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Court of Appeals
Division I
State of Washington

No. 73132-7-I

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

STATE OF WASHINGTON, Respondent,

v.

EDILBERTO GUZMAN-MORALES, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in denying the requested self defense instruction predicated on a theory that the defendant was defending himself in response to a chokehold applied by the nightclub's employee where the State alleged and proved that the assault with the knife occurred inside the entryway of the club and before the club's employee placed the defendant into a chokehold and there was no evidence that the defendant assaulted the employee outside the club, after the chokehold was applied.

C. FACTS

On June 19, 2013 Appellant Edilberto Guzman-Morales was charged with one count of Assault in the Second Degree, in violation of RCW 9A.36.021 a class B felony, along with a Deadly Weapon Enhancement in violation of RCW 9.94A.533, for his acts on or about June 16, 2013. CP 4-5. Guzman-Morales was convicted as charged by a jury on January 15, 2015, including by special verdict of the deadly weapon. CP 42-43. Guzman-Morales does not contest his sentence on appeal, which was the low end of the standard range. CP 48-49.

On the night of June 15th, early morning of June 16th, 2013 Jared Storrs was on duty at the Underground, a nightclub in downtown Bellingham. RP 20-22. The nightclub is a dance club with loud music that

caters to customers who are in their early twenties. RP 22-23. Storrs was working as security that night¹, trying to make sure everyone had fun, handling customer complaints, de-escalating situations, and removing customers if they become too intoxicated. RP 21, 24. Storrs was known for his ability to de-escalate a situation by talking with customers and reasoning with them. RP 24-26, 148, 175. His usual practice was to separate the customers who were in a dispute and deal with the customer who was more uncooperative first. RP 24-25. If the customer refused to cooperate, they would be removed from the club, but if they were cooperative and could be persuaded to leave, they were welcome to come back to the club another night. RP 26-28. Typically if the person were drunk, they would be physically guided outside. RP 27-28.

That night, Storrs was training a new guy, Demetrius, and was wearing a shirt that said "SECURITY" on it. RP 30, 33. Sometime after 1 a.m. he was flagged down by a customer. When Storrs reached the customer, he noticed there were two groups staring at one another. One group included the customer, an African-American², and his friends, and the other, Guzman-Morales and his friend. RP 31-32, 34. As Storrs

¹ Subsequent to this event, Storrs was promoted to head of security and promotion/marketing for the club when Shawn Reilly, the head of security at the time of the incident, left the club's employment. RP 20-21, 23, 68, 150.

² The State is only referencing the man's race as testimony refers to him this way, and in particular Guzman-Morales referred to him as such when he spoke with the police.

walked up, Guzman-Morales backed up into the bar, and Julie, the bartender and manager, tried to grab him, but he started walking away. RP 32, 134, 141, Ex. 10 (avcCH09 1:28:50-1:29:50)³. As the customer was telling Storrs to get this crazy guy away from me, Julie came out from behind the bar to contact Guzman-Morales. RP 32-33, 136, 142. Storrs saw Guzman-Morales trying to avoid the bartender, approached him and told him he needed to speak with Storrs. RP 34, 142-43. Guzman-Morales said something about his beer being spilt and appeared angry and defensive. RP 34-35. He did not say anything about being afraid or that anyone had hurt him or had hit him with a bottle. RP 38. Storrs told him he'd buy Guzman-Morales a new beer, but that Guzman-Morales had to come outside to talk with him. RP 34. Guzman-Morales told Storrs he wasn't going anywhere, that he was concerned about the other guys and his beer. RP 34.

