

No. 34900-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON  
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STATE OF WASHINGTON

V.

LOWELL W. STAMBAUGH

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BRIEF OF APPELLANT

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**ORIGINAL**

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## A. Assignments of Error

### Assignments of Error

1. Jury instructions 11 and 12 erroneously stated the standard for the lawful use of deadly force against a trespassing and predatory animal.

2. The prosecutor committed misconduct when he asked Mr. Stambaugh to opine whether another witness was lying.

### Issues Pertaining to Assignments of Error

1. Did Jury instructions 11 and 12 erroneously state the standard for the lawful use of deadly force against a trespassing and predatory animal when they did not make manifestly clear that: (a) Mr. Stambaugh's actions did not need to be necessary; (b) Mr. Stambaugh was entitled to rely on the facts as they appeared to him at the time; and (c) the reasonableness of Mr. Stambaugh's actions must be viewed from his subjective viewpoint and not that of an objectively reasonable and prudent person?

2. Did the prosecutor commit misconduct when he asked Mr. Stambaugh to opine whether another witness was lying and was this misconduct reversible when: (a) a timely objection was lodged; and (b) the misconduct forced Mr. Stambaugh to opine that other witnesses were lying about irrelevant issues?

## B. Statement of Facts

### **Substantive Facts**

This is the tale of Smokey the sweet Cat. This is also the tale of Smokey the predatory cat. Smokey is a male cat with long blackish-brown hair and a long tail. RP, 139. He was a house pet of Melanie Church and her family, including her daughter, Lori. RP, 139. According to Ms. Church, he was a “very sweet cat.” RP, 142. The image her neighbor, Lowell Stambaugh, painted of Smokey the Cat, however, was a far cry from a “very sweet cat.”

Mr. Stambaugh owns property in rural Pacific County near the Colombia River. RP, 240. He is a commercial fisherman and spends a significant time of each year in Alaska. RP, 245. In 2005, he was gone from the first week of June to the last week of August. RP, 243. During that time, Melanie Church and her family, including Smokey, lived across the roadway from him. RP, 142. Mr. Stambaugh owned two cats, Black Bob, a young manx tomcat, and Fraidy Cat, a female gray barred cat. RP, 244, 249.

In the spring and fall of 2005, Mr. Stambaugh frequently observed Smokey on his property. During that time, Smokey was persistently entering his garage and casing his property. RP, 241. Mr. Stambaugh

assumed it was a feral cat. RP, 247. Several times Mr. Stambaugh expressed his concerns about feral cats on his property to Lori Church. RP, 166.

Just before Mr. Stambaugh traveled to Alaska in June of 2005, he observed Smokey on patrol and fighting with Black Bob. RP, 245. He had observed his cats fleeing and cowering from Smokey's aggressiveness. RP, 246. Ross Stambaugh, defendant's father, was used to seeing Smokey frequently hanging around the defendant's house. RP, 193. Smokey was acting as a "tomcat" around Fraidy Cat. RP, 193. Smokey exhibited ferocity towards Mr. Stambaugh's cats and would fight "quite frequently" with Mr. Stambaugh's cats. RP, 196. The cats would get into a fight that always ended with Black Bob taking flight. RP, 247. Ross Stambaugh observed Smokey attack Black Bob on one occasion. RP, 196.

Lawton Paddock, a longtime friend and frequent houseguest of Mr. Stambaugh, saw Smokey on Mr. Stambaugh's property more than six times. RP, 211. Mr. Paddock chased it away on at least three occasions but it came right back. RP, 214. Mr. Paddock was kept up on many nights by the sound of two or more cats fighting. RP, 209. On at least one occasion, the sound of cats fighting prompted Mr. Paddock to step outside to see Smokey and Black Bob fighting under the vessel in the yard. RP, 210-11.

Mr. Stambaugh described the situation as one of an escalating conflict.<sup>1</sup> RP, 247. It was a territorial battle for control of Mr. Stambaugh's garage. RP, 246. Two days before he left for Alaska, Black Bob was mauled badly and his right cheek was ripped over an inch from aggressive hook marks. RP, 244. Mr. Stambaugh was uncertain if Black Bob was going to survive. RP, 244. Mr. Stambaugh was "absolutely certain" that he received his injuries from Smokey. RP, 245. That was the last he saw of Black Bob because by the time he returned from Alaska, Black Bob had disappeared. RP, 252.

