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Court of Appeals
Division I
State of Washington

No. 73132-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDILBERTO GUZMAN-MORALES,

Appellant.

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

APPELLANT'S OPENING BRIEF

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The trial court erred and violated Edilberto Guzman-Morales' constitutional right to due process by refusing to instruct the jury on self defense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When requested by the defense, a trial court must provide the jury with a self-defense instruction if there is some evidence, from whatever source, to support the instruction. Even in cases where the defendant denies intentionally using force, the instruction may be warranted if there is some evidence to support a finding that the defendant did justifiably use force in self defense. Here, there was evidence that Mr. Guzman-Morales stabbed the bouncer who had put him in a chokehold to protect himself.

Did the court err in refusing to instruct the jury on self defense?

C. STATEMENT OF THE CASE

Edilberto "Eddie" Guzman-Morales is twenty-eight years old and lives in Everson, Washington. 2RP 332-33. A lawful permanent resident of the United States, he was born in Mexico. 2RP 332-33. He works at a feed store in Sumas to support himself, his girlfriend, and their three-year-old child. 2RP 332-34.

On June 16, 2013, Mr. Guzman-Morales was arrested on suspicion of stabbing a Bellingham nightclub bouncer in the leg. CP 6-7. The Whatcom County Prosecuting Attorney's Office charged him with assault in the second degree. CP 4-5. Before trial, relying on RCW 9A.16.110, defense counsel gave notice that Mr. Guzman-Morales intended to use self defense to fight the charge. CP 8. In opening statement, defense counsel told the jury that Mr. Guzman-Morales was lawfully protecting himself: "after he was in the choke hold which Eddie couldn't breathe is when he started poking at Jared to get him off of him, and that, ladies and gentlemen, is self-defense." 1RP 16.

Before the incident at the nightclub, Mr. Guzman-Morales spent the day working and then went to a wedding with a friend. 2RP 335. After the wedding, his friend took him to "The Underground" dance club. 2RP 336. There, Mr. Guzman-Morales took a drink "really fast" and also ordered a beer. 2RP 336.

He testified that as he moved through the crowd, he felt he "got hit" on the back of his head, "heard the noises of the glass splashing… [he] wasn't sure if [he] got hit with a bottle or somebody took the beer down out of [his] hand." 2RP 336. He testified he did not remember much that happened after; he "lost it… blacked out." 2RP 336.

However, he testified that he had flashbacks of “getting choked.” 2RP 336. He awoke in jail with “pain in the back of [his] head, in the side of [his] face.” 2RP 337. His face was “black and blue.” 2RP 337.

Mr. Guzman-Morales testified he told the bouncer – Jared Storrs – that somebody had hit him and taken his beer. 2RP 338. He said he pointed the people out to Mr. Storrs, but the bouncer in turn grabbed him and moved him toward the exit. 2RP 338. While Mr. Guzman-Morales did not remember exactly what occurred, he did admit having a knife with him. 2RP 338-39. He was really intoxicated. 2RP 342. He does not usually carry a knife, but there happened to be one in the pants he had put on that evening, leftover after a camping trip. 2RP 339.

Nightclub security video captured much of the interaction between Mr. Storrs and Mr. Guzman-Morales. Ex. 10. Looking back on the video of the nightclub floor, Mr. Guzman-Morales agreed with the prosecutor that he was not hit and not really in danger before he encountered the bouncer. 2RP 348, 350, 351, 353; Ex. 10. Watching the video, Mr. Guzman-Morales also testified about how Mr. Storrs first put his hands on Mr. Guzman-Morales. 2RP 351.

The bouncer, Mr. Storrs, testified that he contacted Mr. Guzman-Morales because another patron waved him over. 1RP 31. Mr. Storrs decided that Mr. Guzman-Morales was the problem in the interaction because the other patrons were the first ones to contact club staff. 1RP 34.

The bouncer testified that as he led Mr. Guzman-Morales out of the bar, Mr. Guzman-Morales threatened him. 1RP 41-42. Mr. Storrs said this threat was not recorded, that it is off camera. 1RP 81, 111. Mr. Storrs testified that right at the exit, Mr. Guzman-Morales stabbed him in the leg and that Mr. Storrs then put Mr. Guzman-Morales in a chokehold. 1RP 47, 50-51, 95.[1] Mr. Storrs pulled Mr. Guzman-Morales outside, out of the security camera view, and called for other staff to help. 1RP 51-52. Mr. Storrs was wounded and a knife was recovered from Mr. Guzman-Morales. 1RP 59, 175. This end to the scuffle is not on the video. Ex. 10.

