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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 40535-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BRIAN ADAM BARND-SPJUT,

Appellant.

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BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated RCW 9A.16.110 when it refused to grant the defendant's reimbursement request for costs and attorney's fees based upon the jury's verdict acquitting him of assault and the jury's special verdict finding that he had acted in self-defense.

2. The trial court abused its discretion when it refused to compensate the defendant for all of his reasonable costs and attorney's fees under RCW 9A.16.110.

3. The trial court acted without authority when it vacated the order awarding costs and attorney's fees.

4. Under RCW 9A.16.110, the defendant is entitled to reasonable costs and attorney's fees on appeal.

*Issues Pertaining to Assignment of Error*

1. Under RCW 9A.16.110, does a trial court err if it refuses to grant a defendant's reimbursement request for costs and attorney's fees in a criminal case in which the state charged the defendant with assault, the jury acquitted the defendant of that charge, and the jury then returned a special verdict finding by a preponderance of the evidence that the defendant had acted in self-defense?

2. Does a trial court abuse its discretion if it refuses to compensate a defendant for all reasonable costs and attorney's fees under RCW 9A.16.110 after the jury, who had acquitted the defendant, returns a special verdict finding by a preponderance of the evidence that the defendant had acted in self-defense?

3. Does a trial court have authority under any statute or court rule to vacate an award for costs and reasonable attorney's fees under RCW 9A.16.110 more than 10 days after the jury returns special verdicts giving the defendant the right to those fees and more than 10 days after entering an order granting those fees?

4. Is a defendant entitled to reasonable costs and attorney's fees on appeal if a trial court erroneously denies that defendant reimbursement for reasonable costs and attorney's fees under RCW 9A.16.110 and the defendant is then forced to appeal in order to obtain a reversal of that erroneous order?

## STATEMENT OF THE CASE

### *Factual History*

“Kesler’s Bar and Grill” is a drinking and eating establishment in downtown Longview owned and managed by Leo Kesler and his son Brandon Kesler. RP 196-199. According to Don Barnd, a Captain in the Longview Police Department, the staff at Kesler’s has a reputation for violence, a fact that Captain Barnd had many times related to his son, the defendant Brian Barnd-Spjut. RP 396-398. Indeed, Brian was well aware of this reputation, as friends of his had seen the staff at Kesler’s, along with Leo Kesler, beat patrons into unconsciousness in the middle of the alley behind the bar. RP 342-351, 404-407. In fact, some of Brian’s friends had been the victims of those beatings. *Id.*

For example, one of the defendant’s friends by the name of Mr. Holt told Brian about an incident in which he had been drinking at Kesler’s when Kesler’s bouncers told him to leave. RP 406-407. He then left, but asked if he could go back in to get his cousin. *Id.* The bouncer’s said that he could. *Id.* However, when he reentered to get his cousin, the bouncers changed their minds, grabbed him, and beat him. *Id.* During this assault, the Kesler’s bouncers broke his cheek bones and one of his eye sockets. *Id.* The defendant’s friend reported the assault to the police. *Id.* However, when the police went to get the security tapes, the employees at Kesler’s claimed that

the cameras had not been functioning that evening. *Id.*

In addition, a number of months prior to March of 2009, the defendant's friend Ross Van Johnson had gone to Kesler's late at night in order to pick up a friend who had called for a ride. RP 342-351. Mr. Johnson is an industrial carpenter who owns a landscape business and who periodically goes to Japan, China, and Burma as a missionary building churches. *Id.* Once Mr. Johnson got to Kesler's, he found his friend on the ground in the middle of the alley behind the business with a number of Kesler's bouncers beating him. *Id.* He immediately yelled at them to stop, and when he did they turned and beat him to the ground. *Id.* Once on the ground, he lost consciousness just after Leo Kesler kicked him. *Id.*

Mr. Johnson later regained consciousness and found a lady kneeling down, telling him that she was a nurse and asking if he was "okay." *Id.* In fact, he was not. *Id.* He had cuts to his head and mouth, numerous bruises, and was in pain for a number of days. *Id.* Mr. Johnson related everything that had happened to him to Brian. *Id.* In fact, both Brian and his finance' Nicole Hewitt were aware of the reputation Kesler's staff had for violence, and based upon this reputation and the reports from their friends, they had stopped patronizing this business for many months prior to March of 2009, in spite of the fact that Brian was friends with Brandon Kesler. RP 196-199, 407-408.

On Friday, March 28, 2009, Brian and Nicole were out for the evening with three friends. RP 352-353. During that evening, Brian had been talking and “texting” with Brandon Kesler about some business opportunities. RP 196-199, 354-356, 406-408, 438-440. During these conversations, Brandon Kesler had invited Brian to stop by the bar to talk to him for a few minutes. *Id.* Although initially hesitant to go into the business, Brian and Nicole decided that there should be no problem since it was only 9:00 pm, food was still being served, and they were only going to be there for a few minutes as Brandon Kesler’s invited guest. RP 354-356, 406-408. As a result, they drove to the parking lot in the back of the business and went in the back door, leaving their friends waiting for them in the vehicle. *Id.*

Once inside the bar, two of Kesler’s “security staff” immediately walked up to Brian and demanded that he pay a \$5.00 cover charge. RP 356-358, 409-412. The first “bouncer” who approached the defendant was Phillip Church. RP 102-111. Mr. Church is 6’1” tall and weighs 215 pounds. RP 142-144. He has worked for a number of private security companies in the past, and has also worked providing security to businesses’ whose employees were on strike. RP 96-100. The other Kesler’s “bouncer” who confronted Brian was Dominador “Dom” Daniel. Dominador Daniel is 6’5” tall, weighs 340 pounds and also has experience working “security” at bars. RP 156-158, 176-178.

Upon hearing Mr. Church's demand that he pay the \$5.00 cover charge, Brian explained that he was only at the bar to speak with Brandon Kesler at Brandon's specific invitation. RP 356-358, 409-412. He then asked Mr. Church and Mr. Daniel to get Brandon Kesler. *Id.* However, Mr. Church continued to insist that Brian pay the cover charge. *Id.* Brandon again stated that he was only in the bar for a few minutes to speak with Brandon Kesler. *Id.* At this point, Brian turned to look for Brandon Kesler. *Id.* When he did, Mr. Church physically grabbed Brian and put him in a "full nelson," whereby Mr. Church put his arms under Brian's arms from behind and locked his hands together behind Brian's head. RP 359-360, 409-412, 443-444. This physical hold forced both of Brian's arms straight up in the air and his head down. *Id.* As this happened, Mr. Daniel grabbed one of Brian's arms. *Id.* They then physically forced him down the back hallway toward the back door, where two more bouncers were located. *Id.* As they forced Brian down the hall, one of the two bouncers told Brian that "they were going to take him outside and get the money out of him." RP 359-360.

