

NO. 66914-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JACEK JASIONOWICZ,

Appellant.

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Jasek Jasionowicz was deprived of due process of law by the trial court's failure to instruct the jury on the law of self-defense where there was sufficient evidence to warrant the instructions, and, therefore, absence of self-defense was an element of fourth degree assault the State had to prove beyond a reasonable doubt.

2. Alternatively, defense counsel was ineffective because her failure to request self-defense jury instructions where evidence supported it was not sound trial strategy, and it is reasonably probable that the jury would have found the State failed to disprove self-defense if the jury instructions had been properly requested.

3. Even viewing the evidence in the light most favorable to the State, no reasonable jury could have found Mr. Jasionowicz guilty of the crime of possession of a stolen vehicle because there was insufficient evidence to prove beyond a reasonable doubt that Mr. Jasionowicz had knowledge the vehicle was stolen.

4. The trial court lacked authority to prohibit Mr. Jasionowicz from possessing a firearm as punishment for his misdemeanor domestic violence assault conviction because the factual finding of "domestic violence" was not submitted to the jury to be proven

beyond a reasonable doubt and the right to possess a firearm is a fundamental individual right.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant produces “any evidence” of self-defense to the charge of fourth degree assault, due process requires the trial court to instruct the jury on the law of self-defense because the absence of self-defense is an element the State must prove beyond a reasonable doubt. At trial, Mr. Jasionowicz testified that he was trying to defend himself when he pushed the complaining witness away after she started hitting him, but the trial court failed to instruct the jury on the law of self-defense. Did the trial court err by failing to give self-defense jury instructions?

2. A defendant is denied effective assistance where defense counsel’s failure to request jury instructions supported by the evidence cannot be characterized as sound trial strategy and the defendant is prejudiced as a result. Defense counsel failed to request self-defense jury instructions where evidence supported the instructions, it was the only conceivable defense, and there is a reasonable probability that the jury would have found the State failed to disprove self-defense beyond a reasonable doubt. Was Mr. Jasionowicz denied effective assistance of counsel?

3. A defendant's mere possession of a stolen vehicle – without a sufficient combination of additional corroborating evidence – is insufficient to prove beyond a reasonable doubt that the defendant had knowledge the vehicle was stolen. At the scene and at trial, Mr. Jasionowicz explained that he was suspicious but did not know the vehicle was stolen when a man who owed him money left the vehicle at his auto shop and never returned. Did the State fail to present sufficient evidence at trial for the jury to convict Mr. Jasionowicz of the crime of possession of a stolen vehicle?

4. The right to possess a firearm is a fundamental individual right guaranteed by both the Second Amendment and the more protective reach of Article I, section 24. Mr. Jasionowicz lost his fundamental right to possess a firearm as punishment for the trial court's factual finding of "domestic violence," which was not submitted to the jury to be proven beyond a reasonable doubt. At the time of the framing of our Constitution, the right to possess a firearm could not be denied based on a misdemeanor offense. Does it violate the Second Amendment and Article I, section 24 to prohibit Mr. Jasionowicz from possessing a firearm as punishment for his misdemeanor domestic violence assault conviction?

C. STATEMENT OF THE CASE

On the afternoon of October 30, 2010, police officer Coleman Langdon responded to a 911 call at a public storage unit in Lynnwood, Washington. 2/7/11RP 80-81. There, Officer Langdon met with complaining witness Melisa Tryon, who smelled of intoxicants. 2/7/11RP 81-82, 89-90. Ms. Tryon alleged that the previous night, she fought with her boyfriend, Jasek Jasionowicz, at his nearby apartment above his auto shop. 2/7/11RP 81-83.

According to Ms. Tryon, she and Mr. Jasionowicz argued about her relationship with her son. 2/7/11RP 38. She alleged that Mr. Jasionowicz suddenly grabbed her by the hair and rammed her head through the wall. 2/7/11RP 38-41. He then allegedly got on top of her, put his hands around her neck, told her she was a liability, and said he was going to kill her. 2/7/11RP 41-42. Ms. Tryon alleged Mr. Jasionowicz then repeatedly choked her, cutting off her breathing, until she pretended she was dead. 2/7/11RP 42-43. Mr. Jasionowicz then went outside, and Ms. Tryon eventually went to sleep. 2/7/11RP 43, 45-47.

The next morning, Ms. Tryon left his apartment. 2/7/11RP 47-48. Later, she asked Mr. Jasionowicz to put gas in her car, and he complied. 2/7/11RP 48-49. She then returned to the shop again

to have him fix her car door, and he complied. 2/7/11RP 48-49. She left his shop and called 911. 2/7/11RP 54-55.

When Officer Langdon met with Ms. Tryon, he looked for but could not find any visible injuries on her whatsoever. 2/7/11RP 92-95. Officer Langdon called police officers Brad Reorda and Chris Herrera for backup. 2/7/11RP 81. The officers went to Mr. Jasionowicz's auto shop with Ms. Tryon, where the officers immediately arrested Mr. Jasionowicz and read him his Miranda rights. 2/7/11RP 83-84, 104. Mr. Jasionowicz waived his rights and told the officers that Ms. Tryon started to hit him, so he pushed her away and she fell into the wall. 2/7/11RP 84-85.¹

After waiving his rights, Mr. Jasionowicz signed a consent to search form so the officers could inspect the wall in his apartment. 2/7/11RP 85. As the officers took Mr. Jasionowicz out of the handcuffs, Ms. Tryon thought they were releasing him, so she yelled, "Well, if his trying to kill me and strangle me isn't going to put him in jail, how about a stolen vehicle?" 2/7/11RP 56. She was unable to articulate how she knew about any stolen vehicle,

¹ In addition, at trial, Mr. Jasionowicz specifically testified that he was trying to defend himself. 2/7/11RP 131-35.

admitting that “[i]t was a shot in the dark,” but she wanted to make sure that he was arrested and taken to jail. 2/7/11RP 56-57, 76-77.