Mr. Storrs testified he believes that he can see the stabbing in the video and accompanying stills. 1RP 85-86, 120-21. Ex. 10-14. Defense counsel cross-examined him about the video, positing that it shows Mr. Guzman-Morales hitting Mr. Storrs *in the side with an*

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[1] Mr. Storrs told the jury he is bigger than Mr. Guzman-Morales and has years of experience in wrestling and martial arts. 1RP 53, 123-26.

empty hand, not stabbing him *in the thigh with a knife*. 1RP 119. The State's forensic video analyst agreed that the video shows Mr. Guzman-Morales' hand going to the side of Mr. Storrs body, at the "right hip." 2RP 301, 307.[2] The analyst also testified that the video *could be* showing the stabbing just as described by Mr. Storrs, but is not definitive on this point, in part because it does not seem to show a knife, and the scuffle continues out of the camera's view. 2RP 304, 309.

The prosecutor had most of the State's witnesses testify about Mr. Storrs' character, as a trustworthy person who makes good decisions, especially when it comes to use of force as a bouncer. E.g. 1RP 148 (prosecutor eliciting bartender Julie Rofkar's opinion that he is an "excellent employee… he is not one to start fights;" as opposed to other "more aggressive" bouncers, Mr. Storrs "talks"); 2RP 224, 227 (prosecutor asking Mr. Storrs' employer Brian Tines to confirm he believes Mr. Storrs acted appropriately and that he trusts Mr. Storrs); 1RP 202 (prosecutor asking fellow bouncer Danielle Swankie to confirm that Mr. Storrs is a good co-worker and boss); 1RP 163 (prosecutor asking supervising bouncer Shawn Reilly to confirm he had

[2] The treating physician testified that Mr. Storrs sustained a "laceration to his right interior thigh." 2RP 319.

no concerns about the way that Mr. Storrs "handled the situation"); 1RP 175-76 (prosecutor asking Mr. Reilly to talk about Mr. Storrs as "an ideal employee… very talkative… he's polite" as a bouncer, had no history of "poor judgment or using excessive force," and handled himself "professionally and justifiably" in this situation). The prosecutor even had Mr. Storrs himself testify about how he "typically" handles difficult customers. 1RP 24-28, 36-37.[3]

Officer Joe Leighton with the Bellingham Police Department arrived on the scene, arrested Mr. Guzman-Morales, and *Mirandized* him. 2RP 271. In the patrol car, Mr. Guzman-Morales told Officer Leighton "he was scared because people were hitting him." 2RP 273. Mr. Guzman-Morales told the officer that "African-American men"[4] were hitting him and he "also mentioned that he had been hit by a bottle." 2RP 273. When the Officer asked Mr. Guzman-Morales about the stabbing, he answered plainly: "I was scared." 2RP 274, 278.

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[3] The prosecutor also asked directly: "Do you take any pride in being able to deescalate situations?" and Mr. Storrs answered: "A lot of pride. I'm one of best at it. I'm known for it. It's one thing that I'm known for. I'm not the big guy known for picking them up and kicking them outside. I am known for talking." 1RP 56.

[4] The bouncer confirmed there had been a group of African-American patrons in the club, that one of them got his attention because of Mr. Guzman-Morales, but no one from this group was ever identified or brought to court. 1RP 105.

Another bouncer who punched Mr. Guzman-Morales in the face while Mr. Storrs had him in a chokehold, also testified that she told the police she heard Mr. Guzman-Morales saying that he was scared. 1RP 198-99, 204.

Defense counsel proposed jury instructions on self defense and so did the State. Defense proposed the trial court instruct on WPIC 17.02 Lawful force definition, WPIC 17.04 Lawful Force – Actual Danger Not Necessary, WPIC 17.05 Lawful Force – No Duty To Retreat. CP 9-12. State originally also proposed that the trial court instruct on WPIC 17.02 Lawful force definition, WPIC 16.04 Aggressor – Defense of Self, Others, Property, WPIC 17.04 Lawful Force – Actual Danger Not Necessary. Supp. CP___; 2RP 359.

