

NO. 37127-8-II

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

BY: [Signature]
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
1990 WAC 101-01-001

STATE OF WASHINGTON,

Respondent,

v.

SHAUN K. DIGGS,

Appellant.

APPELLANT'S BRIEF

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Defendant's Proposed Jury Instruction regarding Self Defense (Instruction No. 1)

Defendant's Proposed Jury Instruction regarding Self Defense (Instruction No. 2)

Defendant's Proposed Jury Instruction regarding Self Defense (Instruction No. 3)

A. ASSIGNMENTS OF ERROR

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in ruling the defendant's offer, and renewed offer, of proof did not establish a prima facie case for his theory of self defense? (Assignments of Error No. 1 and No. 2)

2. Whether the trial court erred by precluding Mr. Diggs from testifying regarding historical and background information necessary to assist him in establishing he was a "hyper-vigilant" person in support of his theory of self defense. (Assignment of Error No. 3)

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C. STATEMENT OF THE CASE

1. Procedural History

Mr. Diggs was charged with two counts of Assault in the Second Degree. CP 6-9. The information contained a special allegation claiming Mr. Diggs was armed with a firearm. CP 7-8. The trial court allowed Mr. Diggs to present a lesser included offense of Unlawfully Displaying a Weapon at the time of trial. CP 52-55. Following a jury trial, the jury returned guilty verdicts to two counts of Unlawful Display of a Firearm. CP 59. This appeal timely follows. CP 70.

2. Substantive Facts

Shaun K. Diggs grew up in Harlem, New York City, in upper Manhattan near 110th Street. RP 347. Following graduation from high school, Mr Diggs joined the United States Navy. RP 348. He reached the rank of a Second Class Petty Officer, an E-5. *Id.* He served in operation Desert Fox and Operation Enduring Freedom. *Id.* He was honorably discharged in 2002. *Id.*

Mr. Diggs was thirty years of age at the time of the alleged incident of August 21, 2007. RP 347. At that time he lived with Chelsea Parker. RP 349. The two of them were roommates. *Id.* Ms. Parker was employed at Pizza Hut. RP 302. Mr. Diggs was employed as a car salesman at Today Chevrolet Cadillac and was a productive salesman. RP 392.

On August 21, 2007 Mr. Diggs was using Ms. Parker's car. RP 349. He used Ms. Parker's car to drop her off at work and to pick her up when she got off work. *Id.* Mr. Diggs arrived at Ms. Parker's place of employment at between 6:30 p.m. and 7:00 p.m. on August 21, 2007 to pick up some money from her during her work shift. RP 350. When Mr. Diggs arrived at the Pizza Hut parking lot, he pulled into what was referred during trial as stall number three. RP 352. As he sat in the parking lot using his cell phone, he saw Ms. Parker exit Pizza Hut, speak with some individuals who were outside of the restaurant, and smoke a cigarette. RP 350-351. Mr. Diggs did not know the individuals with whom Ms. Parker was hanging out with. RP 350. When Ms. Parker noticed Mr. Diggs in the parking lot, she ran over to him. RP 351. Ms. Parker put some money into the middle console of the car, gave Mr. Diggs a hug, and the two of them conversed for about ten minutes. RP 351, 353.

During that time Mr. Diggs saw Jacob Kreifels looking at him in a crazy way. RP 372-373. Mr. Diggs inquired of Ms. Parker why Mr. Kreifels was "looking at me like that way". RP 359. Ms. Parker informed Mr. Diggs that Mr. Kreifels had been fired from Pizza Hit for using the "N" word. *Id.* Mr. Diggs testified as to that part of his conversation with Ms. Parker as follows: "She told me he got fired for using the N word, being racial." *Id.*

During Mr. Diggs' conversation with Ms. Parker, he heard Mr. Kreifels say: "What the fuck". PR 355, 359. Mr. Diggs looked up in

response to Mr. Kreifels, saw a group of males within one or two feet of Ms. Parker, and was walking around the hood of the vehicle by its right fender in stall number two. RP 355. Mr. Kreifels was near the line that separates stall two from stall three. *Id.* Mr. Diggs looked up and saw the two other guys, for a total of three males. RP 383. The group walked towards Mr. Diggs. *Id.* Mr. Diggs did not know that the car next to him belonged to one of the members of the group. RP 384. Mr. Diggs responded to the approaching group by displaying his holster. RP 356. Mr. Diggs was concerned that Mr. Kreifels' actions may have been racially motivated. RP 358. The holster was latched onto the door about one foot below the window. *Id.* Mr. Diggs grabbed the holster and pulled it up with his right hand. RP 357. Mr. Diggs testified of that action as follows:

