

70461-3

70461-3

NO. 70461-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL EARL NEUMAN,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ELIZABETH BERNIS

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

To be entitled to a self-defense instruction, a defendant must produce some evidence, from any source, that he intentionally used force to defend himself. Neuman was charged with second-degree assault for pointing a firearm at another driver. At trial, he denied that he intentionally displayed his firearm, and contended only that the victim may have “accidentally” seen it. Did the trial court properly exercise its discretion when it determined that Neuman was not entitled to a self-defense instruction because he denied the intentional use of force?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On August 17, 2012, appellant Daniel Neuman was charged in the King County Superior Court with felony harassment. CP 1. The information was amended on April 18, 2013, to reflect a charge of second-degree assault, based on the State’s allegation that Neuman pointed a firearm at the occupants of another vehicle during an incident of road rage. CP 2-4, 51. The State elected not to pursue a firearm enhancement. CP 51.

The case was assigned to trial before the Honorable Judge Elizabeth Berns in April 2013. 1RP 3.<sup>1</sup> At the close of the evidence, the State objected to Neuman's proffered instructions on the lawful use of force. CP 28-41, 60-62; 3RP 127. The court reviewed briefing from both parties, read the relevant cases, re-listened to Neuman's testimony via audio recording, and heard oral argument. 4RP 4-10. The court declined to instruct the jury on the lawful use of force. 4RP 11-13.

The jury found Neuman guilty as charged of second-degree assault. CP 85. The trial court imposed an exceptional sentence below the standard range, based on Neuman's failed defense of self. CP 144, 230-32. However, upon later discovery that the imposed electronic home detention sentence was not authorized for second-degree assault, the court vacated the original judgment and sentence, and imposed a new exceptional sentence below the standard range of credit for time served. CP 229, 238; 4RP 103-07, 111. Neuman appeals, alleging that the court erred when it declined to instruct the jury on the law of self-defense.

## **2. SUBSTANTIVE FACTS**

Late in the day of August 16, 2012, sixteen-year-old Uri Rosas and his family were in their 1986 Toyota minivan, driving home. 2RP 8, 27,

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<sup>1</sup> The Verbatim Report of Proceedings consists of four volumes, referred to herein as: 1RP (Volume 1), 2RP (Volume 2), 3RP (Volume 3), and 4RP (Volume 4).

44, 46, 69-70, 96-97. On the side of the minivan was advertising for the family business—children’s inflatable “bouncy house” rentals. 2RP 8-9, 118; 3RP 103. Uri’s mother, Margarita Antonio, was driving. 2RP 8, 44, 46, 70, 88, 97, 119-20. Uri was seated in the front passenger seat. 2RP 10, 45, 71, 97. Ashlee Rosas (Uri’s fourteen-year-old sister) and Rogelio Rosas-Morales (Uri’s father) were in the back of the van.<sup>2</sup> 2RP 10-11, 43, 45, 70-71, 88, 97.

Antonio was a cautious driver, and she was driving either at or below the speed limit. 2RP 72, 97. The minivan had a noisy engine. 2RP 11, 19, 57, 87, 98, 119. It was warm outside, and the van had no air conditioning. 2RP 9, 27, 58, 87, 119. Uri’s window was down. 2RP 13, 48, 64, 74, 102, 119.

While on their way home, Antonio approached a stoplight as it turned yellow. 2RP 99. She hit her brakes rather suddenly to stop. 2RP 99-100, 120. Rosas-Morales, Antonio, Ashlee, and Uri all heard honking and/or angry yelling coming from another car that pulled up along the passenger side of the minivan. 2RP 12, 16, 19, 47, 52, 59, 73, 83, 100, 102, 106. The driver of the other car was appellant Neuman. 2RP 12, 75, 100-01. Neuman began yelling at Uri’s family, something about “Mexicans,” or “Stupid Mexicans, don’t know how to drive.”

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<sup>2</sup> Uri and Ashlee, who share the same surname, will be referred to by their first names to avoid confusion. No disrespect is intended.

2RP 19-20, 37-38, 84, 102-03. Neuman appeared very angry. 2RP 16, 30, 36-37, 102.

While at the stoplight, and while he was yelling at Uri's family, Neuman pulled out a gun and pointed it at Uri and the minivan. 2RP 12, 15, 39, 41, 47-48, 52, 74-75, 103, 123. Neuman raised the gun to his shoulder or chest level, with the barrel pointed at Uri and the minivan. 2RP 15, 39-40, 103-04. The gun was partially outside of Neuman's window. 2RP 76-77, 103-04.

