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No. 65678-3-1

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

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COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN PEGUES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa Doyle

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BRIEF OF APPELLANT

---

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## A. SUMMARY OF ARGUMENT

Kevin Pegues was tased by police during a standoff. Pegues fell face-forward on the ground. While he was down, a 100-pound police dog attacked him and bit him around the head, face, and neck. Fearful that he would be mauled or killed, Pegues stabbed the dog, severing a muscle in the dog's neck. In response, police officers shot Pegues, paralyzing him from the waist down.

The State prosecuted Pegues for second degree assault and for maliciously injuring a police dog. The trial court barred Pegues from raising a justifiable force defense to the count involving the dog, reasoning that a dog is not a "person", the dog was not an agent of the police, and the dog was not a deadly weapon. The trial court's ruling was contrary to Washington law and denied Pegues his Sixth Amendment right to present a defense.

In addition, trial counsel was ineffective because she failed to request lesser included offense instructions with regard to the second degree assault charges although an "all-or-nothing" approach was unreasonable and there is a reasonable likelihood the jury would have convicted on the lesser offense if given this option.

Finally, in his closing argument the prosecutor distinguished between “spoken defenses” and “unspoken defenses,” and urged the jury to conclude that the general denial defense Pegues was forced to raise was an “unspoken defense” that required the jury to find the State’s witnesses were fabricating their testimony in order to acquit. This argument subverted the presumption of innocence and shifted the burden of proof, denying Pegues due process of law.

**B. ASSIGNMENTS OF ERROR**

1. In violation of Pegues’ Sixth Amendment and article I, section 22 right to a defense, the trial court erred in precluding him from raising a justifiable force defense to count three of the amended information, maliciously injuring a police dog.

2. Trial counsel denied Pegues the effective assistance he was constitutionally guaranteed by the Sixth Amendment and article I, section 22 when she failed to request lesser-included offense instructions on unlawful display of a weapon with regard to the second degree assault charges.

3. Multiple instances of prosecutorial misconduct denied Pegues his due process right to a fair trial secured by the Fourteenth Amendment.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person is guaranteed the right to present a defense by the Sixth Amendment of the United States and article I, section 22 of the Washington Constitution. In Washington, a person has the right to use force to defend himself during an arrest if he is in actual, imminent danger of serious injury. Pegues was prosecuted for maliciously injuring a police dog where he stabbed the dog as the dog was biting him around the face, neck, and shoulders. Did the trial court's ruling barring Pegues from claiming self-defense deny him his right to present a defense? (Assignment of Error 1)

2. An accused person may be deprived his Sixth Amendment and article I, section 22 right to the effective assistance of counsel where counsel fails to request jury instructions on a lesser included offense, the difference in maximum penalties is significant, and there is no legitimate reason to pursue an "all-or-nothing" trial strategy. Despite conflicting testimony regarding the manner in which Pegues displayed a knife, in a prosecution for assault in the second degree counsel did not request lesser included offense instructions on the gross misdemeanor of unlawful display of a weapon. Where the difference in maximum penalties

was substantial and a conviction for assault in the second degree was a second qualifying offense under the Persistent Offender Accountability Act, did counsel's failure to request the instructions deny Pegues the effective assistance of counsel to which he was constitutionally entitled? (Assignment of Error 2)

3. Prosecutorial misconduct in closing argument may deprive an accused person of his Fourteenth Amendment right to a fair trial, and only a fair trial is a constitutional trial. In closing argument, the prosecutor differentiated between so-called "spoken defenses" and "unspoken defenses" and told the jury that Pegues' "unspoken defense" of general denial required the jury to conclude the State's witnesses were fabricating testimony in order to acquit. Did the prosecutor's arguments constitute flagrant misconduct requiring reversal of Pegues' convictions? (Assignment of Error 3)

#### D. STATEMENT OF THE CASE

On June 15, 2009, Kevin Pegues and a female friend were buying groceries at the Tukwila Trading Company. 6RP 7;<sup>1</sup> 7RP

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<sup>1</sup> The verbatim report of proceedings is cited as follows:

March 7, 2010 - 1RP  
March 25, 2010 - 2RP  
April 6, 2010 - 3RP  
April 7, 2010(1) - 4RP  
April 7, 2010(2) - 5RP  
April 8, 2010 - 6RP  
April 12, 2010 - 7RP

30-31. The woman attempted to pay for the groceries with an electronic benefits card but the pin number did not work and the woman became upset. 7RP 31. Pegues and the woman went across the street to a motel while the cashier stored their groceries for them. 7RP 40. Upon their return 10 to 15 minutes later, they again attempted to pay, but there was insufficient money on the card. 7RP 32, 42.

Pegues had been tossing a \$1.49 rubber ball in the air and attempted to purchase it with the card, but the card could only be used to pay for food. 7RP 33. Both Pegues and his friend began to raise their voices. The store manager was attracted to the commotion and ordered Pegues twice to pay for the ball. 6RP 10. Pegues became upset and started cursing. Id. He stumbled backward into the manager. 6RP 12. He said this was accidental, but the manager did not believe him. Id.

