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SUPREME COURT
STATE OF WASHINGTON
3/12/2018 1:50 PM
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No. 95192-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN BRIAN YELOVICH,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Court of Appeals No. 48949-0-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 15-1-02224-7
The Honorable Jerry Costello, Judge

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I. ISSUES PRESENTED FOR REVIEW

1. Is defense of property a valid affirmative defense to the crime of violation of a no-contact order predicated on assault?
2. To what extent can a defendant rely on the defense of property as a defense when he or she uses force to recover property?
2. Was Petitioner entitled to use reasonable force to recover the cellular telephone that he believed had been unlawfully taken from him by the alleged victim, where our criminal laws, common laws, and tort laws all establish that a person is entitled to use reasonable force to recover personal property that has been unlawfully taken from them?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Steven Brian Yelovich with one count of felony violation of a domestic violence court order (RCW 26.50.110) and one count of bail jumping (RCW 9A.76.170). (CP 3-4, 45-46, 47-48) The jury convicted Yelovich as charged. (CP 62-65; RP 432-33) Yelovich timely appealed. (CP 113) The Court of Appeals affirmed Yelovich's conviction and sentence and this Court granted Yelovich's petition for review.

B. SUBSTANTIVE FACTS

On the morning of June 7, 2015, Andrew Norman was driving home from work when he noticed out of the corner of his eye what appeared to be an altercation between a man and a woman. (RP

124, 125-26) He stopped his car and got out. (RP 127) The woman was on the ground and the man was straddling her. (RP 125-26) Norman thought the man struck the woman, but he was not sure. (RP 127, 137) He also thought the man pulled the woman off the ground and then slammed her back down again. (RP 127, 137) Norman testified that the man seemed angry and the woman was crying. (RP 129)

Norman yelled at the man to leave the woman alone, and the man stopped and stood up. (RP 128) Norman called 911 and, at the woman's request, asked for both police and medics to respond. (RP 132) As they waited, the man told Norman that the woman had stolen his cellular telephone. (RP 134) Norman testified that the man was not confrontational and did not flee when the police arrived. (RP 141)

Pierce County Sheriff's Deputy Eric Lopez responded to Norman's 911 call. (RP 147, 149) He contacted the woman after the medics finished treating her. (RP 150) Deputy Lopez testified that the woman, Faith De Armond, was acting odd, had trouble focusing and responding to questions, and appeared intoxicated. (RP 150, 151-52) He noticed that she had some redness and a small laceration on her elbow. (RP 152-55)

Deputy James Oleole also responded, and contacted the man, Steven Yelovich. (RP 184, 185) When the officers learned of a court order prohibiting Yelovich from contacting De Armond, Deputy Oleole placed Yelovich under arrest. (RP 157-60, 187; Exh. P1)

De Armond testified that she and Yelovich had dated for several years. (RP 321, 322, 323) She saw Yelovich that morning at a friend's house and things were fine, but he seemed to be getting upset so she left. (RP 327) As she was walking down the street, Yelovich arrived in his car, ran up to her and pushed her to the ground. (RP 328-23, 333) According to De Armond, Yelovich tried to grab her purse, hit her with his elbows, and punched her in the face. (RP 333, 349-50, 353)

Yelovich testified that he was moving his belongings from the garage of his son's house, when he noticed De Armond walk past the house. (RP 245, 247, 248) He walked to his car to put a box inside, and noticed that several items, including his cellular telephone, were missing. (RP 248) He looked down the street towards De Armond, and saw her look back nervously. (RP 249) Yelovich thought she must have stolen his telephone, so he got in his car and followed her so he could try to get it back. (RP 249)

Yelovich approached De Armond and asked her to return his telephone, but she turned and swung her purse at him. (RP 249) He grabbed the purse and tried to yank it from her, all the while asking her to return his telephone. (RP 249-50) De Armond fell to the ground, and they continued to struggle over the purse. (RP 250, 282) Yelovich denied striking or putting his hands on De Armond. (RP 282)

III. ARGUMENT & AUTHORITIES

Defense of property is valid affirmative defense to the assault element of the crime of felony violation of a protective order. And defense of property is also valid affirmative defense when reasonable force is used to retrieve stolen property. Yelovich was entitled to a defense of property jury instruction as to the assault element of the charge of felony violation of a protective order because he used reasonable force to retrieve a cellular telephone that the protected party had moments earlier stolen from him. The Court of Appeals' decision interpreting the defense of property statute to the contrary leads to an absurd result, conflicts with longstanding common law principles, and violates Yelovich's constitutional right to present a defense.

A. DEFENSE OF SELF OR OF PROPERTY IS A VALID AFFIRMATIVE DEFENSE TO THE CRIME OF VIOLATION OF A NO-CONTACT ORDER PREDICATED ON ASSAULT.

The crime of violating a domestic violence court order is a gross misdemeanor. RCW 26.50.110(1)(a). However, RCW 26.50.110(4) provides that “[a]ny assault that is a violation of an order issued under this chapter ... and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony.”