During the parties' jury instruction conference, the trial judge questioned whether a self defense instruction ought to be given. 2RP 359-73. The trial judge denied the defense request to have the jury instructed on self defense. 2RP 373; CP 18-38 (jury instructions).

The trial judge gave, as a lesser included offense, an instruction on assault in the fourth degree. CP 32-34. In making this ruling, the trial judge said that the evidence, specifically the video which did not capture the conclusion of the struggle could be interpreted as consistent

with Mr. Guzman-Morales hitting Mr. Storrs with an open hand, not stabbing him with a knife: "And there was only a hitting of his hand rather than a stabbing. I think he can make the argument [that Mr. Guzman-Morales did not commit assault in the second degree as charged.] 2RP 374.

The jury found Mr. Guzman-Morales guilty of second degree assault with a deadly weapon. CP 42-43. At sentencing, the court imposed the low end of the standard range. Mr. Guzman, whose criminal history consisted only of two driving-related misdemeanors, was ordered to serve out a term of 15 months of incarceration. CP 47-57 (judgment and sentence); CP 59 (criminal history). He timely appealed. CP 60.

D. ARGUMENT

THE TRIAL COURT ERRED AND VIOLATED MR. GUZMAN-MORALES' CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY REFUSING TO INSTRUCT THE JURY ON SELF DEFENSE

1. **A criminal defendant has a constitutional due process right to a jury instruction on self defense whenever there is some evidence, from whatever source, to support the instruction**

The right to assert a defense of self defense in a criminal trial stems from the robust right of every citizen in Washington State "to

reasonably defend himself against unwarranted attack." State v. Janes,121 Wn.2d 220, 237, 850 P.2d 495 (1993).

Additionally, it is constitutionally mandated that, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired." Art. I, § 24.[5] This "quite explicit language about the 'right of the individual citizen to bear arms in defense of himself'" set forth in article I, section 24 "means what it says." State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 99 (2010).

The federal constitution likewise guarantees the right to act in self defense; "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." McDonald v. City of Chicago, Ill., 561 U.S. 742, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); U.S. Const. amends. II, XIV. The right to bear arms in self defense is "deeply rooted" and "fundamental" to our concept of liberty. McDonald, 130 S. Ct. at 3036-37; Sieyes, 168 Wn.2d at 292.

The right to a jury instruction on self defense when the evidence supports it is guaranteed by the accused's constitutional due process right to fully defend against the charges. "The right of an accused in a

[5] Article I, section 24 states in full, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."

criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. The right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that supports the defense theory as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

> Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.

State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

A defendant is entitled to an instruction on self defense if there is *some* evidence demonstrating self defense. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010) (reversible error not to instruct on self defense even though the accused asserted gun discharged on accident). There must be some evidence that (1) the defendant subjectively feared that he was in imminent danger of bodily

harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. Id. at 337. The question of whether the defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. State v. Walker, 40 Wn.App. 658, 662, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985).

In determining whether sufficient evidence has been produced to justify a jury instruction on self defense, the trial court must view the evidence from the defendant's subjective point of view as conditions appeared to him or her at the time of the act. Wanrow, 88 Wn.2d at 234–36; Werner, 170 Wn.2d at 337. It is a “well-settled principle in Washington” that the jury also must view self defense from the conditions as they appeared to the defendant and consider what a reasonable person would have done if placed in the defendant’s situation. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); State v. Read, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002).

A person need not be in actual danger of bodily harm in order to be justified in using force in self defense. State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Instead, a person is entitled to act on appearances and, if he believes in good faith and on reasonable grounds

that he is in actual danger of bodily harm, although it afterwards might develop that he was mistaken as to the extent of the danger, he is entitled to use a reasonable amount of force to defend himself. Id.