Julie told Storrs she wanted Guzman-Morales out of the club. RP 36, 144, 146. Storrs tried to convince Guzman-Morales to go outside with him by offering to buy him a beer and to compensate him for his cover

³ The transcript references ABCH before the number of the camera, but the video refers to the different cameras as avcCH and then the camera number. As Counsel for the State did not have an opportunity to review exhibit 10 before it got transferred to the Court, Counsel does not know how the videos are displayed or grouped on the exhibit that was sent to the Court. On the State's CD, the videos shown to the jury are contained in the subfolder "Conversions."

charge. RP 39. Storrs just wanted Guzman-Morales to talk with him and to tell him what was going on, but Guzman-Morales didn't want to talk about it and still tried to twist away and acted aggressively. RP 39. After offering to buy him a beer a number of times, and repeatedly asking Guzman-Morales to walk out outside with him, Storrs put an arm on Guzman-Morales and said, "Let's walk." RP 40-41. Guzman-Morales walked with Storrs for about 10 feet, then grabbed him by the shirt and threatened Storrs by telling him he was going to regret it. RP 41-42. Storrs told Guzman-Morales not to threaten him, and took Guzman-Morales' hand off him and grabbed Guzman-Morales' arm and started walking with Guzman-Morales towards the entrance of the club. RP 42, Ex. 10 (avcCH09 1:28:50-1:29:50).

Guzman-Morales' friend came around Storrs' side, and Guzman-Morales said, "Do not embarrass me in front of my brothers." RP 42. Storrs told Guzman-Morales that he wasn't trying to embarrass him, that he would let him go, but that he needed to walk with Storrs. RP 42. Guzman-Morales walked with Storrs a few feet and then grabbed Storrs, told Storrs to look him in the eyes and said "I'm a dangerous man, this is going to end very badly for you." RP 44. Storrs told Guzman-Morales not to threaten him, that he was just there to help, but he needed him to walk outside so they could talk. RP 45. Storrs touched Guzman-Morales on his

back and guided him forward. RP 45. Guzman-Morales was walking by Storrs' side, said something about his beer again, and then told Storrs again that he'd regret this. RP 45-46, Ex. 10 (avcCH06 1:30:55-1:31:08).

About two to three feet from the door, Storrs felt something like someone hitting his groin area with a hot hammer. RP 47-48. Storrs looked down and out of the corner of his eye, Storrs saw a knife, which had a four inch blade, in Guzman-Morales' right hand. RP 49, 52, 264, Ex. 18. He thought Guzman-Morales was going to stab him again, so he put him in a chokehold. RP 49-50, Ex. 10 (avcCH02 1:31:02-1:31:15; avcCH03 1:31:05-1:31:10)⁴; Ex. 11, 12, 13. While Storrs was putting Guzman-Morales into and holding him in a chokehold, Storrs tried to control the hand that was holding the knife, and he yelled, "He's got a knife," and "I've been stabbed" or words to that effect. RP 50-51, 166, 188, 198, 244. Storrs got Guzman-Morales into a chokehold outside the doors to the club. RP 51, Ex. 10. (avcCH02 1:31:05- 1:31:10). Storrs was adamant that he was stabbed inside the club, before he started struggling with Guzman-Morales and before he put him into a chokehold. RP 55, 85-87, 94-95, 112.

⁴ The jury was shown a slow-downed version of camera 2. A slow-downed version of the stabbing appears on Ex. 10 under the Zoomed folder, entitled "slow-stab."

Storrs struggled to maintain control of Guzman-Morales outside the club, and Shawn, the head of security at the time, came over to assist after he heard Storrs say that Guzman-Morales had a knife and that he'd been stabbed. RP 52-53, 164-66, 244. Storrs and Shawn yelled at Guzman-Morales to drop the knife, but he refused. RP 52-54, 170. They put Guzman-Morales into the concrete wall, while blood ran down Storrs leg. RP 52-54, 170. He continued to refuse to drop the knife, shaking his head no, despite a number of the bouncers telling him to do so. RP 57, 199, 245. Storrs started to freak out because he realized how much blood he was losing. He told Dani, another member of the security team, to hit Guzman-Morales despite the club's rule not to hit customers. RP 57-58, 170, 199. Dani eventually hit Guzman-Morales in the face, and he dropped the knife. Shawn stepped on it and waited for the police to arrive to retrieve it. RP 58, 170, 199-200, 260.