Officer Herrera, with permission from Mr. Jasionowicz, then searched his shop. 2/7/11RP 111-12, 117-19. Officers found a stolen vehicle covered with a tarp in the back of the shop, next to two other vehicles, one of which was also covered with a tarp. 2/7/11RP 105-06, 111-12. At trial, Maria Bindas, the owner of the stolen vehicle, testified that on December 7, 2008 – over ten months earlier – her 2003 Audi was stolen while it was parked on the street in downtown Seattle. 2/7/11RP 102. She also testified that she did not know Mr. Jasionowicz and did not give him permission to take her vehicle. 2/7/11RP 101.

At the scene and at trial, Mr. Jasionowicz explained that a man had dropped the vehicle off to store it at his auto shop about a year earlier. 2/7/11RP 113-15, 139-42. This man owed Mr. Jasionowicz over \$1,500, left Mr. Jasionowicz with a key to the car, and told Mr. Jasionowicz that he bought the car at an auction and it had transmission problems. 2/7/11RP 139. When the man never returned for the car, Mr. Jasionowicz suspected there was something wrong with the vehicle – either it was stolen or used in a crime. 2/7/11RP 121. Mr. Jasionowicz explained that because the

man still owed him \$1,500, he removed the motor for his friend Mike, who owned an auto dealership. 2/7/11RP 113, 140-41. After conducting an investigation, Officer Herrera recovered the motor from the auto dealership. 2/7/11RP 120. Nobody – neither the police nor the prosecutor – asked Mr. Jasionowicz for the name of the man who left the vehicle at his shop. 2/7/11RP 113-14.²

On February 8, 2011, the jury found Mr. Jasionowicz not guilty of second degree assault, but guilty of the lesser-included crime of fourth degree assault. CP 42-43. The jury also found Mr. Jasionowicz guilty of possession of a stolen vehicle. CP 41.

At sentencing, on March 10, 2011, the trial court made a factual finding that the fourth degree assault was a crime of domestic violence, and Mr. Jasionowicz lost his right to possess a firearm as a result. 3/10/11RP 1; CP 33-35. In addition, Mr. Jasionowicz was sentenced to 120 days incarceration for the assault, and 30 days incarceration for the possession of a stolen vehicle. CP 22-36; 3/10/11RP 9. Mr. Jasionowicz had an offender

² When Officer Herrera was questioned about whether he asked Mr. Jasionowicz for the name of the man who left the stolen vehicle at the shop, Officer Herrera conceded, "I can only imagine that I did. That's part of a normal investigation. But I can't specifically say: What was your friend's name?" 2/7/11RP 113-14. In addition, when Mr. Jasionowicz testified, neither defense counsel nor the prosecutor asked Mr. Jasionowicz for the name of this man.

score of zero, no violent history, and a criminal record limited to driving offenses. CP 37; 3/10/11RP 1-2, 5.

This appeal timely follows. CP 5-21.

D. ARGUMENT

I. THE TRIAL COURT VIOLATED MR. JASIONOWICZ'S DUE PROCESS RIGHTS BY FAILING TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE.

The trial court erred by failing to give a self-defense instruction to the jury. As an initial matter, Mr. Jasionowicz's defense counsel did not request a self-defense instruction at trial as required by CrR 6.15(a).³ 02/07/11RP 147. Nor did Mr. Jasionowicz's defense counsel object to the failure to give this instruction. 02/08/11RP 147-48. "A defendant cannot claim that the trial court erred in refusing an instruction he did not offer *unless the failure to so instruct is violative of a constitutional right.*" State v. Tamalini, 134 Wn.2d 725, 730-31, 953 P.2d 450 (1998) (citing State v. Scott, 93 Wn.2d 7, 14, 604 P.2d 943, cert. denied, 446 U.S. 920, 100 S.Ct. 1857, 64 L.Ed.2d 275 (1980)) (emphasis added). Accordingly, RAP 2.5(a)(3) provides, in relevant part, that

³ CrR 6.15(a) provides, in part: "**Proposed Instructions.** Proposed jury instructions shall be served and filed . . . by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge . . . before the court has instructed the jury." CrR 6.15(a).

“a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.” RAP 2.5(a)(3). Thus, the issue is whether the trial court’s failure to give a self-defense instruction in this case was a manifest error affecting Mr. Jasionowicz’s constitutional rights.

Courts must analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is manifest constitutional error. State v. O’Hara, 167 Wn.2d 91, 104, 217 P.3d 756 (2009).

- a. Failure to give self-defense instructions where evidence supports it violates due process because, without such an instruction, the trial court relieves the State of its burden to prove each element of the crime of fourth degree assault beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). There are two ways to determine whether absence of self-defense is an element of the crime that the State must prove: (1) the statute may reflect a legislative intent to treat absence of self-defense as an element of the crime; or (2)

proof of self-defense may negate an element of the crime. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983); State v. Hanton, 94 Wn.2d 129, 132, 614 P.2d 1280, cert. denied, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497 (1980).

The Washington Criminal Code is silent on whether the State must prove that a defendant did not act in self-defense. See RCW 9A.16.020. The Legislature's silence on the burden of proof of self-defense is a "strong indication that the Legislature did not intend to require a defendant to prove self-defense." Acosta, 101 Wn.2d at 615-16; McCullum, 98 Wn.2d at 492.