"I looked at him, had eye contact, grabbed my holster. Because it was three guys. It wasn't just Jacob. It was all three guys. And I grabbed my holster. And I'm looking at him, and the whole time I'm just, you know, watching him, watching his every move. And they're walking behind Chelsea. And then he looks at Chelsea, and I'm like "Don't talk to her like that. Don't talk to my girl like that." RP 359

After that exchange Mr. Diggs stated "This is my girl", and he put the holster down. RP 360, 382. Mr. Kreifels responded to that comment by saying "I don't give a fuck. This is my girl right here". RP 360. Mr. Diggs knew that Ms. Parker had told the group that he had a gun. RP 360. Mr. Kreifels and his group got into their car and left the parking lot. RP 361. Mr. Diggs also left the parking lot. *Id.* As Mr. Diggs came

across the group again as he was driving. *Id.* As he was driving by, the front passenger of the vehicle flipped him off. *Id.* Later, as Mr. Diggs was driving, a police car make a “crazy U-turn” behind him. RP 362. Five police cars arrived at the scene, law enforcement activated their lights, and Mr. Diggs pulled over. RP 362-363. Mr. Diggs was cooperative with law enforcement. RP 363, 366.

Mr. Diggs does have a concealed weapons permit. RP 366. The permit was in Mr. Diggs’ back pocket at the time of the incident. *Id.* Mr. Diggs did have a pistol in the vehicle located under the passenger seat. *Id.* This information was provided to Deputy Watson at the time Mr. Diggs was stopped by law enforcement. *Id.*

Mr. Kreifels also testified at trial. Mr. Kreifels went to Pizza Hut on August 21st with his girlfriend to eat. RP 176. Mr. Kreifels had previously worked with Ms. Parker at Pizza Hut. RP 191. Mr. Kreifels was fired from his employment at Pizza Hut about two months prior to the incident. RP 247. He was fired due to his use of the “N” word. *Id.*

After Mr. Kreifels and his girlfriend, Ms. Nicole Cardell, finished their meal, they waited with a group of friends outside of the restaurant. RP 191. He was having a cigarette outside the premises by the handicap ramp and stall. *Id.* This location was referred to as stall number one during the trial. RP 193. Mr. James Bolinsky arrived at Pizza Hut to provide a ride for Mr. Kreifels. RP 191. Mr. Bolinsky pulled into stall

number two. RP 193. Mr. Brandon Chapman accompanied Mr. Bolinsky to Pizza Hut. RP 193. The two occupants of the vehicle emerged and joined Mr. Kreifels and his girlfriend in the area of the handicap ramp and stall. RP 194. The group was joined by Ms. Parker. RP 177, 194. Ms. Parker smoked a cigarette with the group. RP 195. Ms. Parker sat on a banister that ran down the handicap ramp. *Id.*

Almost immediately after Ms. Parker sat down she stated: "Oh, I didn't realize you were here." RP 198. Ms. Parker then walked over to stall number three where Mr. Diggs was parked. RP 199-200. Mr. Kreifels testified that he heard Ms. Parker tell Mr. Diggs: "No, no. It's not like that. He's here with his girlfriend." RP 201. Mr. Kreifels also testified that he was not sure, but thought he heard the sound of a gun cock. RP 201. Mr. Kreifels stated that as he was getting into Mr. Bolinsky's vehicle he heard Mr. Diggs say: "This is my girl, New York all Day." RP 205. Mr. Kreifels thought the comment was directed at him and he replied: "This is my girl right here man. I'm not going for your girl. This is my girl." RP 205. At the time of this exchange Mr. Kreifels was at about where the white line separates stall number one from stall number two. RP 202. Mr. Diggs denied making the comment "New York all day". RP 360.

Mr. Kreifels testified Mr. Diggs held a gun in his left hand. RP 185. Mr. Diggs was inside of his vehicle. RP 181-183. Mr. Diggs never pointed the gun at Mr. Kreifels. RP 205. Following the incident Mr. Kreifels

contacted 911. RP 188. Mr. Kreifels reported during the call to 911, "Some nigger just pulled a gun on me." RP 213.

