not whether the entry of Jefferson County Sheriff's Deputies was lawful.[4] The concepts of curtilage and privacy are relevant because this case involves the prohibitions of RCW 9.41.270, which the State acknowledges is intended to "prevent someone from displaying dangerous weapons so as to reasonably intimidate *members of the public*." (State's Brief, p. 5) (citing *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984)) (emphasis added). Incorporating the concept of curtilage into the "place of abode" definition is appropriate because no members of the public could be intimidated by the display of the firearm in the location where he was alleged to have displayed it. Stated another way, because no members of the public could reasonably feel entitled to lawfully bypass Mr. Owens' locked gate in the darkness of night and travel through the forest along the driveway of his property to access the area *behind* his house where he held the firearm, RCW 9.41.270 should not apply. Thus, an instruction on the statutory defense was appropriate.

[4] There were certainly exigent circumstances to justify the warrantless entry due to the report of a crime at Mr. Owens' home. But, the deputies were entering, not as members of the public on legitimate business, but as emergency responders with authority to disregard privacy rights of the curtilage of the home.

d. Mr. Owens Adduced Sufficient Evidence to Justify an Instruction on the Statutory Defense to a Charge of Unlawful Display of a Weapon.

The State erroneously claims that the trial court denied Mr. Owens' proposed instruction due to insufficiency of evidence. (Brief of Appellant, p. 2 – "The court rejected the Defense Counsel version of the WPIC and selected WPIC 133.40 *because there was no evidence the offense occurred in the Defendant's place of abode.*") (emphasis added). The State cites the verbatim report of proceedings at pages 229-230 for this proposition, but Counsel for Mr. Owens is unable to locate any discussion by the trial court regarding the sufficiency of the evidence in that portion of the verbatim report of proceedings, or anywhere, for that matter. Simply put, there was no indication that the trial court ever considered the sufficiency of the evidence when it denied the instruction. (VRP 226-235; CP 282-291). In the event that this Court concerns itself with whether the alleged instruction error was harmless, some discussion regarding the sufficiency of the evidence adduced by Mr. Owens in support of his request for instruction is warranted.

A defendant must adduce *some evidence* in support of an instruction of the defense. *See State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) ("To be entitled to a jury instruction on self-defense,

the defendant must produce *some evidence* demonstrating self-defense ..."); *State v. Ginn*, 128 Wn.App. 872, 883, 117 P.3d 1155 (Div. II, 2005) ("Ginn presented evidence of each element of the 'qualifying patient' defense under the [Medical Marijuana Law]. Thus the jury should have been instructed on the burden and elements of that affirmative defense.") (emphasis added); "[I]n evaluating whether the evidence is sufficient to support such a jury instruction, the trial court must interpret the evidence most strongly in favor of the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility." *Ginn*, at 879 (internal citations omitted).

Even if this Court treats the statutory defense of RCW 9.41.270(3)(a) as an affirmative defense to be proven by a defendant by a preponderance of evidence, Mr. Owens adduced sufficient evidence to place that determination before the jury.

Evidence adduced at trial shows that the events allegedly constituting Unlawful Display of a Weapon took place at night in a rural community within twenty (20) feet of the rear of Mr. Owens' residence between his home and a detached garage positioned twenty to thirty (20-30) feet behind the home. The driveway and sole access route to this rural residential property was guarded by a locked gate, and the actual physical residence was nearly one-half mile away from Center Road along a

driveway through a forest. The property was frequented by wildlife such as bears, coyotes, and cougars; and was completely surrounded by forest such that no neighboring residences or property are visible.

It was in this isolated private location where Mr. Owens allegedly was in violation of RCW 9.41.270(1). As set forth in *Jesson* and *Ridgeway*, cited *supra* at pages 17-18, the access route to the detached garage behind Mr. Owens' home was deserving of Fourth Amendment privacy protection due to its intimate association with his home. RCW 9.41.270 cannot reach into that area of his abode to proscribe conduct on the basis of an interest in protecting the public which could not lawfully see into, nor be present in, that area.

The aforementioned disparate rulings of Divisions One and Three reveal that, at minimum, there is a *factual* dispute regarding the applicability of the defense. Such a factual dispute regarding the applicability of a statutory defense should be resolved by the trier of fact. The area immediately behind Mr. Owens' residence, between his home and nearby detached garage, was far more like the uncovered deck in *Haley* than the broken fence line immediately adjacent to neighboring property in *Smith*. The curtilage of Mr. Owens' home was more isolated from the public eye than the uncovered open deck in *Haley*. The curtilage of Mr. Owens' home was dramatically unlike the backyard in *Smith* where the defendant was near

the perimeter of the property, intentionally projecting his threats to an adjacent property from an area fully exposed to the public. The superior court aptly distinguished the precedent in *Smith* and properly determined that the path from the rear of Mr. Owens' home to his nearby detached garage was more like the area described in *Haley*.

