74062-8

NO. 74062-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ACKLEY,

Appellant.

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

The Honorable Susan K. Cook, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The court erred in refusing to instruct the jury on self-defense.

2. Appellant's due process rights were violated where the court refused to instruct the jury on self-defense.

3. The trial court erred when it excluded evidence relevant to appellant's experiences with the complaining witness.

4. The court erred when it failed to consider relevant evidence of appellant's experiences with the complaining witness in making its decision not to instruct the jury on self-defense.

Issues Pertaining to Assignments of Error

1. Appellant was charged with second degree assault with a deadly weapon. He claimed self-defense. Where appellant presented evidence that he pulled out a knife during his confrontation with the complaining witness because he believed the witness was reaching for a gun, was appellant's due process right to present a defense violated when the court refused to instruct the jury on the defense theory that appellant acted in self-defense?

2. Where the defense is self-defense jurors must consider past experiences in assessing the reasonableness of a defendant's actions. Appellant presented evidence that a few months before the confrontation

with the complaining witness, the witness threatened appellant. The evidence impacted appellant's perceptions and reactions to the threat he perceived. The court not only excluded the evidence of the threats, it failed to consider the evidence in its determination of appellant's self-defense claim.

a. Did the court err in excluding the evidence?

b. Did the court err in failing to consider the evidence in its assessment on whether appellant was entitled to a self-defense claim?

3. The State presented evidence appellant pulled out a knife and brandished it toward the complaining witness causing the witness fear of bodily harm. The appellant acknowledge he pulled out a knife and held it by his side. The court reasoned because appellant testified he held the knife by his side he failed to acknowledge there was an assault and therefore he was not entitled to a self-defense claim. Was the court's reason for rejecting appellant's self-defense claim insufficient as a matter of law?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecutor's Office charged Christopher Ackley with second degree assault with a deadly weapon. CP 75. The

information alleged Ackley intentionally assaulted James O'Connor with a knife. Id.

Ackley's defense theory was self-defense and he proposed self-defense instructions. CP 53-63. The court refused to instruct the jury on Ackley's self-defense theory, which is more fully explained below.

A jury found Ackley guilty as charged. CP 90. Ackley was sentenced to a standard range sentence of 17 months based on his offender score. CP 74-74.

Ackley timely appealed his judgment and sentence. CP 28.

2. Substantive Facts

a. State's Case

James O'Connor and Ackley both live in Mount Vernon, Washington. Ackley's wife, Julie Ackley, is O'Connor's cousin. 1RP 106, 157.[1] Sometime in 2012, while Ackley was in California, Julie Ackley allegedly had an affair with O'Connor's brother-in-law, who was married to O'Connor's sister. 1RP 159, 171-172; 2RP 153. O'Connor discovered the affair when he saw Ackley's wife and his brother-in-law at a restaurant O'Connor owned at the time. 1RP 172. According to

[1] 1RP refers to the verbatim report of proceedings (VRP) for August 3, 2015; 2RP the VRP for August 4, 2015, the morning of August 5, 2015, and October 2, 2015; 3RP the VRP for the afternoon of August 5, 2015 and October 1, 2015.

O'Connor the affair ended a few days before Ackley returned from California. Id.

A few years later, in early 2014, O'Connor decided to reveal that he knew about the affair to Ackley's wife, his sister and his mother. 1RP 173; 2RP 153. The affair became a topic of discussion within the family. 1RP 159, 173. Ackley was angry with O'Connor for discussing the affair with family members. 1RP 107, 159, 173.

On two occasions in early March 2015, firecrackers were thrown from a car at O'Connor's home. 1RP 108. The first time it happened O'Connor was on business trip and only his wife, Angie O'Connor, was at home. Id. O'Connor was home when it happened the second time. 1RP 108, 160.