Other witnesses presented at trial provided varying versions of the incident. For example, Ms. Cardell's description of Mr. Diggs' display of a gun varied during her testimony. On direct examination Ms. Cardell stated she was scared because Mr. Diggs "pulled out a gun". RP 259. On cross-examination Ms. Cardell stated that Mr. Diggs "waved" a gun. RP 275. Ms. Parker did not see a firearm and did not see Mr. Diggs hold a firearm in any way. RP 309-310. Ms. Parker spoke to Mr. Diggs while she was leaning into the car with her elbows on the window. RP 307. She was in that position when Mr. Kreifels and his girlfriend walked behind her. RP 309.

During the trial, prior to Mr. Diggs' testifying, the trial court denied Mr. Diggs' request to provide testimony regarding his self defense theory of the case. RP 326-327. Defense counsel argued as part of the offer of proof on this issue that Mr. Diggs' proposed testimony included the following:

"...that he grew up in a rough neighborhood in New York on the southern edge of Harlem, that he attended school as (sic) a significant gang problem, although he was never personally a gang member himself. After he graduated from high school he joined the military, and he served in two wars. He served at the end of the first Iraq war and he served at the beginning of the second Iraq war.

Although he never had to actually fire his firearm at the enemy, he was frequently put in a position where he had to

stand guard. I believe the phrase the military uses is security class alpha, which basically means when you're a security class alpha, if you see something you don't recognize you shoot it and ask questions later. Fortunately, he never had to fire his firearm in that situation. However, I believe that someone who had formal training of the nature that the military has given him, he is going to react differently to a threatening situation than another person might.

I believe all of this is admissible under the subjective prong of the lawful force case law, and I intend to introduce it..." RP 327-28.

The defendant's offer of proof regarding the alleged crime was as follows:

"He is going to testify that he was startled when Mr. Kreifels came over; that - that Mr. Kreifels make a comment to him along the lines of "what the fuck is going on over here."

My client was startled. He responded by saying that this is my girl. I am just talking to my girl. He then patted his holster to demonstrate that he was armed and that he was willing to defend himself, at which time Mr. Kreifels backed off. RP 329

The defense further explained how Mr. Diggs' life experiences in New York and in the military were probative of the situation in the parking lot. RP 330-333. Defense counsel argued in part as follows:

"I guess, Your Honor, I believe that Mr. Diggs' life experiences tend to make him hypervigilant. Mr. Diggs will testify at his high school they had a common phrase that they all used which (sic) keep your head on a swivel. Basically, you need to be constantly looking around you. You need to be aware of your circumstances. You don't want to be caught unawares.

And he went through life, he went through high school keeping his head on a swivel. Then as soon as he finished high school he immediately goes off to the Middle East where he's repeatedly put in situations where he's told if you see something you don't recognize you shoot first and ask questions later.

I believe that that life experience tends to make him hypervigilant, and when he has someone he doesn't know who's coming up who's taking a threatening posture towards him, he make react a little differently that you and I might react.

I believe that that goes directly to his subjective state of mind, which I am allowed to introduce." RP 332-333.

The trial court ruled that the testimony was not a prima facia case for self defense and that the personal information about that issue was not admissible because there was no prima facia case for self defense.

RP 343. Defense counsel renewed the request to provide this information which was again denied. RP 364. Finally, defense counsel proposed to instruct the jury regarding the issue of self defense. RP 404; CP 10-19. That request was denied as well. RP 425; CP 36-57

D. ARGUMENT

1. THE TRIAL COURT ERRED BY PRECLUDING MR. DIGGS FROM ASSERTING THE DEFENSE OF SELF DEFENSE.

In this case the trial court made a finding that no evidence supported Mr. Diggs' claim of self defense, both when the request was first presented, and later during Mr. Diggs' testimony. The trial court's factual finding on both occasions was above that no evidence supported

Mr. Diggs' claim of imminent danger of great bodily injury is reviewable for an abuse of discretion under *State v. Walker*, 136 Wn.2d 767, 777, 966 P.2d 883 (1998).

Self defense is proven with evidence of the following factors:

1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; 2) this belief was objectively reasonable; 3) the defendant exercised no greater force than was reasonably necessary; and 4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997). Evidence of self defense must be evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees". *State v. Janes*, 121 Wn.2d at 238, *State v. Walden*, 131 Wn.2d at 474. Under this standard, the jury is to stand in the shoes of the defendant, consider all the facts and circumstances known to him, and then determine what a reasonable person in the same situation would have done. *State v. Janes*, 121 Wn.2d at 238.

