IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN RANDALL PEGUES, Appellant.	)	DIVISION ONE No. 65678-3-I UNPUBLISHED OPINION FILED: December 27, 2011

Dwyer, C.J. — A jury convicted Kevin Pegues of two counts of assault in the second degree and one count of harming a police dog arising from an incident in which he stabbed a police dog and lunged at Tukwila police officers with a knife. Pegues contends that these convictions must be reversed because (1) he received ineffective assistance of counsel when his trial attorney failed to request a lesser included offense instruction to the charges of assault in the second degree, (2) improper arguments made by the prosecutor denied Pegues his right to a fair trial, and (3) the trial court erred by declining to instruct the jury regarding Pegues' claim of self-defense to the charge of harming a police dog. We conclude that Pegues' first two contentions are without merit and, accordingly, affirm his convictions for assault in the second degree. However,

because the trial court erred in declining to instruct the jury regarding the use of justifiable force, we reverse Pegues' conviction for harming a police dog and remand for additional proceedings consistent with this opinion.

I

On June 15, 2009, Kevin Pegues was involved in an altercation with store employees while buying groceries in Tukwila. When the situation escalated, the store's manager told Pegues that he was calling the police. As Pegues began to leave the store, a security guard attempted to detain him. Pegues managed to free himself and ran out of the store.[1] The security guard, along with several other store employees, pursued him. Pegues, now holding a knife, fled across the street and hid in the basement of a motel.

Several minutes later, Tukwila police officers arrived at the scene. Pegues fled again. The officers pursued him into an adjacent city park. Pegues was ordered to stop. Still brandishing the knife, Pegues told the officers that they would have to kill him. As Pegues ran toward the park exit, an officer moved to cut off his escape route. The officer arrived at the exit only moments before Pegues. The officer advanced toward Pegues, who was "bouncing up and down" while holding the knife. Report of Proceedings (RP) (April 14, 2010) at 40. Pegues again told the officer, "you are going to have to kill me." RP (April 14, 2010) at 91. After several other officers approached the area with their

[1] Several witnesses assert that Pegues attempted to hit the security guard with a closed fist. This alleged action was the basis for a charge of assault in the fourth degree of which Pegues was acquitted.

guns drawn, the first officer drew his taser and fired it at Pegues. Two electrical probes—transmitting 50,000 volts of electricity—contacted Pegues' upper chest and hand, and he fell face-forward to the ground. The officer placed his weight on Pegues' back to "make sure he wouldn't get up." RP (April 14, 2010) at 45.

Either just before or just after Pegues was tased, a K-9 handler, Officer James Sturgill, released a police dog. The dog ran toward Pegues, who was temporarily immobilized by the taser, and bit him around the head and neck. Pegues brought his hands to his head in an effort to protect himself and then wrestled with the dog for several seconds. While still on his knees, Pegues stabbed the dog with the knife, severing a muscle in its neck.[2] Pegues then began to get up, lunging toward the officers as he did so. An officer yelled "knife," and a different officer fired two rounds into Pegues' torso. RP (April 15, 2010) at 64. Pegues is permanently paralyzed as a result.

Pegues was charged with two counts of assault in the second degree, one count of harming a police dog, and one count of assault in the fourth degree. At trial, Pegues proposed a jury instruction that would have permitted the jury to find that Pegues was acting in self-defense when he stabbed the police dog.[3] The trial court ruled that Pegues was not entitled to the instruction.

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[2] The dog underwent surgery immediately following the incident to repair a four-inch-deep wound. The knife missed all major blood vessels and internal organs, and the dog was able to make a full recovery.

[3] Pegues' proposed instruction, based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02.01, at 253 (3d ed. 2008) (WPIC), read, in pertinent part:

> It is a defense to a charge of Harming a Police Dog that force used was lawful as defined in this instruction.
>
> A person may use force to resist an arrest by someone known by the person to

The jury acquitted Pegues of assault in the fourth degree and convicted him of the remaining charges. Pegues was sentenced to 75 months of confinement.

Pegues appeals.