O'Connor reported the incidents to police. The O'Connor home is equipped with a surveillance camera. Although O'Connor and his wife viewed the video from the camera and testified they recognized Ackley's car, O'Connor told police it was too dark to see anything on the video and he did not let police view the video. 1RP 108, 160; 2RP 160-161.

On May 15, 2015, O'Connor and his wife were on a walk. They were holding hands and O'Connor was walking on the outside of his wife on street side of sidewalk. 1RP 109-110, 127-128, 161-163, 183-184. Ackley happened to drive by them. Ackley's daughter was in the car with

him. 1RP 111, 117, 164-165. As he drove by Ackley said something to O'Connor. Ackley then turned his car around, parked perpendicular to the sidewalk, and got out of the car. 1RP 111, 164-165.

When Ackley got out of his car, O'Connor's wife started to backup and O'Connor turned to face Ackley. 1RP 129. Ackley, who was about 20 feet from O'Connor, reached into his pocket, pulled out a knife and waved it at O'Connor. 1RP 112, 115, 165, 189-190, 192. Ackley started walking toward O'Connor and said, "I will slice you open bitch." RP 165 (8/3/2015). O'Connor testified he put his hands up in the air and told his wife to run and call 911. 1RP 167, 191. O'Connor then asked Ackley what he was going to do with knife. 1RP 165.

While O'Connor's wife was running to find a phone she heard Ackley tell O'Connor that he was "going to slice you open bitch." 1RP 132. O'Connor's wife ran up to Jill Salas, who was close by, and Salas noticed she had tears on her face and was obviously upset. 1RP 139. O'Connor's wife asked Salas if she could borrow Salas' phone to call police. 1RP 138. O'Connor's wife used Salas' phone and called 911. When she was on the phone with 911 she heard O'Connor and Ackley saying things to each other. 1RP 116, 134. Salas heard two men swearing at each other and one of them said, "leave us alone." 1RP 144-146.

While O'Connor's wife was on the phone, O'Connor and Ackley confronted each other. O'Connor testified that he asked Ackley why he had knife. 1RP 192. When he saw that his wife was on the phone with 911 O'Connor started yelling at Ackley that the police were coming. 1RP 168. Ackley then got back into his car and drove away. Id. Both O'Connor and his wife said they scared and afraid. 1RP 115, 168.

Officer Chantelle VanDyke responded to the 911 call and spoke with O'Connor and his wife. 2RP 15-16. On cross examination O'Connor denied he stepped out and raised his hands towards Ackley when Ackley drove by. 2RP 8-9. He said he did not raise his hands until Ackley pulled out the knife. 2RP 10. However, O'Connor told VanDyke that when Ackley drove by and yelled at him he turned and raised his hands toward Ackley's car. 2RP 36. O'Connor told VanDyke that Ackley then turned the car around, and that when Ackley got out of the car he pulled out a knife, held the knife towards O'Connor and said he was going to slice him. Id.

After VanDyke spoke with O'Connor and his wife, police went to Ackley's home. His home is only a few blocks away from where he and O'Connor confronted each other. 2RP 18. Ackley was in his garage and the garage door was open. Id. VanDyke called to Ackley and he came out and spoke with her. 2RP 19. Ackley told VanDyke he had done

something stupid. 2RP 19. When VanDyke told Ackley that he was going to be arrested, Ackley told VanDyke he suffered from PSTD, and anxiety and that when he saw O'Connor he yelled out the window of his car "suck it bitch." 2RP 20-21, 31. Ackley admitted that he pulled out a knife and said that he thought about hurting O'Connor but his "better judgment" told him not to and he set the knife down. 2RP 20. Ackley also wanted to show VanDyke what he said were threatening text messages he received from O'Connor a few months earlier but she did not look at the messages because she did not believe the messages were relevant to her investigation. 2RP 19-20, 33.

b. Defense Case

Ackley testified that after he moved back to Mount Vernon he studied drug and alcohol counseling at Skagit Valley College. He also worked for a few months at the Skagit Valley Recovery Center helping youth go through detoxification. 2RP 63-65.