Even if the Legislature did intend to require the defendant to prove self-defense, this requirement will withstand constitutional scrutiny only if self-defense does not negate an essential element of the crime. Acosta, 101 Wn.2d at 616; McCullum, 98 Wn.2d at 494; Hanton, 94 Wn.2d at 132. To determine whether self-defense negates an essential element of the crime, courts analyze each element of the crime charged. Id. In this case, Mr. Jasionowicz was charged with second degree assault; the jury was instructed on the lesser included offense of fourth degree assault, RCW 9A.36.041(1). The statute provides that "[a] person is guilty of fourth

degree assault if under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1).⁴ “An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person.” 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008) (hereinafter “WPIC”); CP 56. Because “intentional” is expressly made an element of fourth degree assault, the prosecution must prove intent beyond a reasonable doubt. The mens rea statute provides: “(a) *Intent*. A person acts with intent or intentionally when he acts with the objective or purpose *to accomplish a result which constitutes a crime*.” RCW 9A.08.010(1)(a); CP 57 (emphasis added).

Self-defense is defined by statute as a lawful act. See RCW 9A.16.020(3).⁵ Therefore, a person acting in self-defense cannot be acting intentionally as that term is defined in RCW 9A.08.010(1)(a). There can be no intent to touch or strike another person unless a

⁴ The term “assault” is not defined in the Washington Criminal Code. Therefore, courts use the common law to define the crime. State v. Krup, 36 Wn. App. 454, 457, 676 P.2d 507 (1984); Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 504, 125 P.2d 681 (1942).

⁵ Use of force is not unlawful when used “by a party about to be injured . . . in preventing or attempting to prevent an offense against his person.” RCW 9A.16.020(3).

defendant does so “unlawfully,” i.e., “with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); CP 57. Since self-defense is explicitly made a “lawful” act under Washington law, see RCW 9A.16.020(3), it negates the element of “unlawfulness” contained within Washington’s statutory definition of criminal intent. McCullum, 98 Wn.2d at 495. Therefore, “due process . . . require[s] . . . that the State must disprove self-defense in order to prove that the defendant acted unlawfully.” See Acosta, 101 Wn.2d at 616; McCullum, 98 Wn.2d at 496.⁶

A trial court’s failure to provide an instruction that allocates the burden of proof to the State is not reversible error *per se* “so long as the instructions, taken as a whole, make it clear that the State has the burden.” Acosta, 101 Wn.2d at 621. Accordingly, due process requires that the trial court instruct the jury “in some unambiguous way that the State must prove the absence of self-defense beyond a reasonable doubt.” See Id. In this case, the trial court failed to give *any* jury instructions on self-defense. CP 45-67.

⁶ This is consistent with the rule in Washington that “[a] person commits fourth degree assault by intentionally assaulting another *unlawfully*.” State v. Stevens, 127 Wn. App. 269, 276, 100 P.3d 1179 (2005), aff’d, 158 Wn.2d 304, 143 P.3d 1179 (2006) (emphasis added).

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; and, once the defendant produces some evidence, *then* the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); Acosta, 101 Wn.2d at 619).

- b. In this case, the trial court violated Mr. Jasionowicz's due process rights by failing to instruct the jury on the law of self-defense because there was sufficient evidence to warrant self-defense jury instructions.

The issue of self-defense is properly raised if the defendant produces "any evidence" tending to show self-defense. State v. Adams, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). RCW

9A.16.020 defines self-defense as follows:

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 not lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3). In Adams, this Court held it was a violation of due process for the trial court to fail to give self-defense jury

instructions when the defendant testified that he observed the decedent robbing his trailer, was “very scared,” and “unintentionally fired one fatal shot.” Adams, 31 Wn. App. 394-96. This Court said, “[O]nly where no plausible evidence appears in the record upon which a claim of self-defense might be based is an instruction on [self-defense] not necessary A defendant’s testimony alone is sufficient to raise the issue of self-defense.” Id. at 396 (citing State v. Roberts, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977); State v. Bius, 23 Wn. App. 807, 808, 599 P.2d 16 (1979); State v. Savage, 22 Wn. App. 659, 660, 591 P.2d 851 (1979)).

Similarly, in this case, Mr. Jasionowicz’s testimony was sufficient to constitute “any evidence” of self-defense. Mr. Jasionowicz testified that the complaining witness “had been drinking” and “was intoxicated.” 2/7/11RP 127. He was “sitting down” while she was “standing right behind” him, “she pulled out a belt buckle” and “hit [him] in the head when [he] was sitting,” she hit him a second time so he tried to grab the belt, and when he was not successful he “pushed her.” 2/7/11RP 131-33. Mr. Jasionowicz explained, “I tried to defend myself because she was slamming that belt buckle.” 2/7/11RP 133. When Ms. Tryon fell back against the wall, “she was screaming and cussing really violently.” 2/7/11RP

134. Mr. Jasionowicz then put his hand over her mouth “to stop the screaming” as he was “trying to get the belt away” from her, he did not “think there was any other way to calm her down,” and he knew “how violent and dangerous” she could be. 2/7/11RP 134-35, 159. She was the first person to become physical, and Mr. Jasionowicz never put his hands around her neck, choked her, strangled her, or attempted to make her stop breathing. 2/7/11RP 161-62. The next day, Officer Langdon investigated and did not notice any injuries on the complaining witness – “no bruising,” “no red marks,” “no scratches,” no bump on the back of her head, no injuries whatsoever. 2/7/11RP 93-94. This was more than sufficient to raise the issue of self-defense. See Adams, 31 Wn. App. 393.

As this Court held in Adams, “[o]nce any evidence of self-defense is produced, the defendant has a due process right to have his theory of the case presented under proper instructions.” Id. at 396. Therefore, the trial court violated Mr. Jasionowicz’s due process rights by failing to instruct the jury on the law of self-defense where sufficient evidence supported it. However, it still must be determined whether the error was prejudicial or harmless.

- c. The trial court's failure to instruct the jury on the law of self-defense where evidence warranted the instructions was prejudicial and not harmless error.