While Mr. Stambaugh was in Alaska, Fraidy Cat had two kittens. RP, 251. Initially after his return, Smokey did not come around very much. RP, 252. But as the kittens started to mature, Smokey started hanging around the garage and interacting with the kittens, particularly at night. RP, 253. Mr. Stambaugh estimates he would catch Smokey in the garage on about twenty percent of the nights. RP, 254. The kittens would be cowering in the extreme recesses of the garage. RP, 253. Mr. Stambaugh believed that Smokey was there to kill his two kittens. RP, 242. Either they were going to be driven from his garage and flee or they were going to lose their lives. RP, 274.

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<sup>1</sup> Mr. Stambaugh's actual testimony was that it was "an ascending conflict, if you please, or accelerating conflict." RP, 247. Counsel assumes he meant "escalating."

On November 29, 2005, Mr. Stambaugh stepped out on his porch in the morning and saw Smokey standing in the open. RP, 256. Usually he would run off at the first sight of him. RP, 256. Mr. Stambaugh determined to try and shoot the cat because he deemed it a threat and there was no other reasonable way to protect his own animals. RP, 269. Mr. Stambaugh went into the house, retrieved his shotgun, and fired it at Smokey, hitting him. RP, 257. Ms. Church saw Mr. Stambaugh fire his shotgun from his front porch. RP, 150. She saw Smokey running away into the trees. RP, 150. Ms. Church and her daughter, Lori Church, then started looking for Smokey. RP, 151. They found him about thirty minutes later, bleeding from the eye and ear. RP, 152. She immediately loaded him into the car, but he died en route to the veterinarian. RP, 152.

Ms. Church contacted law enforcement right away. RP, 151. Deputy Rick Goodwin responded. RP, 106. Mr. Stambaugh never disputed shooting Smokey. When questioned, Mr. Stambaugh told Deputy Goodwin he “shot the cat with a 12-gauge shotgun.” RP, 109. He explained he “owns the property that’s up there and he has problems with feral cats and there’s all kinds of other animals that come on his property like raccoons and coyotes.” RP, 107. The feral cats eat the food he puts out for his own cats. RP, 108. This particular cat had been around for about four months. RP, 113. He deemed this cat to be feral and that it was

the responsibility of the Churches to maintain their animals off of his property. RP, 128. He stated, "This is my property. I will shoot whatever I want, wherever I want, whenever I want." RP, 110.

### **Procedural Facts**

Mr. Stambaugh was charged with one count of First Degree Animal Cruelty. CP, 1. The State's theory was that he "did intentionally and unlawfully cause physical injury to an animal." CP, 1. He was found guilty by a jury of that charge. CP, 55. He was also charged with malicious mischief, but the jury acquitted him of that charge. CP, 56.

Mr. Stambaugh testified at length at trial. There were several significant differences between his testimony and the State's witnesses. For instance, Melanie Church testified that Smokey was primarily a house cat, very sweet around other cats, and never stayed out after dark, facts that were disputed by Mr. Stambaugh. RP, 141-42. During the State's cross-examination of Mr. Stambaugh, the State tried to point out some of these inconsistencies. For instance, the prosecutor tried to establish that Mr. Stambaugh knew Smokey lived with the Churches.

Q: They had their cat for two years and they lived on your trailer with the cat for two years.

A: Well –

Q: That's what their testimony was, sir.

A: -- approaching two years would be my understanding of –

Q: Let me rephrase –

A: -- what I hear in testimony.

Q: Their testimony was that they, for about two years, lived at your trailer with their cat Smokey. Okay, that's their testimony. That's not a question.

A: Okay. Well, if that's their testimony, that's what their testimony is.

RP, 289-90. After sparring back and forth a bit on this issue, the following occurred:

Q: You heard that [Melanie and Lori Church] testimony; right?

A: Yes, I did.

Q: So your testimony –

A: I found it –

Q: -- is now you don't agree with their testimony.

A: I haven't agreed with several points of their testimony, in fact a large portion of it.

Q: So you're saying they're lying.

A: That works.

RP, 291-92. Shortly thereafter:

Q: Did you laugh at her [Melanie Church] after you shot her cat that day?

A: No. That wasn't – it –

Q: You didn't. So she's lying about that too; is that what you're saying?

A: It's a matter of characterization, yes.

Q: Are you saying she's lying about that now too?

Defense counsel: Objection, argumentative.

Prosecutor: It's a simple question, Your Honor.

A: Uh, yes.

The Court: Excuse me –

A: Yes. Yes, I'll say she lied,

The Court: Excuse me. Excuse –

A: -- or at least recharacterized what I said –

The Court: Excuse me. Be –

A: -- what I -- how I said it.