In this case the trial court abused its discretion, both in the initial ruling and the subsequent request for reconsideration, because the factual finding made by the trial court is not supported by the record. The trial court ruled that it would required an offer of proof before Mr. Diggs presented a case of self defense and before Mr. Diggs testified. RP 300. An offer of proof was presented by defense counsel. RP 329. The trial

court found that no prima facia case existed to allow the claim of self defense to be raised. RP 343.

The trial court stated as the facts of the case as follows:

“The defendant’s theory of the case is simply that when confronted at the window by the alleged victims he simply tapped the gun which was beside him in the vehicle, as opposed to brandishing it in any sense during the course of his response to the alleged victims.” RP 342.

The trial court determined that there was no prima facie case for self defense. RP 343.

However, the offer of proof provided by the defense was as follows:

“My client was startled. He responded by saying that this is my girl. I’m just talking to my girl. He then patted his holster to demonstrate that he was armed and that he was willing to defend himself, at which time Mr. Kreifels backed off.” RP 329.

During Mr. Diggs’ testimony he stated that he held up the holster. RP 360, 382. His gun was underneath the passenger seat. RP 357. Defense counsel renewed the motion to submit a self defense claim during Mr. Diggs’ testimony by requesting the trial court to reconsider its ruling denying Mr. Diggs’ ability to raise self defense. RP 364. Defense counsel argued in part:

“...given the testimony that my client has given that he actually grabbed the holster, that he waived the holster, and that Mr. Kreifels made statements I think could easily be interpreted as threatening statements, the fact that my client knew that Mr. Kreifels had been fired from Pizza Hut for using the N word.” RP 364-365.

The trial court denied the motion for reconsideration. RP 365.

The trial court based its determination that there was no prima facie case for self defense on the belief that the actions of Mr. Diggs was as follows:

“...simply tapped the gun which was beside him in the vehicle, as opposed to brandishing it in any sense during the course of his response to the alleged victims.” RP 342.

The trial court held as follows:

“I think that under this version of the facts that there is no prima facie case of self defense. And that’s because the defendant does not commit under this version of the facts an act that needs to be justified by the defense. There is no self defense under that version of the facts.” RP 342.

The trial court’s ruling ignored the other evidence presented during the trial. The witnesses presented by the prosecution testified that Mr. Diggs brandished a pistol which they saw even though it was not pointed at any of them. RP 207; RP 258-259.

The facts presented at trial supported the presentation of Mr. Diggs’ claim of self defense. As stated in the case of *State v. Walden*, 131 Wn.2d at 473:

“To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self -defense beyond a reasonable doubt...”

In this case Mr. Diggs produced some evidence of self defense when he testified that he displayed his holster in reaction to a display of force.

RP 356.

The decision to prohibit Mr. Diggs from raising the claim of self defense was improper not only because a factual basis for the claim was made as outlined above, but also because the subjective and objective analysis required by the case of *State v. Walker*, 136 Wn.2d 767, 966 P.2d 883, was met in this case. Under *State v. Walker*, trial court must perform the following analysis:

“In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis.” *State v. Walker*, 136 Wn.2d at 772.

In this case the defense attempted to convince the trial court that admission of evidence of Mr. Diggs’ military experiences while on duty in the first and second Iraq wars in order to show that he perceived he was in danger at the time of the incident. RP 327-28

The case of *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) is analogous to the case at hand. In that case the defendant claimed he was pushed off his bicycle by three teenagers with whom he had been involved in an altercation on at least one previous occasion. After he was pushed off the bicycle, the defendant attempted to use a knife against the three teens who were unarmed. His conviction for Second Degree Assault was reversed based on a faulty instruction.

In the *Walden* case the jury was not allowed to consider “the defendant’s subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the batter at issue would result in great personal injury.” *State v. Walden*, 131 Wn.2d at 477. According to *State v. Walker*, *supra*, case “*Walden and Painter* stand for the proposition that one could reasonable fear great bodily harm of death from an unarmed assailant, depending on the circumstances.” *State v. Walker*, 136 Wn.2d at 776. The case of *State v. Painter* is found at 27 Wn.App. 708, 620 P.2d 1001 (1980).

Furthermore, in this case a reasonable person in the defendant’s position or shoes could have perceived the threat of great personal injury because Mr. Diggs was black and he know from what he had been told by Ms. Parker that his perceived assailant Mr. Kreifels “looking at me like that, the way he was.” RP 372. Mr. Diggs heard Mr. Kreifels speak in a derogatory, threatening manner and saying to Mr. Diggs: “What the fuck?”, as he approached the vehicle. RP 355. Mr. Diggs responded by holding up an empty holster to indicated that he was armed. RP 382. The action by Mr. Diggs was reasonable.