As Philip Church and Dominador Daniel physically forced Brian down the hallway, one of two other bouncers by the name of Kirk Turya opened the door. RP 165-169. As he did, Mr. Church and Mr. Daniel, both still physically holding Brian, proceeded through the door and took Brian to the middle of the alley, now with one or two of the bouncers at the door with

them. RP 420-421, 447-448. The fact that the bouncers had taken him out to the middle of the alley and not just thrown him out the back door particularly alarmed Brian and convinced him that they intended to give him a beating. RP 447-448, 491. Once in the middle of the alley, Mr. Church released Brian from the full nelson. *Id.* Thinking that he was about to be beaten as had his friends Mr. Holt and Mr. Johnson, as well as Mr. Johnson's friend, Brian quickly pulled a gun from his waistband and turned around before anyone could jump on him. RP 450-452. In fact, Brian has a concealed weapon's permit to carry that firearm and always does so for personal protection. RP 352-353, 420-421. His purpose in pulling the gun was simply to prevent the bouncers from beating him and to get the bouncers to back off so he could get away. RP 426, 448-452. He did not waive the pistol around and he did not try to pull the trigger. RP 420-426, 446. At that moment, he was not mad. RP 450-452. Rather, he was extremely scared. RP 426.

Once the bouncers saw the pistol, they stopped moving toward Brian. RP 426, 446-448. At this point, Brandon Kesler came running out the back door, and yelled at Brian to leave. RP 420-421, 450-452. According to Brandon, the defendant looked very scared. RP 399-401. Brian and his finance' then went over to his vehicle, got in, and left the area. RP 360-363, 456. The police later stopped the vehicle the defendant was in and placed

him under arrest. RP 250-267.

### ***Procedural History***

By information filed March 31, 2009, and amended two weeks later, the Cowlitz County Prosecutor charged the defendant Brian Adam Barnd-Spjut with four counts of second degree assault against Philip Church, Dominador Daniel, Brandon Kesler, and Kirk Turya. CP 1-2, 4-5. Each count included a firearm enhancement. CP 4-5. Since the defendant had no prior felony history, each of these charges carried a standard sentence range of 153 to 163 months in prison (33 to 43 months plus four consecutive 36 months firearms enhancements) of which only 33 to 43 months was subject to a good time reduction). CP 3. At pretrial, the defendant gave oral and written notice that he was claiming self-defense. CP 7-8, 9, 10-14.

The case later came on for trial before a jury with the state calling eight witnesses, including Philip Church, Dominador Daniel, Brandon Kesler, and Kirk Turya (the extra bouncer who accompanied Philip Church and Dominador Daniel out into the middle of the alley while they were holding Brian). RP 96, 156, 196, 217. All of these witnesses claimed that when released, Brian immediately turned and waived a gun at all of them. *Id.* The state also called four police officers who had responded to a call at Kesler's and who had arrested the defendant. RP 237, 250, 306, 318.

Following the end of the state's case, the defense called six witnesses,

including Brian, his fiancé, and Ross Van Johnson. RP 300, 342, 352, 396, 399, 404. These witnesses testified to the facts set out in the preceding factual history. *See Factual History*. After these witnesses, the state recalled two witnesses for brief rebuttal, and the defense recalled one witness for sur-rebuttal. RP 507, 512, 529. The court then instructed the jury on all four charges and included an instruction on the justified use of force. CP 82-106; RP 544-557. The state did not object to any of the court's instructions, including the instruction on the justified use of force. RP 534.

After instruction, counsel presented their closing arguments. RP 557-631. The jury then retired for deliberation, later returning verdicts of "not guilty" on all counts. CP 113-117. At this point in the trial, the court read the jury the following oral instruction:

Based on your verdict in this case, there is an additional issue that the law requires you to decide.

You will be asked to decide whether the defendant's use of force was lawful. You will hear additional evidence on this question in the next phase of the trial.

The next phase of the trial differs in several ways from the phase you have already completed. First, the burden of proof is on the defendant. In order to receive reimbursement, the defendant must prove by a preponderance of the evidence that his use of force was lawful. When it is said that a claim must be proved by a preponderance of the evidence, it means you must be persuaded, considering all of the evidence in the case, that the claim is more probably true than not true.

Second, the definition of lawful force is different for this phase

of the trial. This time, you will apply an objective rather than a subjective standard. This means that the issue is whether a reasonably prudent person, under the same or similar conditions existing at the time of the incident, would have used the same degree of force as the defendant. You will receive additional instruction on this before you deliberate.

And finally, when you deliberate on this question, only ten of you will need to agree.

Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the entire proceeding.

During your deliberations, you should consider the evidence presented to you in the first phase of this case.

CP 111.

The court then read the jury a written instruction, and sent the jury back to deliberate with that instruction and a special verdict form. CP 112-

113. The written instruction stated as follows:

You must decide whether the defendant has proved the claim of lawful force by a preponderance of the evidence.

When it is said that a claim must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the claim is more probably true than not true.

For this part of the trial, you will use the following definition of lawful force:

The use of force or the offer to use force is lawful when a person appears about to be injured. In determining if the defendant's person's perceptions are reasonable you must use an objective

standard. If a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant, then the force was lawful.

You have been provided with a special verdict form to be used in answering the question of whether defendant had met his burden of establishing lawful use of force. Because this is a civil question, ten or more of you must agree to return a verdict. When ten of you have agreed, the presiding juror will sign the special verdict form, regardless of whether or not the presiding juror agrees with the special verdict. You will then notify the bailiff who will escort you into the court to declare your special verdict.

CP 112.

Following further deliberation, the jury returned with the special verdict form filled out as follows:

We, the jury, return a special verdict by answering the following question:

QUESTION 1: Did the defendant, Brian Barnd-Spjut, prove by a preponderance of the evidence that the use of force was lawful?

Yes   X                        No       

QUESTION 2: Was the defendant engaged in criminal conduct substantially related to the events given rise to the crime with which the defendant was charged?

Yes                             No   X  

CP 113.

