

FILED
SUPREME COURT
STATE OF WASHINGTON
6/2/2021 10:45 AM
BY SUSAN L. CARLSON
CLERK

No. 99734-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,
Respondent,

vs.

DAVID ZAITZEFF,
Petitioner.

ANSWER TO PETITION FOR REVIEW

PETER S. HOLMES
SEATTLE CITY ATTORNEY

Richard Greene
Assistant City Attorney
WSBA #13496

Attorneys for Respondent

Seattle City Attorney
Criminal Division
701 Fifth Ave., Suite 2050
Seattle, Washington 98104
telephone: (206) 684-8538

TABLE OF CONTENTS

A.	<u>IDENTITY OF RESPONDENT</u>	1
B.	<u>COURT OF APPEALS DECISION</u>	1
C.	<u>ISSUES PRESENTED FOR REVIEW</u>	1-2
D.	<u>STATEMENT OF THE CASE</u>	2-4
E.	<u>ARGUMENT</u>	
	1. Defendant has not shown that the Court of Appeals decision conflicts with <i>Seattle v. Evans</i> or any other decision of this court.	4-6
	2. Defendant has not shown that the Court of Appeals decision applying intermediate scrutiny to his challenge to Seattle’s ordinance presents a significant issue of constitutional law.	6-11
	3. Defendant has not shown that the Court of Appeals decision recognizing the limited scope of Seattle’s ordinance involves an issue of substantial public interest.	11-13
	4. Defendant has not shown that the Court of Appeals decision added an element to the crime of Unlawful Use of Weapons.	13
	5. Defendant has not shown that the Court of Appeals decision violated his right to present a defense.	14-16
F.	<u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Table of Cases

Federal:

<i>Harley v. Wilkinson</i> , 988 F.3d 766 (4th Cir. 2021)	8
<i>Libertarian Party of Erie County v. Cuomo</i> , 970 F.3d 106 (2d Cir. 2020)	8
<i>Mai v. United States</i> , 952 F.3d 1106 (9th Cir. 2020)	8
<i>Maloney v. Singas</i> , 351 F. Supp. 3d 222 (E.D.N.Y. 2018)	8
<i>United States v. McGinnis</i> , 956 F.3d 747 (5th Cir. 2020), <i>cert. denied</i> , 141 S.Ct. 1397 (2021)	8
<i>United States v. Singh</i> , 979 F.3d 697 (9th Cir. 2020)	8
<i>Young v. Hawaii</i> , 992 F.3d 765 (9 th Cir. 2021)	10-11

Washington state:

<i>Kitsap County v. Kitsap Rifle & Revolver Club</i> , 1 Wn. App. 2d 393, 405 P.3d 1026 (2017), <i>review denied</i> , 190 Wn.2d 1015 (2018)	7
<i>Seattle v. Evans</i> , 184 Wn.2d 856, 366 P.3d 906 (2015), <i>cert. denied</i> , 137 S.Ct. 474 (2016)	1, 4, 5 & 6
<i>Seattle v. Evans</i> , 182 Wn. App. 188, 327 P.3d 1303 (2014), <i>affirmed</i> , 184 Wn.2d 856 (2015), <i>cert. denied</i> , 137 S.Ct. 474 (2016)	7-8
<i>Seattle v. Montana</i> , 129 Wn.2d 583, 919 P.2d 1218 (1996)	6, 7 & 12

<i>State v. Arntsen</i> , 11 Wn. App. 2d 1062 (2020)	15
<i>State v. Calvin</i> , 176 Wn. App. 1, 316 P.3d 496 (2013), <i>remanded</i> , 183 Wn.2d 1013, 353 P.3d 640 (2015)	10
<i>State v. Gallegos</i> , 73 Wn. App. 644, 871 P.2d 621 (1994)	16
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993)	10
<i>State v. Jeffrey</i> , 77 Wn. App. 222, 889 P.2d 956 (1995)	15
<i>State v. Jorgenson</i> , 179 Wn.2d 145, 312 P.3d 960 (2013) 5, 7, 8 & 10	
<i>State v. Parker</i> , 127 Wn. App. 352, 110 P.3d 1152 (2005)	15
<i>State v. Ruelas</i> , 7 Wn. App. 2d 887, 436 P.3d 362, <i>review denied</i> , 194 Wn.2d 1015 (2019)	16
<i>State v. Rummelhoff</i> , 1 Wn. App. 192, 459 P.2d 976, <i>review denied</i> , 77 Wn.2d 961 (1969)	10
<i>State v. Smith</i> , 176 Wn. App. 1010 (2013)	15 & 16
<i>State v. Spencer</i> , 75 Wn. App. 118, 876 P.2d 939 (1994), <i>review denied</i> , 125 Wn.2d 1015 (1995)	7
<i>State v. Ward</i> , 8 Wn. App. 2d 365, 438 P.3d 588, <i>review denied</i> , 193 Wn.2d 1031 (2019)	14
<i>Volk v. Demeerleer</i> , 184 Wn. App. 389, 337 P.3d 372 (2014), <i>affirmed in part, reversed in part</i> , 187 Wn.2d 241, 386 P.3d 254 (2016)	6
<i>Zaitzeff v. City of Seattle</i> , 484 P.3d 470 (2021)	5