II

Pegues first contends that he received ineffective assistance of counsel because his trial attorney did not request that the jury be instructed regarding unlawful display of a weapon, which can be a lesser included offense of assault in the second degree.[4] We disagree.

A claim of ineffective assistance of counsel is reviewed de novo. State v. Binh Thach, 126 Wn. App. 297, 319, 106 P.3d 782 (2005).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient where it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of defense counsel's performance is highly deferential and employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251

> be a police officer only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

Clerk's Papers (CP) at 48.

[4] The State agrees that unlawful display of a weapon would be a lesser included offense of assault in the second degree under the circumstances of this case.

(1995). "To rebut this presumption, the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). In order to establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure to make the necessary showing on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

Pegues asserts that his counsel was deficient by failing to request that the jury be instructed on unlawful display of a weapon, a lesser included offense to assault in the second degree. However, our Supreme Court recently rejected a nearly identical ineffective assistance of counsel claim.[5] In Grier, the court held that because defense counsel could reasonably have believed that an all-or-nothing approach was the best strategy for securing an outright acquittal, defense counsel's decision to forgo instructions on a lesser included offense did not constitute ineffective assistance. 171 Wn.2d at 43. The court explained

[5] In making his claim of ineffective assistance of counsel, Pegues relies in part on the three-step deficiency test set forth in State v. Ward, 125 Wn. App 243, 104 P.3d 670 (2004). See also State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010), review granted, 171 Wn.2d 1016, 253 P.3d 392 (2011). This test, however, was rejected by our Supreme Court in Grier. 171 Wn.2d at 32 ("[T]he Court of Appeals sharply deviated from the standard for ineffective assistance the United States Supreme Court announced in Strickland. Today, we reaffirm our adherence to Strickland [and] reject the three-pronged test the Court of Appeals used to analyze Grier's claim."). Obviously, Pegues can no longer rely on this now-rejected test.

that, "[a]lthough risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal." 171 Wn.2d at 42.

Similarly, here, defense counsel's all-or-nothing strategy constituted a legitimate trial tactic. Because there was no evidence that Pegues initiated physical contact with the officers during the confrontation, in order to convict him of second degree assault, the State was required to prove that Pegues' actions created in the officers a "reasonable apprehension and imminent fear of bodily injury."[6] CP at 32. Defense counsel focused on this element of assault as a crucial component of Pegues' trial strategy. In closing argument, defense counsel argued that, because the State could not establish that the officers had been placed in fear, the jury was required to acquit:

> [Y]ou heard him say on the stand that he was more scared than ever in the eight years he has ever been a police officer this was the most scared he has ever been in his life. Really? Really? Because Mr. Pegues was standing in an open field. He was surrounded by officers. . . . Everybody was ready to shoot. And they see some movement on the ground. And that's going to scare them?
> . . .
> Is the fact that these police officers with a combined experience of over 30 years when someone is getting up, is that going to cause them fear that they believe they're going to have bodily injury? I'd say no.

RP (April 19, 2010) at 70-71, 78.

The defense strategy would have been undercut had the jury been

[6] The jury was instructed that an "assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP at 32. During closing argument, the prosecutor focused on the officers' fear of bodily injury resulting from Pegues' actions.

instructed on unlawful display of a weapon, as such an instruction would have seriously undermined Pegues' goal of outright acquittal. In order to convict Pegues for unlawful display of a weapon, the State needed to prove only that Pegues displayed a weapon in a manner that "manifest[ed] an intent to intimidate another."[7] RCW 9.41.270(1). The statute does not require that another person be placed in fear of bodily harm under either an objective or subjective test. Given that the evidence presented at trial was that Pegues brandished a knife at the officers on multiple occasions, a jury instruction on the lesser offense of unlawful display of a weapon would have virtually assured at least a conviction on that charge. Such a result would have been at odds with the defense strategy. Accordingly, Pegues has failed to meet his burden of establishing the absence of any "'*conceivable* legitimate tactic explaining counsel's performance.'" Grier, 171 Wn.2d at 42 (quoting Reichenbach, 153 Wn.2d at 130). Trial counsel's performance was not deficient.

