**SUPREME COURT NO.** 95599-9
**COA NO. NO. 49105-2-II**
**CONSOLIDATED WITH**
**NO 50181-3-II**

Cowlitz Co. Cause NO. 14-1-01251-6

# SUPREME COURT OF STATE OF WASHINGTON

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**FERNANDO JACA-ORTIZ,**

**Appellant/Petitioner.**

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## PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

The State of Washington, represented by Jason Laurine, Deputy Prosecuting Attorney, asks this court to accept review of the Court of Appeals decision reversing Jaca-Ortiz's convictions of Assault in the first degree and Assault in the second degree, both with deadly weapon enhancements, designated in Part II of this petition.

## II. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is the unpublished opinion filed on February 18, 2018. A copy of the decision is included in the Appendix at pages A-1 through A-10.

## III. ISSUES PRESENTED FOR REVIEW

1. Is it error to deny a defendant a defense of self or others instruction when on multiple occasions he denied assaulting anyone and accused someone else of the crimes?

2. Should all reviewing courts apply constitutional error analysis for instructional error?

3. Should reviewing courts apply a separate instructional error analysis on separate charges that apply to separate assaults against two separate victims before considering reversal?

## IV. STATEMENT OF THE CASE

### A. Procedural History

The State charged Fernando Jaca-Ortiz with two counts of Assault in the first degree with deadly weapon enhancements on June 4, 2015. The case proceeded to trial on March 15, 2016. RP 1. The jury found Jaca-Ortiz guilty of one count of Assault in the first degree with a deadly weapon enhancement and one count of Assault in the second degree with a deadly weapon enhancement. Jaca-Ortiz timely appealed. The Court of Appeals held that, despite Jaca-Ortiz's repeated denials of assaulting anyone involved, the trial court should have instructed the jury on self-defense and defense of others.

### B. Statement of Facts

On October 12, 2014, after having a few beers and singing karaoke with friends at a bar, RP 64, Juan Ledesma (Ledesma) was beaten with a car jack by Fernando Jaca-Ortiz (Jaca-Ortiz). Jaca-Ortiz took offense to Ledesma's singing, and he and a friend confronted Ledesma about their disapproval. RP 37, 56; RP 154; 160. The friend, Ciro Aguillar (Ciro). took off his shirt in the bar, calling Ledesma outside. RP 66-7, 82. Despite repeatedly telling Ciro to "calm down," Ledesma went outside with Ciro and Jaca-Ortiz. RP 39, 84.

Maria Santa Cruz (Maria) went outside with Ledesma. RP 67. She saw Jaca-Ortiz standing next to Ciro, holding the car jack. RP 67. It was Ciro who initiated the assault – he hit Ledesma with his fists while both he and Jaca-Ortiz argued with him. RP 68. Ledesma hit Ciro back, only for Ciro to him again. RP 39. Jaca-Ortiz, who had disappeared momentarily, then returned, walked around Ledesma and hit him from behind with a car jack. RP 39, 67–9, 70, 72, 140–41, 157. Maria pleaded with Jaca-Ortiz to stop but he would not stop. RP 70–2. Ledesma was knocked unconscious. RP 70, 88. Maria thought he was dead. RP 70.

Ledesma cannot remember what happened after he was clobbered. He remained comatose in the hospital for two weeks. RP 76, 94–5. His skull was fractured in two areas where the bone is thickest, front and back. RP 185, 193–94, 196–97. He suffered a subdural hematoma and a subarachnoid hemorrhage. RP 182–83, 185. He could have died from either injury, but the combination of the two increased the risk of death. RP 182–84.

Megan McCall (McCall), a waitress at the bar, watched Jaca-Ortiz leave the bar with Ciro, Ledesma, and Maria, go directly to his truck and quickly return, carrying a "crowbar." RP 227–28. Jaca-Ortiz was starting a fight, not defending anyone. RP 229, 234. She observed him hit Ledesma and then Juventino, and beat them for over a minute. RP 231.

Juventino walked outside just before Ciro hit Ledesma. RP 139–40. Within seconds of his arrival, Juventino observed Jaca-Ortiz hurry towards Ledesma swinging something metal. RP 140–41; 157. Recognizing Jaca-Ortiz was armed, Juventino grabbed Ledesma to prevent something bad from happening. RP 140–41, 158. This was before Ciro and Ledesma began fist-fighting. RP 139–40. Only Jaca-Ortiz was armed. RP 141. Juventino then felt a strong blow on his face and then everything went black. RP 142. He awoke choking on his own blood. RP 143. Jaca-Ortiz broke Juventino's nose, tearing much of it from his face, and several of Juventino's teeth. RP 144–45, 150, 328–29.