Ackley admitted he felt animosity towards O'Connor because O'Connor had told him that Ackley's wife cheated on Ackley a few years earlier. 2RP 119. He also admitted he threw the firecrackers at O'Connor's house because he wanted to disturb O' Connor's sleep. 2RP 115.

The last time Ackley spoke with O'Connor was the February before the May confrontation. During that conversation, in reference to O'Connor's revelation that Ackley's wife had an affair, Ackley told O'Connor not to bring O'Connor's family drama into his family, and to keep Ackley's wife's name out of his (O'Connor's) mouth. 2RP 111-113. O'Connor hung up on Ackley but before he did O'Connor told Ackley he wanted to continue the conversation. 2RP 113-114.

O'Connor also testified that during the conversation Ackley told him to keep his (Ackley's) wife's name out of his mouth. 2RP 156. O'Connor was out of town at the time and he admitted that he told Ackley that when he returned they would talk again, and that at some point during the conversation he hung up on Ackley. 2RP 157.

Ackley testified that on May 15, 2014, he was driving his daughter home from softball practice when he saw O'Connor and O'Connor's wife walking. Out of his car's window he yelled to O'Connor "suck it bitch." 2RP 66-67. When he looked in the rear view mirror after passing O'Connor, he saw O'Connor raise his hands in the air in a manner that Ackley believed indicated O'Connor wanted to talk to him. 2RP 68. Ackley turned his car, stopped perpendicular to the sidewalk and got out. 2RP 69.

As Ackley got out of the car O'Connor quickly put his hands down to his waist and pulled his shirt up. 2RP 71, 73. Ackley, who grew up in Los Angeles, explained it was a dangerous city when he was growing up and that what flashed through his mind when O'Connor pulled up his shirt was that O'Connor was going to pull a gun on him. 2RP 72, 120. In response Ackley pulled out his pocketknife, clicked the blade out, and held it down by his side. 2RP 72, 73. O'Connor then asked Ackley in loud voice what his was going to do with the knife and if Ackley was going to "slice" him. 2RP 74. Ackley took a few steps towards O'Connor and O'Connor again asked Ackley what he was going to do with knife. Ackley thought he might have said something to O'Connor but after a few seconds he realized O'Connor did not have a gun. 2RP 74-75. At that point Ackley did not believe he needed a weapon to defend himself so he closed the knife, walked back toward his car, and threw the knife inside. 2RP 76.

Ackley then asked O'Connor if there was something O'Connor wanted to talk about. O'Connor told Ackley that his wife was calling police, that he did not have anything to say to Ackley, and he asked Ackley to please leave. 2RP 79-80. Their conversation was loud and laced with profanities. 2RP 80, 134. Ackley got back into his car and drove home. Id.

When VanDyke and another officer came to his house a short time later, Ackley asked if they were there because of something stupid he had done. Ackley was referring to yelling at O'Connor and putting his young daughter in a dangerous situation. 2RP 83-84. Ackley explained to the officers he stopped because he saw O'Connor raise his hands as he drove by. 2RP 105. Ackley also wanted the officer to hear a message on his phone. 2RP 85.

Ackley admitted that pulling out the knife was stupid but that he did it in reaction to O'Connor lifting his shirt. He believed O'Connor was going for a gun and he pulled out his knife to defend himself. 2RP 106, 124, 127.

c. Additional Facts Pertaining to Assignments of Error

The defense theory was self-defense. Prior to O'Connor's testimony Ackley moved to admit the message O'Connor left on Ackley's phone about two months before the May 15 confrontation. The message refers to Ackley being in prison and O'Connor threatens Ackley. 1RP 148-153; CP 89 (transcript of the message). Ackley argued the message was relevant to Ackley's self-defense claim because it was evidence of Ackley's state of mind at the time of the confrontation. RP 149-150. The court reserved ruling on admission of the recording because at that point in

the trial the court did not believe Ackley had established he acted in self-defense, and therefore the recording was not relevant. 1RP 153-154, 156.