Other jurisdictions:

<i>Connecticut v. DeCiccio</i> , 315 Conn. 79, 105 A.3d 165 (2014)	8
<i>Ex parte Lee</i> , 617 S.W.3d 154 (Tex. App. 2020), <i>petition for discretionary review refused</i> (2021)	8
<i>New Mexico v. Murillo</i> , 347 P.3d 284 (2015)	8
<i>Ohio v. Weber</i> , 2020 WL 7635472 (Ohio Supreme Court 2020)	8
<i>Wisconsin v. Roundtree</i> , 395 Wis. 2d 94, 952 N.W.2d 765 (2021)	8

Constitutional provisions

United States Constitution, 2 nd Amendment	4 & 10
Washington Constitution, Article I, section 24	4
Washington Constitution, Article XI, section 11	12

Rules, Statutes and Ordinances

GR 14.1(a)	15
RAP 13.4(b)	4, 7, 11, 13 & 14
RCW 9A.16.020	9
Seattle Municipal Code 12A.14.080	4
Seattle Municipal Code 12A.14.100.C	8-9

Other Authorities

A. IDENTITY OF RESPONDENT

The City of Seattle asks this court to deny review of the decision designated in Part B of this Answer.

B. COURT OF APPEALS DECISION

The Court of Appeals decision, entered on April 5, 2021, affirmed the Superior Court Decision on RALJ Appeal, which affirmed defendant's conviction for Unlawful Use of Weapons.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Court of Appeals determined that the 24-inch sword defendant was openly carrying in a park qualified as an "arm" under the constitution, does the decision that Seattle's ordinance prohibiting carrying a fixed-blade knife in public was not unconstitutional as applied to defendant's conduct conflict with *Seattle v. Evans*,¹ in which this court determined that the defendant's paring knife was not an "arm" under the constitution and thus did not address whether Seattle's ordinance was unconstitutional?

¹ 184 Wn.2d 856, 366 P.3d 906 (2015), *cert. denied*, 137 S.Ct. 474 (2016).

2. Does application of intermediate scrutiny to defendant's challenge to Seattle's ordinance prohibiting carrying a fixed blade knife in public present a significant issue of constitutional law?

3. Does the Court of Appeals decision rejecting defendant's challenge to Seattle's ordinance prohibiting carrying a fixed-blade knife in public involve an issue of substantial public interest that should be decided by an appellate court?

4. Did the Court of Appeals decision rejecting defendant's as-applied challenge to Seattle's ordinance improperly consider the location of the incident?

5. Where defendant acknowledged that nobody was imminently threatening him during the incident, did the trial court correctly deny defendant's necessity defense?

C. STATEMENT OF THE CASE

Defendant was convicted of Unlawful Use of Weapons. He appealed, contending that the ordinance prohibiting his conduct is unconstitutional, the trial court erred by precluding his defense of necessity and the evidence was not sufficient to support his

conviction. The Superior Court on RALJ appeal rejected these contentions, and the Court of Appeals affirmed that decision.