The prosecution bears the burden of disproving, beyond a reasonable doubt, that the defendant reasonably believed that force was necessary to defend himself against imminent bodily harm. Walden 131 Wn.2d at 473. A self defense instruction is erroneous if it does not make it manifestly apparent to the average juror that a person is entitled to use self defense even though he is not in actual danger so long as he reasonably, but mistakenly, believes he is in danger. State v. Theroff, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

In Walden, the defendant was accused of stabbing several unarmed men. 131 Wn.2d at 472. The Supreme Court explained that self defense applies even to the use of "of deadly force in self defense against an unarmed assailant." Id. at 474, 475. The law of self defense does not bar a person from using a weapon; instead, it rests on whether the degree of force was necessary and reasonable, based on how the defendant perceived the threat he faced. Id. at 477. And a chokehold is deadly force. See State v. Valentine, 132 Wn. 2d 1, 31, 935 P.2d 1294, (1997) quoting City of Los Angeles v. Lyons, 461 U.S. 95, 116, 103

S.Ct. 1660, 1672–73, 75 L.Ed.2d 675 (1983) (Marshall, J., dissenting) ("It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death.").

Most critically, "In order to properly raise the issue of self-defense, there need only be *some evidence admitted in the case from whatever source* which tends to prove a [use of force] was done in self-defense." McCullum 98 Wn.2d at 488 (emphasis added). There need only be *some evidence*, but not necessarily so much as to create a reasonable doubt in the minds of the jurors on the issue of self defense. Id. This is a low threshold: "[t]he trial court is justified in denying a request for a self-defense instruction only where *no* credible evidence appears in the record to support a defendant's claim of self-defense." Id. (emphasis added).

2. **Mr. Guzman-Morales who testified he had "flashbacks" of Mr. Storrs choking him was entitled to a jury instruction on self defense even if he did not clearly remember stabbing Mr. Storrs in response.**

The trial court ruled the defense-proposed self-defense instructions were not warranted. 2RP 367-68. Unfortunately, the trial court's approach to the discussion was off-the-mark and its ruling is erroneous. From Mr. Guzman-Morales' statements to the police that he

was scared, his in-court testimony of "flashbacks" of being choked, and through other direct and circumstantial evidence in the record, there was ample support for a threshold finding that he intentionally and justifiably used force in self-defense.

A trial court determines whether there is sufficient evidence to instruct the jury on self defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). Because the defendant is entitled to the benefit of all the evidence, a defense of self defense may be based upon facts that are even inconsistent with his own testimony. Id; Werner, 170 Wn.2d at 337-38 (per curiam reversal for failure to instruct on self defense even though the accused claimed accident); Accord Callahan, 87 Wn. App. at 933-34; State v. Redwine, 72 Wn. App. 625, 631, 865 P.2d 552 (1994); State v. Fondren, 41 Wn. App. 17, 20, 701 P.2d 810 (1985).

In Callahan, the defendant engaged in a hostile verbal altercation with the driver and passengers of another car after the other car cut in front of him. Callahan, 87 Wn. App. at 928. The two cars pulled into a parking lot and the passengers of the other car got out. Id.

Callahan took a handgun from his car, got out, and approached the other men. Id. At trial, one of the passengers, Ben Manning, testified that Callahan pointed the gun at him during the altercation. Id. Callahan admitted displaying the gun, saying he did so because he feared for his safety, but denied intentionally pointing the gun at Manning. Id. The Court of Appeals concluded that the evidence was still sufficient to warrant a jury instruction on self defense. Id. at 933-34. Manning's testimony, coupled with Callahan's admission that he displayed the weapon, supported the inference that he intentionally used force in self defense. Id. Thus, the trial court erred in refusing to provide a self-defense instruction. Id.

Similarly, in Redwine, Darwin Hines testified that the defendant pointed a shotgun at him when he went to his home to serve him with legal papers. Redwine, 72 Wn. App. at 627. Redwine testified he displayed the shotgun but never pointed it at Hines. Id. at 627-28. Two more witnesses also testified they saw Redwine carrying the gun but said he never pointed it at Hines. Id. Even on those facts the Court concluded the evidence was still sufficient for a factfinder to find Redwine justifiably used force in self defense and a self defense instruction should have been provided. Id. at 631.

The defendant in Fondren, grabbed a shotgun to protect himself. Fondren, 41 Wn. App. at 20. During a struggle, the gun accidentally went off, killing a person. Id. There too the Court rejected the State's argument that self defense was not at issue because Fondren denied intentionally pointing the gun or pulling the trigger. Id.

