

70461-3

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No. 70461-3

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL EARL NEUMAN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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DIVISION ONE
KING COUNTY
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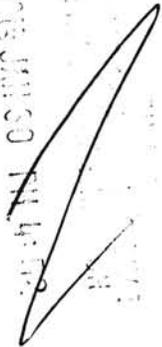


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A. ASSIGNMENT OF ERROR

The trial court erred and violated Daniel Neuman's constitutional right to due process by refusing to instruct the jury on self defense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When requested by the defense, a trial court must provide the jury with a self-defense instruction if there is some evidence, from whatever source, to support the instruction. Even if the defendant denies intentionally using force, the instruction may be warranted if there is evidence to support a finding that the defendant justifiably used force in self defense. Here, there was some evidence that Mr. Neuman subjectively and reasonably believed he was in imminent danger of bodily harm and that he pointed his gun at his perceived assailants in order to protect himself. Did the court err in refusing to instruct the jury on self defense?

C. STATEMENT OF THE CASE

Mr. Neuman is a stay-at-home dad who lives with his wife and daughter in Renton. 4/24/13RP 89-90. He is active in the community and coaches football for the Junior Football League. 4/24/13RP 83. He has a reputation among members of the Junior Football League for

peacefulness and nonviolence. 4/24/13RP 81-87. He has no prior criminal convictions. 4/24/13RP 93.

In the late afternoon of August 16, 2012, Mr. Neuman was returning home from football practice in Kent, driving his Volkswagen Passat. 4/24/13RP 93. He had a handgun in a backpack next to him on the passenger seat. 4/24/13RP 93. He had bought the gun a few years earlier for personal protection and safety in the home. 4/24/13RP 92. He had a valid concealed weapons permit. 4/24/13RP 95. Mr. Neuman grew up around guns, acquiring his first rifle at the age of 12. 4/24/13RP 91. His father was a police officer who had taught him how to shoot and handle guns safely. 4/24/13RP 91-92. Mr. Neuman did not usually carry the gun with him to football practice but on that day, he had been in a hurry and had not had time to take the gun out of the bag. 4/24/13RP 93.

That day, there was quite a bit of traffic on the road. 4/24/13RP 96. Mr. Neuman noticed a Toyota van ahead of him that had either stopped in the middle of the road or was moving very slowly. 4/24/13RP 96. Mr. Neuman thought he saw a man driving the van and another man sitting in the passenger seat. 4/24/13RP 102. He pulled ahead of the van and honked his horn as he passed. 4/24/13RP 96. He

was not trying to be rude but merely trying to tell the driver of the van to turn on its hazard lights; other drivers were also honking their horns at the van. 4/24/13RP 97. Mr. Neuman did not yell at the people in the van or engage in any verbal altercation. 4/24/13RP 99.

As Mr. Neuman passed through the next intersection, the van passed him on the right and swerved aggressively to cut right in front of him. 4/24/13RP 97-98. Mr. Neuman thought the driver of the van was trying to force him to drive into oncoming traffic or run him off the road. 4/24/13RP 97, 102. He swerved and moved into the next lane. 4/24/13RP 97. Mr. Neuman felt scared and threatened and thought the driver of the van was trying to cause him harm. 4/24/13RP 98.

At the next red light, Mr. Neuman pulled up next to the van in the right lane. 4/24/13RP 98. As he pulled alongside the van, he noticed the passenger window started to roll down. 4/24/13RP 100. Mr. Neuman was afraid and thought he might become the victim of a drive-by shooting. 4/24/13RP 100-02, 106. He grabbed his gun from the backpack and put it on his lap; he kept one of his hands on the gun while using the other hand to steer. 4/24/13RP 104. He did not take the gun out of the holster. 4/24/13RP 104. A portion of the silver barrel could be seen while the gun was in the holster. 4/24/13RP 104-

05. The magazine of the gun was loaded but there was no bullet in the chamber. 4/24/13RP 63, 105-06. It was impossible to rack a bullet into the chamber while the gun was in the holster. 4/24/13RP 105-06.