In McCullum, the Court reviewed an unpreserved claim that a self-defense instruction was improper. McCullum, 98 Wn.2d at 496. The Court held that the error was a "manifest error affecting a constitutional right" because the self-defense instruction improperly placed the burden of proof upon the defendant. Id. at 488, 496-97. "Since the error infringed upon a constitutional right of the petitioner, the error is presumed prejudicial, and the State has the burden of proving the error was harmless." Id. at 497 (citations omitted). Constitutional errors cannot be deemed harmless unless they are harmless beyond a reasonable doubt. State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). An instructional error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Walden, 131 Wn.2d at 478 (citations omitted).

In this case, the trial court's failure to instruct the jury on the law of self-defense improperly placed the burden of proof upon Mr. Jasionowicz. As discussed above, the jury heard Mr. Jasionowicz's testimony that he was trying to defend himself when he pushed Ms.

Tryon away because she was attacking him. 2/7/11RP 131-35. Mr. Tryon instigated the assault and had no visible injuries. 2/7/11RP 93-95, 161-62. Moreover, the jury credited his testimony over Ms. Tryon because the jury found him not guilty of second degree assault. However, the jury was never instructed on self-defense and did not know the State bore the burden of proof on that issue with respect to the fourth degree assault charge. CP 45-67.

As the Court reasoned in McCullum, “[a] reasonable juror could have mistakenly concluded that the petitioner had not met his ‘burden of proof’ to establish a ‘reasonable doubt,’ and thus convicted him.” McCullum, 98 Wn.2d at 498. Since the trial court’s failure to give the instruction could well have affected the final outcome of the case, the error cannot be deemed harmless beyond a reasonable doubt. The error must, therefore, be prejudicial. See Id. The conviction for fourth degree assault must be reversed.

II. ALTERNATIVELY, DEFENSE COUNSEL DENIED MR. JASIONWICZ EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST SELF-DEFENSE JURY INSTRUCTIONS WHERE EVIDENCE SUPPORTED IT.

If the trial court’s failure to instruct the jury on the law of self-defense was not a violation of due process, then defense counsel

denied Mr. Jasionowicz effective assistance of counsel by failing to request self-defense jury instructions where evidence supported it.

The United States and Washington State Constitutions guarantee a defendant the right to effective assistance of counsel in criminal trials. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).⁷ The purpose of this requirement is to ensure a fair and impartial trial. Thomas, 109 Wn.2d at 225.

In Strickland, the U.S. Supreme Court set forth the prevailing standard for reversal of criminal convictions based on ineffective assistance of counsel. Strickland, 466 US. 668. Under Strickland, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said

⁷ Amendment VI of the United States Constitution provides: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense. And article I, section 22 of the Washington State Constitution provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting Strickland, 466 U.S. at 687). See also State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) (“Washington has adopted the Strickland test to determine whether a defendant had constitutionally sufficient representation.”).

- a. Defense counsel’s performance was deficient because her failure to request self-defense jury instructions where evidence supported it cannot be characterized as legitimate trial strategy in this case.

Performance is deficient if it falls “below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel’s performance was reasonable.” State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant bears the burden of establishing deficient performance. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Defense counsel is not expected to request jury instructions that are not supported by the evidence. See State v. Stanley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (defendant is entitled to jury

instructions if they are supported by the evidence); State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not required to argue self-defense where the defense is not warranted by the facts). As discussed above, in this case defense counsel failed to put forth a self-defense theory and request jury instructions where there was clearly sufficient evidence to warrant self-defense instructions. See Section E.I.b, supra. However, this failure does not end the deficiency prong analysis.

“When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” Kyllo, 166 Wn.2d at 863; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’” (quoting State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not

whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

In this case, no conceivable legitimate strategy or tactic could justify not putting forth a self-defense theory or requesting jury instructions on the law of self-defense. Defense counsel asked the jury to find Mr. Jasionowicz not guilty of the fourth degree assault charge. 2/8/11RP 183. However, self-defense was the *only* conceivable defense theory because, as defense counsel conceded in opening statement and closing argument, Mr. Jasionowicz assaulted the complaining witness by "pushing" or "shoving" her after she started "hitting" him. 2/7/11RP 22; 2/8/11RP 178-79. A self-defense theory and instruction was entirely consistent with Mr. Jasionowicz's testimony. 2/7/11RP 132-34; 2/8/11RP 161-62. In addition, a self-defense theory and instruction was entirely consistent with the fabrication defense to the second degree assault charge.⁸ Moreover, at no point in the proceedings

⁸ In closing, defense counsel conceded there was touching and hinted at self-defense, arguing, "What makes sense is that she was angry and drunk and hitting him and he just wanted her to stop . . . screaming, swearing, hitting him." 2/8/11RP 178. Consistent with that, defense counsel then addressed fabrication of the second degree assault: "She knows if she calls the police and says I was drunk, I was hitting him, I was yelling and he shoved me, that might not get him in trouble. But if she says he strangled her, then he'll get in trouble." 2/8/11RP 179.

did defense counsel indicate that she was aware of the law of self-defense.⁹ This reinforces the conclusion that defense counsel's failure to pursue a self-defense theory or request self-defense jury instructions was unreasonable and not conscious "trial strategy or tactics." See, e.g., State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Thus, defense counsel's performance was deficient.

- b. Defense counsel's deficient performance prejudiced Mr. Jasionowicz because failure to request self-defense jury instructions where evidence supported it undermines confidence in the outcome.

To satisfy the prejudice prong of the Strickland test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." Kyllo, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226; Garrett, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of

⁹ In fact, defense counsel failed to submit or request any jury instructions whatsoever. 2/7/11RP 147.

arbitrariness, whimsy, caprice, 'nullification' and the like."

Strickland, 466 U.S. at 694-95.