Guzman-Morales didn't say anything during the struggle, and he had two friends close by. RP 171. He stopped struggling once he dropped the knife. RP 172-73. His friends said that Guzman-Morales didn't speak English, and that he was scared, he didn't know what was going on. RP 204-05. When the officer spoke with him in English, which he appeared to understand, Guzman-Morales said that he was scared because African-American men had been hitting him, that he had been hit by a bottle, and

that one of them touched his wife's ass⁵. RP 272-74. When asked about the stabbing, he said he was scared. RP 274.

Storrs was eventually taken to the hospital where he was treated for a knife wound, approximately two to three centimeters long. RP 66, 319-21. Storrs suffered damage to his tendons and nerves and at the time of trial, 18 months later, his leg was still healing. RP 66-67.

At trial Guzman-Morales testified that he didn't remember much about the night after the bouncer told him he would buy him a drink at the front. RP 338. He said that he was intoxicated and had gotten hit on the back of his head that night, and that he blacked out later. RP 336-38, 342. He didn't remember threatening the bouncer, though he did remember having difficulty walking and that the bouncer asked him what happened, that he told the bouncer that someone had hit him and did something to his beer and that the bouncer walked him towards the front. RP 338. On cross, he admitted it looked like on the video that he was having a good time at the club, that he wasn't in any danger before Storrs contacted him. RP 344-50. He admitted that no one was hitting him in the video, that Storrs wasn't doing anything violent to him, that Storrs had just been talking to him, asking him what had happened and that he had told Storrs

⁵ Guzman-Morales admitted at trial that he didn't have a wife and that his girlfriend was not at the club that night. RP 345-46.

that someone took his beer, and Storrs said he would buy him a beer at the front and they started walking. RP 350-53.

D. ARGUMENT

- 1. The trial court did not abuse its discretion in denying the proposed self defense instruction because there was no evidence of an assault occurring after the assault inside the club, and defense counsel conceded Guzman-Morales could not assert self defense regarding the assault inside.**

Guzman-Morales asserts that the trial court erred in denying his request to instruct the jury on self defense. The trial court did not abuse its discretion in denying the request because there wasn't any evidence in the record to support a self defense instruction given the assault charged by the State and the defense theory of self defense. The act the State charged as the assault was based on Guzman-Morales' actions inside the entryway to the club, and the defense theory was predicated on the assertion of self defense in response to the chokehold the victim applied, outside the club, after he was stabbed. The defense theory was not consistent with the alleged act of assault by the State. Therefore the trial court properly denied the request.

Moreover, while the defense argued for a "self defense" instruction, the instruction actually submitted was a defense of others instruction. There was absolutely no evidence to support a defense of

others' instruction and therefore the trial court did not err in refusing the actual proposed instruction. Finally, the evidence was overwhelming that Guzman-Morales did not act in self defense to the charged assault, so any error in denying a self defense instruction regarding the chokehold and events subsequent to the assault was harmless.

a. The trial court did not abuse its discretion in refusing to instruct the jury on self defense.

Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997) *cert. denied*, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998). Instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury and permit each party to argue its theory of the case. State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656, *rev. den.*, 133 Wn.2d 1014 (1997). A defendant is not entitled to an instruction that is not a correct statement of the law or for which there is insufficient evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A defendant is not entitled to an instruction on an issue or theory that is not supported by the evidence. State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986). If a trial court refuses to give a self defense instruction based on the lack of factual evidence to support the claim, the