Based upon this special verdict, the defendant filed a motion with the court requesting reimbursement for costs and attorney's fees as allowed under RCW 9A.16.110. CP 122-127. The defendant filed his own affirmation

setting out his claim for attorney's fees, costs, and lost wages, along with the affirmation of his attorney. CP 128-130, 133-141, 179-180. Specifically, the defense requested the following: \$3,460.92 in costs; \$1,500.00 paid as the Bail bond premium; \$12,249.15 in lost wages; and \$75,000.00 in attorney's fees. *Id.*

The defense also filed the sworn statements of four experienced criminal defense attorneys licensed to practice in Washington who each rendered opinions that the defendant's request for attorney's fees was reasonable given the length and complexity of the case. CP 131-132, 142-143, 146-147, 170-174. The first attorney was Randolph Furman. RP 131-132. Mr. Furman has 39 years experience at the bar as the ex-chief criminal deputy prosecutor attorney for both Snohomish and Cowlitz counties, as a District and Superior Court Judge, and finally as a criminal defense attorney for ten years. *Id.* The second was John Hays, who has 22 years experience practicing criminal law in Southwest Washington at both the trial and appellate level. RP 142-143. The third was James Morgan, an attorney with 27 years experience practicing criminal law in Southwest Washington. RP 146-147. The fourth was Steve Thayer, an attorney with over 30 years experience defending felony charges in southwest Washington and a former vice president of the Washington Association of Criminal Defense Attorneys. RP 170-174.

In addition, on February 26, 2010, the defense also presented the testimony of Mr. Furman and Mr. Hays in support of its argument that its request for attorney's fees was reasonable. RP 686-708. The state presented no evidence whatsoever in contravention of either the amount of attorney's fees requested or the defendant's affirmations concerning the reasonableness of the request for attorney's fees. CP 191-193. Following a hearing on the matter, the court decided that in its opinion, the reasonable amount of lost wages was \$4,000.00, and the reasonable amount of attorney's fees was \$40,000.00. RP 709-723. As a result, on March 17, 2010, the court signed an order awarding costs as requested, but only awarding lost wages in the amount of \$4,000.00, and attorney's fees in the amount of \$40,000.00. RP 185-186.

Two weeks after the court entered the written order granting attorney's fees and costs, the court, *sua sponte*, changed its mind and decided that the defendant was not entitled to any costs or attorney's fees at all. CP 187. The court filed a four page narrative decision in support of this decision. CP 181-184. The gist of this narrative was that the court believed that (1) no objective evidence supporting the jury's finding that the defendant acted in self defense, and (2) that the court's supplemental instruction B was in error. *Id.* Following entry of the written order vacating the award of attorney's fees, the defendant filed timely notice of appeal. CP 188-190.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED RCW 9A.16.110 WHEN IT REFUSED TO GRANT THE DEFENDANT'S REIMBURSEMENT REQUEST FOR COSTS AND ATTORNEY'S FEES BASED UPON THE JURY'S VERDICT ACQUITTING HIM OF ASSAULT AND THE JURY'S SPECIAL VERDICT FINDING THAT HE HAD ACTED IN SELF-DEFENSE.**

Under Washington Constitution, Article 1, § 24, the citizens of this state have the right to bear arms in their own defense. In recognition of this right, the Washington legislature has adopted a policy that no person shall be placed in legal peril based upon the reasonable use of force in defense of self, others or property. This policy is stated in RCW 9A.16.110(1), which provides:

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

RCW 9A.16.110(1).

In recognition of this policy, the Washington legislature has provided that the state shall reimburse the reasonable costs, lost wages, and attorney's fees of any person put in legal peril through criminal prosecution based upon that person's reasonable use of force in defense of self, others, or property. This self-defense reimbursement provision is found in RCW 9A.16.110(2),

which states:

(2) When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

RCW 9A.16.110(2).

The only limitation the legislature placed upon this right to reimbursement is found in subsection 3 of the statute, which states as follows:

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

RCW 9A.16.110(3).

Our courts have liberally construed this statute to allow a defendant to recover all reasonable fees associated with a criminal prosecution that ends with a verdict of acquittal and a finding by a preponderance that the defendant acted in self defense. *State v. Jones*, 92 Wn.App. 555, 964 P.2d 398 (1998). For example, in *State v. Jones, supra*, the first trial of a defendant charged with second degree assault ended in a mistrial after the

jury disclosed that it was hopelessly deadlocked. The second trial ended in acquittal on a claim of self defense, and the jury then returned a special verdict that the defendant had proven by a preponderance of the evidence that he had acted in self-defense. The defendant then sought reimbursement for all of his legal fees, including those associated with the first trial and those associated with his post trial motions seeking reimbursement.

The trial court denied the majority of the defendant's requested fees, holding that since the first trial did not result in an acquittal, the defendant was not entitled to attorney's fees. Further, since the criminal proceeding ended with the entry of the judgment of acquittal, the post trial attorney's fees were not part of the criminal prosecution. On review, the court of appeals rejected both of these arguments, holding as follows:

When the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to "reimburse the defendant for all reasonable costs ... involved in his or her defense." The italicized word connotes the defendant's participation in the entire prosecution process; it is not limited to participation in a specific part of the process, such as one of two or more trials. Accordingly, RCW 9A.16.110 entitles a defendant to reasonable fees and costs related to the entire prosecution process, including all trials, if, after the last trial, the trier of fact acquitted and entered the required finding of self-defense.

*State v. Jones*, 92 Wn.App. 561-562.

The court then went on to state the following concerning the defendant's right to post-trial attorney's fees under RCW 9A.16.110.

Having held that Jones may recover reasonable fees and costs

related to the first trial, because the prosecution process is to be viewed as a whole, we next address when the prosecution process ends for purposes of RCW 9A.16.110. According to Jones, it ends when all disputes in the case, including fees and costs, have been finally resolved; thus, a defendant may recover post-acquittal fees and costs reasonably incurred in the trial and appellate courts. According to the State, the process ends at the moment of acquittal; thus, a defendant may not recover fees or costs related to the special verdict proceeding in the trial court, or an appeal in an appellate court.

When the Legislature commanded the State to reimburse the defendant “for all reasonable costs ... incurred in his or her defense,” it expressly and deliberately made reasonable fees and costs a part of the criminal case in which they are incurred. Indeed, it even provided by subsequent amendment that such fees and costs must be claimed in the criminal action, and that they cannot be claimed in an independent civil action. At least as a general rule, the “defense” of a case continues until all claims have been finally resolved. Accordingly, we hold that the State must compensate for post-acquittal fees and costs reasonably incurred in the trial or appellate courts.

*State v. Jones*, 92 Wn.App. 563-564.

As is apparent from a reading of RCW 9A.16.110(2), a jury’s verdict of acquittal alone is insufficient to entitle a defendant to an award of fees because the statute conditions reimbursement upon the defendant’s ability to prove to the jury by a preponderance of the evidence that the defendant acted in self defense. Thus, upon acquittal in a case in which the defendant argued self defense, the statute requires the court to submit a special verdict form to the jury asking two questions: (1) whether or not the defense had proven by a preponderance of evidence that the defendant acted in self defense, and (2)

whether or not the defendant “was engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?” *See* RCW 9A.16.110(4)&(5). While an affirmative verdict on the second question does not preclude reimbursement given an affirmative verdict on the first question, it does allow the trial court to reduce the reimbursement to the defendant. However, under the statute, an affirmative verdict on the first question and a negative verdict on the second question leaves the court with no discretion: it must enter an order reimbursing the defendant for all reasonable costs and fees.