Misael ran outside when he heard Maria screaming "they were hitting Juan [Ledesma]." RP 70, 105, 130. He saw Jaca-Ortiz hitting an unconscious Ledesma with the car jack. RP 106. He blocked another blow with his left arm and then took the jack away from Jaca-Ortiz. RP 107–9. Jaca-Ortiz then got in his Ford Expedition and revved the accelerator, lurching toward Ledesma. RP 132. Misael got between Jaca-Ortiz's Expedition and Ledesma, yelling, "don't do it. Don't do it." RP 71, 72, 73–5; 109, 111-12. Jaca-Ortiz then fled from the scene. RP 112–13.

Jaca-Ortiz testified at trial. RP 342–59. He testified on seven separate occasions during direct, cross-examination, and redirect, that he did not assault anyone the night of October 12, 2014, in defense of himself

or anyone else. RP 352–58. In fact, he blamed Misael. He testified that Misael hit Ledesma and Juventino with the car jack. He testified he left the bar and waited at his truck for 15 minutes. RP 345–46. He said Ciro came out of the bar with his shirt removed and that several people were hitting him. RP 346–47. He asked Ciro what happened. RP 347. He then went back to his truck, where Misael was seated behind him, holding the car jack. RP 347. They struggled for the jack in the truck. RP 348. Misael ended up with the car jack and hit Ledesma with it. RP 348–49. Jaca-Ortiz then left the scene. RP 350.

Because Jaca-Ortiz gave no indication in his testimony that "he struck, hit, assaulted, laid hands on anyone," the court denied him a defense of self or others instruction. RP 365. The court reasoned that "even in an expanded definition of the word 'force' and the common understanding of self-defense and defense of others, that's more than just standing your ground, it's taking action and applying force to another human or using a transferred force from a weapon, a stick, or a fist to something else." RP 365. The purpose of self-defense is to negate any assaultive behavior; the court found that because Jaca-Ortiz claimed he never assaulted anyone, there was nothing to negate. RP 367–68.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review will be accepted by the Supreme Court only: 1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or 2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or 3) if a significant question of law under the Constitution of the State of Washington or of United State is involved; or 4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

### A. The decision of the Court of Appeals is in conflict with a decision of the Washington Supreme Court.

In *State v. Walker*, the defendant confronted the victim at which time the victim struck the defendant with his fists. 136 Wn.2d 767, 770, 966 P.2d 883 (1998). The defendant then stabbed the victim eight times, killing him. *Id.* The trial court refused to give a self-defense instruction, finding that there was no evidence to support the defendant's claim that he believed he was in danger of being killed or seriously injured by the victim. *Id.* at 771. There was no evidence that the defendant had suffered injuries indicating a severe beating, so the Supreme Court found that it was unreasonable for him to respond with deadly force. *Id.* at 777. The Court explained that the defendant has the burden of introducing some

evidence that he had a reasonable fear of great bodily injury in order to use deadly force in self-defense. *Id.* This is because the person claiming self-defense must have had a reasonable apprehension of great bodily harm. *Id.* at 773. If there is no evidence of such a reasonable apprehension, the defendant is not entitled to a self-defense instruction. *Id.* at 779.

Additionally, a defendant must show that he had actually used force before a self-defense instruction will be given. In *State v. Aleshire*, the defendant and another man were at a bar when they were asked to leave by another patron. 89 Wn.2d 67, 69, 568 P.2d 799 (1977), *overruled on other grounds*. They then attacked the patron with their fists and with pool cues. The defendant was charged with and ultimately convicted of Assault in the second degree. *Id.* Prior to his arrest, the defendant admitted to the police that he had joined in the fracas at the bar. *Id.* at 71. However, when he testified at trial, the defendant expressly denied that he had hit anyone with either his fists or a pool cue, and stated that his earlier statement to the police had been a lie. *Id.* The Washington Supreme Court held that the trial court did not err in refusing to give a self-defense instruction because a person cannot deny that he struck someone and then claim that he struck them in self-defense. *Id.*

The decision in this case is in conflict with both *Walker* and *Aleshire*. Jaca-Ortiz did not show a reasonable apprehension of great

bodily harm when he attacked Ledesma and Juventino with a car jack. Jaca-Ortiz did testify that he was in fear for his life, but the physical evidence does not support the use of force that he used. His own testimony was that he was being hit only with fists, and there was no evidence that he had suffered extreme injury indicating a severe beating. Therefore, as in *Walker*, Jaca-Ortiz had no legal basis to hit anyone with a car jack, causing severe injuries, and was not entitled to a self-defense instruction.