standard of review is abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

In order to be entitled to an instruction on self defense, there must be some evidence of self defense. Goglin, 45 Wn. App. at 643. A person is entitled to assert self defense when s/he reasonably believes that s/he is about to be injured and uses no more force than is necessary. RCW 9A.16.020(3); *see also*, Read, 147 Wn.2d at 242-43 (to be entitled to self defense instruction, defendant must point to evidence that he subjectively believed in good faith that he was in danger of harm and that this belief, when viewed objectively, was reasonable). There must be some evidence that (1) the defendant subjectively feared that he was about to be injured; (2) this belief was objectively reasonable; (3) no more force was used than was necessary; and (4) the defendant was not the aggressor. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). If any element of the defense is missing, the defendant is not entitled to an instruction on self defense. State v. Bell, 60 Wn. App. 561, 566, 805 P.2d 815 (1991). Fear alone does not entitle a defendant to a self defense instruction. State v. Kidd, 57 Wn. App. 95, 102, 786 P.2d 847, *rev. den.* 115 Wn.2d 1010 (1990). There must also be some evidence of aggressive or threatening gestures, behavior or communication by a victim before a defendant's use of force can be reasonable. Kidd, 57 Wn. App. at 102.

Furthermore, if the defense theory is inconsistent with self defense or if there isn't evidentiary support for it, the court's refusal to instruct on self defense is proper. Gogolin, 45 Wn. App. 643-44; *see also*, State v. Porter, 150 Wn.2d 732, 739-40, 82 P.3d 234 (2004) (defendant not entitled to lesser included instruction because the lesser crime was not based on the charged conduct). For example, a defendant cannot deny that s/he hit someone and then try to assert that s/he hit the person in self defense. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); *see also*, State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) (defendant not entitled to self defense instruction where he denied the underlying act that was the basis for the assault charges).

Before the defense case presented its case, the trial court denied the defense half-time motion, noting there was no evidence of the assault occurring at any time other than when Guzman-Morales swept his hand behind his back. RP 329. Guzman-Morales then testified, but testified he blacked out while in the club and didn't remember much until he was in the patrol car. RP 336. He remembered the bouncer asking him what happened, that he told the bouncer that someone had hit him and something had happened to his beer and the bouncer asked him who, that he had pointed to some people, and the bouncer walked him out and said he would buy Guzman-Morales a beer at the front. Guzman-Morales

testified he blacked out at that point. RP 338. On cross-examination, he testified that he was really intoxicated that night and didn't have a clear memory of what happened. RP 342. When shown the video, he admitted that it looked like he was having a good time, that he wasn't in any danger before being approached by the bouncer and that he didn't remember anyone touching him. RP 344-50. He admitted that Storrs was just talking to him, wasn't doing anything violent to him, that he was just touching Guzman's shoulder. RP 351. He admitted that Storrs just asked him what happened, that he told Storrs that someone took his beer, that Storrs told him Storrs would buy him a beer up front and then they started walking. RP 352. He admitted the video showed no one hitting him, that it showed he wasn't in any danger and that a friend of his was with him. RP 353. Defense then rested without any redirect. RP354.

When discussing jury instructions, the judge inquired of defense counsel what evidence there was to support the proposed self defense instruction. RP 359. Defense counsel responded that the stabbing may not have occurred before the chokehold, that it was arguable that it happened afterward. The court inquired what evidence there was of that, to which defense counsel replied that Storrs was hit "there" (at hip) and not down there" (inner thigh). The court responded that there was no testimony that a stabbing occurred during the chokehold, to which counsel countered the

video contradicted that. RP 359. The court explained that the video didn't show a stabbing outside, only a possible stabbing inside:

Had there been something, if somebody had said they saw the knife being flashed around, and somebody could have gotten stabbed with it, had Mr. Guzman testified that that was when he actually used the knife to defend himself, if there was any other evidence, I think I would be inclined and required to give the instruction; I'm just not sure what there is to support an instruction that it happened during the choke hold ... other than counsel's argument.

RP 360. Counsel explained that the defense theory was that the video shows that a stabbing didn't occur where everyone said it did. The court felt that would require the jury to speculate that it happened outside when there was no actual evidence of that. RP 360. When counsel stated that he would be arguing that the stabbing did not happen on the inside based on the evidence, the court reiterated:

The fact that there's evidence that could be read that way or could be read not to be a stabbing is not evidence that there was a stabbing at some other time and place when Mr. Guzman was feeling threatened or was in the words of this instruction attempting to prevent himself from being hurt. I mean, if there was something that said that when he was in the choke hold, he reacted, and he was moving his hand around or something, and he had the knife in his hand, maybe that would be enough ... but we don't have any of that.

