

FILED
COURT OF APPEALS
DIVISION II
JES

NO. 34080-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JACOB T. CHILDRETH,

Appellant.

BRIEF OF APPELLANT

**Lisa E. Tabbut, No. 21344
Attorney for Appellant**

**1402 Broadway
Longview, WA 98632
(360) 425-8155**

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I. ASSIGNMENTS OF ERROR

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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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III. STATEMENT OF THE CASE

A. Factual History

At approximately 10:00 p.m., on July 19, 2005, Jacob Childreth, Christopher Molash, Josh Hopkins and a young lady, Kelli Fich, were

riding bikes to a McDonald's in Clark County, Washington. RP 43-45, 62. While crossing the road near a Schuck's Auto Supply, the youth exchanged words with Jason Pumphrey. RP 46-47, 140, 166. Pumphrey pulled into the Schuck's parking lot as did the youth. Id. There was a verbal exchange particularly between Hopkins and Pumphrey, followed by some pushing and shoving between the two. RP 48.

Seemingly, the struggle between Pumphrey and Hopkins was over when Molash threw an empty plastic Dasani water bottle at Pumphrey. RP 152, 201, 303. The bottle throwing had the effect of igniting the physical altercation. Id. Pumphrey testified that a group of boys surrounded him and hit him repeatedly. RP 143. He did not identify either Molash or Childreth as participating in any specific fashion other than to say that Molash threw the bottle at him. RP 201.

After the altercation was over, Pumphrey made his way to the hospital where he stayed for four days. RP 154. Pumphrey had fractured ribs, a fractured vertebra, a fractured zygomatic arch, and various contusions and abrasions. RP 18-21, 34. Dr. Chris Jackson testified that he examined Pumphrey during his hospital stay and opined that a significant amount of force had to have been used to inflict Pumphrey's injuries. RP 13, 17, 36.

Childreth did acknowledge to Officer Shilah Nelson that he hit Pumphrey a few times although Josh Hopkins did most of the hitting. RP 214. In a written statement to Officer Timothy McNall, Childreth also implicated Molash by saying that Molash was swinging at Pumphrey and fought with him for a minute or so. RP 259.

During his testimony, Molash said that he kicked Pumphrey while Pumphrey was on the ground but he was only doing so in an effort to break up the fight. RP 321-22.

When Childreth testified he said that he used his foot during the encounter only to help out his friend, Hopkins, when Pumphrey had Hopkins in a headlock. RP 361. Childreth also acknowledged a factual basis for count II, making a false statement to a police officer, by admitting that he had initially lied about Molash's involvement in the encounter, specifically, that he had told the police, untruthfully, that Molash had walked away and not been present during the fight. RP 382.

B. Procedural History

The Clark County prosecuting attorney charged juveniles Christopher Molash and Jacob Childreth with assault in the second degree alleging an intentional assault with reckless infliction of substantial bodily harm upon Jason Pumphrey. CP 1. By an amended information,

Childreth was also charged with making a false statement to a police officer. CP 2-3.¹ Molash and Childreth were tried to the bench, Judge Barbara Johnson, on October 12 and October 17, 2005. *See Verbatim Reports*. CrR 3.5 hearings were held as part of the trial for both defendants. RP 115, 122, 219. Both defendants testified on their own behalf. RP 293-334, 345-383. The Court found both offenders guilty as charged and refused to consider their claims of defense of self or others. RP 426-427. The court sentenced Childreth within his applicable standard range. Childreth filed timely notices of appeal. CP 44. More than two months after the trial, the State presented written findings of fact and conclusions of law on the verdict. CP 45-48.

V. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT 12 MORE THAN TWO MONTHS AFTER THE TRIAL BECAUSE IT WAS NEITHER A FINDING OF THE COURT AT TRIAL NOR DID THE COURT APPLY IT IN RENDERING ITS VERDICT.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial

¹ A third juvenile, Joshua Hopkins, was also charged with the second degree assault although his charge was severed and heard at a different time.

evidence rule. *State v. Nelson*, 89 Wn. App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to findings of fact number 12. It states:

12. This court finds Mr. Childreth and Mr. Molash intentionally assaulted Mr. Pumphries and beyond a reasonable doubt that the force they used was excessive and not done for the purpose of self defense and/or the defense of others.

CP 47.

The problem with this finding of fact is not that there is no evidence in the record to support it. The court did not make the finding when it announced its verdict at trial. Rather, two months after trial the State crafted findings of fact in an attempt to cover up the trial court's failure to apply the correct legal standard when it rendered its verdict. The

State only did this after defendant Molash brought a motion for arrest of judgment that specifically spoke to the trial court's failure to apply the correct standard.

This situation is akin to that which occurs when the State fails to enter findings of fact until the defense has filed its opening brief of appellant and then the State crafts the findings in order to specifically refute the defendant's arguments. *See State v. Royal*, 122 Wn.2d 413, 423, 858 P.2d 259 (1993). If the State has taken this action, or if the delay has caused prejudice, then the defendant is entitled to a new trial. *Id.* In any event, the appellate court should not rely upon such findings. Similarly, in the case at bar, the State specifically crafted finding number 12 in order to respond to the defendant's anticipated argument that the trial court applied the wrong legal standard. Thus, this court should not consider finding of fact number 12 even if substantial evidence supports it because the court did not enter this finding when it rendered its verdict.