At approximately 4:30 pm on April 2, 2018, Seattle police officers responded to a 911 call of a man wearing a thong carrying a sword in a sheath strapped in front of him walking around Green Lake taking pictures of women in bathing suits.² CP 147-48. The officers found defendant near the wading pool and recognized him as someone they have previously spoken to about Seattle's fixed-blade knife ordinance. CP 148. Defendant was carrying a large sword in a sheath hanging around his neck. CP 148. Defendant acknowledged that it was a sword, that he was aware of Seattle's ordinance prohibiting carrying a fixed-blade knife and that he was not hunting, fishing or going to or from a job requiring use of the sword. CP 148. One of the officers spoke both in person and later by telephone with one of the 911 callers, who recounted that after seeing defendant he had followed him for a short time and observed him stop and face two women sitting on a bench, who appeared to be

² Defendant ultimately agreed to allow the trial court to determine his guilt or innocence based solely on the police report. *See* CP 79-80; Defendant's Statement on Submittal; CP 136.

frightened. CP 148. Photographs of the sword showed that it had a blade length of 24 inches. CP 172.

D. ARGUMENT

1. Defendant has not shown that the Court of Appeals decision conflicts with *Seattle v. Evans* or any other decision of this court.

As did the trial court and the Superior Court on RALJ appeal, the Court of Appeals rejected defendant's contention that Seattle's ordinance³ prohibiting carrying a fixed-blade knife violates both the federal⁴ and state constitutions.⁵ Defendant first argues that the Court of Appeals decision rejecting his challenge conflicts with this court's decision in *Seattle v. Evans*,⁶ warranting review under RAP 13.4(b)(1). The Court of Appeals determined that defendant's 24-

³ Seattle Municipal Code (SMC) 12A.14.080 provides:
It is unlawful for a person knowingly to:

. . .
B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm;

⁴ The 2nd Amendment provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

⁵ Article I, section 24 of the Washington Constitution provides:

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.

inch sword was an “arm” for purposes of the constitution.⁷ In *Evans*, this court determined that the defendant’s paring knife was not an “arm” for purposes of the constitution,⁸ and thus did not address whether Seattle’s ordinance is constitutional. How these decisions conflict is less than obvious.

Defendant also contends that the Court of Appeals application of intermediate scrutiny to evaluate Seattle’s ordinance conflicts with *State v. Jorgenson*,⁹ which determined that intermediate scrutiny applied to a statute prohibiting firearms possession by someone released on bond after a judge has found probable cause to believe that person has committed a serious offense. Again, the nature of the conflict between these decisions is entirely unclear.

Defendant also contends that the Court of Appeals analysis reciting that defendant’s conduct occurred in a park conflicts with some unidentified United States Supreme Court precedent. Defendant raised an as-applied challenge to the ordinance so the particular facts of the incident necessarily frame the court’s

⁶ 184 Wn.2d 856.

⁷ *Zaitzeff v. City of Seattle*, 484 P.3d 470, 475-76 (2021).

⁸ *Evans*, 184 Wn.2d at 870–73.

analysis.¹⁰ Defendant chose to carry his sword in a park and to challenge application of Seattle’s ordinance to his conduct so hardly can fault the Court of Appeals for basing its analysis on the particular circumstances involved.

Defendant also seems to contend that the Court of Appeals decision conflicts with Justice Alexander’s concurrence in *Seattle v. Montana*.¹¹ A concurring opinion is not controlling.¹² That the Court of Appeals decision is contrary to certain statements in that concurring opinion does not create a conflict with the actual decision in *Montana*.

2. Defendant has not shown that the Court of Appeals decision applying intermediate scrutiny to his challenge to Seattle’s ordinance presents a significant issue of constitutional law.

Defendant next contends that the Court of Appeals decision applying intermediate scrutiny to Seattle’s ordinance presents a

⁹ 179 Wn.2d 145, 161, 312 P.3d 960 (2013).

¹⁰ An as-applied challenge to the constitutional validity of a statute is characterized by a party’s allegation that application of the statute in the specific context of the party’s actions or intended actions is unconstitutional. *Evans*, 184 Wn.2d at 862.

¹¹ 129 Wn.2d 583, 600-01, 919 P.2d 1218 (1996);

¹² *Volk v. Demeerleer*, 184 Wn. App. 389, 426, 337 P.3d 372 (2014), *affirmed in part, reversed in part*, 187 Wn.2d 241, 386 P.3d 254 (2016).

significant question of constitutional law, warranting review under RAP 13.4(b)(3). He first makes the erroneous claim that the government bears the burden of establishing the constitutionality of the ordinance.¹³ On the contrary, a legislative enactment, including a municipal ordinance, is presumed to be constitutional, and the party challenging it has the burden of proving its unconstitutionality beyond a reasonable doubt.¹⁴ This presumption of constitutionality applies even when a defendant claims the statute unconstitutionally infringes on his right to bear arms.¹⁵

Defendant seems to contend that the appropriate level of scrutiny is unclear or uncertain. In a variety of 2nd Amendment challenges to statutes and regulations, courts always have applied the level of intermediate scrutiny.¹⁶

¹³ Petition for Review, at 11.