Given the facts detailed above, if defense counsel had requested jury instructions on the law of self-defense, the trial court's failure to offer the instructions would have been an abuse of discretion. See Section E.I.b., supra. Had the jury been properly instructed, and had defense counsel explained that Mr. Jasionowicz had the lawful right to act in self-defense, it is reasonably probable that the jury would have found that the State failed to disprove self-defense beyond a reasonable doubt, preventing his conviction for fourth degree assault. Mr. Jasionowicz denied strangling Ms. Tryon but admitted that he pushed her, explaining that he was acting in self-defense. 2/7/11RP 131-35, 162. Because the jury's verdict endorsed his testimony,¹⁰ defense counsel's failure to request jury instructions and explain that he had the lawful right to act in self-defense was manifestly prejudicial.

In sum, defense counsel's failure to request self-defense jury instructions and explain that Mr. Jasionowicz had the lawful right to

¹⁰ Ms. Tryon adamantly testified that Mr. Jasionowicz strangled her repeatedly, cutting off her air supply, until she went limp. 2/7/11RP 42-43, 66-67. However, the jury obviously credited Mr. Jasionowicz's testimony and discredited Ms. Tryon's testimony because the jury returned a verdict of not guilty to the charge of second degree assault by strangulation. CP 43, 55.

act in self-defense where evidence supported it was deficient performance – not legitimate trial strategy. Because defense counsel’s deficient performance prejudiced Mr. Jasionowicz, he was denied effective assistance of counsel. Therefore, the fourth degree assault conviction must be reversed.

III. UNDER RCW 9A.56.068, THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. JASIONOWICZ COMMITTED THE CRIME OF POSSESSION OF A STOLEN VEHICLE.

When reviewing a challenge to sufficiency of the evidence, courts view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found every element of the crime proven beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999); State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Although the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, a jury’s verdict must be overturned if there is not “substantial evidence” to support each element of the crime. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, rev. denied, 119 Wn.2d 1003, 832 P.2d 487 (1992) (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 709, 575 P.2d 215 (1978); State v.

McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979)).

Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (citation omitted).

- a. The State was required to prove knowledge beyond a reasonable doubt.

“A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle.” RCW 9A.56.068(1). In addition, an essential element of the crime of possession of stolen property is knowledge that the property was stolen. State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971).¹¹ Thus, to convict Mr. Jasionowicz of unlawful possession of a stolen vehicle, the State had to prove beyond a reasonable doubt that Mr. Jasionowicz knowingly possessed a stolen vehicle and that he “acted with knowledge that the motor vehicle had been stolen.” 11A WPIC 77.20-21, at 171, 176; CP 62-63. In other words, the State was required to prove beyond a reasonable doubt that Mr. Jasionowicz not only knowingly possessed a stolen vehicle, but that he possessed it “*knowing that it has been stolen.*” 11A WPIC 77.20, at 171; CP 62 (emphasis added).

¹¹ RCW 9A.56.140 provides, in pertinent part: “Possessing stolen property’ means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen.”

A defendant has knowledge when he is either directly aware of a fact or has information that would lead a reasonable person in the same situation to conclude the fact exists. RCW 9A.08.010(1)(b); CP 64. Although knowledge may not be presumed because a reasonable person would have knowledge under similar circumstances, it may be inferred. State v. Womble, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999) (citing State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)). However, a jury may only infer knowledge “where it is plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Thus, it is well settled that mere possession of stolen property is insufficient to justify a conviction; additional corroborating evidence is necessary to establish – beyond a reasonable doubt – that a defendant had knowledge the property was stolen. See, e.g., State v. Douglas, 71 Wn.2d 303, 428 P.2d 535 (1967); State v. Couet, 71 Wn.2d 773, 430 P.2d 974 (1967); State v. L.A., 82 Wn. App. 275, 918 P.2d 173 (1996); State v. Rockett, 6 Wn. App. 399, 493 P.2d 321 (1972); State v. McPhee, 156 Wn. App. 44, 230 P.3d 284 (2010).

- b. Even viewing the evidence in the light most favorable to the State, there was insufficient corroborating evidence beyond mere possession to establish Mr. Jasionowicz had knowledge the vehicle was stolen.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Jasionowicz had knowledge the vehicle was stolen because there was insufficient corroborating evidence beyond his mere possession of the stolen vehicle.

In determining whether there is sufficient corroborating evidence of a defendant's knowledge that property is stolen, courts look to find a sufficient *combination* of the following inculpatory circumstances beyond mere possession: (1) the property was recently stolen;¹² (2) the defendant fled from the scene or police;¹³ (3) there are visible indications that the property was stolen;¹⁴ (4) the defendant admits actual knowledge;¹⁵ (5) the defendant attempts to possess a forged bill of sale;¹⁶ (6) the defendant gives a

¹² E.g. Couet, 71 Wn.2d at 775 (defendant caught "within several weeks" after vehicle was stolen); State v. Hudson, 56 Wn. App. 490, 495, 784 P.2d 533, rev. denied, 114 Wn.2d 1016, 791 P.2d 534 (1990) (stolen vehicle had less than 1,500 miles on it).

¹³ E.g. Womble, 93 Wn. App. at 604 (defendant fled from scene); State v. Medley, 11 Wn. App. 491, 495, 524 P.2d 466 (1974) (defendant fled from police).

¹⁴ E.g. L.A., 82 Wn. App. at 276 (a damaged ignition is corroborative evidence defendant knew vehicle was stolen).

¹⁵ E.g. McPhee, 156 Wn. App. at 63.

¹⁶ E.g. State v. Smyth, 7 Wn. App. 50, 51-52, 499 P.2d 63 (1972).

fictitious name or false address;¹⁷ and (7) the defendant gives an explanation for possession that the State establishes is false, improbable, or incapable of being checked or rebutted.¹⁸

For example, a defendant's possession of a stolen vehicle with a broken rear window the day after it was stolen is insufficient to establish knowledge that it was stolen. See L.A., 82 Wn. App. 275. In L.A., the defendant was convicted of taking a motor vehicle without the owner's permission. Id. The 14-year-old defendant was found driving the vehicle with a broken rear window the day after it had been stolen. Id. at 276. In reversing the defendant's conviction, this Court held that although the defendant was stopped with the vehicle the day after it was stolen, "[i]n the absence of corroborative evidence such as a damaged ignition, an improbable explanation or fleeing when stopped, there is not sufficient evidence that [the defendant] knew the vehicle was taken unlawfully." Id.