Although not explicitly required in the statute, there is one further requirement in the procedure for submitting the reimbursement question to the jury. That requirement is that the defense must prove by a preponderance of the evidence that the claim of self-defense was “objectively” reasonable as opposed to only “subjectively” reasonable. *State v. Manuel*, 94 Wn.2d 695, 619 P.2d 977 (1980); *see also State v. Watson*, 55 Wn.App. 320, 777 P.2d 46 (1989). In other words, the defense has the burden of proving by a preponderance “that a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant.” *See State v. Walden*, 131 Wn.2d 439, 932 P.2d 1237 (1998) (“[T]he objective [standard for self defense] requires the jury . . . to determine what a reasonably prudent person similarly situated

would have done.”)

In the case at bar, the state charged the defendant with four counts of second degree assault, all with allegations that the defendant committed the crimes while armed with a firearm. The defense then gave both oral and written notice that it was claiming self defense. Following trial, the jury returned verdicts of “not guilty” on each count. The court then gave supplemental instructions to the jury stating that the defense had the burden of proving by a preponderance of the evidence that the defendant’s use of force was “objectively” reasonable. After argument and further deliberation, the jury returned special verdicts as required under the statute finding that (1) the defendant had proven by a preponderance of the evidence that his use of force was “objectively” reasonable, and (2) the defendant had not been engaged in the commission of any criminal conduct. Thus, under the statute, the defendant was entitled to costs, lost wages, and reasonable attorney’s fees.

***(1) Substantial Evidence Supports the Jury’s Finding That the Defendant’s Use of Force Was Lawful and Objectively Reasonable.***

In this case, one of the reasons the court vacated its written order awarding costs and attorney’s fees was that it believed that there was no objective evidence supporting the jury’s finding that the defendant acted in self defense. This decision was based upon the court’s own view of the evidence, which it gave in its memorandum decision as follows:

Considering the evidence most favorably toward the defendant, the uncontroverted evidence is as follows: The defendant went to Kessler's to visit with the son of the owner who was a friend of the defendant's. He had heard stories about people being evicted from the premises and then beaten by staff from the establishment. He had been warned by his father, a retired police captain, of the dangers involved in going to this establishment. Before entering the establishment he armed himself with a pistol concealed under his clothing. He had a permit to carry a concealed weapon. When he arrived at Kessler's he was asked by the staff to pay a cover charge. The cover charge was required of all customers attending the show at Kessler's that night. The defendant declined to pay the cover charge, explaining that he was there to see the owner's son by invitation and did not intend to stay for the show. The owner's son was not available to confirm or deny the defendant's claims. The management suggested that the defendant pay the cover charge, and that it would be refunded by him when the manager's son verified the defendant's statements. The defendant declined this offer. The staff of the establishment then requested the defendant to leave. The defendant declined to leave. The staff then physically escorted the defendant out of the building by the same door that he had entered. The physical ejection of the defendant was accomplished by two members of the bar taking his arms behind his back and marching him outside. Once outside, the staff released the defendant. The defendant immediately drew his pistol and pointed it at the staff, including the owner's son, who was now on the scene.

These facts do not support, as a matter of law, any finding that the defendant acted lawfully in pointing a gun at the bar staff.

CP 183.

The error in the court's analysis is two fold. First, in rendering this opinion, the court substituted its own review of the evidence, including the questions of credibility of the witnesses, for that of the jury. In so acting, the court exceeded its authority under RCW 9A.16.110. Under subsection (2) of this statute, only the trier of fact has the authority to determine exactly what

happened, and then whether the defendant's actions were reasonable under that interpretation of the facts.

The second error the court made in this case was in its application of the appropriate standard of review. The court alluded to this standard when it stated that it was “[c]onsidering the evidence most favorably toward the defendant.” This is the “substantial evidence rule” and it is indeed the correct standard to apply when determining whether or not there is sufficient evidence in the record to support a particular legal conclusion. Under the substantial evidence rule, evidence is sufficient to support a particular legal conclusion if, when viewed in the light most favorable to the prevailing party, “it permits any rational trier of fact” to find the essential facts sufficient to support the legal conclusion at issue. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). “A claim of insufficiency admits the truth of the [prevailing party's] evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wash.2d at 201. The court's “defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

As a close review of the decisions just cited indicate, in the criminal context, the substantial evidence rule is usually raised in the context of a convicted defendant who challenges the sufficiency of the evidence to

support a conviction. Thus, the court speaks in terms of reviewing the evidence “in the light most favorable to the state” and in terms of sustaining a conviction if there is any evidence in the record from which a jury could conclude that the elements of the crime charged were proven. However, as the decision in *Herriman v. May*, 142 Wn.App. 226, 174 P.3d 156 (2007), sets out, the substantial evidence standard is the same in a purely civil context. In this case, one of the parties in a civil action was arguing that substantial evidence did not support the jury’s award for damages. The court held:

Juries have considerable latitude in assessing damages, and a jury verdict will not be lightly overturned. We evaluate whether substantial evidence supports the jury’s verdict, viewing the evidence in the light most favorable to the nonmoving party. “If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury. A trial court has no discretion to disturb a verdict within the range of evidence.

Further, inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury. *McUne v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954). In *McUne*, the Washington Supreme Court reversed a decision in which the trial court granted a new trial due to the jury’s failure to award damages. In finding that the evidence supported the jury verdict the court noted that the evidence was strongly conflicted as to whether the plaintiff suffered the alleged injuries and emotional upset. Due to this conflicting evidence, the court concluded there was substantial evidence to support the jury’s award.

*Herriman v. May*, 142 Wn.App at 232-233.

Thus, when the court in this case stated that it was going to review the

evidence in the light “most favorable toward the defendant,” it was at least stating part of the correct standard of review. However, in the case at bar, the error arose in that once the court stated this standard, it proceeded to ignore it when reviewing the evidence. This fact is immediately evident from the court’s first claim that “the uncontroverted evidence is as follows.” This was incorrect because a great deal of the evidence was controverted. Indeed, at every critical point, the state’s evidence conflicted with defendant’s evidence. The following examines the court’s rendition of the facts and how it failed to follow the substantial evidence rule.