¹⁴ *Montana*, 129 Wn.2d at 589; *Kitsap County v. Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393, 413, 405 P.3d 1026 (2017), *review denied*, 190 Wn.2d 1015 (2018); *State v. Spencer*, 75 Wn. App. 118, 121, 876 P.2d 939 (1994), *review denied*, 125 Wn.2d 1015 (1995); *see also Jorgenson*, 179 Wn.2d at 150 (This court will presume a legislative enactment constitutional and, if possible, construe an enactment so as to render it constitutional).

¹⁵ *Jorgenson*, 179 Wn.2d at 150–52 (rejecting constitutional challenge to statute prohibiting possession of firearm pending trial).

¹⁶ *See Jorgensen*, 179 Wn.2d at 161 (firearm possession by person free on bond); *Seattle v. Evans*, 182 Wn. App. 188, 196 n. 27, 327 P.3d

Defendant argues that the intermediate scrutiny standard as discussed in *Jorgensen*¹⁷ should not apply because Seattle’s ordinance applies to all persons in all places. Again, defendant is wrong. Seattle’s ordinance does not apply to hunters or fishers or to persons using a knife in their job or in a person’s home or place of business.¹⁸ Seattle’s ordinance applies only to certain persons in certain places.

1303 (2014), *affirmed*, 184 Wn.2d 856 (2015), *cert. denied*, 137 S.Ct. 474 (2016) (fixed-blade knives); *New Mexico v. Murillo*, 347 P.3d 284, 288 (2015) (possession of switchblade); *Connecticut v. DeCiccio*, 315 Conn. 79, 142, 105 A.3d 165 (2014) (possession of weapon – dirk knife and police baton – in a motor vehicle); *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021) (possession of firearm by convicted domestic violence misdemeanor); *Wisconsin v. Roundtree*, 395 Wis. 2d 94, 952 N.W.2d 765, 771 (2021) (possession of firearm by non-violent felon); *Ex parte Lee*, 617 S.W.3d 154, 167 (Tex. App. 2020), *petition for discretionary review refused* (2021) (possession of firearm in motor vehicle by member of criminal street gang); *Ohio v. Weber*, 2020 WL 7635472 (Ohio Supreme Court 2020) (carrying a firearm while intoxicated); *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020) (possession of firearm by nonimmigrant visa holder); *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) (requiring good moral character for firearms license); *United States v. McGinnis*, 956 F.3d 747, 757 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1397 (2021) (possession of firearm while subject to domestic violence protection order); *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020) (possession of firearm by person previously subject to involuntary commitment); *Maloney v. Singas*, 351 F. Supp. 3d 222, 239 (E.D.N.Y. 2018) (possession of nunchaku).

¹⁷ 179 Wn.2d at 158 & 160-61.

¹⁸ SMC 12A.14.100 provides:

The proscriptions of Section 12.A.14.080.B relating to dangerous knives shall not apply to:

Defendant’s argument that Seattle’s ordinance prohibits him from carrying his sword for self-defense is not supported by the facts or the law. Defendant told that trial court that nobody was imminently threatening him on April 2, 2018,¹⁹ but claimed that lawful self-defense includes deterring would-be assailants.²⁰ On the contrary, the use of force is not lawful unless the person is “about to be injured.”²¹ Defendant’s argument about the scope of the right to

A. A licensed hunter or licensed fisherman actively engaged in hunting and fishing activity including education and travel related thereto; or

B. Any person immediately engaged in an activity related to a lawful occupation which commonly requires the use of such knife, provided such knife is carried unconcealed; provided further that a dangerous knife carried openly in a sheath suspended from the waist of the person is not concealed within the meaning of this subsection;

C. Any person carrying such knife in a secure wrapper or in a tool box while traveling from the place of purchase, from or to a place of repair, or from or to such person’s home or place of business, or in moving from one (1) place of abode or business to another, or while in such person’s place of abode or fixed place of business.