Finally, in *Aleshire*, the defendant explicitly denied that he had hit anyone. The Supreme Court held that a person cannot deny striking someone and then claim that he struck them in self-defense. *Id.* Here, Jaca-Ortiz testified that Misael hit Ledesma and Juventino with the car jack. RP 348. He furthered testified that he did not assault or hit anyone on that day. RP 355; RP 356. Just as in *Aleshire*, Jaca-Ortiz denied striking anyone. A person cannot deny striking someone and then claim that he struck them in self-defense. This decision is in conflict with *Aleshire*.

**B. The decision of the Court of Appeals is also in conflict with a published decision of the Court of Appeals, namely Division I's decision in *State v. Gogolin*.**

In *Gogolin*, the defendant was charged with assaulting his ex-wife. 45 Wn. App. 640, 641, 727 P.2d 683 (1986). He testified that he raised his hand to push his wife away and she fell down the stairs. He did not know if he had even touched her and claimed she fell accidentally. *Id.* at 642.

Division I of the Court of Appeals found that there was no evidence to support the theory that the defendant had acted in self-defense, and the trial court properly refused to give the jury instruction. *Id.* at 644.

Giving an instruction on an issue or theory that is not supported by the evidence is improper. *Id.* As in *Gogolin*, Jaca-Ortiz denied hitting anyone and, in fact, blamed the assault on another person. The State's witnesses all testified that Ciro began a fight with Ledesma, at which time Jaca-Ortiz intervened with the car jack, striking Ledesma and knocking him unconscious. There simply was not credible evidence in this case that Jaca-Ortiz was acting in self-defense. Therefore, the Court of Appeals decision is at odds with *Gogolin*.

**C. The decision involves a significant question of law under the Constitution of the State of Washington or of the United States is involved.**

The issue of whether a jury verdict should be overturned because a trial judge, who is in the best position to know and evaluate the facts as they were presented to the jury, denied a defendant a defense of self or others instructions is a significant question of law under both the Washington State Constitution and the United States Constitution. Different divisions of the Court of Appeals have written decisions on either side of this issue, and many of them have performed constitutional error analysis. Division II did not perform that analysis in this case. This

issue is best addressed by the Supreme Court; therefore, Jaca-Ortiz's case should be accepted for review.

1. *The Court of Appeals did not perform constitutional error analysis.*

The Court of Appeals determined the failure to instruct the jury on defense of self or others was reversible error. However, the Court failed to perform a constitutional error analysis.

An error affecting a defendant's self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt. *State v. Arth*, 121 Wn.App. 205, 213, 87 P.3d 1206 (2004). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

To convict someone of Assault in the first degree, the State must show that the defendant, with intent to inflict great bodily harm, assaulted another person with a deadly weapon or by force likely to produce great bodily harm. RCW 9A.36.021(1)(a). "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent

loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c).

Here, Jaca-Ortiz beat two unarmed men with a car jack. Ledesma suffered two brain bleeds, either of which could have killed him if left untreated, and was comatose in the hospital for two weeks. Juventino suffered Le Fort I and Le Fort II fractures of his skull, his nose was nearly removed from his face, he is still unable to breathe from one nostril, and he lost his front teeth.

Had the court instructed the jury on defense of self or others, it would have informed them that:

> The use of force upon or toward a person of another is lawful when used by a person who reasonably believes he is about to injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used was by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02. The jury would further be instructed that:

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

WPIC 16.05. Because Jaca-Ortiz was charged with two separate counts of Assault in the first degree, the trial court had to determine whether defense of self or others applied to one or the other or both. It determined the defense did not apply to either.

Here, if there was error, it was harmless because no reasonable jury could have reached any other result. Jaca-Ortiz used force that exceeded that which was necessary to defend himself and Ciro. He and Ciro started a fistfight with Ledesma. As Juventino attempted to calm the situation by corralling Ledesma and pushing him away from Ciro, Jaca-Ortiz used a car jack against the two unarmed men and continued to beat them while they were unconscious. Ledesma suffered life-threatening injuries, while Juventino suffered multiple fractures and permanent loss of several teeth and the use of one nostril. Jaca-Ortiz then denied assaulting either man, opting to blame another witness for the assaults. These facts are enough to show the State proved beyond a reasonable doubt the absence of defense of self or others and that failure to give the jury this instruction was harmless error, if it was error at all.