RP 361. Defense again stated its theory was that self defense came in after the chokehold because no evidence showed the stabbing happened before. RP 362. The judge explained that was a sufficiency of the

evidence argument regarding the stabbing inside, but that in order to warrant a self defense instruction:

I think there has to be some evidence that the Defendant reasonably believed he was about to be injured by someone or at the time that he used force, and there's no evidence that he used force at all. In fact, there's no testimony from Mr. Guzman that he stabbed anybody, and there's no testimony from any other witness that he stabbed Mr. Storrs after the choke hold was in place.

RP 363. The court continued that the only evidence of potential force being used by Guzman-Morales occurred inside the doorway when he swung his arm behind his back and that was the only act alleged by the State, and there was no evidence that it occurred outside. RP 364-66.

Defense conceded there was no basis for self defense if Storrs was stabbed inside the doorway, and the court further submitted that if the jury found the stabbing did not occur inside the doorway, as alleged by the State, then Guzman-Morales was not guilty. RP 367. Despite its belief there was no evidentiary support for self defense, the court indicated it would give defense counsel additional time to find some authority to support its position. RP 368. The defense was unable to do so. RP 372.

Later, before argument, defense informed the court that should the State argue the stabbing occurred later in time, defense would either seek a mistrial or to revisit the issue of self defense. RP 386. The prosecutor assured counsel that he was going to argue the assault with the knife

occurred when Storrs said it did and there wasn't evidence of it occurring at any other time. RP 387. During closing the prosecutor did just that, arguing the assault occurred when Storrs felt the intense pain in his leg, at the threshold of the doorway as the jury had seen numerous times on the video, when Guzman-Morales thrust his arm back behind his body towards Storrs' leg. RP 419-20. He argued the stabbing couldn't have happened at any other time other than right before the door because Storrs described the feeling of blood going down his leg then and there was no testimony anyone was stabbed outside and no opportunity for someone to be stabbed outside. RP 429-30. Defense counsel then argued that there was insufficient evidence that a second degree assault occurred at the time on the video, 1:31:07, as the State alleged and had to prove, that all Guzman-Morales did at that time was hit Storrs in his side and therefore he was only guilty of fourth degree assault. RP 437, 448-50.

After giving the defense every opportunity to provide it with a basis to give the requested self defense instruction, the court ultimately denied the instruction because there was no evidence to support it. The alleged assault that was the basis for the charges was the assault that occurred within the club as Guzman-Morales was being escorted to the entrance of the club. Defense wanted to be able to argue that the assault might have happened outside after Storrs put a chokehold on Guzman-

Morales, and that if it had happened that way, his use of the knife was in self defense. The flaw in defense's argument, however, was that there was no evidence of Guzman-Morales assaulting Storrs after the incident inside the club. Guzman-Morales never testified that he assaulted anyone, he testified he didn't have a clear recollection of anything after he was being escorted towards the doorway of the club. There must be some evidence of self defense and the self defense argument must be consistent with the basis of the State's alleged assault. There is nothing in the record upon which to argue the stabbing occurred outside the club. The act that the State alleged and argued as the basis for the second degree assault charge was the assault admitted by Guzman-Morales' attorney in closing, which occurred inside the doorway, and defense counsel had admitted that he could not make a self defense argument regarding that assault.