When Uri and his family saw the gun, they were scared and nervous. 2RP 13, 32, 46, 48-49, 53, 79, 105. Uri immediately rolled up his window. 2RP 13, 52-53, 63-64, 77, 104-05. Rosas-Morales tried to "cover," or protect, his wife and/or son. 2RP 14, 32, 34, 77-78, 105-06.

When the light turned green and the two cars started moving forward, Neuman briefly continued yelling at Uri and his family. 2RP 107. Neuman still had the gun pointed at Uri, but he put it down as they continued forward. 2RP 107-08. Antonio continued driving toward their home, with Neuman headed in the same direction. 2RP 49, 80-81, 106-07, 109, 123-26. Neuman got in front of the minivan. 2RP 126. Neuman "brake-checked," or hit his brakes suddenly several times, with the minivan directly behind him. 2RP 126-27.

Uri called 911 from the minivan. 2RP 32, 52, 63, 91-92, 110, 116. They recorded Neuman's license plate number. 2RP 107, 109, 124. After a short distance, Neuman turned off into the Cascade Shopping Center and stopped at a smoke shop. 2RP 80, 91-92, 109-10. The family continued home. 2RP 109-10.

After the family arrived home, they were contacted by law enforcement, and asked to return to the Cascade Shopping Center to identify Neuman. 12RP 16-17, 81, 110-11. Rosas-Morales, Antonio, and Uri each identified Neuman as the driver who had pointed the gun at them. 12RP 17-18, 111, 138-39, 152-53.

Neuman was arrested, and following the advisements of his rights, told police that he had honked at the minivan because it was blocking traffic. 3RP 32. He stated that after he honked his horn, the minivan caught up to him, and its occupants began "mean-mugging" him. 3RP 33. Neuman told the police that out of concern for his safety, he took his gun and placed it, in its holster, in his lap, just in the event that anything was to happen. Id. Neuman told the police that the only reason the people in the minivan could have seen his gun was because their vehicle was higher than his. Id. A fully-functional, semiautomatic handgun, with a loaded magazine containing hollow point bullets, was discovered in Neuman's

car; it was in a holster that was clipped onto the lower left-hand portion of the dash. 3RP 34, 53-56, 70-73, 105, 114-15.

**C. ARGUMENT**

**THE TRIAL COURT PROPERLY REJECTED NEUMAN'S PROPOSED SELF-DEFENSE INSTRUCTIONS WHEN NEUMAN DENIED THE INTENTIONAL USE OF FORCE.**

Neuman testified that he did not intend for Uri and his family to see his firearm, and that he did not intentionally display it in any manner. Nonetheless, he contends that the trial court erred when it declined to give his proposed instructions on self-defense. However, a defendant who denies committing an intentional act of force is not entitled to a lawful use of force instruction for the simple reason that he has denied using force altogether. Because Neuman specifically denied that he intentionally displayed a firearm to the victims, he was not entitled to a self-defense instruction.

The use of force upon another is not unlawful when used by a party preventing or attempting to prevent an offense against his or her person, so long as the force is not more than is necessary. RCW 9A.16.020(3). A self-defense analysis includes both subjective and objective components. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). A person's use of force is lawful when: (1) he or she

subjectively fears imminent physical harm, (2) such belief is objectively reasonable, and (3) he or she exercises no more force that was reasonably necessary. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Once a credible claim of self-defense has been raised, the State must disprove it beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74.

Jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue its theory of the case, and properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 625, 56 P.3d 550 (2002). To be entitled to a lawful use of force instruction, “a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense[.]” State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The trial court must evaluate each element of self-defense to determine if a self-defense instruction is required. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). An instruction not supported by the evidence is improper. State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986) (citing State v. Gibson, 32 Wn. App. 217, 223, 646 P.2d 786 (1982)).

When determining whether the evidence was sufficient to support giving an instruction, the appellate court views the evidence in the light most favorable to the party that requested the instruction.

State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

When the trial court declines to instruct on self-defense based on a factual determination that the evidence does not support the theory, this Court reviews that decision for an abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). A trial court abuses its discretion only when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Woods, 143 Wn.2d 561, 579, 23 P.3d 1046 (2001).

Generally speaking, a defendant cannot deny the acts underlying the crime and be entitled to a self-defense instruction. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (defendant originally admitted to police his participation in a bar fight, but later denied any intentional use of force at trial); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (defendant denied the acts comprising assault charge). In the absence of any evidence that the defendant intentionally used force, a self-defense instruction is inappropriate. State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996). A trial court properly refuses to give a self-defense instruction when the defendant's story is inconsistent with the intentional use of force, even if his testimony contains certain elements of self-defense. Gogolin, 45 Wn. App. at 643-44 (self-defense instruction unwarranted where defendant claimed

that his wife attacked him and he put his hands up to push her away but did not know if he actually touched her, and claimed that she accidentally fell down the stairs).