### D. This petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issue of whether a jury verdict should be overturned based on the trial court's denial of an instruction of defense of self or others involves a substantial public interest that should be determined by the Supreme Court. The public has a great interest in the finality of judgments. The public also has a great interest in knowing what is permissible self-defense and defense of others, and when defense of self or others is appropriate. These issues are best addressed by the Supreme Court; therefore, Jaca-Ortiz's case should be accepted for review.

A defendant is entitled to an instruction on his theory of the case if the evidence supports the instruction. *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). Generally, a defendant is entitled to a self-defense or defense of others instruction if, viewing the evidence in the light most favorable to the defendant, there is some evidence demonstrating self-defense or defense of another. *Fisher*, 185 Wn.2d at 849. The sufficiency of the evidence is determined by what a reasonable person would do standing in the shoes of the defendant." *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010).

To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or

great bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary. *Werner*, 170 Wn.2d at 241, *citing State v. Callahan*, 87 Wash. App. 925, 943 P.2d 676 (1997).

The question of whether a defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495. When the basis for refusing to give a requested affirmative defense is lack of evidence, the standard of review is *de novo*. *Fisher*, 185 Wash.2d at 836.

*1. The Court of Appeals misapprehended the facts of the case.*

The Court of Appeals' decision misapprehends both the trial court's reasoning and the facts of this case. The Court of Appeals believed that the trial court opined Jaca-Ortiz was entitled to a defense of others instruction, likely based on a flippant aside by the trial judge. In fact, the trial court ruled the opposite – the trial court refused the instruction because, based on Jaca-Ortiz's testimony, there was nothing to negate. The trial court remained convinced that the defendant provided no evidence of self-defense or defense of others, ruling:

> So, I think given the testimony of Mr. Jaca-Ortiz, I'm not going to give any instruction related to self-defense or defense of others because there's nothing to negate. There's no force that he used on anybody that needs to be negated.

The Court of Appeals also justified reversal because the State offered the defense of self and others instruction prior to trial. However, it is common trial practice for the State to provide proposed instructions prior to trial and prior to any evidence or testimony being presented. When preparing those instructions, the State anticipates possible defenses. In this case, Jaca-Ortiz claimed defense of others at a pre-trial hearing. Following the presentation of evidence, the parties determine which instructions are appropriate based on the evidence produced at trial. In the case, the trial court determined the instruction on self-defense or defense of others was not appropriate. *See Walker*, 136 Wn.2d at 778-9 (the trial judge is in the best position to weigh the evidence to determine if it supported defendant's self-defense claim).

The key to the trial court's inquiry was the exercise of force. Jaca-Ortiz stated repeatedly he did not use force. A person can be subjectively fearful of imminent danger and that belief can be objectively reasonable, but without acting on it they have not acted in self-defense. *See State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979) (If any one of the elements of self-defense is not supported by the evidence, the self-defense theory is not available to a defendant, and the defendant cannot present the theory to a jury).

Moreover, he accused another person. That claim is further a denial. Taken in the light most favorable to Jaca-Ortiz, it is clear the trial court's decision to deny a self-defense instruction was not error.

2. *The amount of force exceeded that which was necessary.*

Jaca-Ortiz was not entitled to a self-defense instruction because a reasonable person in the defendant's position would not have felt it necessary to use a car jack against Ledesma and Juventino.

Whether to instruct on self-defense is the trial court's prerogative, where it applies a mixed subjective and objective analysis. *Walker*, 136 Wn.2d at 773. The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant. *Janes*, 121 Wash.2d at 238. The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done. *Id.*

The objective inquiry tempers the subjective inquiry. Without it, a defendant's beliefs would always justify an assault. *Janes*, 121 Wn.2d at 239. Crucial to the inquiry is determining what is necessary. *Id.* at 240. A defendant's acts are necessary if, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force

used was reasonable to effect the lawful purpose intended. RCW 9A.16.010(1).

If the court finds no reasonable person in the defendant's shoes could have perceived a threat of great bodily harm, then the court does not have to instruct the jury on self-defense. *State v. Bell*, 60 Wn. App. 561, 805 P.2d 815 (1991).

This Court upheld a trial court's denial of a defense of self or others instruction in *Walker*. In that case, the defendant had a verbal argument with his victim before going inside his house, grabbing a knife, coming back out and stabbing the victim to death. 136 Wash.2d 767. There, even though the victim was bigger than the defendant and was engaged in a fistfight with him, this Court held that no evidence existed to suggest the defendant was afraid he was going to die. *Id.*

Here, not one witness expressed any fear of great bodily harm. Given the circumstances, no reasonable person could have perceived such a threat. The character of the altercation changed from a fistfight to an assault by an armed man against two unarmed men. This evidence does not support self-defense instruction. *See State v. Bingham*, 52 Wn.App. 208, 210, 758 P.2d 559 (1988). Like *Walker*, Jaca-Ortiz was rightly denied the instruction and his convictions should be reinstated.