Mr. Neuman said he did not point the gun at anyone in the van or point the barrel outside his car. 4/24/13RP 106-07. He put the gun on his lap for his own protection because he was afraid. 4/24/13RP 106. If the people in the van could see the gun, that was because the van was higher than Mr. Neuman's Volkswagen Passat. 4/24/13RP 108. Mr. Neuman did not intend for the people in the van to see the gun. 4/24/13RP 107.

When the light turned green, Mr. Neuman took off quickly. 4/24/13RP 107. The van got behind him and followed him for another mile or so. 4/24/13RP 107. At that point, Mr. Neuman pulled into a strip mall and went into a smoke shop. 4/24/13RP 108. He clipped the holster of the gun, with the gun still in it, under the steering wheel of his car when he went into the store. 4/24/13RP 108.

The driver and passengers of the van told police, and testified at trial, about a different version of events. Seventeen-year-old Uri Rosas Antonio was in the front passenger seat of the van. 4/23/13RP 94, 98. His mother Margarita Antonio was driving. 4/23/13RP 98. His father

Rogelio Rosas Morales was sitting in the back with Uri's 14-year-old sister Ashlee. 4/23/13RP 98. The family was driving to their home in Renton, returning from work on a construction site. 4/23/13RP 96.

According to Uri, when the van approached a yellow light, his mother put on the brakes suddenly. 4/23/13RP 99, 120. Mr. Neuman, who had been behind the van, drove up beside them and yelled and cursed at them. 4/23/13RP 99-100. Uri said Mr. Neuman pulled out a gun and pointed it out the window at him. 4/23/13RP 99-100, 103. When Uri saw the gun, he rolled up his window because he was afraid that Mr. Neuman might shoot him. 4/23/13RP 102-04. Mr. Neuman put down the gun as the cars started moving again. 4/23/13RP 107. Uri noted Mr. Neuman's license plate number and called 911. 4/23/13RP 109-10.

The police stopped Mr. Neuman as he exited the smoke shop.¹ 4/23/13RP 111. He was charged with one count of second degree assault with a deadly weapon of Uri. CP 51; RCW 9A.36.021(1)(c).

Defense counsel proposed jury instructions on self defense.² The State objected. 4/24/13RP 7-9. After hearing the evidence, the

¹ There was no sign that Mr. Neuman was intoxicated or had consumed any alcohol. 4/24/13RP 21.

² Counsel proposed four instructions on self defense as follows:

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use force [sic] upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 30-31.

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 32.

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 33.

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for

trial court agreed with the State. 4/24/13RP 10-13. The court ruled that self-defense instructions were not warranted because Mr. Neuman denied intentionally pointing the gun at Uri. 4/24/13RP 10-13.

The jury found Mr. Neuman guilty of second degree assault as charged. CP 85. At sentencing, the court imposed an exceptional sentence below the standard range based on Mr. Neuman's failed defense of self defense. CP 144, 231-32; 5/31/13RP 96.

believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.
CP 34.

D. ARGUMENT

THE TRIAL COURT ERRED AND VIOLATED MR. NEUMAN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY REFUSING TO INSTRUCT THE JURY ON SELF DEFENSE

1. **A criminal defendant has a constitutional due process right to a jury instruction on self defense whenever there is some evidence, from whatever source, to support the instruction**

The right to assert a defense of self defense in a criminal trial stems from the robust right of every citizen in Washington State “to reasonably defend himself against unwarranted attack.” State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

The right to a jury instruction on self defense when the evidence supports it is guaranteed by the accused's constitutional due process right to fully defend against the charges. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. The right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that

supports the defense theory, as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

A defendant is entitled to an instruction on self defense if there is some evidence demonstrating self defense. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). There must be some evidence that (1) the defendant subjectively feared that he was in imminent danger of bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. Id. at 337.

The sufficiency of the evidence is evaluated by determining what a reasonable person would do standing in the shoes of the defendant. Werner, 170 Wn.2d at 337. Evidence of self defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” Janes, 121 Wn.2d at 238. A person need not be in actual danger of bodily harm in order to be justified in using force in self defense. State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Instead, a person is entitled to act on appearances and, if he believes on good faith and on reasonable grounds that he is in actual danger of bodily harm,

although it afterwards might develop that he was mistaken as to the extent of the danger, he is entitled to use a reasonable amount of force to defend himself. Id.