In its rendition of the facts, the trial court stated that the defendant “had heard stories about people being evicted from the premises and then beaten by staff from the establishment.” While this is correct in so far as it goes, it ignores the other evidence that the defense presented that Kesler’s staff had, in fact, brutally assaulted customers and innocent bystanders in the past, including two different friends of the defendant. The court then notes that “before entering the establishment [the defendant] armed himself with a pistol concealed under his clothing.” This characterization makes it sound as if the defendant was anticipating trouble and specifically prepared himself for it, thus becoming a willing participant in what happened. In fact, what the defendant and his finance testified was that the defendant always carried a firearm for self protection. Going to Kesler’s that night had nothing to do

with his being armed.

The court went on to state that (1) “[w]hen the defendant arrived at Kesler’s he was asked by the staff to pay a cover charge,” (2) “[t]he cover charge was required of all customers attending the show at Kesler’s that night,” and (3) “[t]he defendant declined to pay the cover charge, explaining that he was there to see the owner’s son by invitation and did not intend to stay for the show.” This is the state’s version of events presented through its witnesses, a version of the events that the court apparently found more credible than the defendant’s claims. The defendant’s version of events was that the bouncers immediately approached him in an aggressive manner and demanded that he pay the cover charge, in spite of his explanation that he was only there to speak with Brandon’s Kessler at his invitation. The problem here is that the court was not entitled to either adopt the state’s version of events or come to its own conclusion as to which version was the most credible. Under the “substantial evidence rule” the court was required to adopt that version most favorable to the defendant as the prevailing party. Again, the court did not do this.

The court went on to state that (1) “[t]he owner’s son was not available to confirm or deny the defendant’s claims,” (2) [t]he management suggested that the defendant pay the cover charge, and that it would be refunded by him when the manager’s son verified the defendant’s

statements,” and (3) “[t]he defendant declined this offer.” Once again, the court was either adopting the state’s version of events or simply deciding the facts as the court found them to be most persuasive and credible. What the defendant and his fiancé testified was that the defendant requested that the bouncers get Brandon Kesler to verify what the defendant was saying and that they refused. In addition, the defendant and his fiancé denied that the bouncers said anything about refunding the cover charge. Finally, the defendant flatly denied that he ever refused to pay. The trial court refused to accept this version of the events even though required to under the substantial evidence rule.

In its statement of the facts, the court went on to claim that (1) “[t]he staff of the establishment then requested the defendant to leave,” (2) “[t]he defendant declined to leave,” (3) “[t]he staff then physically escorted the defendant out of the building by the same door that he had entered,” and (4) “[t]he physical ejection of the defendant was accomplished by two members of the bar taking his arms behind his back and marching him outside.” Once again, the court is here adopting the state’s version of the events, which the court, in its own opinion, apparently found more credible. The defense version of these events, presented through the testimony of the defendant and his fiancé, was that (1) the bouncers continued to demand that the defendant pay the cover charge and did not order him out, (2) that he did not refuse to

leave as he had never been ordered to do so, (3) that when he turned to look for Brandon Kesler, one of the bouncers grabbed him from behind and put in a wrestling hold called a “full nelson” while the other bouncer grabbed one of his arms, and (4) while the bouncers were assaulting him, one of them said that “they were going to take him outside and get the money out of him.” Under the substantial evidence rule, the court should have accepted this version of events along with all reasonable inferences that flowed from it. One of the reasonable inferences from the assault and particularly from the statement, was that the bouncers were going to take the defendant out to the alley and beat him as they had the defendant’s friends.

Finally, the court found in its version of events that (1) “[o]nce outside, the staff released the defendant,” and (2) “[t]he defendant immediately drew his pistol and pointed it at the staff, including the owner’s son, who was now on the scene.” Herein, the court again adopted the state’s version of events, once again apparently because the court found it more credible. The defendant’s version of events was dramatically different. In the defendant’s version of events, he was not taken to the back door and “released” as the state’s witnesses claimed. Rather, the two bouncers took him through the door and out to the middle of the alley, now joined by two more bouncers who had been at the back door. According to the defendant, it was only at this point that the one bouncer released him from the “full

nelson,” the point at which he believed they were going to “get the money out of him.” That is to say, they took him to the middle of the alley in order to beat him. In addition, while the defendant admitted that he immediately pulled his pistol, turned, and held it up, he denied waving it around or pointing it at any specific person. Rather, he held it up in order to keep the bouncers from beating him.

As the foregoing explains, the trial court in this case neither reviewed the evidence in the light most favorable to the defendant nor accepted all of the reasonable inferences that flowed from that view of the evidence. Rather, for the most part, the trial court simply adopted the state’s version of the events as the most credible and then indulged in those inferences that reasonably flowed from that version of events. In so doing, the trial court overstepped its bounds and supplanted the role of the jury, which was the trier of facts in this case. This action by the court violated the substantial evidence rule.

In this case, the evidence, seen in the light most favorable to the defendant, reveals the following. First, the defendant and his fiancé went into Kesler’s for a few minutes at the specific invitation of Brandon Kesler. The defendant was then immediately accosted by two physically daunting bouncers who aggressively demanded that the defendant pay the cover fee. They refused to get Brandon Kesler at the defendant’s request, and when the

defendant turned to look for Brandon, the two bouncers physically assaulted the defendant. They did not tell him to leave. Rather, they simply grabbed him. They then dragged the defendant out the back door and into the alley, telling him that they were going to “get the money out of him.” As the bouncers took the defendant through the door and out into the middle of the alley, they were joined by either one or two other bouncers who had been at the back door. It was only in the middle of the alley that the bouncer who had the defendant in the “full nelson” released him from that hold. Now the bouncers had the defendant in the exact location where the defendant knew they had beaten his friend Ross Van Johnson into unconsciousness a few months previous, along with the person Ross Van Johnson had gone to get.

The reasonable inferences to be drawn from this version of the events is that the bouncers at Kesler’s intended to beat the defendant and cause him serious bodily injury in the same manner that they had previously beaten Ross Van Johnson and his friend into unconsciousness and seriously injured the defendant’s friend Mr. Holt. The inference is not just that the defendant reasonably perceived that he was about to be seriously beaten as would any reasonable person perceive. Rather, the inference to be drawn from these facts is that the bouncers did intend to seriously injure the defendant and that the only reason he was not beaten was that he was able to pull a firearm to defend himself. Seen in the light most favorable to the defendant, there is

substantial objective evidence to support the jury verdict that the defendant had proven by a preponderance of the evidence that his use of force was lawful. The trial court's conclusion to the contrary was erroneous.