A woman standing behind Pegues in line paid for the ball. 7RP 44-47. Nevertheless, when Pegues attempted to leave the

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April 13, 2010	-	8RP
April 14, 2010	-	9RP
April 15, 2010	-	10RP
April 19, 2010(1)	-	11RP
April 19, 2010(2)	-	12RP
May 21, 2010	-	13RP
May 26, 2010	-	14RP

store with the ball, the manager ordered Pegues to remain and said that he was calling the police so that Pegues could be trespassed.

6RP 12. Pegues tried to run past him, and, although this was contrary to store policy, the manager and a security guard tried to grab him. 6RP 13, 31-32; 7RP 104. Pegues managed to free himself and ran out of the store. 6RP 17.

Again despite the store policy, the manager chased him. 6RP 17. Pegues hid in the basement of the motel across the street, and when the police arrived, the manager flagged them down and told them where to find him. Id. Pegues again fled, crossing the street and jumping over a fence into a nearby playing field. 7RP 52, 74.

The police pursued Pegues into the field, where they attempted to establish a perimeter. 6RP 86. Tukwila police officer Brian Jordan ordered Pegues to “get the fuck down on the ground,” but Pegues waved a knife at him and shouted, “You are going to have to fucking kill me.” 9RP 34-36. Pegues then ran, as if for the exit, but Jordan decided to try to contain the exit before Pegues was able to flee. 9RP 38-39.

Jordan barely made it in front of Pegues, so only a distance of 10-12 feet remained between them. 9RP 39. This proximity

made Jordan uncomfortable, and he drew his Taser and fired it at Pegues. 9RP 39, 43. When Jordan fired the Taser, two electrical probes were discharged that landed in Pegues' upper chest and hand. 9RP 44-45. The probes transmitted a 50,000 volt electric current for a five second period that was designed to fully incapacitate Pegues. 7RP 90-92; 8RP 24; 9RP 28-29. It was a "good tase": Pegues "rag-dolled" and fell forward face-down. 6RP 94; 7RP 77; 9RP 45-46.

Officer James Sturgill, a K-9 handler, had been dispatched to the scene with his 100-pound police dog, Gino. 9RP 111, 113, 139. The dog was trained to assist in the apprehension of suspects. 9RP 116. When apprehending a suspect, the dog would bite the person and latch on until commanded by Sturgill to release. 9RP 117.

When Sturgill arrived at the playing field, Jordan and Pegues were facing one another and Jordan was giving Pegues commands. 9RP 119, 121. Sturgill's car was about 25 feet away from them. 9RP 143. Sturgill released Gino and the dog charged at Pegues "full force." Id. Sturgill released the dog either just before Jordan shot Pegues with the Taser or just after. 7RP 78; 9RP 122. The dog launched himself at Pegues, who was still

largely immobilized by the Taser, and bit him around the head, neck, and shoulders. 9RP 82, 145.

Pegues rose to his knees and brought his hands to his head in an effort to protect himself from the dog's attack. 9RP 49, 82. He managed to get the dog into a headlock and stabbed the dog in the neck. 9RP 49-50. The dog yelped and ran off,<sup>2</sup> and Pegues started to rise to his knees. 7RP 94. Another officer, James Devlin, who had approached Pegues after he was tased with the intention of assisting Jordan with his arrest, drew his pistol and yelled "knife." 10 RP 64. Tukwila police detective Jay Seese then shot Pegues twice in the center of his body. 6RP 100-01. Pegues is permanently paralyzed as a result. 1RP 12; 8RP 27.

The King County Prosecutor charged Pegues by amended information with two counts of assault in the second degree, one count of maliciously injuring a police dog, and one count of fourth degree assault. 1RP 3; CP 82-84. Pegues submitted as a proposed jury instruction a modified version of WPIC 17.02.01, which would have permitted the jury to find Pegues was acting in self-defense when he stabbed the dog. CP 49. The State moved

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<sup>2</sup> The dog suffered a severed muscle in his neck but no major blood vessels or other organs were affected, and the dog made a full recovery. 9RP 132; 10RP 6.

to bar Pegues from presenting any claim of justifiable force with regard to the count involving the police dog. 1RP 9; CP 51-57.

The court granted the State's motion and refused the instruction, explaining:

Under the basic self-defense instruction, 17.02, it still has to be a person, and the dog's not a person. I know some police officers refer to police dogs as "officer," but they're not a person, so I'm – so I think as a matter of law, that self-defense does not apply to the charge of harming a dog, and I'm not willing to go so far as to say the dog is effectively a deadly weapon and an agent of the police, that's a little convoluted. And then that sort of messes up the whole analysis about whether the use of force is lawful and excessive, was the biting excessive? I just don't think it fits basically. So for that reason, I'm going to deny the request.