II. THE TRIAL COURT DENIED JACOB CHILDRETH HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FAILED TO PROPERLY CONSIDER THE DEFENSE OF LAWFUL USE OF FORCE.

Under Washington Constitution, Article 1, Section 3 and United States Constitution, Fourteenth Amendment a defendant is entitled to raise

any defense supported by the law and facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). In order to properly raise the issue of self-defense in the State of Washington, a defendant need only produce “any evidence” supporting the claim that the defendant’s conduct was done in self-defense. *State v. Adams*, 31 Wn. App. 393, 641 P.2d 1207 (1982). This evidence need not even rise to the level of sufficient evidence “necessary to create a reasonable doubt in the jurors’ minds as to the existence of self-defense.” *Adams*, 31 Wn. App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* The defendant’s claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn. App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not “any” evidence exists to justify instructing on self-defense, the court must apply a “subjective” standard. *Adams*, 31 Wn. App. at 396. In other words, “the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and ‘not by the condition as it might appear to the jury in the light of testimony

before it.” *Adams*, 31 Wn. App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

Tyree, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

Tyree, 143 Wash. at 316.

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *Adams*, 31 Wn. App. 393, 641 P.2d 1207 (1982) also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense beyond a reasonable doubt as part of the elements of the offense. The following examines these cases.

In *Wanrow, supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and got the decedent, whom the other woman believed had molested one of her children. The Supreme Court gave the following outline for the facts as they followed this point.

It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5'4" woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

Wanrow, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She then appealed, arguing, among other things, that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable

grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, *and has reasonable grounds* to believe, that *he* is in imminent danger of death or great bodily harm.

Wanrow, 88 Wn.2d at 239 (italics in original).

In *Wanrow*, the court reversed, based in part upon this erroneous instruction. The court's comments were as follows.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

State v. Wanrow, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *Adams, supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbor's unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my life..." Adams knew there were other guns in the trailer. He didn't know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn't intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox's death.

Considering these circumstances and Adams' testimony-he thought Chard and Cox had come to do him harm because Goard fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a loaded gun-a jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing "any evidence." Accordingly, the trial judge should have given a self-defense jury instruction.

Adams, at 397-98.

In *Wanrow*, the Supreme Court reversed on the basis that the jury instruction erroneously failed to allow the jury to consider the defendant's particular vulnerability under all the facts as they existed, even though the defendant had only been threatened with a simple assault if even that.

Similarly, in *Adams*, the court reversed upon the trial court's failure to give a self-defense instruction in a situation in which the defendant had not even been threatened directly. Both of these cases stand for the proposition that under circumstances of particular vulnerability, a defendant using deadly force may be entitled to a self-defense instruction even if only faced with a simple assault, or no assault at all.

In *Wanrow*, the defendant was particularly vulnerable because of her small stature relative to the decedent, the decedent's intoxication, and the fact that she had a cast on her foot. In *Adams*, the defendant was particularly vulnerable because of his isolation, the potential that the burglars knew he was present, and the fact that they might have been armed with deadly weapons. In the case at bar, the evidence seen in the light most favorable to the defendant shows that defendant and his friends, were crossing the road when an adult drove by, yelled at them, and then specifically pulled over in order to confront them. This person then twice started a physical confrontation with Mr. Hopkins. As the prior cases clarify, this evidence is sufficient to trigger the defendant's right to force the State to prove the absence of self-defense beyond a reasonable doubt.

As is apparent from the cases previously cited, claims of self-defense require the court as trier of fact to make two separate

determinations, each with a different standard of proof. The first question is: “Does the evidence presented at trial constitute some evidence of self defense when seen in the light most favorable to the defendant?” If this question is answered in the affirmative, then the second question is: “Has the evidence presented at trial proven the absence of self-defense beyond a reasonable doubt.” In the case at bar the trial court collapsed these two separate and distinct questions into the single question of whether or not the court believed the defendants. This is found on page 424 of the verbatim reports wherein the court stated as follows:

In order to find defense of others, the Court would need to find that the defendants acted reasonable and without a use of excessive force, and the Court finds that this was not an act of self-defense and was an excessive amount of force to respond to the situation.

RP 424.

In making this finding the court failed to make the preliminary determination that the record did contain sufficient evidence of self-defense when seen in the light most favorable to their case to entitle the defendant’s to force the state to disprove the defense beyond a reasonable doubt. In other words, the statement “the Court would need to find that the defendants acted reasonably and without a use of excessive force” was a misstatement of the law. Rather, the statement should have been that the court “found sufficient evidence to entitle the defendant’s to their claim of

self-defense,” but that the court “found beyond a reasonable doubt that the state had disproved self-defense.” The court’s failure here to recognize this standard of proof and apply it denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment and entitles him to a new trial.

VI. CONCLUSION

The defendant’s conviction should be reversed and the case remanded for a new trial with instructions to the court to properly consider the defense of lawful use of force.

DATED this 15th day of June, 2006.

Respectfully submitted,



LISA E. TABBUT, WSBA 21344
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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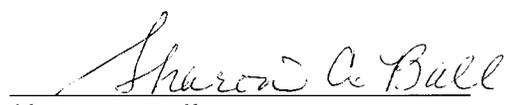
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- (2) AFFIDAVIT OF MAILING

Dated this 15th day of June 2006.


 LISA E. TABBUT, WSBA #21344
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 15th day of June 2006.




 Sharon A. Ball
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 State of Washington
 Residing at Longview, WA 98632
 My commission expires 06/10/07