The State charged Yelovich with felony violation of a protective order. (CP 45-46, 47-48) The trial court’s “to-convict” instruction informed the jury that in order to convict Yelovich of this crime, it must find that Yelovich violated a provision of the order and that his “conduct was an assault[.]” (CP 73) The court also instructed the jury on the definition of assault. (CP 75-77)

Due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Assault is the element that elevates the protection order violation from a misdemeanor to a felony. So the fact of an assault is an essential element that the State must prove to convict a defendant

of felony violation of a protective order.¹

“Traditionally, self-defense is available in an assault situation.” State v. Mierz, 127 Wn.2d 460, 478, 901 P.2d 286 (1995) (citing State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986) (entitlement to self-defense instruction where there is “any” evidence tending to support the claim)); State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984) (demonstrating the absence of self-defense is part of the State’s burden).

This right to use reasonable force is codified in RCW 9A.16.020:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

“As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written.” State

¹ See e.g. State v. Davis, 154 Wn.2d 291, 306, 111 P.3d 844 (2005); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

v. Jensen, 149 Wn. App. 393, 401, 203 P.3d 393 (2009) (citing Morgan v. Johnson, 137 Wn.2d 887, 891-93, 976 P.2d 619 (1999)). RCW 9A.16.020 is part of the criminal code, Title 9A. It is included in Chapter 9A.16, which is very generally entitled “Defenses.” The title of the statute is “Use of force—When lawful.” RCW 9A.16.020. The statute broadly provides that the use of reasonable force “is not unlawful” when used to defend one’s person or property. RCW 9A.16.020(3). The language of the statute does not limit its application to certain crimes or exclude its application to others. RCW 9A.16.020(3). Clearly, as shown by its location and its plain terms, this defense can apply to any crime and whenever force is used.

In general, however, self-help is not favored under the law, and a citizen’s right to retrieve stolen property without legal assistance is not unlimited.² The statute and common law excuse the use of reasonable force to defend and retrieve property under certain circumstances; but neither Washington statute nor common law appear to broadly excuse all other criminal behavior committed

² See e.g. State v. Valentine, 132 Wn.2d 1, 17, 935 P.2d 1294 (1997) (“The concept of self-help is in decline. It is antisocial in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available.”) (citing State v. Koonce, 89 N.J.Super. 169, 214 A.2d 428, 436 (1965)).

in defending property. Accordingly, while a person's use of reasonable force to regain property during a prohibited contact may be excused, the prohibited contact itself may still be punishable.³

Defense of self or property is a valid affirmative defense whenever assault is charged or whenever assault is an element of the charged crime. It is therefore also an available defense when the alleged assault would elevate a protective order violation from a misdemeanor to a felony.

B. YELOVICH WAS ENTITLED TO USE REASONABLE FORCE TO RECOVER THE CELLULAR TELEPHONE THAT HE BELIEVED HAD BEEN UNLAWFULLY TAKEN FROM HIM BY THE PROTECTED PARTY AND WAS THEREFORE ENTITLED TO A JURY INSTRUCTION DEFINING REASONABLE FORCE.

The Sixth Amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution grant criminal defendants the right to present a defense. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). A defendant is also entitled to have the jury instructed on his theory of the case if there is evidence that supports the theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (citing State v. Hughes, 106

³ Other defenses, such as necessity, may exist under certain circumstances to excuse a protective order violation. But those circumstances were not advanced at trial in this case.

Wn.2d 176, 191, 721 P.2d 902 (1986)). It is reversible error to refuse to instruct the jury on an affirmative defense where a defendant has met this burden. Williams, 132 Wn.2d at 260 (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

The crime of violating a domestic violence court order is a gross misdemeanor, but is elevated to a class C felony if the violation involves an assault. RCW 26.50.110(1)(a), .110(4). The State charged Yelovich with felony violation of the court order, alleging that he assaulted De Armond. (CP 45-46, 47-48) It is a defense to a charge of assault that the force used was lawful. See McCullum, 98 Wn.2d at 494 (self-defense negates the intent element of a crime). Use of force is lawful when used by a party “in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession,” so long as the force “is not more than is necessary.” RCW 9A.16.020(3).

Yelovich asked the trial court to instruct the jury that it could acquit if it found that he used reasonable force to defend himself or his property. (CP 58; RP 380-81) The trial court denied the request because, in the court’s opinion, a person cannot use reasonable force to retrieve property:

I am unwilling to instruct the jury that as a matter of law he could use force to get back a cell phone that he believed had been wrongly taken. The law doesn't support that. He was acting offensively, not defensively to protect property. So I cannot and will not instruct on the use of force to protect property under these circumstances.

(RP 382) The Court of Appeals agreed with this interpretation, stating:

an owner of property cannot use force to defend that property when (1) the interference with the property occurs when the defendant was not present, (2) the interference has been completed and the property is no longer in the owner's possession, and (3) the property has been removed from an area within the owner's control.

(Opinion at 9-10) The trial court and the Court of Appeals are both incorrect.