On appeal, Guzman-Morales asserts he was entitled to the instruction because he testified he had flashbacks of being choked, that he told the officer he was scared because people were hitting him, and that when the officer asked about the stabbing, he said he was scared. This is insufficient: Guzman-Morales didn't testify as to what point in time the choking he flashbacked on occurred and the evidence showed that he was put in a chokehold after the time the State alleged the stabbing occurred. The incident Guzman was referring to when he told the officer that he was

scared because people were hitting him was the incident inside the bar, before he was contacted by Storrs, and the men he was referring to were African Americans. RP 273-74. Finally, fear alone is insufficient to warrant a self defense instruction. *See, Kidd, supra.*

Guzman-Morales' theory of self defense was inconsistent with the basis of the State's assault charge, and therefore the court did not abuse its discretion in denying the requested instruction. *See, Porter*, 150 Wn.2d at 738-40 (defendant not entitled to instruction on lesser-included offense of attempted unlawful possession of a controlled substance was not based on the conduct that was the basis for the charged crime of unlawful delivery of a controlled substance.) The only evidence introduced of an assault committed by Guzman-Morales was when Storrs and Guzman-Morales were still in the doorway, inside the club, before the chokehold Storrs applied in response to being stabbed. The State did not allege that Guzman-Morales committed any assault outside the club. Even if Guzman-Morales should have been able to assert self defense for an assault he alleged could have occurred outside the club, he still would have not have been entitled to an instruction because he was the first aggressor as to anything happening after the assault inside the club. *See, State v. George*, 161 Wn. App. 86, 249 P.3d 202, *rev. den.*, 172 Wn.2d 1007 (2011) (defendant not entitled to self defense instruction if the

aggressor). Even if he had claimed self defense regarding the assault within the club, he had to point to some evidence to show that he subjectively feared injury to himself at that time, that such belief was objectively reasonable, and that he used no greater force than was necessary. He could not do so, which is why defense counsel conceded Guzman-Morales could not assert self defense as to the charged assault.

Cases cited to by Guzman-Morales are distinguishable because in those cases there was evidence presented that the defendant intentionally used the force, the basis for the charges, in response to fear for their safety, even though the defendants either denied the pointing or shooting the guns intentionally. In Redwine the trial court actually gave a self defense instruction that stated it was lawful to use force to prevent an offense against his person or when used to prevent a malicious trespass. State v. Redwine, 72 Wn. App. 625, 628, 865 P.2d 552, *rev. den.*, 124 Wn.2d 1012 (1994). The State argued on appeal the instruction shouldn't have been given due to insufficient facts to support it. *Id.* at 630-31. With respect to the assault in the second degree charge, the appellate court concluded the instruction was warranted because the defendant had testified that he became alarmed when the process server reached for a case that appeared to contain a pistol in it and that was the reason he retrieved the shotgun and approached the person with it, even though he

denied pointing it at the process server. He also specifically testified that he had stood ready to defend himself and others on the property from someone he thought had a pistol, and that he had stood his ground until the process server had left. Id. at 628, 631.

The issue in Callahan was whether the claims of self defense and accident were mutually exclusive such that a defendant would not be entitled to a self defense instruction if they at the same time claimed the use of force was accidental. Callahan, 87 Wn. App. at 927-28, 930. There the defendant and a driver of another car got into a heated exchange and pulled over. Id. at 928. Seeing that he was outnumbered when the driver get out of his car along with two other men, the defendant testified he brought his handgun with him as he got out of the car. Id. The gun discharged when the driver tried to grab the gun from the defendant. The defendant admitted that he had displayed the gun, though he denied pointing it at the driver, and testified that he displayed it because he feared for his safety. Id. After concluding that the defenses of self defense and accident are not necessarily mutually exclusive, the appellate court determined that the trial court had abused its discretion in denying the self defense instruction because the defendant had testified that he had the gun, at the time of the alleged assault, and that he had the gun because he feared for his safety, and that such fear was reasonable. Id. at 933.

Fondren also addressed the situation of an admission of intentional display of a gun with a claim that the shooting itself was accidental. The State argued on appeal that the defendant was not entitled to self defense because he denied pulling the trigger on the gun. State v. Fondren, 41 Wn. App. 17, 21, 701 P.2d 810, *rev. den.*, 104 Wn.2d 1015 (1985). The appellate court concluded self defense was an issue in the case because there was evidence the defendant got the gun to protect a friend, his wife and his mother due to threats he'd heard earlier that evening and he was aiding the friend, who has being attacked by two men, when the gun discharged. *Id.* at 20-21. The appellate court ultimately reversed the conviction because the jury instructions did not make it clear that the State bore the burden of disproving self defense. *Id.* at 21-22.

