

No. 41387-6-II

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

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STATE OF WASHINGTON, Respondent

v.

JACK SEBADE, Appellant

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APPEAL FROM THE ORDER OF THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR  
WAHKIAKUM COUNTY

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RESPONDENT'S BRIEF

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Daniel H. Bigelow  
WSBA No. 21227  
Prosecuting Attorney  
P.O. Box 397  
Wahkiakum County Courthouse  
Cathlamet, WA 98612  
(360)795-3652

## TABLE OF CONTENTS

	<u>PAGE</u>
I. Facts.....	1
II. Response to Assignments of Error.....	6
III. Response to Issues Pertaining to Assignments Of Error.....	7
IV. Argument.....	7
V. Conclusion.....	14

**TABLE OF AUTHORITIES**

TABLE OF CASES

**PAGE**

Washington Cases

State v. Bailey, 22 Wn.App. 646, 650  
P.2d 1212 (1979).....8

State v. Burt, 94 Wash.2d 108  
614, P.29, 654.....13

State v. Churchill, 52 Wash. 210, 223  
100 P. 309 (1909).....11, 12, 14

State v. Ferguson, 131 Wn.App. 855, 860-61  
129 P.3d 856 (2006).....8

State v. Read, 147 Wn.2d 238, 243  
53 P.3d 26 (2002).....11

State v. Rodriguez, 121 Wn.App 180, 185  
87 P.2d 1201 (2004).....9, 10

State v. Walden, 131 Wn.2d 469  
932 P.2d 1237 (1997).....7, 8, 9, 10

Washington Statutes

RCW 9A.16.050(1).....8

RCW 9A.16.020(3).....9, 12

Other Authorities

13A Royce A. Ferguson, Jr. & Seth Aaron Fine, Washington  
Practice, Criminal Law §2604, at 351 (1990).....8

1 Wayne R. LaFave & Austin W. Scott, Jr.,  
Substantial Criminal Law §5.7(b) (1986).....8

## I. FACTS

In the evening of October 23, 2009, Jack Sebade drove to the Duck Inn in Skamokawa, Washington. RP 9. With a .22 Magnum pistol in his pocket, he entered the bar at the Duck Inn, where he proceeded to get drunk. RP 10 (bar), 12-13 (bragging to a complete stranger that he was carrying the pistol), 50-51 (drinking in bar, intoxicated). After spending hours in the bar (RP 17, Sebade arrives approximately 7 PM; RP 7, incident reported at 12:57 AM; RP 19, bartender estimates Sebade spent five hours in the bar), during which time he had to be reminded to “behave” by the bartender (RP 18) because he was loudly declaring he was gifted in determining peoples’ sexual orientations (id.), he eventually stumbled to his car, first telling the bartender that he didn’t want to drive right then. RP 20 (to his car), 90 (stumbled, and bumped into his car when he got to it). The bartender assumed this was because he had had too much to drink. RP 21.

Meanwhile, Darren Hall came to the Duck Inn bar with some female friends, one of whom was underage and had to stay in the parking lot. RP 24. This friend, Amanda Lindsey, 19 (RP 87), was Hall's designated driver. RP 89. As Amanda waited in the parking lot for Darren and his friend Sarah, who were in the bar (id.), Sebade stumbled over to her, put his face within six inches of hers, and, with breath perfumed with alcohol, commenced trying to change Amanda's religion. RP 90-91. Amanda, intimidated by the conversation and Sebade's proximity, kept backing up, but Sebade produced a handful of religious tracts, pressed one on her, and continued his exhortations. RP 90 (Amanda "really intimidated"), 91-2 (tracts and further proselytization). Sebade's attentions were so unwelcome and persistent that Amanda texted "HELP ME" to her passenger Sarah. RP 93.