***(2) The Trial Court's Special Instructions and Verdict Forms Correctly Stated the Law Under RCW 9A.16.110.***

In the case at bar, the second reason the court gave for vacating the award of costs and attorney's fees was that the court believed the supplemental written instruction was erroneous. On this point, the court noted:

Furthermore the court is convinced that the Court gave an improper instruction in this case. Supplemental instruction B (C.P. 66) reads as follows: "The use of force or the offer to use force is lawful when a person appears about to be injured." RCW 9A.16.020 defines the use of force as lawful when "used by a party about to be injured." The use of the word "appears" in this instruction is improper. This instruction as given substitutes a subjective test for an objective test of self-defense. The instructions given were all proposed by the defendant. The State did not propose any instructions. Nevertheless, the defendant's proposed instructions incorrectly stated the law. This was an error. So the answer to the first question above, i.e., was there objective evidence to support a finding that the defendant acted in self-defense, the answer must be "no."

CP 183.

The portion of Instruction B to which the court assigned error is found in the fourth paragraph, which stated as follows:

The use of force or the offer to use force is lawful when a person

appears about to be injured. In determining if the defending person's perceptions are reasonable you must use an objective standard. If a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant, then the force was lawful.

CP 112.

Initially, it should be noted that the court's claim that "[t]he State did not propose any instructions" is erroneous. In fact, the state did propose a written supplemental instruction. CP 48-49. The fourth paragraph from that instruction proposed by the state was identical to the instruction proposed by the defense and given by the court. The fourth paragraph of the state's proposed instructions stated:

The use of force or the offer to use force is lawful when a person appears about to be injured. In determining if the defending person's perceptions are reasonable you must use an objective standard. If a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant, then the force was lawful.

CP 48.

The court's opinion that the use of the word "appears" in this instruction set a subjective standard as opposed to the required objective standard is without merit. As was noted previously in this argument, the "objective standard" is that of the reasonable person. In other words, to find that a particular act or perception is "objectively reasonable," the jury must find that "a reasonably prudent person under the same or similar

circumstances existing at the time of the incident would have used the same degree of force as the defendant.” See *State v. Walden*, *supra* (“[T]he objective [standard for self defense] requires the jury . . . to determine what a reasonably prudent person similarly situated would have done.”) This is precisely the standard set in the special instruction proposed by both the state and the defense. The court instructed the jury:

If a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant, then the force was lawful.

CP 112.

Contrary to the court’s opinion, this instruction specifically required the jury to apply an objective standard. In addition, jury instructions must be read together and viewed as a whole to determine whether or not they set out the law correctly. *State v. Teal*, 117 Wn.App. 831, 837, 73 P.3d 402 (2003). In this case, the Special Instruction A, read to the jury before Special Instruction B, included the following admonition for the jury:

Second, the definition of lawful force is different for this phase of the trial. This time, you will apply an objective rather than a subjective standard. This means that the issue is whether a reasonably prudent person, under the same or similar conditions existing at the time of the incident, would have used the same degree of force as the defendant. You will receive additional instruction on this before you deliberate.

CP 111.

When viewed as a whole, these instructions specifically informed the

jury that the defense had the burden of proving by a preponderance of the evidence that the defendant's use of force was objectively reasonable. Thus, the court erred when it held that the instructions submitted by both the state and the defense failed to properly instruct the jury pursuant to RCW 9A.16.110.

**II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO COMPENSATE THE DEFENDANT FOR ALL OF HIS REASONABLE COSTS AND ATTORNEY'S FEES UNDER RCW 9A.16.110.**

As was previously argued in this brief, the trial court has no discretion in deciding whether or not to award costs, lost wages and attorney's fees once the jury returns a special verdict that (1) the defendant proved by a preponderance of the evidence that the use of force was lawful, and (2) the defendant did not engage in criminal conduct substantially related to the events giving rise to the crime with which the defendant was charged. As the court noted in *State v. Jones*, "[w]hen the Legislature enacted RCW 9A.16.110(2), it expressly commanded the State to 'reimburse the defendant for all reasonable costs ... involved in his or her defense.'" *State v. Jones*, 92 Wn.App. 561-562.

The only discretion the court has in the context of RCW 9A.16.110 is in determining the reasonableness of the defendant's request for costs, lost wages, and attorney's fees. However, as in all other circumstances at law, the

court's exercise of discretion is not unfettered and it is subject to appellate review when the trial court abuses that discretion. An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

In the case at bar, the trial court's decision to only grant the defendant \$40,000.00 in attorney's fees, as opposed to the amount the defendant had actually owed was arbitrary for three separate reasons. The first reason was that the trial court did not find that the actual fees the defendant paid were unreasonable. Rather, the court only found that the amount it arbitrarily assigned was reasonable. Second, the trial court's decision was not based upon any evidence presented. In this case, the defense presented the sworn statements and testimony of four separate criminal defense attorneys with a combined experience representing defendants charged with felonies of over 100 years. Each of these experienced attorneys rendered opinions that the defendant's request for attorney's fees was entirely reasonable given the seriousness and complexity of the case. The state did not present any evidence whatsoever to contradict the defendant's claims. Thus, the court's decision was based upon a lack of any supporting evidence.

Third, the court's insistence that the defense quantify its efforts in terms of hours expended calculated at a particular rate per hour was itself

arbitrary because it constituted the court's refusal to acknowledge the realities of criminal defense representation. That reality is that few if any criminal defense attorney's ever undertake representing a person accused of committing a serious crime on an hourly basis, as do civil attorneys. The reason is obvious to any attorney who has maintained a criminal practice. Few clients have the financial ability to make good on their legal obligations. If the defense is successful, then the defendant is no longer in jeopardy and usually has no motivation or means to pay. If the defense is unsuccessful, then the defendant has no ability to pay.

For these reasons, most criminal defense attorneys represent their clients on a flat fee basis with the majority, if not all, of the flat fee due at the beginning of the case. This is precisely what the defense did in this case. The defense charged a flat fee of \$75,000.00 paid at the beginning of the case with \$7,500.00 in cash and the remainder in a note. CP 134. As four experienced defense attorney's opined in sworn statements, given the complexity and seriousness of the case, this fee was more than reasonable. When the trial court insisted that the defense quantify this fee in hours expended at an hourly rate unused by criminal defense attorneys, the court acted in an arbitrary manner and abused its discretion. Given the amount and quality of the defendant's evidence given in support of its request for attorney's fees, as well as the state's failure to present any evidence to

contradict this evidence, this court should reverse the trial court's initial determination of attorney's fees and remand with instructions to grant the defendant's request in its entirety.