3. *Physical facts support the conclusion Jaca-Ortiz was the aggressor and exceeded the force necessary.*

Jaca-Ortiz provoked the fight. One who provokes a fight cannot successfully invoke self-defense to justify causing great bodily harm. *State v. Jelle*, 21 Wn. App. 872, 876, 587 P.2d 595 (1978), *citing State v. Craig*, 82 Wash.2d 777, 514 P.2d 151 (1973). Jaca-Ortiz did not remove himself from the altercation he provoked. Instead, he hit two unarmed men with a weapon and beat them while unconscious until Misael intervened.

The physical facts support this conclusion. When physical facts are uncontroverted and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts and therefore cannot differ. *Jelle*, 21 Wn. App. at 877, *citing Bohnsack v. Kirkman*, 72 Wn.2d 183, 190 432 P.2d 554 (1967). The injuries suffered by Ledesma supported witness testimony that Jaca-Ortiz beat him while he was unconscious on the ground and the trial court's ensuing decision to deny a defense of self or others instruction. If a victim is lying on the ground unconscious, he does not present a conceivable threat of harm to anyone. Self-defense and defense of others is appropriate only if the force used was reasonable and necessary to prevent an offense against a person. While multiple blows are not specifically proof against defense of others, they are when the victim is unconscious.

In comparison, faced with the same circumstances, Juventino used reasonable force to separate Ledesma from Ciro and Jaca-Ortiz. He grabbed Ledesma and tried to remove him from the fray. This was the appropriate approach to a fistfight. Juventino did what was necessary and reasonable to halt the altercation, where the defendant escalated that altercation.

4. *The Court of Appeals erroneously reversed the conviction for Assault in the Second degree with deadly weapon enhancement.*

There was no evidence to support an instruction of self-defense or defense of others on the assault against Juventino, as charged in Count II.

CrR 4.3(a) authorizes joinder of counts where the offenses are of the same or similar character. Separate defenses are appropriate. The trial court instructed the jury that "a separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." RP 393. The Court of Appeals did not review the appeal in the same fashion. Taken in the light most favorable to Jaca-Ortiz, no court could find the self-defense instruction should have been provided for Count II, against Juventino.

All testimony indicated that Juventino arrived at the same time Jaca-Ortiz arrived with the car jack, that he was separating Ledesma and Ciro, and that his back was turned to Jaca-Ortiz when Jaca-Ortiz hit him.

Furthermore, considering the physical facts, it is also clear Jaca-Ortiz hit Juventino more than once. Juventino suffered Le Fort I and II fractures, his nose was nearly severed from his face, and he lost two teeth.

In order for the court to instruct the jury on self-defense or defense of others there must be some evidence to support the instruction. *Fisher*, 185 Wn.2d at 849. One of the factual questions related to a claim of self-defense or defense of others is whether the defendant reasonably believed he or another was in imminent danger of harm from the victim. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996) *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Here, Jaca-Ortiz claimed he did nothing to Juventino, and that Juventino was hit by Misael. If we consider his testimony on its face, Jaca-Ortiz did nothing to justify a self-defense or defense of others instruction. However, a de novo review considers all the evidence from the beginning.

The evidence showed that Juventino was assaulted as he tried to pacify the event. Juventino turned his back to Ciro and Jaca-Ortiz in an effort to remove Ledesma peaceably from the situation. It was then that Jaca-Ortiz hit Juventino with the car jack. This evidence suggests an attack, not a defense.

This petition raises issues of substantial public interest that should be determined by the Supreme Court.

## VI. CONCLUSION

The State respectfully asks this Court to accept review of this petition.

Respectfully submitted this 13 day of March, 2018.