¹⁹ CP 56.

²⁰ CP 29.

²¹ RCW 9A.16.020 provides:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

. . .

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

self-defense seems somewhat similar to that rejected by the court in *State v. Rummelhoff*,²² where the defendant argued that because he had twice been assaulted on the streets, he was entitled to use a knife to stab a taxi driver who pursued him after he failed to pay the fare in the belief that he was defending himself. “If we were to agree with appellant’s position, there would be no limit to the amount of force which a person could use in defending himself against such alleged peril.”²³

As the court noted in *Jorgenson*,²⁴ the defense of necessity would be available to any defendant who might need to carry a weapon in public for self-defense.²⁵ Seattle’s ordinance does not

See also State v. Calvin, 176 Wn. App. 1, 14, 316 P.3d 496 (2013), *remanded*, 183 Wn.2d 1013, 353 P.3d 640 (2015) (Reasonable force in self-defense is justified if there is an appearance of imminent danger.)

²² 1 Wn. App. 192, 193, 459 P.2d 976, *review denied*, 77 Wn.2d 961 (1969).

²³ *Rummelhoff*, 1 Wn. App. at 193 (*quoting State v. Hill*, 76 Wn.2d 557, 566, 458 P.2d 171 (1969)); *see also State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993) (The objective aspect of self-defense keeps it firmly rooted in the narrow concept of necessity and prevents giving free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not.)

²⁴ 179 Wn.2d at 158 n 5.

²⁵ With respect to the 2nd Amendment, the 9th Circuit, after an exhaustive analysis of the history of the right to bear arms, recently concluded that there is no general right to carry arms in public for the

preclude presentation of facts or argument that a fixed-blade knife was carried in public for self-defense. Defendant simply did not present such facts.

Defendant makes no claim that Seattle Municipal Court is in need of guidance regarding application of this ordinance or that the trial courts or the Superior Courts on RALJ appeal have reached inconsistent decisions regarding the constitutionality of this ordinance. Defendant has not shown that the Court of Appeals decision presents a significant issue of constitutional law.

3. Defendant has not shown that the Court of Appeals decision recognizing the limited scope of Seattle's ordinance involves an issue of substantial public interest.

Defendant next contends that the Court of Appeals decision recognizing that Seattle's ordinance does not apply to certain persons or in certain places involves an issue of substantial public interest, warranting review under RAP 13.4(b)(4). That a person's right under state law to carry a firearm differs from that person's right under Seattle's ordinance to carry a fixed-blade knife simply

purpose of self-defense. *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021).

reflects that the Legislature does not believe that state-wide uniformity is necessary with respect to non-firearms weapons. Local governments are allowed to regulate non-firearms because of different local conditions. The Seattle City Council is entitled to believe that fixed-blade knives are a problem.

Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed.²⁶

Local governments in other parts of Washington, however, may believe that carrying fixed-blade knives in public is not a public safety problem and need not be restricted. The beauty of article XI, section 11 of the constitution²⁷ is that it authorizes each local

²⁶ *Montana*, 129 Wn.2d at 595. In the 25 years since *Montana* was decided, Seattle has become an even more densely urban environment. According to the Washington Office of Financial Management, Seattle's population increased from 534,700 in 1996 to 761,100 in 2020. See [April 1, 2020 Population of Cities, Towns, and Counties \(wa.gov\)](#).

²⁷ Article XI, section 11 provides:
Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

government to address its own particular problems in its own particular manner without having to resort to the Legislature for a one-size-fits-all solution. Defendant makes no claim that a significant number of persons are prosecuted for carrying a fixed blade knife in public or how Seattle's limited prohibition actually impacts the right to self-defense. Defendant has not shown that the Court of Appeals decision involves an issue of substantial public interest.

4. Defendant has not shown that the Court of Appeals decision added an element to the crime of Unlawful Use of Weapons.

Defendant next contends that the Court of Appeals decision adds an implied element to the crime that the fixed-blade knife was carried in a park, which conflicts with some unexplained decision of this court and presents a significant issue of constitutional law, warranting review under RAP 13.4(b)(1) and (3). As previously discussed, the references to where defendant was carrying his sword are a necessary part of the court's analysis of defendant's as-applied challenge. The Court of Appeals did not purport to add any element to the crime of Unlawful Use of Weapons.