4RP 17-18.

A jury acquitted Pegues of fourth degree assault and convicted him of the remaining counts. CP 59-62. This appeal follows.

E. ARGUMENT

1. THE TRIAL COURT DENIED PEGUES HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A DEFENSE WHEN IT REFUSED TO ISSUE JUSTIFIABLE FORCE INSTRUCTIONS WITH REGARD TO COUNT THREE, MALICIOUSLY INJURING A POLICE DOG.

- a. Accused persons are guaranteed the right to

present a complete defense by the Fourteenth Amendment and the Sixth Amendment.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.”

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Const. art. I, § 22.

An accused person also has the Sixth Amendment right to jury instructions necessary to present his defense. “Jury instructions are improper if they do not permit the defendant to argue his theories of the case, mislead the jury, or do not properly inform the jury of the applicable law.” State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008).

The trial court barred Pegues from raising a self-defense claim with regard to count three, harming a police dog. The trial court’s ruling denied Pegues his right to a defense.

b. The right of an accused person to use force to defend himself from an attack is enshrined in the Washington common law. Washington courts protect a person’s common law right to “stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm.” State v. Meyer, 96 Wn. 257, 264, 164 P. 926 (1917). A claim of self-defense negates the intent element of the crime and requires the jury to “evaluate the reasonableness of the defendant’s actions in defense of himself ‘in the light of all the circumstances.’” State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (citing State v. Tribett, 74 Wash. 125, 132 P. 875

(1913)).<sup>3</sup> The Washington Supreme Court has resisted efforts to modify or abridge this fundamental right of self-defense. State v. Allery, 101 Wn.2d 591, 596-98, 682 P.2d 312 (1984).

i. Under Washington law, a person is entitled to use force to defend himself against serious injury by a police officer. The general rule is that to prove self-defense, “there must be evidence that (1) the defendant subjectively feared that he was in imminent danger []; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary.” State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 946 (2007). In Washington, a person is entitled to defend himself against the use of force by a police officer, although the right to act in self-defense in this instance is abridged.

When claiming self-defense against a police officer effecting an arrest, the person must show that he actually faced imminent danger of serious injury or death. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). This requirement of “actual, imminent danger” applies even to unlawful arrests. Id. at 738 (citing State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997)). If a person establishes that he was in actual danger of serious injury during the

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<sup>3</sup> Accord, State v. Ellis, 30 Wash. 369, 70 P. 963 (1902); State v. Churchill, 52 Wash. 210, 100 P. 309 (1909).

course of an arrest, and acts in his own defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Bradley, 141 Wn.2d at 740; State v. Miller, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997).

ii. Under Washington law, a person is entitled to use force to defend himself from an animal. The Washington Supreme Court also recognizes that the common law right to self-defense entitles a person to use force to defend himself or his property from an animal. In Vander Houwen, the Court reaffirmed the common law rule that “it may be justly said that one who kills an elk in defense of himself or his property, if such a killing was reasonably necessary for such purpose, is not guilty of violating the law.” 163 Wn.2d at 28 (quoting State v. Burk, 114 Wash. 370, 376, 195 P. 16 (1921)). In Burk, the Court had held that a property owner has a constitutional right under article I, section 3 to defend his or her property against destructive game. Burk, 114 Wash. at 376.

The Court in Vander Houwen held that recently-enacted legislation limiting the circumstances in which the killing of protected game may be permissible did not abrogate this constitutional right:

Although a fact finder may take into account measures provided by the wildlife code and the Department of Fish and Wildlife . . . when determining whether resorting to killing protected game was “reasonably necessary,” Washington’s legislatively enacted wildlife code does not abrogate a property owner’s constitutional right to protect his property from destructive game.

Vander Houwen, 163 Wn.2d at 29; see also id. at 35-36.

The Court reiterated that “when a property owner charged with unlawful hunting or waste of wildlife presents sufficient evidence that he exercised his constitutional right to protect his property from destructive game, the burden shifts to the State to disprove this justification.” Id. at 36.

c. Pegues had the right to defend himself against the deadly force of the police dog's attack. The Supreme Court recognizes that a dog can be a deadly weapon under RCW 9A.04.110(6). State v. Werner, \_\_\_ Wn.2d \_\_\_, 241 P.3d 410, 412 (2010) (citing State v. Hoeldt, 139 Wn. App. 225, 160 P.3d 55 (2007)). Hoeldt involved an appeal following a conviction for second degree assault with a deadly weapon based upon a pitbull’s attack on a police officer. Construing the statutory definition of “deadly weapon” contained in RCW 9A.04.110, the Court concluded that the pitbull qualified as an “instrument . . . which,

under the circumstances in which it [was] used, attempted to be used, or threatened to be used, [was] readily capable of causing death or substantial bodily harm.” Hoeldt, 139 Wn. App. at 229.