The right to use reasonable force to prevent damage to or recapture personal property is well recognized. Under RCW 9A.16.020, "[t]he use of force to recover property is sanctioned in some instances." State v. Madry, 12 Wn. App. 178, 180, 529 P.2d 463 (1974) (interpreting RCW 9A.16.020's identical predecessor statute, Former RCW 9.11.040).⁴

⁴ "Because the language of RCW 9A.16.020 is identical to the former statute, RCW 9.11.040, cases decided under the former statute should be applicable." 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 17.01 (4th Ed).

There appear to be no published Washington cases directly applying this recovery rule in a criminal case. But the idea that one can use reasonable force without criminal liability to regain property has been implicitly recognized. For example, when holding that a good faith claim of title in property may be a defense to a charge of robbery, this Court long ago noted:

The rule, moreover, is not without reason in its support. *A contrary rule would prevent an owner of property who caught a thief in the act of carrying away his property from retaking the property by force or by putting the thief in fear, contrary to that general principle that a man has the right to protect his property against the unlawful invasion of another by such acts of force as are necessary to so protect it.*

State v. Steele, 150 Wn. 466, 473, 273 P. 742 (1929) (emphasis added); see also State v. Larsen, 23 Wn. App. 218, 219, 596 P.2d 1089 (1979).

And it is well established under both common law and tort law that a person is immune from liability for the use of reasonable force to recover stolen personal property. See Estes v. Brewster Cigar Co., 156 Wn. 465, 472, 287 P. 36 (1930) (“[i]n retaking [property] from a thief whom he pursues immediately after the theft, he may call persons to his aid and use such force as may be reasonably necessary to accomplish his purpose without liability except for

excess of force”); W. Page Keeton et al, PROSSER & KEETON ON LAW OF TORTS § 22, at 137 (5th ed. 1984) (one of the privileges “recognized” in American law is “[t]he privilege of an owner dispossessed of his chattel to recapture it by force against the person”); RESTATEMENT (SECOND) OF TORTS § 100 (“[t]he use of force against another for the sole purpose of retaking possession of a chattel is privileged if ... [certain] conditions ... exist”); 16 WASH. PRAC., TORT LAW AND PRACTICE § 14:26 (4th ed.) (“One whose possession” of personal property “is momentarily interrupted may use reasonable force to retake possession”).⁵ Therefore, the trial court was clearly wrong when it denied Yelovich this instruction based on an incorrect understanding of the law.

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. Williams, 132 Wn.2d at 259-60; State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). In this case, Yelovich testified that he confronted De Armond moments after he believed she stole his cellular telephone and demanded she return it. (RP 249) When she did not, he

⁵ The time between the taking and the attempt at recapture must be short, and the force used must be reasonable and be preceded by a verbal demand for the return of the property. See 16 WASH. PRAC., TORT LAW AND PRACTICE § 14:26 (citing RESTATEMENT (SECOND) OF TORTS § 101-105).

grabbed and pulled on her purse in an effort to retrieve his telephone. (RP 249-50) Thus, Yelovich presented sufficient facts to support giving the requested self-defense/defense of property instruction, and he was entitled to have the jury instructed on this law.

Nevertheless, the Court of Appeals affirmed the trial court's decision to deny the requested instruction, finding:

Yelovich was not about to be injured when he accosted De Armond; he already *had* been injured through the loss of his cell phone. He was not attempting to prevent a theft; the theft already had occurred. And Yelovich no longer had possession of the cell phone; the phone allegedly was in De Armond's possession. Therefore, defense of property under RCW 9A.16.020(3) cannot apply and there was no evidence to support Yelovich's other proposed instruction.

(Opinion at 10)

However, when interpreting statutes, the court must avoid absurd results. See State v. Liden, 138 Wn. App. 110, 117, 156 P.3d 259 (2007) (citing State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). But that is just what Division 2's interpretation of the statute and the facts of this case does. According to Division 2, when a victim only discovers that their property has been stolen after the thief has walked away with it, but even if the thief is still within sight of the victim, the victim must stand by helplessly and watch the thief and the stolen property go. The victim can do nothing but hope that the

police can retrieve the property before it is destroyed or disposed of. This is an absurd result. A more sensible interpretation would allow the use of reasonable force to retrieve property as long as the retrieval is accomplished during a fresh pursuit of the property. This interpretation would still honor the plain language of the statute, while also acknowledging that a “malicious interference” does not end just because the thief has taken control of stolen property.

Failure to give a defense of property instruction when warranted is prejudicial error. Williams, 132 Wn.2d at 259-60; Hughes, 106 Wn.2d at 191. By refusing to instruct the jury that Yelovich’s use of force could be lawful and justified, the trial court denied Yelovich his right to argue his theory of the case to the jury. And without this instruction, the jury did not know that they could acquit Yelovich if they found his testimony more credible than De Armond’s testimony. Yelovich’s conviction for felony violation of a court order must therefore be reversed.

IV. CONCLUSION

Self defense or defense of property is a valid defense to the assault element of felony violation of a protective order. Yelovich was denied his right to present a defense and to have the jury instructed on his theory of the case when the trial court incorrectly

concluded that an individual has no right to use reasonable force to reclaim stolen property. This Court should reverse Yelovich's conviction, and remand for a new trial.

DATED: March 12, 2017



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March 12, 2018 - 1:50 PM

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Superior Court Case Number: 15-1-02224-7

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