The Court: Mr. Stambaugh, when I start talking

A: I'm sorry.

The Court: -- you stop talking.

A: Okay.

The Court: When I start talking, the attorneys stop talking. I'm going to overrule the objection. I'm going to allow the answer that Mr. Stambaugh gave.

Prosecutor: Thank you, Your Honor.

RP, 294-95.

The issue of what the jury instructions should look like was discussed early and often in this trial. Mr. Stambaugh contended that the State had to prove that his actions were unlawful. RP, 8. His counsel contended that "Mr. Stambaugh was protecting his property, protecting his cats and acting within his rights." RP, 9. The State contended early on that it had no duty to show the behavior was unlawful. RP, 32. Eventually, the Court agreed that the behavior needed to be unlawful, but defining that term proved problematic. The Court indicated at one point that the analogous situation was the jury instructions dealing with defense of property. RP, 72-75. The Court also cited the self defense WPIC. RP, 81.

Eventually, the Court wrote many of its own instructions. The Court said, "I'm not interested in taking argument on them. I'll just take your objections or exceptions and you can note those on the record but to the best of my knowledge, unless there's some gross error, these are the Instructions which are of course the Court's responsibility to create." RP, 318.

In the “to convict” instruction, the Court instructed the jury that the jury could only convict if he “acted without lawful authority.” CP, 44. Jury Instruction 10 reads: “A person acts with lawful authority where there is reasonable and apparent necessity to perform that act.” CP, 45. Jury Instruction 10 reads: “Every person has a natural right to defend and protect his animals from injury or destruction by other animals if such defense is reasonable and necessary considering all the surrounding circumstances or events, both before and during such defense.” CP, 46.

Both parties objected to Instructions number 10 and 11. RP, 320, 322. Mr. Stambaugh excepted to Instructions 10 and 11 saying, “I would just say if we have 11, we don’t need 10 and my basic objection would be reasonable and necessary. I would think that if the defense is reasonable considering all – so that’s- that’s what I’d ask for.” RP, 323-24.

### C. Argument

**1. Jury instructions 11 and 12 erroneously stated the standard for the lawful use of deadly force against a trespassing and predatory animal when they did not make manifestly clear that: (a) Mr. Stambaugh’s actions did not need to be necessary; (b) Mr. Stambaugh was entitled to rely on the facts as they appeared to him at the time; and (c) the reasonableness of Mr. Stambaugh’s actions must be**

**viewed from his subjective viewpoint and not that of an objectively reasonable and prudent person.**

The issue of when a person acts with lawful authority under the Cruelty to Animals statute is an issue of first impression. The trial court, as well as the attorneys, struggled with this issue at length, with the trial court eventually writing its own instructions. The resulting Jury Instructions 10 and 11 were objected to by both counsel. Despite the trial court's deliberative efforts, Instructions 10 and 11 fail to make clear the legal standard for when a person acts with lawful authority by injuring an animal.

The standard for clarity in a jury instruction is higher than for a statute. Courts may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative tools. Accordingly, a jury instruction must be manifestly clear to the average juror. State v. Watkins, \_\_\_ Wn.App. \_\_\_ (56507-9-I, Dec. 18, 2006) citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The instructions here are not manifestly clear to the average juror.

RCW 16.52.205 requires an unlawful act in order for a person to be convicted of cruelty to animals. Mr. Stambaugh's basic argument at trial was that he believed it necessary to kill Smokey in order to protect his

property and other animals. The trial court properly looked to the case law in the area of defense of property in order to define an unlawful act. Unfortunately, the trial court did not correctly define the defense of property for the jury.

The statute defining the defense of property is RCW 9A.16.020, which reads:

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;

(4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public.

In State v. Arth, 121 Wn. App. 205, 87 P.3d 1206 (2004) the Court of Appeals addressed whether this statute applies to crimes other than homicide and assault. At issue in that case was the charge of malicious mischief. The defendant claimed that he damaged another person's vehicle in an effort to avoid being run over by the driver. The Court of Appeals held that sound public policy compels the conclusion that self

defense is a defense to malicious mischief. The Court further held that RCW 9A.16.020 is not limited to crimes against persons, but applies equally to crimes against property.