Although a defendant may be entitled to a self-defense instruction based on facts that are inconsistent with his own testimony, there must still be evidence of an intentional act of force. For example, in State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997), the State alleged that the defendant, acting with “road rage,” intentionally shot another driver who had cut him off in traffic. However, the defendant testified that he had been confronted by a hostile motorist, that he feared for his safety, and that he intentionally displayed a gun to deescalate the situation. Callahan denied pointing the gun at the victim, and claimed that the gun discharged accidentally when the victim tried to grab it. 87 Wn. App. at 928, 933. This Court determined that Callahan was entitled to a self-defense instruction. Although Callahan denied that he intentionally shot the victim, he nonetheless admitted to an intentional act of force (intentionally displaying the gun in order to deescalate the situation). Id. at 930-31.

Likewise, in State v. Fondren, 41 Wn. App. 17, 701 P.2d 810 (1985), the defendant testified that he armed himself with a gun because he was afraid for his safety and that of his mother. He testified that he

believed the presence of the gun would stop the altercation. 41 Wn. App. at 20. Fondren denied intentionally shooting the victim, claiming instead that the victim was shot and killed during a struggle over the gun. Id. Like Callahan, Fondren admitted to the intentional use of force—intentionally displaying a gun in an effort to deescalate, or stop, an altercation. Id. As such, he was entitled to a self-defense instruction despite the fact that he denied intentionally causing the victim’s death. Id. at 21.

A case with facts similar to Callahan and Fondren is State v. Redwine, 72 Wn. App. 625, 865 P.2d 552 (1994). There, the defendant was charged with second-degree assault based on the victim’s allegation that the defendant had pointed a shotgun at him following a verbal dispute. 72 Wn. App. at 626-27. Redwine, however, denied pointing the firearm at the victim, and testified instead that he simply raised the shotgun over his head, so that the victim “would be sure to see it.” Id. at 628. He did so to “defend himself and the women and children on his property.” Id. Because Redwine admitted to an intentional act of force (raising the shotgun over his head where he was sure the victim could see it), the State was required to disprove that his use of force was lawful. Id. at 631.

To the contrary here, Neuman specifically denied the intentional use of force. Neuman testified that the Toyota minivan was holding up

traffic. 3RP 96. He claimed that he honked his horn as he drove by the minivan. Id. Neuman told the jury that he was “not trying to be rude,” and that he honked “just kind of to say, hey, you know, we’re coming, there’s people behind me, you know maybe turn on your turn signal, turn on your flashers, something.” 3RP 96-97. Neuman testified that when he stopped at the next stoplight, the minivan passed him on his right, cut across traffic, and tried to run him into the oncoming lanes. 3RP 97. He claimed that he felt like the minivan was trying to “kill him,” and that he was “very scared,” and “very threatened.” 3RP 97-98.

Neuman testified that at the next light, he stopped his car next to the minivan, but denied any verbal communication with its occupants, and denied yelling at them or referring to them in derogatory terms. 3RP 99. Neuman said that he believed a male was driving the minivan and another male was in the front passenger seat. Id. Neuman testified that his firearm was in his backpack on his front passenger seat. Id.

While at the light, Neuman claimed that the passenger side window of the minivan, which was already halfway down, was rolled further down, at which time he became “very scared,” and felt “like something bad was gonna happen.” 3RP 100. Neuman testified that because the minivan had “tried to run him off the road,” he felt like the people in the van “could do anything, they could pull a gun on me, they

could get out of the car.” 3RP 102. Neuman told the jury that he retrieved his gun, which was in a holster, from his backpack in the passenger seat, and placed it on his lap. 3RP 104. He denied being angry, denied ever removing the gun from its holster, and denied pointing the gun at the van or its occupants. 3RP 106-07, 117-18, 120-21.

Importantly, Neuman testified that he “never intended on [the occupants of the minivan] seeing the weapon.” 3RP 107. He told the jury that he was not trying to scare them, that he “never intended them to see that,” and that he was merely “preparing for this unknown situation.” 3RP 107, 111. Neuman explained to the jury that after he was arrested and Officer Rice had asked him about the gun, he told Officer Rice that he thought the people in the minivan may have seen it only because their minivan was higher off the ground than his car. 3RP 108.