During Ackley's testimony, and after he testified that he pulled out his knife to defend himself because he believed O'Connor had a gun when O'Connor lifted his shirt, defense counsel asked Ackley about the phone message he received from O'Connor. 2RP 85. The State objected and there was another lengthy discussion about the message and Ackley's self-defense claim. 2RP 86-104.

Ackley argued that based on O'Connor's and Ackley's testimony the jury could infer that Ackley pulled out the knife to create an apprehension of fear of bodily injury. 2RP 98-101. Because he believed O'Connor had a gun when he lifted his shirt, Ackley pulled out his knife to defend himself. 2RP 100-101, 103-104. Therefore, the evidence that O'Connor left a threatening message on Ackley's phone a couple of months earlier was relevant to Ackley's belief that when O'Connor lifted his shirt he was going to get a weapon. 2RP 94.

The court ruled the phone message evidence was not relevant because Ackley was not entitled to a self-defense instruction. 2RP 104. The court reasoned Ackley was required to acknowledge he committed second degree assault before he was entitled to claim self-defense, and because he testified he held the knife at his side "...there isn't an assault,

and therefore there can't be a justifiable assault." 2RP 104. The court concluded, "...therefore there isn't any need for self-defense instructions." 2RP 103.

Later, again during Ackley's testimony, counsel requested permission to examine Ackley about a conversation O'Connor and Ackley had in late January or early February. Counsel made an offer of proof that part if the conversation included threats. 2RP 108. The court ruled Ackley could testify he had a conversation with O'Connor and O'Connor told him they would talk again because it supported Ackley's testimony that when O'Connor raised his arms Ackley believed O'Connor wanted to talk to him and that was why he stopped his car. The court also ruled, however, that defense counsel could not examine Ackley about any threats O'Connor made during that call. Id.

After Ackley testified, defense counsel renewed her request that the court instruct the jury on self-defense. 2RP 142-143; see, CP 53-63 (defense proposed instructions). In the alternative counsel proposed the court instruct the jury on the alternative definition of assault as an act that requires unlawful force.[2] And, further, based on the court's earlier ruling that by pulling the knife out of his pocket and holding to his side Ackley

[2] Washington Pattern Jury Instruction (WPIC) 35.50; CP 57.

did not commit an assault, counsel requested that the court instruct the jury that act did not constitute unlawful force. 2RP 144-145.

The court denied the requests. It reasoned:

> Number one, Mr. Ackley did not use force when he held the knife down next to his leg, and its very difficult for to see that my reasonable juror could find that he was presented with a need to protect himself simply by Mr. O'Connor pulling on his shirt.
>
> And I do read RCW 9.41.270[3] to require a use of presently threatened unlawful force, or use of unlawful force, and we don't have that here. What we have is Mr. Ackley's testimony that Mr. O'Connor pulled up his shirt in a way that Mr. Ackley felt demonstrated the fact that he might have a gun under there simply because of – apparently Mr. Ackley's experience in L.A. So this not a self-defense case either for the unlawful display of a weapon or for the Assault in the Second Degree.

2RP 146-147.

After the defense rested its case, the court reiterated it would not instruct the jury on self-defense, nor include the unlawful force definition of assault. 2RP 163. Ackley took exception to the court's definition of assault instruction, and objected to the court's failure to instruct the jury on his proposed instructions. 3RP 1.

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[3] "It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." RCW 9.41.270(1).

The court again explained its reasons for not instructing the jury on self-defense. It found Ackley's testimony did not describe an assault, and that a reasonable person would not be afraid of injury because someone lifts up the front of his shirt. 3RP 3-4.

C. ARGUMENT

THE COURT'S REFUSAL TO INSTRUCT THE JURY ON ACKLEY'S SELF-DEFENSE CLAIM VIOLATED ACKLEY'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE.