Sarah came out of the bar and, seeing that Amanda "didn't know what to do," drew Sebade's attention onto herself by claiming to be Amanda's wife. RP 94. This commenced an argument in which

Sebade started by telling the two of them they were hellbound sinners. Id. Sebade got as close to Sarah's face as he had to Amanda's, but Sarah argued back at Sebade. Id. This, apparently, was more than Sebade was prepared to handle from a hellbound sinner: he put his hands on Sarah and pushed her into a Suburban in the parking lot. Id. Sarah called for Amanda to get Darren, and Amanda did so. Id.

Darren, in the bar, saw Amanda run into the bar and call, "Darren, Darren, Sarah needs help." RP 140. Exiting the bar, he saw Sebade in a "heated argument" with Sarah, holding her by the shoulder while she was yelling for him to let go, still holding his religious pamphlets in his other hand. RP 140-141. Darren told Sebade to "scram, you know, get out of there. Let go of her." RP 141. Sebade flailed at Darren in what Darren describes as either "a swing or a push at me," and Darren shoved him back. RP 142. Darren told him again to leave. RP 143. Sebade responded with fisticuffs, and after being hit a few times, Darren responded with a

single blow that brought Sebade to the ground. RP 144. Figuring the fight was over, Darren stepped back. Id. But Sebade got his feet under him, extended his arm at Darren, and said he either should or would kill Darren. RP 146. Darren saw a gun in Sebade's hand and turned to run, but Sebade shot him anyway, hitting him in the abdomen. RP 147 (shot), 149 (abdomen). The bullet hit him on the left side of his abdomen and traversed the full width of his body to lodge in the skin of the right side of his abdomen. RP 167. Hall was fortunate; he lived to testify and had relatively few long-term effects from the gunshot wound. RP 149.

By the time Sebade came to trial, his defense was that he was innocently engaging in a religious conversation with Amanda (RP 186) when Sarah, "extremely irate," came "hollering" and "yelling" out at him and stuck her face into his so closely that his hat was pushed into his face (RP 190-191). He never touched her, even though he was "alarmed" at her implication she was homosexual. RP 191-192. Then Darren appeared, swore at him,

and told him to get in his car and leave. RP 193. But Sebade, in his own words, does not “take orders from some person who walks up to me with his attitude in a public place. I’m not leaving,” he decided. RP 198. So he drew his pistol and said he was a “sovereign citizen.” RP 197. Darren then struck him once in the face, knocking him unconscious. RP 198. When he woke up, he saw that Darren was still there, so he shot Darren. Id. He explained that he thought he was in danger of death because “Just a month or -- previous to that in Salem, Oregon, a retired Marine, 74, was out walking at 4:30 in the morning with his dog, and some guy came up and asked him for money he didn't have, and the guy beat him in the head. He died from that beating.” RP 203. When asked for any other grounds for fear of “grievous bodily injury,” Sebade listed the fact that he had been punched and Darren’s “attitude” and “voice intonation.” Id.

The jury was instructed to convict Sebade of assault if he intentionally assaulted Darren Hall with his pistol. RP 259. Since

Sebade's defense was self-defense, self-defense instructions were given. RP 258. The jury was further instructed that if Sebade believed in good faith and on reasonable grounds that he was in actual danger of great personal injury, he was entitled to defend himself. Id. Nonetheless, Sebade was convicted of assault in the second degree while armed with a firearm – a verdict from which he timely appeals.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

- 1.-2. The self-defense instructions in Sebade's case are accurate statements of the law.
3. Sebade was allowed to argue his theory of the case and received a fair trial in all respects.
4. Sebade received very effective representation.

**III. RESPONSE TO ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR**

1. By Sebade's own report, a man punched him so he gutshot the man with a pistol. He claimed he feared for his life because of a news article he read. Despite its tenuousness, Sebade was allowed to argue this self-defense claim to the jury with appropriate jury instructions. Now he complains of his failure to prevail. Sebade received a fair trial.
2. Sebade received more than effective representation, or self-defense instructions would never even have been given based on the facts as presented.