“In order to properly raise the issue of self-defense, there need only be some evidence admitted in the case from whatever source which tends to prove a [use of force] was done in self-defense.” Id. at 488. There need only be *some evidence*, not necessarily enough to create a reasonable doubt in the minds of the jurors on the issue of self defense. Id. In other words, “[t]he trial court is justified in denying a request for a self-defense instruction only where *no* credible evidence appears in the record to support a defendant’s claim of self-defense.” Id. (emphasis added).

When some evidence of self-defense is presented, the State has the burden to prove the absence of self defense beyond a reasonable doubt. Id. at 500.

2. **Mr. Neuman was entitled to a jury instruction on self defense even though he said he did not intentionally point the gun at Uri**

The trial court ruled the defense-proposed self-defense instructions were not warranted because Mr. Neuman denied intentionally using force. 4/24/13RP 10-13. The court’s ruling is

erroneous. Even though Mr. Neuman said he did not intentionally point the gun, there was sufficient evidence in the record to support a finding that he intentionally and justifiably used force in self-defense.

A trial court determines whether there is sufficient evidence to instruct the jury on self defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

Because the defendant is entitled to the benefit of all the evidence, a defense of self defense may be based upon facts that are inconsistent with his own testimony. Id.

A self-defense instruction is not appropriate if there is *no* evidence that the defendant intentionally used force. Id. at 931. But “[t]he law does not require an explicit statement of intent.” Id. at 933 (quotation marks and citation omitted). As long as there is *some* evidence, from whatever source, to support the self-defense claim, the court must provide the instruction. Id.; McCullum, 98 Wn.2d at 488.

The Court of Appeals has consistently held that an instruction on self defense may be warranted in a case where the defendant denies intentionally using force, as long as there is *some* evidence that he

intentionally used force in self defense. See, e.g., Callahan, 87 Wn. App. at 933-34; State v. Redwine, 72 Wn. App. 625, 631, 865 P.2d 552 (1994); State v. Fondren, 41 Wn. App. 17, 20, 701 P.2d 810 (1985).

In Callahan, for example, Callahan engaged in a hostile verbal altercation with the driver and passengers of another car after the other car cut in front of him. Callahan, 87 Wn. App. at 928. The two cars pulled into a parking lot and the passengers of the other car exited their vehicle. Id. Callahan took a handgun from his car, exited his car, and approached the other men. Id. At trial, one of the passengers, Ben Manning, testified that Callahan pointed the gun at him during the altercation. Id. Callahan admitted displaying the gun, saying he did so because he feared for his safety, but denied intentionally pointing the gun at Manning. Id. The Court of Appeals concluded that the evidence was sufficient to warrant a jury instruction on self defense. Id. at 933-34. Although Callahan denied intentionally aiming or firing the gun at Manning, Manning testified that he did aim the gun at him. Id. Manning's testimony, coupled with Callahan's admission that he displayed the weapon, supported the inference that he intentionally used force in self defense. Id. Thus, the trial court erred in refusing to provide a self-defense instruction. Id.

Similarly, in Redwine, Darwin Hines testified that Redwine pointed a shotgun at him when he went to Redwine's home to serve him with legal papers. Redwine, 72 Wn. App. at 627. Redwine testified he displayed the shotgun but never pointed it at Hines. Id. at 627-28. Two witnesses also testified they saw Redwine carrying the gun but said he never pointed it at Hines. Id. The Court concluded the evidence was sufficient for a factfinder to find Redwine justifiably used force in self defense and a self-defense instruction should therefore have been provided. Id. at 631.

Finally, in Fondren, during an altercation Fondren grabbed a shotgun to protect himself but denied pointing the gun at anyone. Fondren, 41 Wn. App. at 20. During a struggle, the gun accidentally went off, killing a person. Id. The Court rejected the State's argument that self defense was not at issue because Fondren denied intentionally pointing the gun or pulling the trigger. Id.