Ackley was charged with second degree assault with a deadly weapon. RCW 9A.36.021(1)(c). Assault is defined as: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). There was no evidence Ackley committed an actual battery or attempted battery. The State's theory was that Ackley intentionally placed O'Connor in apprehension of harm, and the court instructed the jury on that definition of assault. CP 38 (Instruction No. 7).

Ackley's defense theory was that during his confrontation with O'Connor he pulled out his knife because he believed O'Connor was going for a weapon when O'Connor lifted up his shirt. Although the

evidence supported Ackley's self-defense claim the court refused to instruct the jury on self-defense. The refusal to instruct the jury on self-defense denied Ackley his constitutional right to present a defense.

a. Due process requires the court instruct the jury on the defense theory of self-defense where there is some evidence to support a self-defense claim

A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). That entitlement is constitutionally mandated. Due process[4] 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) (citations omitted), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011).

Due process also requires the State prove all elements of a criminal offense beyond a reasonable doubt. That includes proving the absence of

[4] U.S. Const. amend. XIV; Wash. Const. art I, § 3.

self-defense. State v. Acosta, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984).

In the context of a self-defense claim it has long been held that if there is merely some evidence to support a claim of self-defense the issue is properly raised. State v. Werner, 170 Wn.2d 333, 336–37, 241 P.3d 410 (2010); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). "The defendant's burden of 'some evidence' of self-defense is a low burden." State v. George, 161 Wn.App. 86, 96, 249 P.3d 202, review denied, 172 Wash.2d 1007, 259 P.3d 1108 (2011) (quoting State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). Indeed, it is not even necessary that the evidence create a reasonable doubt in the minds of the jurors, and a court is justified in refusing to instruct the jury on self-defense only where there is no credible evidence to support a self-defense claim. McCullum, 98 Wn.2d at 488.

To determine whether a defendant is entitled to instructions on self-defense the court must view the evidence from the standpoint of a reasonable person who "knows all the defendant knows and sees all the defendant sees." State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). This standard incorporates both a subjective and objective element. Id. at 242-243. When subjectively assessing a defendant's self-defense claim,

the trial court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). When objectively assessing a defendant's claim, the trial court must determine what a reasonable person would have done if placed in the defendant's situation. Id.

The standard of appellate review depends on the trial court's reasons for refusing to instruct the jury on self-defense. If the refusal is because the court found no evidence supporting the defendant's subjective belief of imminent danger of injury the standard of review is abuse of discretion. If the refusal is because it found no reasonable person in the defendant's shoes would have acted as the defendant acted the standard of review is de novo. Read, 147 Wash.2d at 243 (citing State v. Walker, 136 Wn.2d at 771–72).

Here, the court found that it was not reasonable for Ackley to have feared danger of injury in response to O'Connor lifting up his shirt. That decision is reviewed de novo.

b. There was sufficient evidence to require the court to instruct the jury on self-defense

Ackley explained that when O'Connor lifted up his shirt he believed O'Connor was going for a gun. Ackley's belief was based in part

on his experience growing up in Los Angeles, where that particular gesture meant something bad was about to happened.[5] See, McCullum, 98 Wn.2d at 489 (sufficient evidence of self-defense where defendant testified the victim made a movement to produce a gun). It would also be reasonable for a person in Ackley's shoes to believe there was no reason for O'Connor to pull up his shirt as soon as Ackley got out of his car unless O'Connor wanted to Ackley to think he had weapon.

The evidence also showed animosity between Ackley and O'Connor because of O'Connor's revelation about Ackley's wife's affair, and both testified that during a heated, aborted phone conversation the two had a few months earlier about O'Connor talking to family members about the affair, O'Connor indicated he wanted to continue the conversation. Ackley stopped his car when he saw O'Connor raise his hands because he believed O'Connor wanted to continue that conversation. Ackley believed O'Connor wanted him to stop. Then Ackley saw O'Connor pulled up shirt as if going for a gun. It can be reasonably inferred from Ackley's testimony that O'Connor wanted Ackley to stop so he could confront him and that by pulling up his shirt the confrontation would involve a weapon.