Mr. Owens adduced sufficient admissible evidence at trial to receive an instruction allowing him to argue that he was in his "place of abode" within the meaning of RCW 9.41.270(3)(a). As such it was erroneous both legally and factually not to instruct the jury regarding the statutory defense to a violation of RCW 9.41.270(1). The superior court correctly reversed Mr. Owens' conviction for the trial court's failure to instruct the jury on the defense in RCW 9.41.270(3), because it abrogated Mr. Owens' constitutional right "to present a complete defense." *See Crane* 476 U.S. at 690.

In its reversal of the conviction, the Jefferson County Superior Court noted that the statutory scheme of RCW 9.41.270 communicates a requirement that "one of the elements the State must prove beyond a reasonable doubt is the 'place' of the exhibition of the weapon is such that the jurors could find the other elements of the crime had been proven." (CP 353-56). This Court should affirm the ruling of the Jefferson County Superior Court. In the event the Court looks beyond the instructional

error, it will find constitutional infirmity related to the ambiguity of "place of abode" and its application to Mr. Owens' case.

II. RCW 9.41.270 is Unconstitutionally Vague and Overbroad Because it Fails to Clearly Define "Place of Abode."

"The void-for-vagueness doctrine is rooted in principles of due process." *City of Sumner v. Walsh*, 148 Wn.2d 490, 499, 61 P.3d 1111 (2003) (internal string citation omitted). "To avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Id.* (citing *Nunez v. City of San Diego*, 114 F.3d 934, 940 (9th Cir. 1997)). A statute or ordinance is void for vagueness if it encourages arbitrary and erratic arrests and convictions. *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.3d.2d 110 (1972) (citing *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940))

A statute can overcome a vagueness challenge only if the terms of the statute provide ascertainable standards for locating the line between innocent and unlawful behavior. *Walsh*, at 498 (*quoting Seattle v. Pullman*, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973). "What is forbidden by the due process clause are criminal statutes that contain no standards

and allow police officers, judge and jury to subjectively decided what conduct the statute proscribed or what conduct will comply with the statute in any given case." *Maciolek*, 101 Wn.2d at 267 (1984).

Here, RCW 9.41.270 fails to adequately define the term "place of abode" in such a way to make it understandable for the average person. The ambiguity flowing from the failure to define "place of abode" has already been recognized by the Court of Appeals. *Haley*, at 98; *Smith*, at 484. This ambiguity makes it unclear for citizens how to avoid running afoul of the law, and provides no discernible enforcement standards for law enforcement.

The disparate decisions in *Haley* and *Smith* reveal that the Courts of Appeals in Washington have differing perspectives on the meaning of "place of abode" in RCW 9.41.270(3)(a). The Jefferson County Prosecutor's decision to charge Mr. Owens' with a violation of RCW 9.41.270 under the facts of this case demonstrates that the statute provides unclear standards for its enforcement. This statute, which the State has acknowledged is intended to protect the public from intimidating displays of firearms, has been applied in this case to Mr. Owens on his rural five-acre plot of land surrounded by forest and behind a locked gate along a three-quarter mile long driveway. Mr. Owens was charged and convicted

for carrying a firearm in a way that manifested the intent to intimidate the public in a place where the public was not allowed to be.

Where a statute infringes upon constitutionally-protected conduct, it should be written clearly and carefully so it is not misunderstood or arbitrarily enforced. The conduct governed by RCW 9.41.270 regulates the right to keep and bear arms. In *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment to the United States Constitution recognized and protected a preexisting and fundamental individual right to keep and bear arms. 554 U.S. 570, 596, 128 S.Ct. 2783, 171 L.Ed 2d 637 (2008). In the wake of the Supreme Court's landmark *Heller* decision, the Ninth Circuit Court of Appeals held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment against the states. *Nordyke v. King*, 563 F.3d. 493 (9th Cir. 2009). The United States Supreme Court confirmed the incorporation of the Second Amendment in 2010 in *McDonald v. City of Chicago*, __ U.S. __, 130 S.Ct. 3020, 177 L.Ed.2d 984 (2010). The incorporation of the Second Amendment to the States is a clear signal that the right to keep and bear arms is a fundamental individual right implicit in our concept of ordered liberty, and the Second Amendment preserves that right of the citizens of Washington State.