Ryan Jurvakainen
Prosecuting Attorney

By: _____ 36871 Go
Jason Laurine, WSBA #36871
Deputy Prosecuting Attorney

Filed
Washington State
Court of Appeals
Division Two

February 13, 2018

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>FERNANDO JACA-ORTIZ,<br><br>Appellant. | No. 49105-2-II<br><br><br><br><br>Consolidated with: |
| In re the Matter of the Personal Restraint of<br><br>FERNANDO JACA-ORTIZ,<br><br>Petitioner. | No. 50181-3-II<br><br><br>UNPUBLISHED OPINION |

SUTTON, J. – Fernando Jaca-Ortiz appeals his jury trial convictions for first degree assault and second degree assault. He argues that the trial court erred when it refused to instruct the jury on self-defense or defense of others and that this prejudiced him by violating his due process right to present a defense. In his consolidated personal restraint petition (PRP), Jaca-Ortiz also argues that the evidence was insufficient to support the convictions because the DNA evidence taken from the weapon used in the assaults was inconclusive.[1] We hold that the trial court erred when it

[1] In his PRP, Jaca-Ortiz also argues that he received ineffective assistance of trial counsel and that his choice to go to trial and not agree to a guilty plea was impeded because he did not have the benefit of an interpreter. Because we reverse on other grounds, we do not reach these additional

refused to instruct the jury on the defense of others and that this deprived Jaca-Ortiz of his due process right to present his defense. We further hold that the evidence is sufficient to support the convictions despite the inconclusive DNA evidence. Accordingly, we reverse the convictions without prejudice and remand for further proceedings.

## FACTS

### I. BACKGROUND

On October 12, 2014, Juan Wanderstrand-Ledesma, his then-girlfriend Maria Santa Cruz-Romero, his cousin Misael Ledesma, and his friend Juventino Alonso Manzano-Quiroz spent the evening drinking beer and singing karaoke songs at a restaurant that they regularly frequented. Shortly before closing time, Jaca-Ortiz confronted Juan[2] about one of the songs Juan had been singing, and Juan began arguing with Ciro Aguilar. According to Juan, the argument escalated, and Aguilar removed his shirt and invited Juan to "go outside." 1 Jury Trial Proceedings (JTP) at 38.

According to Juan, he, Misael, and Manzano-Quiroz went outside with Aguilar to try to calm him down. Once outside, Aguilar hit Juan, and Juan struck Aguilar back in self-defense.

Jaca-Ortiz, who had not initially been present when the group went outside, returned carrying what was characterized as a car jack. When Manzano-Quiroz saw Jaca-Ortiz

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issues. We reach Jaca-Ortiz's sufficiency argument because if it were to be successful, the charges would be dismissed with prejudice rather than without prejudice. *State v. DeVries*, 149 Wn.2d 842, 853-54, 72 P.3d 748 (2003).

[2] Because Juan Wanderstrand-Ledesma and Misael Ledesma share similar last names, we refer to them by their first names for clarity, we intent no disrespect.

approaching, he tried to pull Juan from the fight and leave. As Manzano-Quiroz grabbed for Juan, Jaca-Ortiz struck Manzano-Quiroz in the face, knocking him out. Jaca-Ortiz then struck Juan in the head with the car jack, also rendering Juan unconscious.

Misael was able to take the car jack from Jaca-Ortiz. Jaca-Ortiz briefly left the area, but he returned in his truck. Juan's friends and a waitress from the bar later testified that it appeared that Jaca-Ortiz was trying to run Juan over with his truck, but Jaca-Ortiz left when the police arrived.

The police tested the car jack for DNA. This test revealed a mixture of five individuals' DNA on the car jack. Manzano-Quiroz's DNA was specifically identified, but the other four contributors were not discernible.

## II. PROCEDURE

The State charged Jaca-Ortiz with the first degree assaults of Juan and Manzano-Quiroz. The case proceeded to a jury trial.

### A. TESTIMONY

Juan; Santa-Cruz Romero; Misael; Manzano-Quiroz; a waitress from the restaurant, Megan Renee McCall; several law enforcement officers; and three doctors testified for the State. Their testimony was consistent with the facts above.

Jaca-Ortiz was the only defense witness. Jaca-Ortiz testified that he left the bar about 1:30 AM to start his truck and waited for Aguilar to join him. When Aguilar did not arrive after about 15 minutes, Jaca-Ortiz walked back toward the bar. As he approached, Jaca-Ortiz saw Aguilar being hit by a group of about five people.

Jaca-Ortiz testified that when he tried to ask Aguilar what had happened, Misael appeared and chased him (Jaca-Ortiz) back to his truck. Jaca-Ortiz claimed that after he got into the front seat of the truck, Misael jumped into the back seat and grabbed the car jack. The two men then struggled over the car jack, and, after striking Jaca-Ortiz with the car jack, Misael took the car jack.

Both men returned to the fight. Jaca-Ortiz asserted that Juan and Manzano-Quiroz then began to hit him with their fists and that Misael hit him (Jaca-Ortiz) with the car jack and threatened to kill him.