In this case, Mr. Jasionowicz had possession of the vehicle over 10 months after it had been stolen. 2/7/11RP 102, 110. He did

¹⁷ E.g. State v. Portee, 25 Wn.2d 246, 254, 170 P.2d 326 (1946) (defendant pawned stolen property using fictitious name and fake address); State v. Tollett, 71 Wn.2d 806, 810-11, 431 P.2d 168 (1967) (defendant sold stolen tools using a fictitious name).

¹⁸ E.g. Couet, 71 Wn.2d at 776 (story proven false or improbable where defendant lied to police officer and told contradictory story at trial); Rockett, 6 Wn. App. at 401-03 (story proven incapable of being checked or rebutted where defendant gave story that could not be verified after officer investigated).

not flee from the scene or police. 2/7/11RP 117-19. The vehicle did not have an altered ignition or VIN number; only the front and rear bumpers were missing. 2/7/11RP 107-09. There was no evidence indicating that Mr. Jasionowicz attempted to obtain forged documentation or provide a fake name or fictitious address. Mr. Jasionowicz did, however, provide an explanation for his possession of the vehicle, and based on that explanation, stated his suspicion about the nature of the vehicle. 2/7/11RP 121. As discussed below, this is insufficient corroborating evidence to establish that he *knew* the vehicle had been stolen.

- i. Mr. Jasionowicz's explanation for possession is not sufficient corroborating evidence of inculpatory knowledge because the State did not establish that his explanation was false or "improbable."

Courts have held that an "improbable" explanation is an explanation that is illogical or inconsistent with prior explanations. See, e.g., McPhee, 156 Wn. App. 44; Couet, 71 Wn.2d 773. For example, in McPhee, the defendant hid stolen guns, field binoculars, and tusks in the brush outside his house. McPhee, 156 Wn. App. at 63. The Court noted that the fact that he bought the goods for a mere \$100 could lead a jury to reasonably infer only that the defendant "suspected" the items were stolen. See Id.

However, the Court held that a jury could reasonably infer that the defendant knew the items were stolen because he gave an “improbable” explanation – the defendant explained that his girlfriend would not allow firearms in the home, which was an illogical explanation for hiding *all* the items in the brush. See Id.¹⁹

Similarly, in Couet, a police officer observed the defendant driving a new vehicle with five or ten miles on the odometer within several weeks after it had been stolen from a car dealership. Couet, 71 Wn.2d at 774. When the defendant was arrested, he denied being in the vehicle. Id. Then, for the first time at trial, he told a different story that a fellow employee named Bill had given the defendant the car to use while Bill was on vacation. Id. at 775. In upholding the conviction, the Court considered the defendant’s explanation to be “improbable” because the defendant lied to police officers about riding in the stolen car, which was inconsistent with the explanation provided for the first time at trial that a fellow co-worker let him have the car while on vacation. See Id. at 775-76.

In this case, Mr. Jasionowicz’s explanation for possession was not “improbable” because his explanation was logical and

¹⁹ The Court also noted that the defendant worked next door to where the items were stolen from, and he told the police officer that he “knew they were stolen and it was just kind of a stupid thing to do.” McPhee, 156 Wn. App. at 63.

consistent. When questioned by Officer Herrera, Mr. Jasionowicz said he did not know there was a stolen vehicle in his auto shop. 2/7/11RP 113. Upon further questioning about the vehicle, Mr. Jasionowicz told Officer Herrera a man had dropped the vehicle off to store it there about a year earlier. 2/7/11RP 113. Mr. Jasionowicz explained this man owed him over \$1,500 and left Mr. Jasionowicz with the vehicle and a key to hold temporarily in lieu of the money. 2/7/11RP 139. This man told Mr. Jasionowicz he had purchased the car at an auction and that it had transmission problems. 2/7/11RP 139. Because the man never returned and still owed him money, Mr. Jasionowicz removed the motor for his friend who owned an auto dealership. 2/7/11RP 113, 140-41. Unlike the explanations of the defendants in McPhee and Couet, this explanation logically accounts for Mr. Jasionowicz's actions, it is consistent, and it does not require the jury to find that he lied to police officers. In fact, based on Mr. Jasionowicz's explanation, Officer Herrera recovered the motor from Mike's auto dealership. 2/7/11RP 120. Therefore, it is not an "improbable" explanation, nor was it sufficient to prove knowledge the vehicle was stolen.

- ii. Mr. Jasionowicz's explanation for possession is not sufficient corroborating evidence of inculpatory knowledge because the State did not establish that his explanation was unverifiable or "incapable of being checked or rebutted."

An unverifiable explanation is an explanation that the State has established is "incapable of being checked or rebutted." See, e.g., Rockett, 6 Wn. App. at 400-03; Douglas, 71 Wn.2d at 304-07. For example, in Rockett, the defendant was caught with stolen automobile seats a few days after they were stolen. Rockett, 6 Wn. App. at 400-01. The defendant's explanations made to the police officers, both at the time of the arrest and three days thereafter, were not the same. Id. at 401-03. One of the explanations involved the defendant's dune buggy business in California, *which the investigating officer was unable to locate.* Id. at 403. In upholding the conviction, this Court held that the short period of time between the theft and possession, combined with the multiple and unverifiable explanations, was sufficient evidence for the jury to find the defendant knew the seats were stolen. Id.

Similarly, in Douglas, the defendant was caught in possession of stolen household goods less than two weeks after they were stolen. Douglas, 71 Wn.2d at 304. The defendant explained his possession by saying that he had purchased them

from “an Indian” for \$40 and a tank of gas. Id. at 306-07. The State established that the defendant had never seen this person **who** he described only as “an Indian” before nor had he seen this “Indian” since, he did not take the license number of the car, or any receipt for his money, or any paper evidencing the sale. Id. In upholding the conviction, the Court noted that this “is an explanation of a kind that cannot be checked or rebutted.” Id. at 307.