In the case at hand, the trial court’s factual finding that there was no evidence to support the defendant’s claim of belief of imminent danger of great bodily injury is reviewable under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d at 777. Here, the trial court abused its

discretion because the trial court's factual basis is not supported on the record. The testimony previously outlined in this brief provided a basis to allow the claim of self defense to come under the objective and subjective elements set forth in the case law described in this brief.

2. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF RELEVANT EVIDENCE DENIED MR. DIGGS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Evidentiary rulings are reviewed based on an abuse of discretion standard. *Karl B. Tegland*, 5 *Washington Practice* 99-100 (5th ed. 2007) (citing among other cases *State v. rel. Carroll Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) (see also generally, *State v. Johnson*, 12 Wn.App. 548, 530 P.2d 662 (1975)

Both Washington State and Federal Constitutions guarantee a criminal defendant the right to present evidence in his defense. *U.S. Const. Amends. VI, XIC; Const. Art. I sec. 22*. This right guarantees the defendant the opportunity to put his version of the facts before the jury, so they may determine the truth. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1969) (citing *Washington v. Texas*, 388 U.S. 14, 19., 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). In this case Mr. Diggs should have been entitled to present his background information. Mr. Diggs' background information was necessary, and relevant, for two reasons. The first to allow Mr. Diggs to testify regarding his background to provide the jury with

an understanding of why Mr. Diggs may have acted in the manner in which he did and to provide the jury with information to be applied to the subjective element of self defense.

Information regarding the defendant's background, admissible to let the jury know the defendant. *See State v. Avendano-Lopez*, 79 Wn.App. 706, 720-21, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007, 917 P.2d 129 (1996). Background information includes "data such as place of birth, education, length of residence in the community, length of marriage, size of family, occupation, place of employment, (and) service in armed forces." *State v. Bowers*, 218 Kan. 736, 738, 545 P.2d 303 (Kan. 1976)

The information is necessary for the subjective element of self defense as well. The trial court erred in denying Mr. Diggs the opportunity to present as claim of self defense as previously argued. Washington case law does allow for personal information to be presented towards the subjective element of a self defense claim. Following the case of *State v. Walker, supra*, the Supreme Court held in *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) that the subjective element requires putting itself in the position of and in light of the facts and circumstances known to the defendant. The Court followed this holding in the case of *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The court stated in that case: "The subjective portion requires the jury to stand in the shoes of the

defendant and to consider all the facts and circumstances known to him or her..." *State v. Walden*, 131 Wn.2d at 474.

Furthermore, the case of *State v. Walden, supra*, also holds that the definition of great bodily injury included in *WPIC 204.01* is based on the perceptions of the defendant and is a bold statement of the law. *WPIC 204.01* states as follows:

WPIC 204.01--Great Personal Injury--Definition

In determining whether [use of deadly force in self defense] was justifiable, the phrase great personal injury means an injury that the [defendant] reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon the [defendant]. *WPIC 204.01*

In this case the state argued that Mr. Diggs was precluded from introducing evidence of his upbringing near Harlem in New York and his prior overseas military experiences near a combat zone in Iraq with the argument : "...these experiences do not directly relate to, or involve, the named witnesses, victims and actors in the present case." CP 20. The trial court ruled that Mr. Diggs' personal history information was not relevant. RP 343-344. That decision was in error.

Mr. Diggs' previous life experiences, as they applied to the situation at hand, included his high school and armed forces vigilance. That was part of who Mr. Diggs was at the time of the alleged incident. The testimony should have been admitted not only for purposes of providing background information, as he is entitled to do under the case

law previously stated, but also for the self defense claim he should have been allowed to present. In this case the witnesses for the prosecution were allowed to testify that Mr. Diggs made comments and pulled out a gun. Specifically, Mr. Kreifels testified that he heard Mr. Diggs say: "This is my girl; New York all day." RP 205. Ms. Cardell testified in part: "...Then he, like, pulled out a gun, said like "New York all day, baby, New York all day." RP 258. Ms. Cardell further testified that she was certain of what those comments meant. Mr. Diggs was not given the opportunity to explain those comments. Without the explanation, the jury may have taken those comments to deduce that Mr. Diggs was either crazy, had some strange affinity for New York, or was being aggressive. The decision of the trial court precluded Mr. Diggs from responding.