Mr. Stambaugh presented substantial evidence that Smokey was both a trespasser on his property and a threat to injure his own animals. He was, therefore, entitled to the affirmative defense of defense of property. The fact that the trial court gave a modified version of defense of property in Jury Instructions 10 and 11 supports this conclusion. Once the trial court concluded that such an instruction was necessary, however, the court also had a duty to define the defense of property in a legally correct and manifestly clear manner. There are three separate but interconnected reasons the jury instructions are defective.

A comparison between the instructions the trial court gave and the WPICs is of some assistance. First, the trial court instructed the jury that actions of Mr. Stambaugh must be “necessary” in order to be lawful. This is not correct. WPIC 17.04 says, “A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, though it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.” The WPIC Committee cites State v. Miller, 141 Wn. 104, 250

P. 645 (1926) for support of both instructions. Miller states, “The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances.” The trial court erred by instructing the jury that Mr. Stambaugh’s actions must be necessary.

The second problem with the instructions is closely related to the first: the instructions do not make manifestly clear that Mr. Stambaugh was entitled to rely on the facts as they appeared to him at the time, not as they may have actually been. Again, from Miller, “If the appellants, at the time of the alleged assault upon them, as reasonably and ordinary cautious and prudent men, honestly believed that they were in danger of great bodily harm, they would have the right to resort to self-defense, and their conduct is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the jury in light of the testimony before it.” It is, therefore, irrelevant whether Smokey the Cat was a “very sweet cat” as Ms. Church testified. What was relevant is that Mr. Stambaugh subjectively *believed* he was a dangerous cat.

The issue of the relationship between this subjective belief and the objective facts was analyzed at length in the battered person syndrome cases. In State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984), the Court reviewed an instruction that read, “Homicide is justifiable when committed in the lawful defense of the slayer when the slayer, even

though mistaken, has reasonable ground to believe that the person slain intends to inflict death or great bodily harm and there appears to the slayer to be imminent danger of such harm being accomplished." The Court concluded that the instruction was inadequate.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the slayer at the time. The justification of self-defense must be evaluated from the defendant's point of view as conditions appeared to her at the time of the act. The jurors must understand that, in considering the issue of self-defense, they must place themselves in the shoes of the defendant and judge the legitimacy of her act in light of all that she knew at the time.

All of these facts and circumstances should have been placed before the jury, to the end that they could put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent man similarly situated would have done.

State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977).

In the instant case, the jury was instructed to consider the self-defense issue in terms of the defendant's reasonable apprehension of danger as circumstances appeared to her at the time of the incident. On its face, the instruction adequately conveys the subjective self-defense standard. *See* WPIC 16.02 (1977). However, standing by itself, without additional instructions from the trial court, this instruction does not make the subjective self-defense standard "manifestly apparent to the average juror." The instruction is inadequate because it does not instruct the jury to consider the conditions as they appeared to the slayer, taking into consideration all the facts and

circumstances known to the slayer at the time and prior to the incident.

Defendant's theory of the case was that her intimate familiarity with her husband's history of violence convinced her that she was in serious danger at the time the shooting occurred. There was substantial evidence of the history of violence throughout the marriage between defendant and the victim. The jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim.

Allery at 593-94 (citations omitted).

Comparing the instruction that was found inadequate in Allery to Jury Instructions 10 and 11 in Mr. Stambaugh's case, it is apparent that the Instructions are inadequate. While Instruction 10 does mention "apparent necessity" and Instruction 11 tells the jury to consider "all the surrounding circumstances or events, both before and during such defense," it does not make manifestly clear that the evidence must be viewed from Mr. Stambaugh's perspective in light of all that he knew and had experienced with the cat before.

The third reason the instructions are defective is that they do not make clear that the "reasonableness" of Mr. Stambaugh's actions must be viewed from his subjective viewpoint and not that of an objectively reasonable and prudent person. Jury Instruction 11 required the jury to determine whether Mr. Stambaugh's actions were "reasonable and necessary considering all the surrounding circumstances or events." The

instruction is unclear whether the phrase “considering all the surrounding circumstances or events” modifies the word “necessary,” or both words “reasonable” and “necessary.” As the Allery case makes clear, the reasonableness of Mr. Stambaugh’s actions must be viewed through his subjective knowledge. But the jury probably read the instruction as requiring that they consider the surrounding circumstances in determining the necessity, but not in determining the reasonableness. As the Watkins case says, the jury should not have to guess at an instruction’s meaning and this instruction is not manifestly clear.

**2. The prosecutor committed misconduct when he asked Mr. Stambaugh to opine whether another witness was lying and this misconduct was reversible when: (a) a timely objection was lodged; and (b) the misconduct forced Mr. Stambaugh to opine that other witnesses were lying about irrelevant issues.**

It is well-settled law in Washington that a prosecutor commits misconduct when he or she asks a witness to comment on the veracity of another witness.