The Court noted that the majority of other jurisdictions have ruled that general definitions of “deadly weapons” should be broadly construed to include dogs. Id. at 229-30 (citing cases and other authorities). In addition to holding that a dog may qualify as a deadly weapon under the “instrument” language, the Court ruled that under the facts of the case, the pitbull also met the definition of “deadly weapon” based on the manner of its use. Analyzing the facts, the Court observed:

The evidence here established that Hoeldt used his pit bull as a deadly weapon. Detective Acee described a large, powerful dog that was barking and growling at him. Hoeldt was holding the dog by its neck or collar, and when Hoeldt released the dog, it charged Detective Acee, lunging at his throat and chest. **A large, powerful dog that, by training or temperament, attacks a person in this manner when intentionally released or directed to do so by its handler, meets the instrumentality “as used” definition of deadly weapon.**

Id. at 230 (emphasis added).

In fact, numerous other jurisdictions recognize the right of a person to use self defense against an attacking dog, even where the dog is a police dog. See Henley v. State, 881 N.E.2d 639, 653

(Ind. 2008) (acknowledging defendant's claim that he shot police dog in self-defense); People v. Adams, 124 Cal.App.4th 1486, 1495-96, 21 Cal.Rptr.3d 920 (2004) (discussing jury instructions given in prosecution for battery on a police dog); Weekly v. City of Mesa, 888 P.2d 1346 (Ariz. App. 1994) (legal justification statutes include an officer's use of a police dog as "physical force"); People v. Gittens, 196 A.D.2d 795, 796-97 (N.Y.A.D. 1993) (reversing based on trial court's failure to instruct jury on defendant's right to use self-defense against police dog).

d. The authority cited by the State is not on point.

Below, the State cited only two Washington cases on the subject of whether a person is entitled to use self-defense against an attacking animal. CP 54 (citing State v. Belleman, 70 Wn. App. 778, 856 P.2d 403 (1993) and State v. Bockman, 37 Wn. App. 474, 682 P.2d 925 (1984)). The State distorted the facts and holdings of both of these cases. Neither stands for the principle that a person attacked by an animal may not use force to defend himself.

In Belleman the trial court refused Belleman's proposed self-defense instructions but dismissed the count charging Belleman with harming a police dog. Id. at 780. The issue on appeal related to whether Belleman was entitled to raise an ordinary claim of self-

defense because he did not know his assailant was a police officer. Id. at 780-81. Belleman thus is of no value whatsoever to this Court's assessment of the legal question presented here.

In Bockman, the Court found that Bockman was not entitled to raise self defense because "Timothy Bockman reacted to arrest by picking up a knife, lunging at a leashed police dog and then at Officer Miller, and knocking away Officer Ticken's revolver." 37 Wn. App. at 485. Bockman does not speak to the question of whether a person is entitled to raise self-defense when he uses force to defend himself against an attacking police dog, because there is no indication that the dog was loosed and ordered to attack Bockman.

The State also cited several federal cases. Again, the State either mis-cited these cases or failed to understand their holdings. The State cited Quintanilla v. City of Downey, 84 F.3d 353, 354 (9th Cir. 1996), for the proposition that "[a] suspect has no federal or constitutional right to defend himself or herself against a police dog." CP 53. This is a gross misstatement of Quintanilla. Quintanilla was a §1983 case. 84 F.3d at 354. The cited portion of the Court's opinion discussed a procedural ruling by the trial court:

The court . . . ruled that if the jury found that the three line officers committed no constitutional transgressions when they used the dog to arrest Quintanilla, then the city and Chief would be absolved, as a matter of law, from any liability . . . The court thus required plaintiff to show during the first phase that the use of the police dog on this occasion led to a constitutional deprivation.

Id at 354-55. Quintanilla in no way stands for the broad proposition for which it was cited by the State.

The State cited Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997), for the proposition that “federal courts have ruled that use of police dogs is not necessarily use of deadly force and requires less justification than other uses of deadly force.” CP 53. The State neglected to mention that the central premise of Vera Cruz – that deadly force means “force reasonably likely to kill” – has been overruled, calling into question the legitimacy of the Court’s discussion of “deadly force.” See Smith v. City of Hemet, 394 F.3d 689, 705-07 (9th Cir. 2005) (overruling Vera Cruz).

With regard to the use of police dogs to subdue a suspect, the Court in Smith stated, “while we have not in any of our prior cases found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force.” Id. at 707. The Court noted, further, that in its prior

cases it had applied the “unduly stringent” test set forth in Vera Cruz. Id. at 707 n. 9.

The State last asserted that “unintentional bites by police dogs, where the dog handler did not intend or command the dog to subdue the victim, are not excessive uses of force.” CP 53-54. Even if true, this claim is not germane to this case because the evidence clearly establishes that Gino was deployed to subdue Pegues. Sturgill, the dog’s handler, readily acknowledged that a police dog is trained to bite a suspect; indeed, he stated that this is the “main object” when a police dog is deployed. 9RP 117, 144. Jordan testified that when a dog is deployed he has to “back off” because the dog might bite him. 9RP 81-82. He further testified that in this case, Pegues was on his knees, struggling with the dog, and the dog was biting Pegues because “that’s what he’s trained to do.” 9RP 82. Joshua Vivet, an officer who trains K-9 units, confirmed that a dog trained in the apprehension of suspects will bite them, and will not cease until specifically directed to do so by its handler. 9RP 16-17.