[5] Indeed, O'Connor's wife testified that when Ackley merely reached into his pocket she believed he was reaching for a gun. 1RP 131.

It is axiomatic that in determining whether a self-defense claim is warranted the court must view the evidence in the light most favorable to the defendant. George, 161 Wn.App. at 95–96; see, State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 676 (1997) (same). A defendant's testimony alone is sufficient to raise the issue of self-defense. State v. Adams, 31 Wn.App. 393, 395, 641 P.2d 1207 (1982) (citations omitted). But, the evidence does not need to come from the defendant's testimony, and a defendant may even rely on evidence that is inconsistent with his own testimony. Callahan, 87 Wn.App. at 933.

The entirety of the evidence when properly viewed in favor of Ackley and from the perspective of what Ackley knew and saw satisfies Ackley's low burden of producing some credible evidence that he acted in self-defense. The proper question is not whether Ackley acted in self-defense, but whether he produced some evidence of self-defense. Ackley was entitled to have the jury instructed on self-defense.

c. Evidence that O'Connor threatened Ackley a few months before their confrontation was relevant and necessary to assess the reasonableness of Ackley's belief that he needed to defend himself

Moreover, there was additional evidence that supported Ackley's fear O'Connor wanted to harm him and that also led Ackley to believe O'Connor was going for a weapon when he lifted his shirt. The court not

only erroneously ruled the evidence inadmissible; it failed to consider the evidence in its evaluation of the self-defense claim.

Ackley twice sought to admit a voice mail message he received from O'Connor a couple months before the May incident. In his message O'Connor threatens Ackley. CP 89.[6] Ackley argued the message was relevant to his self-defense claim because it was evidence of his state of mind that he believed O'Connor was going for a gun or weapon when he lifted his shirt. 1RP 149-150; 2RP 94.

Ackley also wanted to testify that during a conversation with O'Connor at about the same time as the message, O'Connor made threatening remarks. Counsel's offered that O'Connor would admit the conversation was hostile. 2RP 107-108; 3RP 3. The court ruled the evidence was irrelevant because Ackley testified he held knife down by his side, therefore he did not commit an assault and therefore was not entitled to claim self-defense. 2RP 102-104.

A defendant has the constitutional right to defend against the State's allegations by presenting a complete defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v.

[6] In addition to referencing Ackley being in prison, which the defense argued should be redacted, O'Connor tells Ackley "If you fucking think that I'm gone and someone over there to do my dirty work, bring it bitch. I will be there as soon as I get here. As soon as I am done here I'll be over there, okay. Keep your fucking mouth going motherfucker. I'll come fucking fix it for you. Fuck you cock sucker." CP 89.

Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI and XIV; Wash. Const. art I, §§ 3, 22. Although a defendant has no constitutional right to present irrelevant evidence, only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn.App. 803, 815, 723 P.2d 512 (1986) *aff'd.*, 108 Wn.2d 515 (1987).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if the State shows that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Jones, 168 Wn.2d 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Moreover, where evidence is highly probative no State interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22. Id. (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). A claimed violation of the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719.

Where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take

into account "all the facts and circumstances known to the defendant, including those known substantially before the [incident]." Id. at 234. The "vital question is the reasonableness of the defendant's apprehension of danger," the jury must stand "as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. at 235 (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

A defendant therefore has a right to present evidence of a victim's prior acts that contribute to the defendant's reasonable apprehension of harm. State v. LeFaber, 77 Wn.App. 766, 769, 893 P.2d 1140 (1995), *rev'd on other grounds*, 128 Wn.2d 896, 913 P.2d 369 (1996). "Thus, circumstances predating the killing by weeks and months were deemed entirely proper, and in fact essential, to a proper disposition of the claim of self-defense." Wanrow, 88 Wn.2d at 235; see also, State v. Allery, 101 Wn. 2d 591, 595, 682 P.2d 312 (1984)), *abrogated on other grounds*, 167 Wn.2d 91, 217 P.3d 756 (2009) ("The jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim.") (emphasis added).