On cross-examination, Jaca-Ortiz denied taking the car jack from his truck or hitting Juan or Manzano-Quiroz with the car jack. Instead, he asserted that Misael accidentally struck Juan and Manzano-Quiroz from behind when he (Misael) was trying to hit Jaca-Ortiz.

After Jaca-Ortiz denied assaulting anyone, the State questioned Jaca-Ortiz about his prior statements in an earlier proceeding suggesting that Jaca-Ortiz had initially planned to claim self-defense. When Jaca-Ortiz denied asserting self-defense, the State clarified that defense counsel had claimed self-defense and pointed out that his counsel's claim of self-defense meant that Jaca-Ortiz had to have assaulted someone. Jaca-Ortiz acknowledged that a self-defense claim would require him to have assaulted someone, but he continued to assert that he had not struck anyone.

### B. JURY INSTRUCTIONS

After the parties rested, the trial court addressed the jury instructions. Jaca-Ortiz proposed a self-defense instruction that included both defense of self and defense of another. The State proposed an instruction on defense of another.

Despite having originally proposed an instruction on defense of another, the State argued that because Jaca-Ortiz had asserted he had not assaulted anyone, in self-defense or otherwise, that no self-defense instructions were appropriate. Defense counsel argued that even though Jaca-Ortiz appeared to be disclaiming self-defense, the evidence supported a self-defense instruction because Jaca-Ortiz testified that three people beat him when he went to check on Aguilar. The State responded that it had asked specifically if Jaca-Ortiz had hit anyone and that Jaca-Ortiz had expressly denied having hit anyone, and thus, an instruction on self-defense instruction was not appropriate.

The trial court ruled:

> If you take a look at the testimony of Megan McCall or other witnesses, there's some indication that Juan and [Aguilar] left the bar in kind of a state of agitation and they were going outside to settle matters. They were going outside to fight. From some of the testimony, once they exited, the allegation is that Mr. Jaca-Ortiz was quickly there and struck them.
>
> *So potentially that could be construed as a defense of others*. Possibly Mr. Jaca-Ortiz saw them arguing and fighting, he was concerned, he arms himself with a jack, he comes and kind of preemptively strikes. *So in that sense it potentially could be a defense of others*. To say that he's defending himself under Mr. Jaca-Ortiz's version, yeah, if he's up like this protecting himself, that's self-defense, but he's not exerting any force or blows on others that would negate any assaultive behavior.
>
> So I think *given the testimony of Mr. Jaca-Ortiz, I'm not going to give any instructions related to self-defense or defense of others because there's nothing to negate*. There's no force that he used on anybody that needs to be negated.
>
> My only struggle with that decision is *the testimony of the prior witnesses which gives a colorable rise to the claim of defense of others*. So I'm not sure how to balance those two, but I think I've made my decision, and the Court of Appeals will let me know one way or the other if the issue goes up.

4 JTP at 367-68 (emphasis added). In closing argument, neither party discussed self-defense or defense of another.

The jury found Jaca-Ortiz guilty of first degree assault (Juan) and of second degree assault (Manzano-Quiroz). Jaca-Ortiz appeals his convictions.

## ANALYSIS

### I. DIRECT APPEAL

Jaca-Ortiz argues that the trial court erred when it refused to instruct the jury on self-defense or defense of another and that this err deprived him of his due process right to present a defense.[3] We agree that the trial court erred in refusing to instruct the jury on the defense of another.

#### A. LEGAL PRINCIPLES

A criminal defendant is entitled to an instruction on his theory of the case if the evidence supports the instruction. *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016) (citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). "Failure to [give such an instruction] is reversible error." *Fisher*, 185 Wn.2d at 849 (citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

Generally, a defendant is entitled to a self-defense or a defense of another instruction if, viewing the evidence in the light most favorable to the defendant, there is some evidence demonstrating self-defense or defense of another. *Fisher*, 185 Wn.2d at 849; *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). We evaluate the sufficiency of the evidence for such instructions "by determining what a reasonable person would do standing in the shoes of the defendant." *Werner*, 170 Wn.2d at 337. "Because the defendant is entitled to the benefit of *all*

[3] Jaca-Ortiz reiterates this argument in his PRP. Because he does not present any additional argument, we do not address the PRP issue separately.

the evidence, *[his] defense may be based on facts inconsistent with [his] own testimony*," including facts established through evidence presented by the State. *Fisher*, 185 Wn.2d at 849, 851 (emphasis added).

"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." *Janes*, 121 Wn.2d at 238 n.7. Because the trial court here determined that there was a lack of evidence to support the self-defense or defense of another instruction, we review the trial court's decision de novo. *Fisher*, 185 Wn.2d at 849.