The trial court abused its discretion by denying Mr. Diggs the opportunity to provide background information regarding his past experiences. The information was relevant and probative to the issue presented at trial. For example, New York reference came up through two prosecution witnesses. Yet, Mr. Diggs was not allowed to testify regarding his New York experiences that made him a hypervigilant person, as argued by his defense counsel. RP 332-333. The Court improperly precluded this testimony.

3. THE TRIAL COURT ERRED WHEN IT EXCLUDED THE
DEFENDANT'S PROPOSED INSTRUCTIONS ON SELF DEFENSE

Each party is entitled to instruct the jury on its theory of the case if evidence presented supports the instruction. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000). Instructions to the jury are constitutionally sufficient if they allow each party to argue its theory of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The determination of the trial court of whether a defendant produces sufficient evidence to raise a claim of self defense is a matter of law. *State v. Janes*, 121 Wn.2ds 220, 238, n.7, 850 P.2d 495 (1993). De Novo review is the appropriate standard of review to be used in examining a trial court's decision to preclude a jury instruction regarding self defense. The refusal to provide a jury instruction based on a factual dispute is reviewable only for an abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 921 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). A trial court's decision to refuse a jury instruction based on ruling of law is reviewed de novo. *Id.* In this case the issue of self defense is one of law, and de novo review is appropriate.

In this case, the trial court's refusal to give the instruction on self defense proposed by the defense rendered the instructions presented in this case inadequate. The instructions that were in fact given to the jury did not properly inform the jury regarding the lawful use of force or the state's burden of proof on that issue. The trial court's refusal prevented Mr. Diggs from arguing his theory of the case. It is well settled in Washington that each party is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. *State v. Williams*, 132 Wn.2d 248, 259-260; *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000).

The issue of self defense should be put to the jury if some evidence, from whatever source, tends to prove the defendant acted in self defense. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Roberts*, 88 Wn.2d 337, 354, 562 P.2d 1259 (1977). The threshold burden of production of the evidence is low. The defendant is not required to present the evidence which would be sufficient to create a reasonable doubt. *State v. Janes*, 121 Wn.2d at 237; *State v. McCullum*, 98 Wn.2d at 488, ; *State v. Adams*, 31 Wn.App 393, 396-97, 641 P.2d 1207 (1982). The court may refuse a self defense instruction only where no plausible evidence appears in the record upon which a claim of self defense may be based. *State v. McCullum*, 98 Wn.2d at 488; *State v. Adams*, 31 Wn.App at 395.

The trial court must view the evidence in the light most favorable to the defendant when making the determination if self defense instructions are required. *State v. Callahan*, 87 Wn.App. At 933. The defendant is entered to the benefit of all the evidence presented in the case and not merely upon evidence presented through defense witnesses. *Id.* In the case of *State v. Henrickson*, 81 Wn.App. 397, 401, 914 P.2d 1194 (1996) the Court held that the defendant was entitled to a self defense instruction based on evidence presented that was inconsistent with the defendant's testimony. In that case the defendant did not recall striking a fatal blow, but other evidence gave rise to the inference that the defendant acted in self defense. *Id.*

In this case Mr. Diggs was convicted of unlawful display of a firearm. In reviewing the evidence to determine if a self defense applies, all evidence must be considered in the light most favorable to the defense. *State v. Callahan*, 87 Wn.App at 933.

To prove self defense evidence must show that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than what was reasonably necessary; and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn.App. 925, 943, P.2d 676 (1997). Viewing the above described evidence in the light most favorable to the defendant, there is evidence that Mr. Diggs

reasonably believed he was in imminent danger, he exercised no greater force than was necessary, and was not the aggressor. See *State v. Callahan*, 87 Wn.App. At 929. Consequently, the evidence presented at trial meets the threshold standard of some evidence of self defense.

In determining if self defense instructions are appropriate, the question for the Court is not whether Mr. Diggs acted in self defense but whether the record contains some evidence which, when viewed in the light most favorable to the defendant, supports a claims of self defense. *State v. Callahan*, 87 Wn.App at 933; *State v. Adams*, 31 Wn.App at 396-7. The defense is not required to convince the Court that Mr. Diggs acted in self defense, but merely that some evidence supports the theory whether the evidence was presented by the prosecution or the defense.