In this case, Ackley's right to present a complete defense encompassed his claim of self-defense. Because Ackley's subjective

impression that he was in danger of injury is measured against the actions of a person in Ackley's shoes knowing all that he knew, evidence of his past experiences with O'Connor and O'Connor's prior acts known to Ackley were relevant and highly probative in assessing his self-defense claim. In addition to the evidence that was admitted, the evidence of the phone message and conversation where O'Connor threatened Ackley were relevant to show why Ackley believed O'Connor was reaching for a weapon when he lifted his shirt. The court erroneously excluded the evidence.

Because it excluded the evidence it appears the court failed to consider it in ruling on Ackley's self-defense claim. In essence the court ruled the evidence that established Ackley's self-defense claim was irrelevant because Ackley failed to first establish his self-defense claim.

As shown above, the evidence was relevant to Ackley's self-defense claim. The evidence was necessary "to a proper disposition of the claim of self-defense." Wanrow, 88 Wn.2d at 235. The message and phone conversation further supports Ackley's self-defense claim. The court abused its discretion when it failed to consider the evidence in assessing Ackley's self-defense claim. [7]

d. The court's reasons for rejecting Ackley's self-defense claim are legally insufficient

The court found that because Ackley testified he held the knife next to his leg it was a separate reason why he was not entitled to present his self-defense claim to the jury. The court reasoned that if Ackley held the open knife to his side it could not have caused O'Connor an apprehension of fear of harm "[s]o, there isn't an assault, and therefore there can't be a justifiable assault." 2RP 104. The court reiterated that theme throughout the trial. See, 2RP 147 (Ackley did not use or offer to use force); 3RP 3-4 (by holding the knife by his side Ackley could not have created fear); 2RP 144-145 (by pulling the knife out of his pocket and holding to his side Ackley did not commit an assault).

[7] "[A] court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.' " State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

It is not entirely clear what the court meant. The court could have meant the law required Ackley to admit he held the knife towards O'Connor, consistent with O'Connor's testimony, before he was entitled to claim he acted in self-defense. It could also have meant Ackley's testimony that he held the knife by his side was inconsistent with a self-defense claim and therefore he was not entitled to claim self-defense. Regardless, both reasons are legally wrong.

First, Ackley was not required to admit he held the knife towards O'Connor before he was entitled to claim self-defense. Evidence of self-defense may come any source and the evidence does not need to be the defendant's own testimony. State v. Walker, 164 Wn.App. 724, 729 n. 5, 265 P.3d 191 (2011) (quoting State v. Jordan, 158 Wn.App. 297, 301 n. 6, 241 P.3d 464 (2010); Callahan, 87 Wn.App. at 933. Assuming the law first required evidence that Ackley committed an assault before he was entitled to claim self-defense, O'Connor's testimony and Ackley's statement to police that when he pulled out the knife because he wanted to hurt O'Connor but decided against it, was sufficient evidence for the jury to infer Ackley intended to cause an apprehension of fear of bodily harm. [8]

[8] Intent to create apprehension of bodily harm is an essential element of assault in the second degree. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

In addition, even without that evidence, Ackley's testimony alone was enough to allow the jury to infer the requisite intent. The court instructed the jury, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." CP 39 (Instruction No. 8); RCW 9A.08.010(1)(a). The required intent is the intent to commit an act that constitutes an assault. State v. Allen, 67 Wn.App. 824, 826–27, 840 P.2d 905 P.2d 905 (1992) (*abrogated on other grounds*, State v. Brown, 140 Wn.2d 456, 466, 998 P.2d 321 (2000). The jury could have reasonably inferred that given the circumstances Ackley intended to create an apprehension of fear of bodily injury. See, State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (intent can be inferred as a logical probability from all facts and circumstances).