RCW 9.41.270 is vague because the term "place of abode" does not establish sufficiently clear standards for the law's enforcement, and it can reach a substantial amount of protected conduct. The *Heller* opinion did not elaborate on the meaning of "home" or limit the Second Amendment right to possession of a firearm for personal protection to areas inside the physical structure of the actual house. It recognized that persons have an "inherent right of self defense" which "has been central to the Second Amendment right." *Heller*, at 628. The United States Supreme Court recognized that the home is "where the need for defense of self, family, and property is most acute." *Heller*, at 628. Mr. Owens lives on property frequented by dangerous wildlife such as bears, coyotes, and cougars. He has both the need and the right to carry a firearm on his property. RCW 9.41.270 is too vague because it has been interpreted by law enforcement and prosecutors to apply to Mr. Owens while he engages in the lawful use of firearms on his private rural property which is completely segregated from public view and access.

III. RCW 9.41.270 is Unconstitutional As-Applied to Mr. Owens.

An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that the application of the statute in the specific context of the party's actions is unconstitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-9, 91 P.3d 875 (2004) (citing

Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000)). "[A] court may not strain to interpret [a] statute as constitutional: a plain reading must make the interpretation reasonable." *Republican Party*, 141 Wn.2d at 282 (citing *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 757, 871 P.2d 1050 (1994)).

RCW 9.41.270 cannot be applied constitutionally to Mr. Owens because the area where he allegedly displayed his rifle is an area deserving of Fourth Amendment privacy protection, and no member of the public could lawfully enter that area, so the purpose of the statute to protect the public from displays of weapons is inapplicable.

The Washington Supreme Court has declined to apply a level of scrutiny to the analysis of laws regulating the Second Amendment. *See State v. Sieyes*, 168 Wn.2d 276, 295, 225 P.3d 995 (2010). It observed that the United States Supreme Court rejected rational basis scrutiny—the minimal level of review—as being too low of a standard to apply to a Second Amendment analysis. *Id.* at 294-5. The Washington Supreme Court instead looked to the original meaning of the Second Amendment and the traditional understanding of the right it conferred. *Id.* at 295.

RCW 9.41.270 does not even survive the inappropriately low rational basis level scrutiny when it is enforced upon Mr. Owens in his rural property. Regulating the way he carries a firearm between his home

and garage behind his house on his five-acre forested property has no rational relationship to the protection of the public from intimidating displays of weapons. If this Court follows the Washington Supreme Court in reviewing the constitutionality of RCW 9.41.270 in the context of the traditional understanding and original meaning of the Second Amendment, its infirmity as applied to Mr. Owens is also evident.

The right to keep and bear arms is an ancient right that was important for self-defense and hunting, as well as service in the militia and protection from tyranny. *See Heller*, at 559. The right to self-defense "was the *central component* of the [Second Amendment] right itself." *Id.* (emphasis in original). Possession of a firearm was an essential tool for self-defense for Americans who lived on the edges of civilization during the people of colonization and westward expansion.

Compared to most in today's society, Mr. Owens lives in the wilderness. Carrying a firearm on his property is necessitated by its remoteness and the fact that dangerous predatory wildlife has been encountered on his property. Carrying a firearm at night between his house and detached garage behind the locked driveway gate and forested perimeter of his five-acre rural property does not endanger members of the

public[5] because they are not lawfully allowed to access his property. As applied to Mr. Owens in this case, RCW 9.41.270 unconstitutionally infringes upon his fundamental right to bear arms on his property for self-defense.

IV. The Superior Court Properly Reversed the Forfeiture Order both Because it was Invalid Upon Reversal of Mr. Owens' Conviction, and Because it Affected an Innocent Owner.

Mere possession of a firearm is not a crime because a firearm is not per se contraband. *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 139, 925 P.2d 1289 (Div. II, 1996). Thus, a firearm must be returned *to its owner* absent some other justification permitting the government to retain the item. *See Id.* (emphasis added). When the Jefferson County Superior Court reversed Mr. Owens' conviction for Unlawful Display of a Weapon under RCW 9.41.270, the Order of Forfeiture had to be reversed as well. *See State v. Browner*, 43 Wn.App. 893, 902, 721 P.2d 12 (1986). Independent of Mr. Owens' conviction being reversed, however, there is alternative justification to reverse the forfeiture order.

[5] If the Court is concerned that he carried a firearm while police were on the premises, it should note that the police approached in stealth without sirens so he didn't have the chance to discard the weapon prior to their arrival. And, if Mr. Owens' conduct had truly risen to the level of an assault upon or tangible threat to either of the deputies, he could have been charged and prosecuted for any number of other offenses, such as Assault, Harassment, or Intimidating a Public Servant.

First, the trial court incorrectly determined the burden of proof for forfeiture to be a mere showing of probable cause. Relying upon RCW 9.41.098(3), it claimed that the duty to return the firearm to the true owner did not accrue because, apparently, the trial court believed there was probable cause that the true owner of the firearm had knowledge of or consented to the act or omission involving the firearm which resulted in its forfeiture. This misapplication of a burden of "probable cause" compromised the forfeiture analysis and ignored the fact that the true owner is entitled to assert ownership with a showing under the statute independent of whether there is probable cause to believe an act triggering forfeiture has occurred.