**III. THE TRIAL COURT ACTED WITHOUT AUTHORITY WHEN IT VACATED THE ORDER AWARDING COSTS AND ATTORNEY'S FEES.**

In the case at bar, the trial court entered an order granting the defendant's request for costs, lost wages, and reasonable attorney's fees under RCW 9A.16.110, following the jury's special verdicts that the defendant had met his burden of proving by a preponderance of the evidence that his use of force was lawful. As has previously been mentioned, once the jury returns the required verdicts, the trial court does not have any discretion on the entry of the order, other than the determination of the reasonableness of the defendant's request for costs, lost wages, and attorney's fees. *See State v. Jones, supra*, and discussion in Argument I. The statute also does not provide for any procedures, either by motion of the opposing party or *sua sponte* by the court, for the court to employ to vacate an order for the payment of attorney's fees once it is entered.

There is, however, a mechanism for the trial court to vacate jury verdicts in civil cases after the verdict is accepted by the court in cases in which the court believes that the is evidence insufficient to support it. This is found in Civil Rule 50(b) and Civil Rule 59(a)(7). The former rule states:

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned; (A) order a new trial, or (B) direct entry of judgment as a matter of law.

CR 50(b).

Under CR 59(a)(7), the court may also grant a new trial based at the motion of one of the parties. This rule states:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

CR 59(a)(7).

Under this latter rule, the motion for a new trial must be brought within 10 days of the entry of the judgment order or decision. This time limit

is found in subsection (b), which provides as follows:

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

CR 59(b).

As the plain language of both of these rules explains, the consideration of the relief available in both rules is contingent on one of the parties litigant bringing a motion under the rule in the time limit specified. Neither rule allows the trial court to bring the motion *sua sponte* and then enter an order upon its own motion. In so acting, the court exceeds its authority and interferes with the adversarial process between the parties.

In the case at bar, the trial court entered a written “Order Reimbursing Defendant’s Attorney Fees and Expenses” on March 17, 2010. CP 185-186. Twelve days later, on March 29, 2010, the trial court entered a new written order vacating its prior order of March 17, 2010. The court exceeded its authority to act in when entering the second order for two reasons. First, the opposing party in this case did not bring a Motion Not Withstanding the Verdict under CR 50 or a Motion for New Trial under CR 59. Since the trial court’s authority to employ either rule to vacate a jury verdict is contingent upon such a motion, the court acted without authority. Second, both CR 50

and CR 59 state that motions for relief under their provisions must be brought “no later than 10 days after entry of judgment.” In the case at bar, no motion was brought with this time limit. Thus, the court was without authority to enter the second order vacating the order awarding costs and attorney’s fees. As a result, this court should vacate that subsequent order.

**IV. UNDER RCW 9A.16.110, THE DEFENDANT IS ENTITLED TO REASONABLE COSTS AND ATTORNEY’S FEES ON APPEAL.**

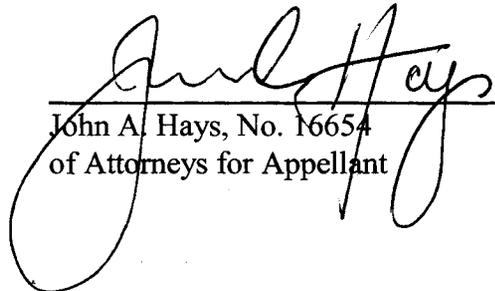
In *State v. Jones, supra*, the court specifically addressed the issue whether or not post-acquittal fees and costs reasonably incurred in the trial or appellate courts are compensable under RCW 9A.16.110. As the court noted in that case, under the statute the Legislature intended to command the State to reimburse a defendant for reasonable fees and costs involved in “his or her defense,” not just “his or her criminal defense.” *State v. Jones*, 92 Wn.App. at 565. Accordingly, in *Jones*, the court held that the State must reimburse the defense for reasonable costs and fees incurred in this case through final appeal. *See also State v. Lee*, 96 Wn.App. 336, 979 P.3d 458 (1999). Consequently, in the case at bar, if the defendant prevails upon his claims, he is entitled to costs and attorney’s fees on appeal.

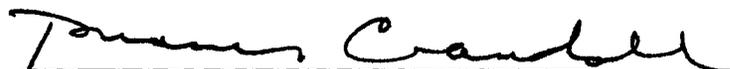
## CONCLUSION

The trial court erred when it denied the defendant's request under RCW 9A.16.110 for reasonable lost wages, costs, and reasonable attorney's fees. As a result, this court should vacate the trial court's final order and remand this case for entry of an order granting the defendant's full request for costs, lost wages, and attorneys' fees. In addition, this court should enter an order granting the defendant costs and reasonable attorney's fees on appeal.

DATED this 5<sup>th</sup> day of October, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
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\_\_\_\_\_  
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## **APPENDIX**

### **RCW 9A.16.110**

#### **Defending against violent crime – Reimbursement**

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

(2) When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

Nothing in this section precludes the legislature from using the sundry claims process to grant an award where none was granted under this section or to grant a higher award than one granted under this section.

(4) Whenever the issue of self-defense under this section is decided by a judge, the judge shall consider the same questions as must be answered in the special verdict under subsection (4) [(5)] of this section.

(5) Whenever the issue of self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty, the court shall instruct the jury to return a special verdict in substantially the following form:

answer yes or no

1. Was the finding of not guilty based upon self-defense?
2. If your answer to question 1 is no, do not answer the remaining question.
3. If your answer to question 1 is yes, was the defendant:
  - a. Protecting himself or herself?
  - b. Protecting his or her family?
  - c. Protecting his or her property?
  - d. Coming to the aid of another who was in imminent danger of a heinous crime?
  - e. Coming to the aid of another who was the victim of a heinous crime?
  - f. Engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?

## **WPIC 17.06**

### **Self-defense Reimbursement – Oral Introductory Instruction**

Based on your verdict in this case, there is an additional issue that the law requires you to decide.

The defendant has alleged that [he][she] acted in self-defense. Under our state's law, if the defendant's use of force was [lawful][justified], the defendant has the right to be reimbursed by the State of Washington for the reasonable cost of legal fees and expenses involved in [his][her] defense as well as for loss of time.

You will be asked to decide whether the defendant's use of force was [lawful][justified]. You will hear additional evidence on this question in the next phase of the trial.

The next phase of the trial differs in several ways from the phase you have already completed. First, the burden of proof is on the defendant. In order to receive reimbursement, the defendant must prove by a preponderance of the evidence that [his][her] use of force was [lawful][justified]. When it is said that a claim must be proved by a preponderance of the evidence, it means you must be persuaded, considering all of the evidence in the case, that the claim is more probably true than not true.

Second, the definition of [lawful][justified] force is different for this phase of the trial. This time, you will apply an objective rather than a subjective standard. This means that the issue is whether a reasonably prudent person, under the same or similar conditions existing at the time of the incident, would have used the same degree of force as the defendant. You will receive additional instruction on this before you deliberate.