Here, as in Callahan, Redwine, and Fondren, Mr. Neuman denied intentionally using force but admitted displaying a gun.³

³ The display of a gun is not alone sufficient to prove the defendant had the specific intent to create fear in the victim and therefore is not sufficient to prove second degree assault. Callahan, 87 Wn. App. at 929 n.1. But a jury may infer specific intent to create fear from the defendant's pointing a gun at the victim. Id.

4/24/13RP 104-08. He said he put the gun on his lap, where the people in the van could have seen it, in order to protect himself because he was afraid and thought the driver of the van wanted to do him harm.

4/24/13RP 97-98, 106-08. The people in the van testified that Mr. Neuman *did* point the gun at Uri. 4/23/13RP 14-15, 47-48, 76-77, 99-100, 103. Thus, there was sufficient evidence in the record of Mr. Neuman's intentional use of force to justify a self-defense jury instruction. Callahan, 87 Wn. App. at 933-34; Redwine, 72 Wn. App. at 631; Fondren, 41 Wn. App. at 20.

In addition, there was sufficient evidence to support the other elements of a self-defense claim. A defendant is entitled to an instruction on self defense if there is some evidence that (1) the defendant subjectively feared he was in imminent danger of bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. Werner, 170 Wn.2d at 337.

Mr. Neuman testified he put the gun on his lap in order to protect himself because he believed the driver of the van had intentionally tried to force him into oncoming traffic or run him off the road in retaliation for Mr. Neuman's honking his horn at the van.

4/24/13RP 96-98, 102. He felt threatened and thought the driver of the van wanted to do him harm. 4/24/13RP 98. He became more alarmed when the front passenger window of the van began to roll down as Mr. Neuman pulled up alongside it; he was afraid he might become the victim of a drive-by shooting. 4/24/13RP 100-02, 106.

From this evidence, the jury could have found that Mr. Neuman subjectively believed he was in imminent danger of bodily harm and that this belief was objectively reasonable. Mr. Neuman was entitled to act on appearances as the situation appeared to him at the time, even if it afterwards developed that he was mistaken as to the extent of the danger, as long as he believed in good faith and on reasonable grounds that he was in actual danger of bodily harm. McCullum, 98 Wn.2d at 489. Mr. Neuman's testimony was sufficient for the jury to make these findings. In addition, the jury could have concluded that Mr. Neuman used no more force than was reasonably necessary to ward off the perceived attack.

Because the evidence was sufficient for the jury to find that Mr. Neuman justifiably used force in self defense, the trial court erred in refusing to provide a self-defense instruction. Werner, 170 Wn.2d at 336-37; McCullum, 98 Wn.2d at 488-89.

3. **The conviction must be reversed**

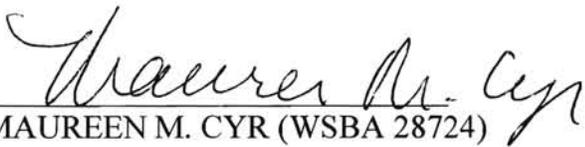
A trial court's refusal to provide a self-defense instruction when requested by the defense is reversible error if the defense is thereby prejudiced. Werner, 170 Wn.2d at 337. The error is prejudicial if there was evidence to warrant the instruction and the jury could have believed that version of events. Id. at 337-38; see also State v. Riley, 137 Wn.2d 904, 908 n.1., 976 P.2d 624 (1999) (failure to provide instruction that would enable defendant to argue self defense, when supported by the evidence, is prejudicial error).

Here, because there was evidence to support the self-defense theory and the jury could have believed that version of events, the court's refusal to instruct the jury on self defense was prejudicial and requires reversal of the conviction.

D. CONCLUSION

The trial court violated Mr. Neuman's constitutional due process right to present a defense by refusing to instruct the jury on self defense. The conviction must be reversed and remanded for a new trial with proper instructions.

Respectfully submitted this 30th day of January, 2014.


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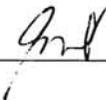
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2014.

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