In this case, the State failed to establish that Mr. Jasionowicz’s explanation was unverifiable or “incapable of being checked or rebutted.” In fact, nobody – neither the police nor the prosecutor – asked Mr. Jasionowicz for the name of the man who left the stolen vehicle at his shop.²⁰ Unlike Rockett and Douglas, there was no evidence that the police attempted to investigate, that the identity the man who left the stolen vehicle at the shop was unknown, or that the explanation was otherwise incapable of being checked or rebutted.²¹ The State – not the defendant – is required

²⁰ When Officer Herrera was questioned about whether he asked Mr. Jasionowicz for the name of the man who left the stolen vehicle at the shop, Officer Herrera conceded, “I can only imagine that I did. That’s part of a normal investigation. But I can’t specifically say: What was your friend’s name?” 2/7/11RP 113-14. In addition, when Mr. Jasionowicz testified, neither defense counsel nor the prosecutor asked Mr. Jasionowicz for the name of this man.

²¹ In fact, the only part of Mr. Jasionowicz’s explanation that police officers did investigate – that Mr. Jasionowicz sold the motor to Mike’s auto dealership – was actually verified, and the motor was recovered. 2/7/11RP 120.

to establish this corroborating evidence of knowledge because due process requires that *the State* prove every fact necessary to establish the crime beyond a reasonable doubt. See Winship, 397 U.S. at 364. Here, because the State failed to establish that Mr. Jasionowicz's explanation was unverifiable, it is not sufficient corroborating evidence to prove knowledge the vehicle was stolen.

c. Reversal is required.

In sum, the State failed to establish that Mr. Jasionowicz's explanation for possession was false, "improbable," or "incapable of being checked or rebutted." Even viewing the evidence in the light most favorable to the State, there was insufficient corroborating evidence beyond mere possession and his suspicion about the nature of the vehicle to establish knowledge the vehicle was stolen. Because the State failed to prove every fact necessary to establish the crime of possession of a stolen vehicle, reversal is required.

IV. THE TRIAL COURT IMPERMISSIBLY DENIED MR. JASIONOWICZ HIS RIGHT TO POSSESS A FIREARM BASED ON A "DOMESTIC VIOLENCE" FINDING THAT WAS NEVER SUBMITTED TO THE JURY AND THIS PROHIBITION VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BEAR ARMS.

In Blakely v. Washington, the United States Supreme Court reiterated the rule of Apprendi v. New Jersey: "Other than the fact

of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (citing Apprendi, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The Blakely Court further held that the relevant statutory maximum was the maximum sentence that a judge may impose without making any additional findings of fact. Blakely, 542 U.S. at 303-04. “When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to punishment,’ . . . and the judge exceeds his proper authority.” Id. at 304. Therefore, the question here is whether the trial court’s finding that Mr. Jasionowicz’s assault conviction was a “domestic violence” offense increases his potential punishment.

In State v. Felix, this Court rejected a claim that a domestic violence allegation must be proven to the jury beyond a reasonable doubt because it had no substantive punishment attached. Felix, 125 Wn. App. 575, 579-80, 105 P.3d 427 (2005). It did not authorize additional punishment, but rather “specifies only additional enforcement measures for no-contact orders that may already be issued as a sentencing condition.” Id. at 580. It also

treated the firearm prohibition as regulatory, but as discussed below, this rationalization does not survive current law explaining the fundamental nature of the right to possess a firearm. Id.

Again, in Felix, this Court dismissed the notion that the firearms prohibition that follows a misdemeanor conviction for a domestic violence offense is punishment, instead of classifying it as “regulatory.” Id. at 581. However, recent case law contradicts the notion that revoking a person’s right to possess a firearm is merely a non-punitive regulation.

The Second Amendment right to bear arms is a fundamental right accorded to an individual. District of Columbia v. Heller, 554 U.S. 570, 594, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

Restrictions on the right to bear arms may not be justified under a rational basis review. Id. at 628 n.27. The right to bear arms is a right “necessary to an Anglo-American regime of ordered liberty and fundamental to the American scheme of justice. It is deeply rooted in this Nation’s history and tradition.” State v. Sieyes, 168 Wn.2d 276, 287, 225 P.3d 995 (2010).

Article I, section 24 “guarantees an individual right to bear arms.” Sieyes, 168 Wn.2d at 287. Sieyes involved a challenge to the statute that prohibits a juvenile from possessing a firearm. The

court recognized the fundamental nature of this right under the state and federal constitutions but refused to settle what level of scrutiny would apply to firearms restrictions. Id. at 295 n.20. It noted that the Court's "occasional rhetoric" treating such restrictions as "reasonable regulation" did not define how prohibitions on firearms possession should be treated. Id.

Due to inadequate briefing, the Sieyes Court declined to address whether the state constitutional protection for an individual right to bear arms is more protective than the federal counterpart. Id. at 293-94. However, the dissenting opinion in Sieyes provided detailed evidence of the historical right of firearm possession for all individuals in Washington that was absent from the parties' briefing and strongly favors strict scrutiny of any prohibitions on an individual's right to bear arms in Washington. Id. at 298-306 (Johnson, J., dissenting).

The Washington Supreme Court is presently considering the constitutionality of the statute that revokes the right to possess a firearm as a consequence of a juvenile sex offense conviction. State v. R.P.H., 147 Wn. App. 177, 195 P.3d 556 (2008), rev. granted, 169 Wn.2d 1005 (2010). The briefing filed in R.P.H.

expands upon the Gunwall²² analysis proffered in the Sieyes dissent, in an effort to show that restrictions on the right to possess a firearm deny a fundamental individual right under the Second Amendment as well as Article I, section 24.²³

There is no historical record supporting the prohibition on firearms possession as a consequence of a misdemeanor assault, including “domestic violence” offenses. The law revoking the right to possess a firearm for a misdemeanor domestic violence offense was not enacted until 1994, over 100 years after the adoption of Article I, section 24. Laws of 1994, 1st Sp.Sess., ch. 7, § 402.