Much as the Court in Hoeldt recognized that a dog can qualify as a deadly weapon, courts in other jurisdictions recognize that a police dog is an instrument wielded by the officer. Thus,

whether force used by a defendant for his protection is reasonable will depend on the force used when the dog is deployed. As the Arizona appellate court reasoned in Weekly:

We see no difference between a police officer directing a dog to attack a person and a police officer directing a blow at a person with a baton. In both situations, the officer is directing the force; in both situations, the reasonableness of the use of that force is a factual determination. Only the instrumentality is different.

888 P.2d at 1352.

The extensive testimony in this case regarding the training and deployment of police dogs confirms the correctness of the Arizona Court's analysis. The dog is deployed by his trainer and answers his commands. 9RP 16-17. By releasing the dog, the trainer determines that the suspect will be attacked and bitten until the trainer decides the dog should stop. Id. Here, because Pegues had been tased and was on the ground, the dog bit him around the face, shoulders and throat. 9RP 82, 145. Notwithstanding this evidence, the trial court barred Pegues from submitting instructions to the jury that would have informed them regarding his right to use force in his own defense against possible serious injury. The trial court's ruling denied Pegues his right to a defense.

e. The constitutional error was prejudicial. Under Washington law, it is established that where a person is in actual, imminent danger of serious injury or death he or she has the right to act in self-defense in response to the use or threatened use of force during an arrest. Bradley, 141 Wn.2d at 737-38. Yet the trial court unreasonably drew a distinction between injury suffered directly at an officer's hands and injury caused by a police dog under an officer's control. 4RP 17-18.

A constitutional error is prejudicial unless the State proves beyond a reasonable doubt that the error did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The State cannot meet this burden here.

Pegues was bitten around the face, neck, and shoulders by a 100-pound dog while he was recovering from the effects of a Taser. Several witnesses testified that when Pegues stabbed the dog, it was attacking him. 6RP 19, 99; 7RP 54, 69, 111; 9RP 48-50. Given the proximity of Pegues' eyes, nose, mouth and throat to the dog's teeth, he was in actual, imminent danger of getting maimed or seriously injured. But because the court prevented him from arguing his use of force was justifiable, he could not present

this defense to the jury. This Court should conclude the violation of Pegues' right to a defense was prejudicial.

2. TRIAL COUNSEL DENIED PEGUES HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN SHE FAILED TO REQUEST LESSER-INCLUDED OFFENSE INSTRUCTIONS WITH RESPECT TO THE SECOND DEGREE ASSAULT CHARGES.

a. Defense counsel rendered ineffective assistance of counsel under the Sixth Amendment when she failed to request that the jury be instructed on the lesser included offense to assault in the second degree of unlawful display of a weapon. An accused person has the right under the Sixth Amendment and article I, section 22 of the Washington Constitution to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 122 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel has two components: (1) deficient performance and (2) resulting prejudice, i.e., that but for counsel's deficient performance, there is a reasonable probability that the verdict would have been different. Strickland, 466 U.S. at 687. An ineffective assistance of counsel

claim is reviewed de novo. State v. Grier, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

Although a reviewing court indulges the presumption that defense counsel was effective, this presumption can be overcome if the defendant can show that there was no legitimate strategic or tactical basis for the challenged conduct. “[D]eliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance.” Id. at 640. If the tactic was unreasonable, the Court will reverse. Id. at 633.

b. Both the legal and factual prongs for lesser included offense instructions of unlawful display of a weapon with regard to the second degree assault counts were established. A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily included in the charged offense (legal prong) and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); In re Personal Restraint of Crace, 157 Wn. App. 81, 106, 236 P.3d 914 (2010) (citing State v. Gamble, 137 Wn. App. 892, 905, 155 P.3d 962 (2007)). If these two prongs are

satisfied, “a lesser included offense instruction is required as a matter of right.” Crace, 157 Wn. App. at 106 (citation omitted).

As prosecuted here, assault in the second degree required the State to prove that Pegues assaulted Jordan and Devlin with a deadly weapon with the intent to create reasonable fear and apprehension of bodily injury. RCW 9A.36.021; Supp. CP \_\_ (Sub No. 105). To convict Pegues of the misdemeanor offense of unlawful display of a weapon, the State would have had to prove that he did:

carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270. Thus, as prosecuted here, unlawful display of a weapon was a lesser-included offense of assault in the second degree. Crace, 157 Wn. App. at 107-08; State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004). The legal prong of the Workman test was established.