Jury instructions are sufficient where they properly inform the jury of the law applicable to the case. *State v. Walden*, 131 Wn.2d at 473. After a defendant presents any evidence of self defense, the burden shifts to the prosecution to disprove self defense beyond a reasonable doubt. *Id.* Where the defendant produces some evidence that he acted in self defense, the jury must be instructed not only on the law regarding self defense but also on the prosecution's burden of proving the absence of self defense beyond a reasonable doubt. *Id* at 473-74. The court's failure to instruct the jury regarding self defense, when evidence establishes self

defense as discussed previously in this brief, effectively relieves the state of its burden of proof and denies the defendant's right to a fair trial.

The failure to give self defense instructions, when appropriate, cannot be deemed harmless error. An error is presumed prejudicial, where jury instructions relieve the state of its burden of proof. *State v. Eaker*, 113 Wn.App 111, 120, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003). Consequently, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict of the jury. *Id.* An error is harmless, as applied to the issue of a missing element, only if that element is supported by uncontroverted evidence. *Id.* Failure to give adequate instructions on a defense theory that is supported by the evidence is prejudicial error. *State v. Williams*, 132 Wn.2d at 259069; *State v. Irons*, 101 Wn.App. At 549.

In this case the instructions did not inform the jury that the prosecution was required to prove the absence of self defense beyond a reasonable doubt. The record in this case contains credible evidence from which a jury could have found that Mr. Diggs acted in self defense. Consequently, the absence of self defense is not supported by uncontroverted evidence, and the error is not harmless. Reversal of the conviction is therefore required in this case.

4. MR. DIGGS' TWO CONVICTIONS FOR UNLAWFUL DISPLAY OF A FIREARM VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Mr. Diggs was convicted of two separate counts of unlawful display of a weapon for a single incident where witnesses testified that he waved a firearm at a group. The two charges for unlawful display of a firearm were based on one act of displaying a weapon that was witnessed by two individuals. Mr. Diggs requests this Court to dismiss one of the counts of unlawful display of a weapon on double jeopardy grounds as a manifest error effecting a Constitutional right. The logical unit of prosecution of unlawful display of a weapon is the defendant's act of displaying a weapon and not based on the number of individuals who witnessed the act.

The double jeopardy clause of the United States Constitution proves that no individual shall "be twice put in jeopardy for the same offense." *Wash. Const.* Art. 1, sec. 9. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)

The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds,

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Double jeopardy principles prohibit prosecution for multiple offenses under the same statute if the defendant commits only one unit of the crime. *United States v. Bell*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002).

The first inquiry in determining if Mr. Diggs was twice placed in jeopardy when he was convicted and sentenced for two counts of unlawful display of a firearm is the applicable "unit of prosecution" the Legislature intended for that offense. *State v. Tvedt*, 153 Wn.2d at 710; *State v. Westling*, 145 Wn.2d at 610. In determining the intent of the Legislature, this Court begins with the statute's plain language and ordinary meaning. *State v. Tvedt*, 153 Wn.2d at 710; *State v. Westling*, 145 Wn.2d at 610. In the event the statute is ambiguous or the unit of prosecution is unclear, courts should apply the rule of lenity to resolve any ambiguity in a manner that protects the defendant's double jeopardy rights. *United States v. Bell*, 349 U.S. at 82-84; *State v. Tvedt*, 153 Wn.2d at 710-11; *State v. Bobic*, 140 Wn.2d at 261-262.

The unlawful display of a firearm statute reads as follows:

(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either

manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(1)

The gravamen of the offense is the act of displaying a weapon in a manner that warrants alarm for others, and not that others are actually endangered. *State v. Workman*, 90 Wn.2d 443, 447, 448, 584 P.2d 382 (1978). Furthermore, the Court in the case of *State v. Karp*, 69 Wn.App. 369, 374, 848 P.2d 1304, review denied, 122 Wn.2d 1005 (1993) held that the unlawful display of a firearm statute may be violated if the defendant's conduct is not directed at any person. Therefore following the cases above, the unit of prosecution is the act of displaying the weapon and not the number of people who saw the weapon.

The analysis of the Washington State Supreme Court on the unit of prosecution for charges of robbery and arson provides some guidance for determining the appropriate unit of prosecution for the charge of unlawful display of a firearm. That analysis shows the unit of prosecution is properly focused on the conduct the statute intends to protect, not the number of individuals involved. In the case of *State v. Tvedt, supra*, the defendant was convicted of four counts of first degree robbery resulting from two service station robberies, with two victims for each incident. In that case the Court determined that the statute specified that robbery was both a property offense and a crime against a person and therefore concluded that the unit of prosecution was each separate taking of

personal property from, or in the presence of, a person having ownership or a possessory interest in the property. *State v. Tvedt*, 153 Wn.2d at 714-715. The number of individuals placed in fear by the robbery was not the correct unit of prosecution. *Id.* Similarly in this case, the unit of prosecution is the actual display of the weapon, and not the number of people who observed the weapon.