More recently, in State v. Werner, the Supreme Court reversed the Court of Appeals when it departed from the above line of precedent. Werner claimed he accidentally discharged a firearm when confronted by a pack of his neighbor's dogs. 170 Wn.2d at 336. The trial court denied his proposed self defense instruction and he was convicted of first degree assault. Id.

> The Court of Appeals in this case distinguished Callahan on the basis that Werner faced two distinct potential threats: the dogs and [his neighbor]. The court held that, viewing the evidence in a light most favorable to Werner, there was no evidence he was justified in acting in self-defense against [the neighbor], the person he was charged with assaulting. We disagree.

Id. at 337.

The Supreme Court observed that Werner "stated that he was afraid" and inferred that such a fear "was arguably reasonable," because the dogs were dangerous and their owner, the neighbor, refused to call them off. Id. The Supreme Court further hypothesized that "Werner could reasonably have believed that [the neighbor]

personally posed a threat through the agency of a formidable group of canines that were under his control." Id. at 338. Despite the fact that Werner claimed the discharge was accidental, the Supreme Court turned to the direct and circumstantial evidence in the record to make its own reasonable inferences in the defendant's favor. Id.

Here, as in Werner, Callahan, Redwine, and Fondren, Mr. Guzman-Morales himself did not provide direct evidence of intentionally using force to protect himself from Mr. Storrs. But, Mr. Guzman-Morales testified that he had flashbacks of "getting choked" and also that he was injured in the encounter. 2RP 336. He admitted the knife was his. 2RP 338-39. Officer Leighton testified that Mr. Guzman-Morales told him he was "scared because people were hitting him" and that he explained the stabbing by saying "I was scared." 2RP 273-74, 278. The bouncer who punched him testified she told the police she heard Mr. Guzman-Morales saying he was scared. 1RP 198-99, 204. And, Mr. Storrs, a trained fighter, most certainly had him in a chokehold. 1RP 53, 123-26.

Between the direct and circumstantial evidence admitted at trial, there was enough evidence in the record of Mr. Guzman-Morales's intentional use of force to justify the requested self-defense jury

instruction. Werner, 170 Wn.2d at 337-38; Callahan, 87 Wn. App. at 933-34; Redwine, 72 Wn. App. at 631; Fondren, 41 Wn. App. at 20.

In addition, there was sufficient evidence to support the other elements of a self defense claim. A defendant is entitled to an instruction on self defense if there is some evidence that (1) the defendant subjectively feared he was in imminent danger of bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. Werner, 170 Wn.2d at 337.

The jury could have found that Mr. Guzman-Morales feared that Mr. Storrs choking him put him in imminent danger of bodily harm and that this belief was objectively reasonable. If Mr. Storrs was wrong, and video shows a hit with an open hand, then the chokehold came before the stabbing, which likely occurred off camera. Ex. 10 at 1:31-1:32. The jury should have been making this determination and it could very well have concluded that taking the knife out was reasonably necessary to ward off Mr. Storrs' attack.[6]

Unfortunately, the record of the jury instruction discussion below makes for an awkward read. The trial court mischaracterized

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[6] RCW 9A.36.021(g) provides that an assault by strangulation or suffocation constitutes an assault in the second degree.

defense counsel's request for a self-defense instruction to be a challenge to the very existence of a stabbing. 2RP 362-63, 365 ("It's a challenge to the sufficiency of the evidence."). The trial court insisted that if the jury were to find that Mr. Guzman-Morales did not stab Mr. Storrs just inside the nightclub – as Mr. Storrs thought – then "there's no need for self-defense, because he's found not guilty. There's no, there is insufficient evidence to find him guilty." 2RP 367.

The trial court also made a strange assertion that "there's no evidence that he [Mr. Guzman-Morales] used force at all." 2RP 363.[7] See also 2RP 373 ("I don't think that we have any evidence of use of force here, *only that he swung his arm around and stabbed Mr. Storrs*.") (emphasis added).

Of course, Mr. Guzman-Morales admitted he had the knife, Mr. Storrs was certainly wounded, and testified that Mr. Guzman-Morales was the one who harmed him. The fact that Mr. Guzman-Morales did not explicitly remember the stabbing is immaterial. Moreover, the trial court erred in insisting that there be direct evidence that Mr. Guzman-Morales stabbed at Mr. Storrs after the bouncer choked him. 2RP 359-60, 363. It was only after denying the self defense instruction that the

[7] In response, defense counsel stated the obvious: "There is evidence that he used it. There's a stab wound." 2RP 364-65.

trial court finally acknowledged defense counsel was arguing this was a factual issue subject to a valid dispute: “And there was only a hitting of his hand rather than a stabbing. *I think he can make the argument*.” 2RP 374 (emphasis added).