The factual prong of the Workman test requires there be evidence supporting a rational inference that only the lesser offense was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 461,

6 P.3d 1150 (2000). In conducting this inquiry, the court must consider the evidence in the light most favorable to the party seeking the instruction. Id. at 455-56.

The State's witnesses could not agree when Pegues displayed the knife and whether he threatened the officers with it. Two police officers did not see a knife at all. 6RP 152; 9RP 165. Another officer said that Pegues did not wave the knife but pointed it straight in the air. 7RP 87. Although Seese, the detective who shot Pegues, claimed that Pegues was lunging at Jordan and Devlin with the knife when he shot him, civilian witnesses said that Pegues was just trying to get up after having been tased. 6RP 105-06; 7RP 69, 129-30. A police video of the shooting contradicted Seese's testimony and showed that Pegues was completely down on the ground when Seese fired his second shot. 6RP 113, 117.

Given the conflicting testimony and the video evidence, considered in the light most favorable to Pegues, the evidence supported the inference that only the lesser offense of unlawful display of a weapon was committed.

c. Defense counsel's failure to request lesser included offense instructions was deficient performance. To gauge whether an attorney's failure to request a lesser included offense

instruction is sound or legitimate trial strategy, the appellate court evaluates three factors:

(1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

State v. Breitung, 155 Wn. App. 606, 615, 230 P.3d 614 (2010). An assessment of these factors provides considerable support for the conclusion that trial counsel's performance was deficient.

i. There was a substantial difference between the maximum penalties for the greater and lesser offenses. The first factor requires the court to compare the maximum penalties for the crimes. Breitung, 155 Wn. App. at 615. Based on Pegues' offender score, a conviction for the crime of assault in the second degree carried a potential sentence of 63-84 months in custody. CP 67. Unlawful display of a weapon is a gross misdemeanor and carries a maximum sentence of 365 days in jail. RCW 9.92.020.

In Crace, the Court noted that a conviction on the charged offense led to a sentence of life without the possibility of parole under the Persistent Offender Accountability Act. Crace, 157 Wn. App. at 109. Given this exposure, the Court found that counsel's "all-or-nothing" approach was objectively unreasonable. Id.

In Ward, considering the disparity between a high-end standard range sentence for assault in the second degree and the statutory maximum for unlawful display of a weapon, the Court concluded that there was no legitimate reason for a defense attorney's failure to request the lesser included offense instruction. Ward, 125 Wn. App. at 250.

In Breitung, also a prosecution for second degree assault, defense counsel did not request lesser included offense instructions on the gross misdemeanor of assault in the fourth degree. Based on his offender score, Breitung's standard sentencing range for the second degree assault was only 13-17 months confinement. 155 Wn. App. at 615. The Court nevertheless found counsel's omission was deficient performance. The Court noted that the maximum penalty Breitung faced was 41.6 percent greater than his maximum punishment for assault in the fourth degree, and that assault in the second degree is a "most serious offense" under the Persistent Offender Accountability Act. Id. at 615-16 (citations omitted).

In other contexts as well, substantial sentencing disparities have persuaded Washington appellate courts to find that the failure to request lesser included offense instructions was deficient

performance. See e.g. Grier, 150 Wn. App. at 641-42 (failure to request manslaughter instructions in second degree murder prosecution was objectively unreasonable); State v. Pittman, 134 Wn. App. 376, 388-89, 166 P.3d 720 (2006) (failure to request instructions on attempted criminal trespass, a misdemeanor, was deficient performance in prosecution for attempted residential burglary).

If convicted of two counts of assault in the second degree, Pegues faced a minimum prison term of 84 months as opposed to a maximum sentence of a year in jail for unlawful display of a weapon. In addition, a conviction for assault in the second degree was a second “strike” for Pegues. RCW 9.94A.030; CP 72. This Court should conclude that the difference in maximum penalties supports the conclusion that counsel’s performance was objectively unreasonable.

ii. The defense theory was the same for both offenses. If lesser included offense instructions on unlawful display of a weapon had been submitted to the jury, Pegues’ defense theory – that Pegues did not have the intent to commit assault – would have remained unchanged. This factor also supports the conclusion that counsel’s omission was deficient performance.

In Crace, a case involving similar facts to Pegues' case, the Court concluded that the defense theory at trial weighed against any conclusion that defense counsel's "all-or-nothing" trial strategy was legitimate. While under the influence of drugs, Crace charged at a police officer with a sword, moving from a distance of fifty feet to within five to seven feet of him before dropping the weapon. 157 Wn. App. at 89-90. As in this case, the police officer testified that he feared injury because Crace had come within 21 feet of him, which is the distance in which an officer's reaction time may be too slow to prevent an assault. Id. at 90 n. 1; see 6RP 79; 9RP 30. The Court concluded that because of Crace's intoxication, the jury could have found Crace did not have the intent to commit assault, and convicted him of the lesser crime. Id. at 108. Here, similarly, the jury could have concluded that Pegues lacked the intent to assault the officers.