Contrary to those cases, there was no evidence here of self defense in response to the act that was the basis for the charged assault. Cases cited by Guzman-Morales addressed a different situation, where the defendant admitted obtaining a weapon and use of that weapon, the basis of the assault charge, but under circumstances where the assault was not intentional or was accidental. There was no evidence here that at the time of the alleged act of assault the defendant used the force in defense of himself.

a. *The defendant proposed an inapplicable self defense instruction.*

While the trial court did not reach the issue of the language of the specific instruction, the proposed “self defense” instruction actually was an instruction for the defense of others. There was no evidence of defense of others, and therefore the trial court did not err in refusing to give the proposed instruction.

On appeal the State may argue an alternative basis supported by the record to uphold the trial court’s ruling. State v. Bobic, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000). Guzman-Morales proposed in relevant part the following instruction based on WPIC 17.02:

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 of force upon or toward the person of another is lawful when used *by someone lawfully aiding a person who he reasonably believes is about to be injured or in preventing or attempting to prevent an offense against the person*, and when the force is not more than is necessary.

...

CP 10 (emphasis added). The proposed instruction was for the defense of others, not for defense of oneself. The correct language to assert true self defense is: “The use of force upon or toward the person of another is lawful when used *by a person who reasonably believes that he or she is about to be injured...*” WPIC 17.02 (emphasis added). There was absolutely no evidence that Guzman-Morales was attempting to come to

the defense of another when he assaulted Storrs. The trial court did not err in denying the self defense instruction proposed by Guzman-Morales.

b. Any error was harmless as the evidence was overwhelming.

Even if Guzman-Morales had been entitled to a self defense instruction, any error was harmless. “The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party.” State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); *but see*, State v. Arth, 121 Wn. App. 205, 87 P.3d 1206 (2004) (“An error affecting a defendant’s self defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt.”) The evidence was overwhelming that Guzman-Morales’s assault of Storrs inside the club was not lawful force. Guzman-Morales himself testified, as Storrs had, that up until to the point of the assault Storrs was just talking to him, offering to buy him a beer up front, while Storrs was escorting him to the front of the club. He also admitted on cross that he wasn’t in any danger up to that point. The videos showed that he wasn’t under any threat, and showing no fear, up until that point. Ex. 10 (avcCH02, avcCH03, avcCH06, avcCH09⁶). Then Guzman-

⁶ The transcript references ABCH before the number of the camera, but the video refers to the different cameras as avcCH and then the camera number. As the Counsel for the State did not have an opportunity to review exhibit 10 before it got transferred to the

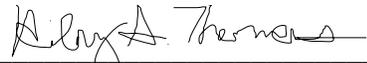
Morales stabbed Storrs without any threatening provocation. Even if there had been evidence that Storrs had said something threatening to Guzman-Morales, the belief that he had to respond to a verbal threat with a knife was not a reasonable belief and the use of a knife in response was clearly more force than was necessary. Moreover, even if Guzman should have been allowed to argue that he committed the assault outside and in self defense, he was the first aggressor and as such his self defense claim would have failed on that basis. *See, Kidd*, 57 Wn. App. at 100-01 (error regarding self defense instructions was harmless where no reasonable jury could have found that the shootings were lawful acts of self defense). Guzman-Morales was not prejudiced by the trial court's refusal to give a self defense instruction, even assuming he had proposed the applicable self defense instruction.

Court, Counsel does not know how the videos are displayed or grouped on the exhibit that was sent to the Court. On the State's CD, the videos shown to the jury are contained in the subfolder "Conversions."

E. CONCLUSION

The State respectfully requests this Court to deny Appellant's appeal and affirm his conviction for Assault in the Second Degree.

Respectfully submitted this 1st day of February, 2016.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Legal Assistant

2/1/16

Date