The concept of "probable cause" becomes relevant if the person seeking recovery as the owner can make a showing that "there is no probable cause to believe" that any one of the triggering statutory violations from 9.41.098(1) occurred. Stated another way the court shall return the firearm if the owner seeking possession can show that there is no probable cause to believe that there is a triggering event justifying forfeiture. RCW 9.41.098(3). Showing the absence of probable cause, however, is not the only way an owner can forestall forfeiture.

An owner seeking to recover the firearm can also do so by making a showing that he or she "neither had knowledge of nor consented to the

act or omission involving the firearm which resulted in the forfeiture." RCW 9.41.098(3). The nature of this "showing" set forth in 9.41.098(3) is not defined in terms of burden of proof. As such, it makes sense to analogize it to the burden shifting jurisprudence which takes place in criminal forfeitures related to convictions for drug crimes.

As demonstrated by RCW 69.50.505, the process of forfeiture adjudication is a burden-shifting one. *See In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009). The burden is upon the government to make an initial showing to justify forfeiture. *Id.* Once this showing is made, a person claiming an exemption from the operation of the statute must make a showing justifying the exemption of the property from forfeiture. *Id.*

In this case, the trial court neglected the mandatory and disjunctive nature of the test in RCW 9.41.098(3):

> (3) The court *shall* order the firearm returned to the owner upon a showing that there is no probable cause to believe a violation of subsection (1) of this section existed **or** the firearm was stolen from the owner **or** *the owner neither had knowledge of nor consented to the act or omission involving the firearm which resulted in its forfeiture.*

(emphases added). The court is required to return the firearm to the true owner if he makes a showing that he "neither had knowledge of nor

consented to the act or omission involving the firearm which resulted in its forfeiture" independent of whether there is probable cause to believe a violation of the statute occurred. RCW 9.41.098(3). This is a classic "innocent owner defense" to forfeiture.

This case presented facts of an innocent owner. On direct examination by the State, Tammy Owens was asked if she recognized the firearm presented as an exhibit at trial. (VRP 77). She indicated that she did recognize it and that it was a rifle belonging to her 18 year old son, Chancey. (VRP 77). Chancey Owens was not involved in the incident in any way. He did not know that Mr. Owens would carry the firearm out of the home toward the garage that night after police were called. Until Mr. Owens' sentencing hearing, there was no notice by the State of its intent to seek forfeiture of the firearm. Chancey Owens did not have the opportunity to appear and present evidence to contest the forfeiture.

The order should be reversed because the trial court relied on an untenable interpretation of RCW 9.41.098 and because an innocent owner was deprived of the opportunity to assert the innocent owner defense. Of 9.41.098. The trial court incorrectly conceptualized the analytical process, and the result was skewed such that the true owner, Chancey Owens, lost his right to the firearm without due process of law.

CONCLUSION

This Court should affirm the Superior Court's reversal of Mr. Owens conviction. It was reversible error for the trial court to decline to instruct the jury on the defense set forth in RCW 9.41.270(3)(a) because Mr. Owens adduced sufficient evidence to allow the jury to decide whether he was in his "place of abode" when he allegedly displayed a firearm. If the Court looks beyond the instructional error, it will see that RCW 9.41.270 is unconstitutionally vague because it fails to adequately define "place of abode." The statute is unconstitutional as-applied to Mr. Owens because, in the name of public safety, it has been applied to regulate constitutionally-protected conduct in an area isolated from, and completely inaccessible to, the public. The Court should uphold reversal of the order of forfeiture due to the reversal of Mr. Owens' conviction. It can independently reverse the order because it was improperly entered without notice and due process against the right of an innocent owner due to the trial court's misunderstanding of the statutory scheme.

Respectfully Submitted this 15 day of April, 2013.

JEFFERSON ASSOCIATED COUNSEL

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Attorney for Respondent

PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed Mark Owens' Brief of Respondent electronically with the Court of Appeals, Division II, through the Court's online filing system.

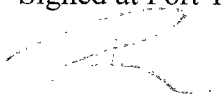
I delivered an electronic version of the same through the Court's filing portal to

Thomas Brotherton
Jefferson County Prosecutor's Office
tbrotherton@co.jefferson.wa.us

I also hand-delivered a hard copy of the Brief of Respondent to the Jefferson County Prosecutor's Inbox in the Jefferson County Superior Clerk's Office, Port Townsend, Washington.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Port Townsend, Washington, on April 15, 2013.



Bret Roberts
Attorney for Mark Owens

JEFFERSON ASSOCIATED COUNSEL

April 22, 2013 - 10:49 AM

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