It was the jury's province to decide whether evidence supported finding Ackley did or did not intend to create an apprehension of fear of bodily injury. "An 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. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (citing State v. Snider, 70 Wn.2d 326, 327, 422

P.2d 816 (1967)).[9] In finding Ackley did not intent to assault O'Connor and therefore was not entitled to a self-defense claim the court invaded the province of the jury by weighing the evidence. "In evaluating the adequacy of the evidence [to support a proposed instruction], the court cannot weigh the evidence." State v. Williams, 93 Wn.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wash.2d 1002, 984 P.2d 1034 (1999).

Second, even if Ackley's testimony was inconsistent with a self-defense claim, which it was not, that does not justify refusing to instruct the jury on self-defense. It is generally permissible for defendants to argue inconsistent defenses if they are supported by the evidence. State v. Frost, 160 Wn.2d 765, 772, 161 P.3d 361 (2007).

The Werner case is instructive. Werner was charged with first degree assault. Werner testified he pulled out his gun to scare away dogs that were circling him. Werner asked the victim to call off the dogs and when he did not Werner went to call police and his gun accidently discharged. Werner, 170 Wn.2d at 336. The trial court refused to instruct the jury on self-defense because Werner claimed the shooting was an accident. The Werner Court held Werner was entitled to claim self-defense. It found Werner could reasonably have believed victim posed a

[9] The law is also well settled that determinations of credibility are solely for the jury. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

threat because the dogs were under his control. Id. at 338. Thus, even though Werner claimed the shooting as an accident, because there was sufficient evidence of both accident and self-defense, Werner was entitled to have the jury instructed on self-defense. Since the outcome turned on which version of events the jury believed, the failure to give a self-defense instruction was prejudicial error. Id.

Here, assuming for the sake of argument there was evidence Ackley lacked the requisite intent, there was also evidence Ackley intended to cause O'Connor apprehension of fear of injury when he pulled out the knife. The evidence when viewed in its entirety shows Ackley intentionally pulled out the knife, and O'Connor was frightened that he would be harmed. O'Connor testified Ackley pointed the knife towards him. Even if the jury believed O'Connor and disbelieved Ackley's testimony that he held the knife by his side, it could have found Ackley acted in self-defense but it was not given that opportunity.

In sum, the court's reasons for refusing to instruct the jury on self-defense are not supported by the law. Ackley was entitled to have the jury decide whether he acted in self-defense. Ackley was prejudiced because the jury could not make that decision absent self-defense instructions.

A court's failure to instruct on a defense theory supported by the evidence is reversible error. Barrett v. Lucky Seven Saloon, 152 Wn.2d

259, 266-267, 96 P.3d 386 (2004); State v. Williams, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997). The court's refusal to instruct the jury on self-defense denied Ackley his constitutional right to present a defense and to have the jury consider that defense. The proper remedy is the reversal of his conviction. Werner, 170 Wn.2d at 338.

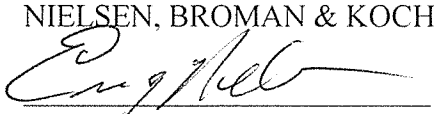
D. CONCLUSION

There evidence was sufficient to meet Ackley's "low burden" to establish he acted in self-defense. The court's rejection of his self-defense claim and its refusal to instruct the jury on self-defense denied Ackley his due process right to present a complete defense. His conviction should be reversed and his case remanded for a new fair trial where the jury is instructed on his defense of self-defense.

DATED this 30 day of March 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 74062-8-I
	)	
CHRISTOPHER ACKLEY,	)	
	)	
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 31ST DAY OF MARCH, 2015, 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.

[X] CHRISTOPHER ACKLEY
DOC NO. 342193
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2015.

X Patrick Mayovsky