[T]he primary and more fundamental rationale for disallowing this type of cross examination is because it places irrelevant information before the jury and potentially prejudices the defendant. To the extent they do in fact prejudice the defendant, we agree that such questions are misleading and unfair. What one witness thinks of the credibility of another witness' testimony is simply irrelevant. In addition, requiring a

defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury.

State v. Wright, 76 Wn. App. 811, 821-22, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). In State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995) the Court of Appeals unequivocally condemned the practice.

The practice of asking one witness whether another is lying "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason". Nevertheless, misconduct is prejudicial only when, in context, there is a substantial likelihood that it affected the jury's verdict. Without a proper objection, request for a curative instruction, or a motion for mistrial, the defendant cannot raise the issue of misconduct on appeal unless it was so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice. Liar questions and comments are held to be harmless if they "were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury". Here, a timely objection would have cured the problem, but no objection was raised.

But the State is incorrect in its view that improper cross-examination of this type is "never really very important to the case". As a practical matter, if that were so, prosecutors would not waste their time planning such questions. As a legal matter, as shown by the result in [previous case law], courts recognize that forcing the defendant into the role of accuser has the potential for turning a close case against the defendant. . .

And so we reject the suggestion, implicit in the State's argument, that courts must and do wink at intentional and repeated unfair questioning by prosecutors under the rubric of harmless error. The tactics at issue are creating problems on appeal in far too many cases.

State v. Neidigh, 78 Wn. App. 71, 76-79, 895 P.2d 423 (1995) (citations omitted).

As the Neideigh case discusses, most of the cases addressing this issue have focused on two issues, whether a timely objection was lodged and whether the error was harmless. In Mr. Stambaugh's case, there was a timely objection and the error is not harmless.

The prosecutor twice tried to pin Mr. Stambaugh down on whether the Churches were lying. The first time, no objection was made. But the second time, which came shortly thereafter, defense counsel objected. But the prejudice was compounded by the Court when the objection was overruled.

Because the prosecutor clearly committed misconduct, and because a timely objection was made to at least one of the improper instances, the next question is whether the error is harmless. The error is not harmless in this case. As argued above, much of the testimony of Melanie and Lori Church was of only marginal relevance. The prosecutor's cross examination was designed to show Mr. Stambaugh was introduced to Smokey by the Churches and, therefore, knew he was not a predatory cat. It did not matter whether Smokey was in fact a sweet cat or a predator. What mattered was whether Mr. Stambaugh subjectively *believed* Smokey was a predator. While the testimony of Melanie Church that she believed Smokey was a sweet cat was marginally relevant to impeach the good faith of Mr. Stambaugh's belief, her opinion was far from dispositive. The

jury could find that both Ms. Church and Mr. Stambaugh were testifying truthfully and still acquit Mr. Stambaugh. The jury could find that Smokey was in fact a sweet cat, but that Mr. Stambaugh subjectively and in good faith believed he was a predator. To force Mr. Stambaugh to openly accuse Ms. Church of lying on a wholly irrelevant issue substantially prejudiced his presentation of evidence.

The second instance of misconduct is even less relevant. It is not probative of any material fact whether Mr. Stambaugh laughed when confronted by Ms. Church. But again, over objection, the State provoked Mr. Stambaugh to accuse Ms. Church of lying. The misconduct was not harmless.

#### D. Conclusion

Mr. Stambaugh's conviction should be reversed and remanded for a new trial.

DATED this 21st day of December, 2006.

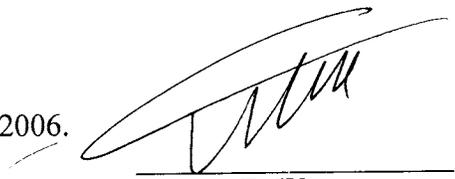
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Thomas E. Weaver, WSBA #22488  
Attorney for Defendant



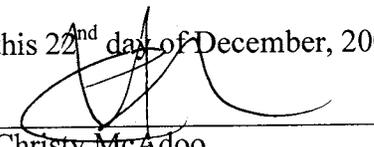
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Dated this 22<sup>nd</sup> day of December, 2006.



Thomas E. Weaver  
WSBA #22488  
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of December, 2006.



Christy McAdoo  
NOTARY PUBLIC in and for  
the State of Washington.  
My commission expires: 07/31/2010