**IV. ARGUMENT**

In his brief, appellant attempts to limit the holding of State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). But appellant

takes no issue with – in fact, does not even mention – the correct outline of the law the Walden court gives regarding self-defense, which includes the following instructive passage:

[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. See State v. Bailey, 22 Wash.App. 646, 650, 591 P.2d 1212 (1979); 13A Royce A. Ferguson, Jr. & Seth Aaron Fine, Washington Practice, Criminal Law § 2604, at 351 (1990). Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or “great personal injury.” 13A Ferguson, supra § 2604, at 351; RCW 9A.16.050(1); 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7(b) (1986).

Walden, 131 Wn.2d at 474 (holding these principles “well settled”).

This is in accord with all known case law in the state of Washington. E.g., State v. Ferguson, 131 Wash.App. 855, 860-61, 129 P.3d 856 (2006), in which this division specifically held:

“To justify killing in self-defense, the slayer must believe that he or someone else is about to suffer death or great personal injury (some cases call it great bodily injury or great bodily harm). **Simple assault or an ordinary battery cannot justify taking a human life.**” *Id.* (Citations omitted; emphasis added).

There is no conflict between these principles and statute. RCW 9A.16.020(3) requires that force used against an assailant be “not more than is necessary.” It is within the purview of the courts to interpret and elaborate upon this concept as necessary, and it has done so in the Walden case and others.

Appellant takes the trial court to task for failing to define “great personal injury.” Appellant’s Brief at 9. But in another case upholding the concept that deadly force is only justifiable to prevent great personal injury, the court did define such injury – and was reversed as a result. State v. Rodriguez, 121 Wn.App. 180, 185, 87 P.2d 1201 (2004) (“innocuous” or “accurate” statement

that defendant must have feared “great bodily harm” to defend with deadly force contaminated by definition of “great bodily harm” that requires permanent disfigurement or impairment or “probability of death”).

Note, too, that Rodriguez, a 2004 case, disproves the appellant’s implication that that the cases support use of the “great personal injury” instruction only in cases of homicide. That case involved a non-fatal assault with a knife. Id. Appellant walks a fine line here, carefully stating at 12 of appellant’s brief that “Supreme Court cases since Walden discussing the ‘death or great personal injury’ standard have also been homicide cases.” This is true, but over-precise to the point of obscuring the gravamen of the case law. None of the homicide cases limit their holdings to homicide cases, and Rodriguez, a case in the Court of Appeals, directly supports the reading of Walden that appellant argues against.

Not that the appellant is hiding the ball. Appellant cites the homicide case of State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002), as follows: “A person is justified in using deadly force in self-defense only if the person reasonably believes he or she is in imminent danger of death or great personal injury.” This is, in fact, the law. The fact that the Read court was applying the law to a homicide case does not mean the same law does not apply in assault cases.

Our state supreme court said it best in State v. Churchill, 52 Wash. 210, 223, 100 P. 309 (1909): “Human life in this state has not become so cheap that it can be taken and the party so taking it obtain immunity on the plea of self-defense, where the facts and circumstances surrounding the killing do not show that the killing was done in an honest belief, either of imminent danger to the life of the party taking it, or of great bodily harm to his person.” That case is good law, and that statement good policy, to this day. And

both the law and the policy are equally good whether the person at the wrong end of the gun dies or not.

Which leads to the obvious question that the appellant does not answer. Why should the standard by which self-defense must be proved at trial depend on whether the victim happens to live or die? Once deadly force is used, its user has relatively little control over the outcome. It seems odd that the standard of proof in any subsequent criminal litigation will depend on medical factors rather than legal ones.

The law can hardly be expected to govern the behavior of a person who will not know what standard he or she will be held to at trial until he or she knows whether the person he or she is contemplating using deadly force against will leave the hospital in a vertical or horizontal position. And it hardly supports the principle of State v. Churchill, supra, that life in this state is not cheap, or the proportionality requirement of RCW 9A.16.020(3), to

hold that it is legal to answer a slap with a gunshot, but only if the shot person survives.