5. Defendant has not shown that the Court of Appeals decision violated his right to present a defense.

Defendant next contends that the Court of Appeals decision upholding the trial court's rejection of his necessity defense conflicts with *State v. Ward*²⁸ and violated his right to present a defense, warranting review under RAP 13.4(b)(1) and (2). During motions in limine, the City moved to exclude the defense of necessity.²⁹ Defendant acknowledged that nobody was imminently threatening him during the incident.³⁰ In response to the trial court's request for an offer of proof, defendant stated that several times each year someone threatens or hits him and such conduct is likely to happen again in the future.³¹ The trial court reserved ruling on the City's motion and agreed to readdress the issue if the testimony showed that defendant was immediately threatened by a specific person on the date of the incident or around that time.³² Defendant thereafter waived his right to a jury and presented no evidence.³³

²⁸ 8 Wn. App. 2d 365, 372-74, 438 P.3d 588, *review denied*, 193 Wn.2d 1031 (2019).

²⁹ CP 55.

³⁰ CP 56.

³¹ CP 58-59.

³² CP 60.

³³ CP 78-80.

Defendant contends that the trial court erred by excluding the necessity defense during the motions in limine. The trial court did no such thing, it simply reserved the issue to await testimony, and defendant thereafter chose not to present any testimony. The trial court did determine that the necessity defense required an immediate threat by a specific person on the date of the incident or around that time. That decision was entirely correct – the threatened harm must be imminent or immediate.³⁴

Moreover, the procedure used also was entirely correct – a pretrial ruling precluding the necessity defense was affirmed in both

³⁴ 2 W. LaFave, *Substantive Criminal Law* § 10.1(d)(5), at 175-76 (3rd Ed. 2018); *State v. Parker*, 127 Wn. App. 352, 354–55, 110 P.3d 1152 (2005) (necessity instruction in an Unlawful Possession of a Firearm case properly refused because the defendant’s testimony that he had been shot almost nine months previously did not show any present and specific threat); *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995) (necessity instruction in an Unlawful Possession of a Firearm case properly refused where the defendant claimed that a suspicious person was lurking outside his house); *State v. Arntsen*, 11 Wn. App. 2d 1062, at *10 (2020) (the defendant’s testimony that he was obtaining weapons to protect himself against a future harm that might occur at some unknown time and place insufficient to raise the defense of necessity); *State v. Smith*, 176 Wn. App. 1010 (2013) (necessity defense not available because the defendant could not demonstrate that any violence he might have feared was imminent). These unpublished opinions are cited as nonbinding authority under GR 14.1(a).

*State v. Gallegos*³⁵ and *State v. Smith*.³⁶ A trial court's correct ruling that sufficient evidence was not presented to support a necessity defense does not violate a defendant's right to present a defense.³⁷ Defendant's concession that he was not faced with any imminent threat on April 2 while strolling around Green Lake precludes the necessity defense. The trial court correctly determined that defendant's offer of proof did not support the defense of necessity, and the Court of Appeals did not err by upholding that decision.

E. CONCLUSION

Based on the foregoing argument, defendant's Petition for Review should be denied.

Respectfully submitted this 2nd day of June, 2021.

PETER S. HOLMES
SEATTLE CITY ATTORNEY

s/Richard Greene
Assistant City Attorney
WSBA #13496
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097

³⁵ 73 Wn. App. 644, 651, 871 P.2d 621 (1994).

³⁶ 176 Wn. App. 1010 (2013).

³⁷ See *State v. Ruelas*, 7 Wn. App. 2d 887, 893-96, 436 P.3d 362, review denied, 194 Wn.2d 1015 (2019).

Telephone: 206 684-8538
Fax: 206 684-4648
e-mail:richard.greene@seattle.gov

SEATTLE CITY ATTORNEY'S OFFICE CRIMINAL

June 02, 2021 - 10:45 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99734-9
Appellate Court Case Title: David Zaitzeff v. City of Seattle

The following documents have been uploaded:

- 997349_Answer_Reply_20210602104238SC936449_4328.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Zaitzeff.pdf

A copy of the uploaded files will be sent to:

- Noah@BetterNoahLawyer.com

Comments:

Sender Name: Richard Greene - Email: richard.greene@seattle.gov
Address:
701 5TH AVE STE 2050
SEATTLE, WA, 98104-7095
Phone: 206-684-8538

Note: The Filing Id is 20210602104238SC936449