In Ward, the Court held that an instruction on a lesser included offense would not have conflicted with counsel's self-defense theory. 125 Wn. App. at 249-50. The Court reasoned:

If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

Id. In this case, if the jury had found that Pegues did not lunge at the officers with the knife or point it at them, they may have convicted him of only the lesser offense. This Court should conclude that the second factor supports the conclusion that counsel's performance was deficient.

iii. The overall risk to Pegues was substantial in light of the totality of the developments at trial. This case involved the highly sensitive circumstance of an alleged assault on police officers and an injury to a police dog, creating a substantial risk that the jury would be emotionally inclined to convict him. Nevertheless, Pegues' behavior was extremely erratic; Jordan testified that Pegues appeared to be mentally unstable. 9RP 74. It was not clear from the evidence whether Pegues intended to harm the officers, harm himself, or flee.

Given both the sensitive nature of the prosecution and the conflicting accounts of what happened, the jury should have been afforded the opportunity to consider the lesser included offense. This Court should conclude that there was no legitimate reason for counsel to fail to request instructions on the lesser included offense.

d. Counsel's deficient performance prejudiced

Pegues. The second prong of Strickland requires Pegues to show prejudice; specifically, that there is a reasonable likelihood that but for counsel's deficient performance, the outcome of the trial would have been different. Strickland, 466 U.S. at 687; Breitung, 155 Wn. App. at 617-18. In evaluating the question of prejudice to a defendant from a defense attorney's failure to request a lesser included offense instruction, this Court has noted:

[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Ward, 125 Wn. App. at 250-51 (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 344 (1973); see also Pittman, 134 Wn. App. at 788 (same)).

In light of Pegues' display of the knife, the jury may have been reluctant to acquit him altogether: they may well have recognized that he was "plainly guilty of some offense." Keeble,

412 U.S. at 213. Because the testimony regarding how Pegues used the knife was conflicting, however, if the jury had been given the option of rendering a verdict on the lesser offense, there is a reasonable likelihood that they would have resolved any doubts in Pegues' failure. This Court should conclude that counsel's deficient performance prejudiced Pegues. Pegues is entitled to a new trial on the assault in the second degree counts.

### 3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED PEGUES A FAIR TRIAL.

a. The prosecutor's closing argument diminished the burden of proof and the presumption of innocence, and improperly appealed to the jury's passions and prejudices. Pegues raised a general denial defense to the assault in the second degree counts and sought to raise a self defense claim to count three of the amended information. CP 49; 3RP 13-15; 12RP 52. The court barred Pegues from offering lawful force jury instructions and Pegues accordingly presented a defense of general denial to this count as well; specifically, that he lacked the mens rea to maliciously injure the dog. 12RP 75-76.

Despite having strenuously opposed any lawful force instruction, and presumably well understanding the State's burden

of proof at trial, the prosecutor nevertheless argued in his rebuttal closing argument:

[I]t's really easy in this line of work to cut into witnesses. Really easy. That's why there's what we call spoken defenses. And spoken defenses are things such as self-defense. He's going to attack me, so I attacked him first. Then there is an alibi defense, it wasn't me, I was at home with my mom. My mom's going to testify. Diminished capacity. Well, I wasn't all there. I was too hammered to know what I was doing and I blacked out. Insanity. I did it, but I'm crazy, forgive me. Those are spoken defenses.

And when you start throwing out unspoken defenses like in this case, when you start cutting into the credibility of the officers, and that one question, do you believe Officer Devlin, do you believe Officer Jordan, they're saying, no, you shouldn't. No, you shouldn't believe what they're saying.

...

What has to be true for these officers to be making this up? Or to be – well, what is counsel really saying? She's saying one of three things. One, these officers are confused. They don't really know what happened here. Two, she is either saying they are confused or these officers are mistaken. Or three, she's saying the officers fabricated the whole story. You tell me, any one of them seem confused about anything? Or mistaken about anything?

...

So what are we really saying? If we were to do an analysis, what they're implying, the unspoken defense, is they are fabricating. Right? They are making this up. Really? Because what has to be true for all these officers to be making this up? They had to have conspired together. They had to have really wanted to get this guy on a conviction for Assault in the Second Degree. They had to plan together. They had to get their stories straight. And in fact, they had

to come up with something convincing enough, like this, where it's not the exact same story, some say shiny, some say later, some say I saw the knife – let's make this believable to the jury, let's make up this great story so we can be really convincing, corroborating each other. Really? Are they that sophisticated to do that? Why would they do that? You are telling me every officer got up here and made something up just for the sake of the charges? They must really, really want to get Mr. Pegues. They must really be out for him. Did you see any evidence of that? What would be motivation for the officers to fabricate this story? That is ridiculous.