Furthermore, the appellant admits facts sufficient to show that the instructions herein were adequate. At the bottom of page 3 of the Brief of Appellant, the appellant's theory of the case is stated twice: "Sebade felt that he would be killed if he did not pull the trigger... Sebade felt that he would be killed if he did not pull the trigger." It seems therefore apparent that the defense's theory was that Sebade felt that he would be killed if he did not pull the trigger. In other words, his theory of the case was that he actually did fear great bodily injury – worse than that, in fact. Jury instructions are sufficient if they allow defendants to argue their theory of the case. State v. Burt, 94 Wash.2d 108, 614 P.2d 654 (1980). If the jury found Sebade credible at all, they would have believed he was in danger of death and acquitted him under the instructions as given to them by the court.

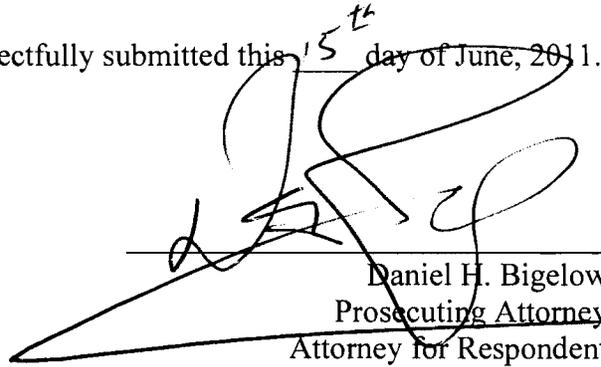
This also answers appellant's argument regarding effective assistance of counsel. Besides agreeing to a appropriate jury instruction that accurately reflects the state of the law, as discussed supra, defense counsel agreed to an instruction that perfectly reflected the defense's theory of the case.

## V. CONCLUSION

It is not proportional to answer a punch in the face with pistol fire. One must fear, and have reasonable grounds to fear, more than an ordinary battery in order to respond with deadly force. Appellant wishes this court to revisit this "well settled" rule that has been with us since at least the Churchill case more than a hundred years ago. Appellant's grounds for doing so constitute basically a raft of technical attempts to distinguish a century's worth of case law, all of which case law is entirely consistent with statute. But we should not lose sight of the forest for the trees: the rule urged by the appellant in this case would encourage the use of deadly force

as an answer to practically any assault. Reversing this case could actually cost lives.

Respectfully submitted this 15<sup>th</sup> day of June, 2011.

A large, stylized handwritten signature in black ink, appearing to read 'D. Bigelow', is written over a horizontal line. The signature is highly cursive and loops around the text below it.

Daniel H. Bigelow  
Prosecuting Attorney  
Attorney for Respondent  
WSBA No. 21227

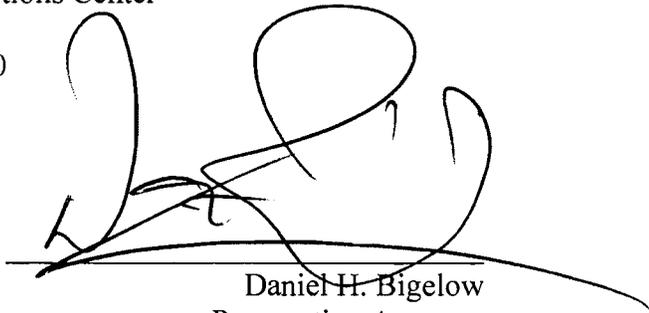
CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid , on June 16<sup>th</sup>, 2011.

David C. Ponzoha  
Washington State Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Lisa E. Tabbut  
Attorney for Appellant  
P.O. Box 1396  
Longview, WA 98632

Jack Sebade, DOC #344875  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520



Daniel H. Bigelow  
Prosecuting Attorney  
Attorney for Respondent  
WSBA No. 21227