At the time of the framing of our constitution, not even convicted felons were banned from possessing firearms. See C. Kevin Marshall, “Why Can’t Martha Stewart Have a Gun?,” 32 Harv.J.L. & Pub. Pol’y 695, 707 (2009) (“bans on convicts possessing firearms were unknown before World War I”); United States v. Chester, 628 F.3d 673, 681 (3rd Cir. 2010) (federal law

²² The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

²³ The briefing is available on the Supreme Court’s website, http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=R.

barring firearm possession for “domestic-violence misdemeanants is of recent vintage, having been enacted in 1996,” as opposed to federal felon disarmament laws that were written in the 1930s).

Mr. Jasionowicz was convicted of a misdemeanor offense. Heller and a subsequent case applying the reasoning of Heller to the states, McDonald v. Chicago, left open the question of what type of regulatory measures states may impose such as “prohibitions on the possession of firearms by felons and the mentally ill.” McDonald, _ U.S. _, 130 S.Ct. 3020, 3047, 177 L.Ed.2d 894 (2010). There was insufficient evidence to convict Mr. Jasionowicz of felony possession of a stolen vehicle, he has no prior felony convictions, and he was not found to be mentally ill.

While Heller and McDonald do not specify the precise scrutiny with which courts should analyze a firearm prohibition, they suggest a restriction on firearm possession is subject to heightened scrutiny if it substantially burdens the right to keep and to bear arms for self-defense. See Chester, 628 F.3d at 683 (under Heller and McDonald, finding inadequate justification for firearms restriction as punishment for misdemeanor domestic violence conviction).

RCW 9.41.040 – the statute that denies Mr. Jasionowicz his right to possess a firearm for any reason by virtue of his

misdemeanor domestic violence assault conviction – is not a historically recognized limitation on the fundamental right to bear arms. It substantially burdens his right to possess a firearm, even in self-defense, based on a factual finding that was not submitted to the jury to be proven beyond a reasonable doubt, and its broad prohibition of any firearms possession based on a misdemeanor offense is contrary to both the Second Amendment and Article I, section 24.

Article I, section 24 explicitly protects the right to bear arms in self-defense, and it further states that this right “shall not be impaired.”²⁴ This textual language and structure is different and broader than the Second Amendment,²⁵ which indicates that the express language of Article I, section 24 is more protective of the individual right (Gunwall factors one, two, and five). See Sieyes, 168 Wn.2d at 293. As to constitutional and common law history, Gunwall factor three, the right to bear arms under our constitution does not include language restricting the right as a penalty for a

²⁴ Article 1, section 24 provides, “The right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”

²⁵ The Second Amendment provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

conviction. This must be viewed in contrast to Article VI, section 3, which explicitly restricts voting rights due to a felony conviction and demonstrates the framers' understanding of how to expressly restrict a right as the result of the commission of criminal offenses. See Madison v. State, 161 Wn.2d 85, 91, 163 P.3d 757 (2007) (explaining constitutional disenfranchisement for people convicted of a felony).

The constitutional history contains no support for absolute prohibitions on a person's right to possess a firearm due to a misdemeanor domestic violence assault conviction. See e.g., State v. Rupe, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984). Gunwall factor four, pre-existing state law, shows no similar rules. Until 1994, people convicted of misdemeanor domestic violence assault were free to own firearms without restrictions. The right to possess a firearm is plainly a matter of state and local concern, Gunwall factor six. Some states have no constitutional provisions protecting the right to bear arms, while others explicitly reserve the right to restrict such possession by law or as needed for the police power. See State v. Schelin, 147 Wn.2d 562, 591-92, 55 P.3d 632 (2002) (Sanders, J., dissenting). Article I, section 24 has no such

limitations, and these variations among the state constitutional texts demonstrates the lack of need for uniformity among states.

Not only under the Second Amendment as recently clarified by the United States Supreme Court, but by virtue of the broadly guaranteed and historically recognized individual right to possess a firearm guaranteed by Article I, section 24, Mr. Jasionowicz was punished by losing his fundamental right to possess a firearm due to his conviction for misdemeanor domestic violence assault. He may neither possess a firearm in his home nor in self-defense. This restriction substantially burdens his right to bear arms and is not justified as a long-standing regulation authorized under Article I, section 24. The trial court lacked authority to impose this punishment based on a factual finding of “domestic violence” that was not submitted to the jury to be proven beyond a reasonable doubt. The punishment imposed unconstitutionally impinges on Mr. Jasionowicz’s fundamental right to bear arms. This unauthorized punishment should be stricken on remand.

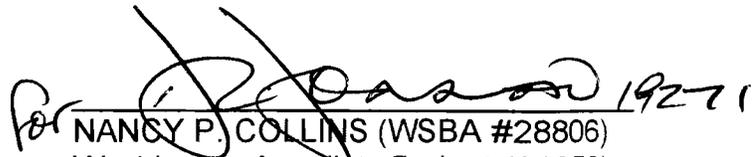
E. CONCLUSION

For all the reasons stated above, Mr. Jasionowicz respectfully asks this Court to reverse his convictions for fourth degree assault and possession of a stolen vehicle and vacate the

firearm prohibition imposed as punishment for the “domestic violence” label attached to his assault conviction.

DATED this 23rd day of November 2011.

Respectfully submitted,


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66914-1-I
)	
JACEK JASIONOWICZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF NOVEMBER, 2011.

X _____ 

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 STATE OF WASHINGTON
 DIVISION ONE