“[O]nly where no plausible evidence appears in the record upon which a claim of self-defense might be based is an instruction on [self-defense] not necessary.” State v. Adams, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982). Here, Mr. Guzman-Morales’ testimony that he was scared, combined with the fact that he was choked by Mr. Storrs, was sufficient to raise the issue of self defense. “Once any evidence of self-defense is produced, the defendant has a due process right to have his theory of the case presented under proper instructions.” Adams, 31 Wn. App. at 396.

Because the evidence was sufficient for the jury to find that Mr. Guzman-Morales justifiably used force in self defense, the trial court erred in refusing to provide a self defense instruction, and this violated Mr. Guzman-Morales’ right to due process. Werner, 170 Wn.2d at 336-37; McCullum, 98 Wn.2d at 488-89.

3. **The conviction must be reversed.**

A trial court's refusal to provide a self-defense instruction when requested by the defense is reversible error if the defense is thereby prejudiced. Werner, 170 Wn.2d at 337. The error is prejudicial if there was evidence to warrant the instruction and the jury could have believed that version of events. Id. at 337-38; State v. Riley, 137 Wn.2d 904, 908 n.1., 976 P.2d 624 (1999).

Here, defense had given notice of its intent to rely on a lawful use of force defense and opened on self defense. CP 8; 1RP 16. The State presented its case-in-chief accordingly and was initially ready to have the jury be instructed on the lawful use of force defense. Supp. CP __. Presumably availing itself of the ER 404(a)(2) exception to the general rule that evidence of a person's character is inadmissible, the prosecution placed great emphasis on Mr. Storrs' character.[8] Much of

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[8] Relevant portions of ER 404 read as follows:

RULE ER 404 - CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except…

…

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the

the State's case-in-chief focused on painting him as a non-aggressive trustworthy man who acted in conformity with those character traits during this incident. 1RP 24-28, 36-37, 56, 148, 163, 175-76, 202, 2RP 224, 227. This evidence could only have been relevant and admissible if self defense – and the first aggressor question – was at issue.

The State bears the burden of proving a constitutional error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this heavy burden here. Defense counsel correctly indicated that the combination of direct and circumstantial evidence supported the inference that Mr. Guzman-Morales stabbed Mr. Storrs off-camera *after* Mr. Storrs wrapped his arm around Mr. Guzman-Morales' throat: "the whole theory of the case is that the video does not show any stabbing." 2RP 360-62. In deciding to instruct on the lesser included offense of assault in the fourth degree, the trial judge accepted that the video could be interpreted that way: "And there was only a hitting of his hand rather than a stabbing. I think he can make the argument." 2RP 374. See also 2RP 304, 309 (state forensic video analyst testifying the video recording is not dispositive).

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prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

Without the self defense instruction, Mr. Guzman-Morales was unable to argue his theory of the case to the jury, instruct it on that theory, inform it of the applicable law, or to give it the ability to decide the critical factual question, as required by due process. Koch, 157 Wn. App. at 33.

The State cannot show beyond a reasonable doubt that the outcome would have been the same had the jury been instructed on self defense. This Court should accordingly reverse the conviction and remand for a new trial.

E. CONCLUSION

The trial court violated Mr. Guzman-Morales' constitutional due process right to present a defense by refusing to instruct the jury on self defense. The conviction must be reversed and remanded for a new trial with proper instructions.

Respectfully submitted this 16th day of October, 2015.

/s Mick Woynarowski

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MICK WOYNAROWSKI (WSBA 32801)
Washington Appellate Project - 91052
Attorneys for Appellant
1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: mick@washapp.org

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 73132-7-I
	)	
EDILBERTO GUZMAN-MORALES,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	EDILBERTO GUZMAN-MORALES 380384 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2048 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

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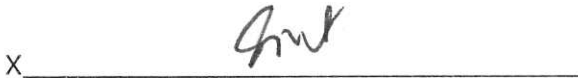

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711