12RP 80-82.

b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, § 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite

sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

Allegedly improper arguments must be reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)). The touchstone of this inquiry is not whether the misconduct was harmless or not harmless, but whether the misconduct denied the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 761, 685 P.2d 1213 (1984) (citing, inter alia, Smith v. Phillips, 455 U.S. 209, 210, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).

An improper comment generally is reviewed for whether there is a substantial likelihood that the comment affected the jury's decision, but where the comment infringes on a constitutional right, it is subject to constitutional harmless error analysis. State v. Moreno, 132 Wn.2d 663, 671-72, 132 P.3d 1137 (2006). "Under

this standard, the court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt.” Id.

i. The prosecutor’s argument shifted the burden of proof and diluted the presumption of innocence. The State bears the burden of proving each element of its case beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is misconduct for the prosecutor to make an argument that diminishes or dilutes the burden of proof. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009). Further, “[a] criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise.” State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

In differentiating between “spoken defenses” and “unspoken defenses” the prosecutor baldly portrayed a general denial defense as less legitimate, and less worthy of credence, than affirmative or so-called “spoken” defenses. 12RP 80-82. The prosecutor described a general denial defense as the defense where the defendant is “really saying” that the State’s witnesses fabricated their testimony. The clear significance of this argument was to try

to imply that Pegues had to be guilty because otherwise he would have offered a “spoken defense.”

But the State’s burden to prove each element of the crime beyond a reasonable doubt is the same regardless of whether the defendant mounts an affirmative defense, claims self-defense, or claims general denial. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). An accused person is presumed innocent and has no duty to present evidence, call witnesses, or otherwise prove his innocence. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, rev. denied, 1006 Wn.2d 107 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). Thus there is no constitutional difference between a “general denial” defense and a statutory defense. The State’s burden to prove each element of the crime charged beyond a reasonable doubt remains unchanged.

The prosecutor’s argument improperly shifted the burden of proof to the defense and subverted the presumption of innocence by implying that the general denial defense essentially was a concession of guilt. Compare State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor argued the defense had “no

case”). The argument was particularly egregious given that the prosecutor battled vigorously to prevent Pegues from raising a justifiable use of force defense to count three at trial. Having prevailed in this argument, the prosecutor then sought to portray the general denial defense as the last stand of an accused person who is guilty. This argument was prejudicial misconduct.

ii. The prosecutor’s burden shifting argument was misconduct. The prosecutor’s argument was improper for an additional reason. The prosecutor shifted the burden of proof by telling the jury that they had to convict unless they concluded that the State’s witnesses were “fabricating” their testimony. 12RP 81-82.

Numerous appellate courts, including this Court, have found such arguments to be reversible misconduct even without an objection from defense counsel. See State v. Johnson, \_\_\_ Wn. App. \_\_\_ 243 P.3d 936, 940-41 (2010) (holding argument that jury had to “fill in the blank” with a reason why the defendant was not guilty was improper “because it subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him”); State v. Venegas, 155 Wn.

App. 507, 523-24, 228 P.3d 813 (2010) (finding similar “fill in the blank” argument to be flagrant misconduct warranting reversal notwithstanding lack of defense objection); State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (holding argument that jury could acquit only if they believed defendant and disbelieved State’s witnesses presented jury with a “false choice” because the jury was entitled to conclude that it did not necessarily believe the defendant but also did not find the State had proven its case beyond a reasonable doubt); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (“This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken”) (citing cases). In Fleming, this Court emphasized, “The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony.” Id. (emphasis in original).

c. The error was prejudicial. The prosecutor’s contention that the jurors had to find the officers were “confused”, “mistaken”, or “fabricating” testimony was flagrant misconduct. The prejudicial effect of the argument was amplified because it was

coupled with the prosecutor's unacceptable insinuation that Pegues' "unspoken defense" was indicative of his guilt.

In fact, there was substantial reason to doubt whether Pegues intended to commit an assault or was simply trying to flee from the officers. There certainly was reason to doubt whether Pegues "maliciously" stabbed the dog or did so for his protection. The prosecutor's effort to portray Pegues' general denial defense as somehow illegitimate was calculated to make any doubts the jury may have had about the conflicting evidence appear unreasonable. This Court should conclude that the prosecutor's argument prejudiced Pegues. Pegues is entitled to a new trial.

F. CONCLUSION

This Court should conclude that under Washington law, an accused person may claim self-defense when he uses force to defend himself against serious injury by a police dog, and that the trial court's refusal to allow Pegues to present this theory to the jury denied him a defense. This Court should further hold that counsel's failure to request lesser included offense instructions on the assault in the second degree counts was objectively unreasonable. Last, this Court should hold that prosecutorial misconduct in closing argument deprived Pegues of a fair trial. Pegues' convictions should be reversed and remanded for a new trial.

DATED this 31<sup>st</sup> day of January, 2011.

Respectfully submitted:



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Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65768-3-I
v.	)	
	)	
KEVIN PEGUES,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] KEVIN PEGUES 851526 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2011 JAN 31 PM 4:53

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710