On cross-examination, the State asked Neuman about how he retrieved the gun from his bag, asking, “And did you keep it low to try and keep them from seeing it?” 3RP 117. Neuman responded, “Yeah. I mean I was – I mean I was trying to keep them from not seeing it. But I mean the height it was, I mean it could have – I could have came up over my stick shift or came across here.”<sup>3</sup> Id.

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<sup>3</sup> Neuman used a double negative when he testified, “I was trying to keep them from not seeing it.” 3RP 117. It is clear from the context that he meant he was attempting to keep the people in the minivan from seeing the gun.

Unlike Callahan, Fondren, and Redwine, Neuman specifically denied the intentional use of force. The defendants in those cases all admitted that they intentionally displayed their weapons to defend themselves. Neuman, however, denied that he intentionally displayed his gun at all, whether to deescalate the situation, defend himself, or to deter the occupants of the minivan from harming him. Indeed, during closing argument, he told the jury that he was merely “preparing” for an unknown situation. 4RP 53. Because Neuman denied intentionally using force of any kind, he was not entitled to a self-defense instruction.

Indeed, “force” in the context of self-defense must be something that is exerted toward or upon another person, not something intended to be kept secret from such other person. RCW 9A.16.020 (“The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases”); see also Washington Pattern Criminal Jury Instruction (“WPIC”) 17.02. Neuman’s own proposed self-defense instruction acknowledged that, “The use [of] force upon or toward the person of another is lawful when . . . .” CP 30. Thus, in order to claim the lawful use of force, a defendant must first concede that he has intentionally used force upon or toward another person. Here, Neuman never intended for the occupants of the minivan to see his weapon. His

act of placing the gun in his lap, although intentional, did not constitute intentional force upon or toward the person of another.

On appeal, Neuman insists that he “displayed” the gun. See Opening Brf. of Appellant at 13. However, “display” means, “To spread before the view,” or “to exhibit to the sight or mind.” Webster’s New International Dictionary, 654 (3rd. ed. 1993). Thus, the very definition of “display” connotes the intent to put something where people can see it, or to show someone what you have. Neuman cannot have attempted to conceal his gun from the view of the minivan’s occupants by “keeping it low,” and then rely on an argument that they “might” have seen it by accident to support a claim that he intentionally used force.<sup>4</sup>

Here, the trial court reviewed briefing from the parties, reviewed the relevant cases, listened to Neuman’s testimony again, and heard the argument of the parties before concluding that Neuman “did not want them to see [the gun],” that he “kept [it] low,” and that he had no intention for anyone in the van to see the gun. 4RP 4, 11-12. This Court cannot say that no reasonable judge would have so concluded. The trial court

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<sup>4</sup> Neuman explicitly argued to the trial court that an “accidental viewing [of the gun] is not inconsistent with the claim of self-defense.” 4RP 10. However, for the reasons outlined, Neuman must have intentionally displayed the weapon in order to assert self-defense. Neuman cannot testify that he tried to keep the victims from seeing the gun, claim that they “may have accidentally seen it,” and then conclude that he has produced sufficient evidence of intentional force.

properly exercised its discretion when it rejected Neuman's proposed self-defense instructions.

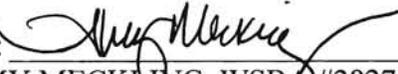
**D. CONCLUSION**

Neuman's claim, that the accidental viewing of a weapon can constitute an intentional act of force, must be rejected. The State respectfully requests that this Court affirm the trial court's refusal to instruct the jury on the lawful use of force and to affirm Neuman's conviction.

DATED this 25<sup>th</sup> day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

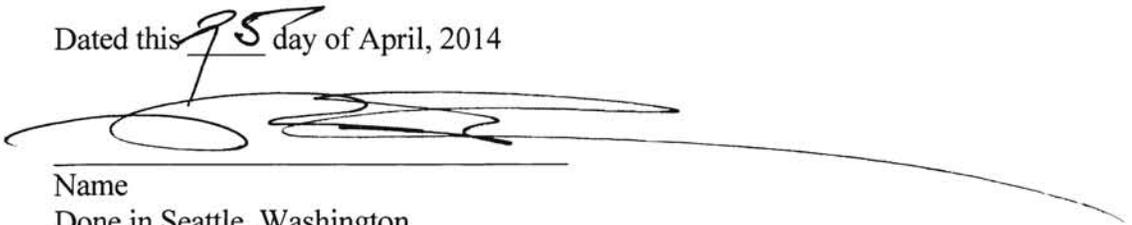
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DANIEL EARL NEUMAN, Cause No. 70461-3 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7<sup>th</sup> day of April, 2014

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\_\_\_\_\_  
Name  
Done in Seattle, Washington