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STATE OF WASHINGTON
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No. 95192-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

STEVEN BRIAN YELOVICH,

Appellant.

BRIEF OF WACDL AS AMICUS CURIAE OBO APPELLANT, STEVEN BRIAN YELOVICH

Thomas E. Weaver
WSBA #22488
WACDL Amicus Committee

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton WA 98337
(360) 792-9345

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A. Interest of Amicus

Thomas E. Weaver, on behalf of the Washington Association of Criminal Defense Lawyers (WACDL), submits this brief in support of the appellant in this case. WACDL is a professional association made up of Washington criminal defense lawyers, public and private, founded in 1987 with over 800 members. It was formed to promote fairness and equity in the criminal justice system and files this brief pursuant to that mission.

B. Issue Presented

1. Reserved
2. Reserved
3. Whether defense of property is a valid affirmative defense to the crime of violation of a no-contact order predicated on assault?

C. Statement of Facts

This Court granted Petitioner Steven Yelovich's petition for review from his conviction for assault in violation of a domestic violence protection order (DVPO).[1] Mr. Yelovich argues in his petition the trial

[1] The legislature, in its wisdom, has seen fit to make the statutory scheme regarding no-contact orders as complicated as it possibly can be enacting at least ten separate types of no-contact orders scattered across four titles of the Revised Code of Washington: RCW 7.90.020 (Sexual Assault Protection Order), RCW 7.92.030 (Jennifer Paulson Stalking Protection Order), RCW 10.14.040 (Anti-harassment Order), RCW 10.99.040

court erred by denying his proposed jury instruction on lawful force (defense of property). WACDL takes no position whether Mr. Yelovich was entitled to a lawful force instruction in this case.

But in granting review, this Court also instructed the parties to brief the following issue: Whether defense of property is a valid affirmative defense to the crime of violation of a no-contact order predicated on assault? This issue is one of importance to WACDL and one which it believes should be answered in the affirmative. The appropriateness of an affirmative defense jury instruction is always dependent on the facts of each case, but WACDL strongly believes that Respondents[2] should not be per se foreclosed from raising the affirmative defense of lawful force.

D. Argument

Washington case law is clear that the onus of complying with a protection order rests with the Respondent, not the Protected Party. But

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(Criminal Domestic Violence Protection Order), RCW 26.09.050 (dissolution restraining order), RCW 26.10.040 (child custody restraining order), RCW 26.26.138 (paternity restraining order), RCW 26.44.063 (child abuse restraining order), RCW 26.50.030 (Civil Domestic Violence Protection Order), and RCW 74.34.110 (Vulnerable Adult Protection Order).

[2] For ease of analysis, this brief will refer generically to individuals who are restrained by a protection order as "Respondents" and those who are protected by the protection order as "Protected Parties."

case law has not yet addressed whether, and in what situations, Respondents may employ lawful force to protect their persons or property.

It is the position of WACDL that the following three-pronged approach adequately balances the need to protect the safety of Protected Parties while simultaneously safeguarding the person and property of Respondents. First, the Respondent must lawfully be in a place where he or she has the right to be. Second, there must be an imminent threat by the Protected Party to the person or property of Respondent. Third, as soon as the threat has dissipated, it is the duty of the Respondent to disengage from the Protected Party and distance himself or herself from the Protected Party.

In *State v. Sisemore*, 114 Wn.App. 75, 55 P.3d 1178 (2002), the Defendant was convicted of violating the no contact order when he was seen by a passing police officer "walking with" the Protected Party. The officer observed them together for no more than two to three seconds. There was no evidence whether the Respondent approached the protected party or vice versa. Nevertheless, the Court of Appeals sustained the conviction, explaining, "Thus, [the Respondent] violated the no contact order if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no contact order if he accidentally or inadvertently contacted [the Protected Party] but

immediately broke it off." *Sisemore* at 78. Under this analysis, an accidental or inadvertent contact is not a violation of the order, but the Respondent has an affirmative duty to promptly disengage from the Protected Party in the event of such accidental or inadvertent contact. *Sisemore*, thus, supports the first and third prong of the analysis,

With respect to the second prong, the problem is, in the real world, not all Protected Parties respond to protection orders with clean hands. Washington courts make clear that consent is not a defense to violation of a no-contact order. *State v. Dejarlais*, 136 Wn.2d 939 969 P.2d 90 (1998). Nevertheless, many Protected Parties continue to invite Respondents to have contact. See *State v. Sanchez*, 166 Wn.App. 304, 271 P.3d 264 (2012) (burglary charge reinstated after protected party voluntarily invited Respondent into home).

It is not difficult to construct compelling hypotheticals where Respondents would feel the need to protect themselves or their property. For instance, if a Protected Party broke into the Respondent's home, the Respondent would feel the need to protect the home. Or if a Protected Party tried to damage Respondent's vehicle, Respondent would naturally want to protect the vehicle. What is the proper response when a Protected Party attempts to purse snatch Respondent's money and credit cards? Is she required to immediately disengage by allowing the purse to be stolen?

Should this Court foreclose lawful force as a defense to assault in violation of a no-contact order, it would effectively leave Respondent's at the mercy of uncharitable Protected Parties.

The second prong is also supported by WPIC 17.05 – No Duty to Retreat. WPIC 17.05 reads, "It is lawful for a person who is in a place that person has a right to be and who has reasonable grounds for believing he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat." In *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984) this Court held it was reversible error to fail to give the instruction. Pursuant to WPIC 17.05, people who are in a place where they have the right to be do not have a duty to retreat in the face of an attack. This right should not be undermined by the existence of a no-contact order.

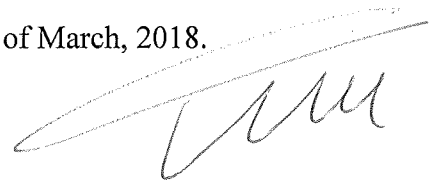
The State in its Supplemental Brief argues that the civil stand-by provisions of RCW 26.50.080 are the sole means of ensuring the "peaceful transfer of commingled property." State's Supplement Brief, 6. WACDL agrees that RCW 26.50.080 provides the only lawful means for a Respondent to approach a Protected Party for the purpose of retrieving property. But the statute fails to take into account the situation in which it is the Protected Party who is the aggressor.

The three-pronged approach urged by WACDL properly balances the needs of society and the needs of the individual. It requires Respondents to disengage from Protected Parties unless there is an imminent threat to their persons or property.

E. Conclusion

This Court should make clear that lawful force is a defense to assault in violation of a no-contact order when Respondents are lawfully where they have the right to be, are responding to an imminent threat to their persons or property, and immediately disengage from the Protected Party when the threat has dissipated. WACDL takes no position whether Mr. Yelovich meets these criteria.

Respectfully submitted this 26th day of March, 2018.



Thomas E. Weaver
WSBA #22488
Co-Chair
WACDL Amicus Committee

THE LAW OFFICE OF THOMAS E. WEAVER

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Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com
Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

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