And finally, when you deliberate on this question, only [ten][five] of you will need to agree.

Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the entire proceeding.

During your deliberations, you should consider the evidence presented

to you in the first phase of this case. You should also consider any evidence offered and received during this phase of the case.

Until you are dismissed at the end of this trial, you must continue to avoid outside sources such as newspapers, magazines, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial.

#### **WPIC 17.06.01**

#### **Self-defense Reimbursement – Concluding Instruction**

If a defendant's use of force was [justified][lawful], as defined in this instruction, the defendant has the right to be reimbursed by the State of Washington for the reasonable cost of all loss of time, legal fees, or other expenses involved in his or her defense.

In order for the court to award the defendant reasonable costs for the expenses incurred in defending this action, you must find that the defendant has proved the claim of [justifiable homicide][lawful force] by a preponderance of the evidence.

When it is said that a claim must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the claim is more probably true than not true.

For this part of the trial, you will use the following definition of [lawful][justified] force: (Insert here the applicable definition from WPIC Chapter 16, as revised to use an objective standard; see the Comment.)

You have been provided with a special verdict form to be used in answering the question of whether defendant has met [his][her] burden of establishing [lawful][justified] use of force. Because this is a civil question, [ten][five] or more of you must agree to return a verdict. When [ten][five] of you have agreed, the presiding juror will sign the special verdict form, regardless of whether or not the presiding juror agrees with the special verdict. You will then notify the bailiff who will escort you into court to declare your special verdict.

**WPIC 190.07**  
**Special Verdict Form – Self-Defense Reimbursement**

(Insert case caption.)

We, the jury, return a special verdict by answering the following question:

QUESTION [1]: Did the defendant \_\_\_\_\_ prove by a preponderance of the evidence that the use of force was [justified] [lawful]?

ANSWER: (Write “yes” or “no”)

[(DIRECTION: If you answered “no” to Question 1, sign this verdict. If you answered “yes” to Question 1, answer Question 2.)]

[QUESTION 2: Was the defendant engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant was charged?]

[ANSWER: (Write “yes” or “no”)]

DATE:

Presiding Juror

### **Court's Instruction A**

Based on your verdict in this case, there is an additional issue that the law requires you to decide.

You will be asked to decide whether the defendant's use of force was lawful. You will hear additional evidence on this question in the next phase of the trial.

The next phase of the trial differs in several ways from the phase you have already completed. First, the burden of proof is on the defendant. In order to receive reimbursement, the defendant must prove by a preponderance of the evidence that his use of force was lawful. When it is said that a claim must be proved by a preponderance of the evidence, it means you must be persuaded, considering all of the evidence in the case, that the claim is more probably true than not true.

Second, the definition of lawful force is different for this phase of the trial. This time, you will apply an objective rather than a subjective standard. This means that the issue is whether a reasonably prudent person, under the same or similar conditions existing at the time of the incident, would have used the same degree of force as the defendant. You will receive additional instruction on this before you deliberate.

And finally, when you deliberate on this question, only ten of you will need to agree.

Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the entire proceeding.

During your deliberations, you should consider the evidence presented to you in the first phase of this case.

### **Court's Instruction B**

You must decide whether the defendant has proved the claim of lawful force by a preponderance of the evidence.

When it is said that a claim must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the claim is more probably true than not true.

For this part of the trial, you will use the following definition of lawful force:

The use of force or the offer to use force is lawful when a person appears about to be injured. In determining if the defendant's person's perceptions are reasonable you must use an objective standard. If a reasonably prudent person under the same or similar circumstances existing at the time of the incident would have used the same degree of force as the defendant, then the force was lawful.

You have been provided with a special verdict form to be used in answering the question of whether defendant had met his burden of establishing lawful use of force. Because this is a civil question, ten or more of you must agree to return a verdict. When ten of you have agreed, the presiding juror will sign the special verdict form, regardless of whether or not the presiding juror agrees with the special verdict. You will then notify the bailiff who will escort you into the court to declare your special verdict.

**Court's Special Verdict Form**

**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

STATE OF WASHINGTON,            )  
  )  
                                  **Plaintiff,**            )  
  )  
v.                                        )  
  )  
**BRIAN BARND-SPJUT,**            )  
  )  
                                  **Defendant.**            )  
\_\_\_\_\_ )

**NO. 09 1 00360 0**

**SPECIAL VERDICT FORM**

We, the jury, return a special verdict by answering the following question:

QUESTION 1: Did the defendant, Brian Barnd-Spjut, prove by a preponderance of the evidence that the use of force was lawful?

Yes   X                      No       

QUESTION 2: Was the defendant engaged in criminal conduct substantially related to the events given rise to the crime with which the defendant was charged?

Yes                           No   X

**CR 50**  
**JUDGMENT AS A MATTER OF LAW IN JURY TRIALS;**  
**ALTERNATIVE MOTION FOR NEW TRIAL;**  
**CONDITIONAL RULINGS**

(a) Judgment as a Matter of Law.

(1) Nature and Effect of Motion. If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

(2) When Made. A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned; (A) order a new trial, or (B) direct entry of judgment as a matter of law.

(c) Alternative Motions for Judgment as a Matter of Law or for a New Trial – Effect of Appeal. Whenever a motion for a judgment as a matter of law and, in the alternative, for a new trial shall be filed and submitted in any

superior court in any civil cause tried before a jury, and such superior court shall enter an order granting such motion for judgment as a matter of law, such court shall at the same time, in the alternative, pass upon and decide in the same order such motion for a new trial; such ruling upon said motion for a new trial not to become effective unless and until the order granting the motion for judgment as a matter of law shall thereafter be reversed, vacated, or set aside in the manner provided by law. An appeal to the Supreme Court or Court of Appeals from a judgment granted on a motion for judgment as a matter of law shall, of itself, without the necessity of cross appeal, bring up for review the ruling of the trial court on the motion for a new trial; and the appellate court shall, if it reverses the judgment entered as a matter of law, review and determine the validity of the ruling on the motion for a new trial.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**CR 59**  
**NEW TRIAL, RECONSIDERATION, AND**  
**AMENDMENT OF JUDGMENTS**

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the

party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on

briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,  
Respondent

vs.

BRIAN ADAM BARND-SPJUT,  
Appellant

NO. 09-1-00360-0  
COURT OF APPEALS NO:  
40535-1-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On October 5<sup>th</sup>, 2010, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

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DUANE CRANDALL,  
ATTORNEY AT LAW  
1447 3<sup>RD</sup> AVE., SUITE A  
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Dated this 5<sup>TH</sup> day of OCTOBER, 2010 at LONGVIEW, Washington.

  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

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