B. DISCUSSION

Here, despite refusing to give the self-defense or defense of another instruction that Jaca-Ortiz proposed, the trial court found that the evidence as a whole could have supported an instruction on defense of others. We agree and hold that the trial court therefore erred in refusing to instruct the jury on defense of another.

A person's use of force against someone is lawful if he (1) reasonably believes that he is about to be injured or (2) is aiding a person who he reasonably believes is about to be injured. RCW 9A.16.020(3). The defendant must also show that he used no greater force than a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Considering the evidence as a whole and in the light most favorable to Jaca-Ortiz,[4] there was evidence that Jaca-Ortiz intervened after Juan and Aguilar began fighting and Juan's friends appeared to come to Juan's aid. This evidence would allow a jury to conclude that Jaca-Ortiz was

[4] *Fisher*, 185 Wn.2d at 849.

coming to the aid of someone he reasonably believed was about to be injured. And, although hitting an unarmed individual with a car jack could potentially be seen as using greater force than was necessary, taking the evidence in the light most favorable to Jaca-Ortiz, the evidence could have shown that using a weapon of some kind was reasonable because Jaca-Ortiz and Aguilar were outnumbered by Juan and his friends. Thus, the trial court was correct when it opined that Jaca-Ortiz was entitled to a defense of another instruction. And without this instruction, Jaca-Ortiz was not able to argue this defense theory to the jury.

The State relies on *State v. Gogolin*, 45 Wn. App. 640, 727 P.2d 683 (1986), *State v. Barrigan*, 102 Wn. App. 754, 9 P.3d 942 (2000), and *State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977), *abrogated in part on other grounds by State v. Dowling*, 98 Wn.2d 542, 656 P.2d 497 (1983), to support its argument that Jaca-Ortiz was not entitled to the self-defense instruction because he denied striking anyone. But in *Gogolin* and *Barrigan*, unlike here, there was no evidence from any source that the defendant feared for his safety or acted in defense of another. And in *Aleshire*, the only evidence that suggested self-defense was the defendant's own statement that he repudiated at trial. 89 Wn.2d at 71. Here, in contrast, the State's evidence supported a defense of another claim. And, as stated above, we consider all of the evidence, not just the defense evidence, when evaluating whether there was an adequate factual basis for the jury instruction. *Fisher*, 185 Wn.2d at 849, 851. Accordingly, these cases do not show that Jaca-Ortiz's claim that he did not strike anyone was sufficient to justify the trial court's refusal to give the defense of another instruction.

Because we hold that the trial court erred when it refused to instruct the jury on defense of another, we reverse the convictions without prejudice and remand for further proceedings.[5] *Fisher*, 185 Wn.2d at 849 (failure to instruct the jury on the defendant's theory of the case when there was evidence to support that theory is reversible error).

## II. SUFFICIENCY

Finally, in his PRP, Jaca-Ortiz appears to assert that the evidence was insufficient to support the convictions because the DNA evidence taken from the weapon was inconclusive. PRP at 3. This assertion fails.

When reviewing a sufficiency of the evidence claim, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). When a defendant challenges the sufficiency of the evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Martinez*, 171 Wn.2d at 364. We defer to the trier of fact as to resolving conflicting testimony, evaluating witness credibility, and evaluating the persuasiveness of the evidence. *Martinez*, 171 Wn.2d at 364.

The DNA evidence relates to whether Jaca-Ortiz struck the two victims with the car jack. Even presuming that the DNA evidence was inconclusive, there is ample evidence in the record to support the conviction. The State's witnesses testified that Jaca-Ortiz struck the two victims with

[5] Whether Jaca-Ortiz will be entitled to present a self-defense or a defense of another claim on remand will depend on the evidence presented if Jaca-Ortiz is retried.

the car jack. Taking this evidence in the light most favorable to the State, a reasonable trier of fact would find that Jaca-Ortiz was the person who struck the victims with the car jack, regardless of the absence of any DNA evidence confirming this testimony. Accordingly, Jaca-Ortiz does not show that the evidence was insufficient to support the conviction.

Accordingly, we reverse the convictions without prejudice and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

We concur:

Johanson, J.

Maxa, A.C.J.

## CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Petition for Review was served electronically via Portal to the following:

Supreme Court
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P.O. Box 40929
Olympia, WA 98504
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and,

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 13th, 2018.

Michelle Sasser

Michelle Sasser

## COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

## March 13, 2018 - 12:06 PM

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