In the case of *State v. Westling, supra*, the Court found that the unit of prosecution for Second Degree Arson is the setting of the fire and not the property damaged by the fire. *State v. Westling*, 145 Wn.2d at 611. In that case the defendant set one fire that caused damage to three automobiles. The Court focused on the language of the statute which prohibits knowingly and maliciously setting a fire that damages property. RCW 9A.48.030(1); *State v. Westling*, 145 Wn.2d at 610-611. The Court found that the appropriate unit of prosecution was the fire set and not the property damaged. *Id.*

The unlawful display of a firearm statute use of the plural word "persons" illustrates that one or more people may be at risk for one unit of prosecution. See *State v. Spencer*, 75 Wn.App. 118, 876 P.2d 939 (1994). A person may display a weapon in such a manner that may cause safety concerns for one or one hundred persons who are present. *State v. Baggett*, 103 WN.App. 564, 570, 13 P.3d 659 (2000).

This issue was raised in the case of *In re Peter F.*, 132 Cal.App.4th 877 (2005). In that case the court determined the appropriate unit of prosecution for unlawful display of a weapon under a statute analogous to Washington. In that case the defendant was charged with four counts of brandishing a deadly weapon for two separate occasions when he waived a knife or box cutter in a threatening manner in front of two people on each occasion. *Id.* He was prosecuted under Cal. Penal Code sec. 417. *Id.* The section of the California Penal Code at issue is similar to the Washington statute regarding unlawful display of a firearm. California Penal Code sec. 417 reads as follows:

Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses as deadly weapon other than a firearm in a fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days. Cal. Penal Code sec. 417 (a)(1)

The court determined under that statute, that a single act of brandishing a weapon supports only one violation of the statute, no matter how many people witness the act. *In re Peter F.*, 132 Cal.App.4th at 8.

In the case at hand, the witnesses for the prosecution testified that Mr. Diggs briefly waived a firearm around of a group of four people. Conviction for two counts of unlawful display of a weapon violates double jeopardy. One of the convictions must be vacated and the case remanded for sentencing on only one count. *State v. Westling*, 145 Wn.2d at 612.

E. CONCLUSION

The evidence presented at trial suggested that Mr. Diggs acted in self defense. Consequently, the Court was required to instruct the jury regarding self defense and the burden upon the prosecution to disprove self defense beyond a reasonable doubt. The failure of the trial court to prove such an instruction precluded Mr. Diggs from presenting his theory of the case, relieved the prosecution of its burden of proof, and denied Mr. Diggs a fair trial. Mr. Diggs respectfully requests this court to reverse the conviction entered against him. Alternatively, Mr. Diggs requests the Court to vacate one of the convictions for unlawful display of a weapon on double jeopardy grounds.

RESPECTFULLY SUBMITTED this 12 day of September, 2008.



MICHELLE BACON ADAMS
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Attorney for Appellant

INSTRUCTION NO. 1

It is a defense to charges of Second Degree Assault and Unlawful Display of a Weapon that the force used or attempted was lawful as defined in this instruction.

The use of or attempted use of force upon or toward the person of another is lawful when used or attempted by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is 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 of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used or attempted 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.

INSTRUCTION NO. 2

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 physical injury, although 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.

WPIC 17.04, as modified in State v. Walden, 131 Wn.2d 469, 932 P .2d 1237 (1997). See also RCW 9A.16.020(3) (use of non-lethal force is lawful whenever person is "about to be injured" if the force is not more than necessary).

INSTRUCTION NO. 3

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

NO. 37127-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHAUN K. DIGGS,

Appellant.

CERTIFICATION OF MAILING

STATE OF WASHINGTON
BY: *ML*

CO-5019 PM 09/01

COURT OF APPEALS
DIVISION II

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Hand-Delivered To:

Clerk of Court
Court of Appeals, Division II
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Tacoma, WA 98402

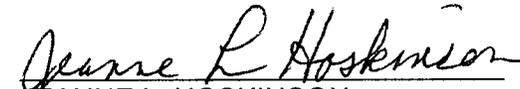
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DATED this 12th day of September, 2008, at Port Orchard,
Washington.


JEANNE L. HOSKINSON
Legal Assistant