In addition, Pegues' claim of ineffective assistance of counsel fails because he cannot demonstrate prejudice. In assessing prejudice, we presume that the jury follows the law. Strickland, 466 U.S. at 694. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like."

[7] RCW 9.41.270(1) stipulates that "[i]t shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons."

Strickland, 466 U.S. at 695; see also Grier, 171 Wn.2d at 34. In Washington, a jury is permitted to render a verdict on a lesser included offense only if, "after full and careful consideration of the evidence," the jury either finds the defendant not guilty of the greater offense or cannot agree on a verdict for the greater offense. State v. Labanowski, 117 Wn.2d 405, 424, 816 P.2d 26 (1991).[8] Consequently, a jury has no occasion to consider a lesser included offense instruction where it unanimously finds a defendant guilty of a greater offense.

Here, the jury, by unanimous agreement, found Pegues guilty of two counts of assault in the second degree—the greater offense—beyond a reasonable doubt. Thus, the jury would never have considered the lesser included offense of unlawful display of a weapon, even had such an instruction been requested and granted. We know this because we presume that the jury followed the law. Strickland, 466 U.S. at 694. Thus, Pegues cannot establish that there was a "reasonable probability" that the availability of a lesser included offense instruction would have changed the outcome of his trial. Strickland, 466 U.S. at 694. Accordingly, Pegues cannot establish prejudice, and his claim of ineffective assistance of counsel fails.

III

[8] The applicable Washington Pattern Jury Instruction stipulates:

> The defendant is charged . . . with _____. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, *then* you will consider whether the defendant is guilty of the lesser crime[s] of _____.

WPIC 4.11, at 90 (emphasis added).

Pegues next contends that several statements made by the prosecutor during closing argument constituted prosecutorial misconduct requiring reversal. We disagree.

"A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). We review the propriety of a prosecutor's conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Improper comments are prejudicial only where "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (alteration in original) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Moreover, "'[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.'" Russell, 125 Wn.2d at 93 (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)). Consequently, where a defendant does not object and request a curative instruction at trial, reversal is unwarranted unless we

determine that the objectionable remark "'is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Here, Pegues asserts that the prosecutor committed reversible misconduct during the State's rebuttal argument. In the course of this argument, the prosecutor first differentiated between "spoken" and "unspoken" defenses. The prosecutor defined "spoken" defenses as "things such as self-defense," "alibi defense," "diminished capacity," and "insanity," and explained that these defenses exist because it is "really easy in this line of work to cut into [the credibility of] witnesses." RP (April 19, 2010) at 80-81. In contrast, the "unspoken" defense relied upon by Pegues could be "one of three things": 1) that the officers were confused; 2) that the officers were mistaken; or 3) that the officers were fabricating. After dismissing the first two possibilities as unsupported by the evidence, the prosecutor argued that what defense counsel was "really saying" was that the officers were "fabricating." RP (April 19, 2010) at 82. The prosecutor then argued that the jury should reject this contention because there was no evidence that the officers had discussed the incident with one another and because it was "ridiculous" that the officers had either the motive or the sophistication to conspire to "get Mr. Pegues." RP (April 19, 2010)

at 82. Pegues did not object to any of these remarks.

Pegues first contends that it was misconduct for the prosecutor to argue that the jury was required to convict Pegues unless it concluded that the State's witnesses were "fabricating" their testimony. This is so, Pegues asserts, because in two cases we determined that similar arguments constituted reversible misconduct even in the absence of an objection at trial. See Miles, 139 Wn. App. at 890; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).[9] However, in each of these cases, the prosecutor explicitly argued that the jury must disbelieve the State's witnesses in order to acquit the defendant. In Fleming, the prosecutor argued to the jury, as the prosecutor did here, that there was no evidence that the State's witness was lying or confused. 83 Wn. App. at 214. However, the prosecutor went further, stating that, "because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree." 83 Wn. App. at 214 (emphasis omitted). Similarly, in Miles, the prosecutor told the jury that they had heard "mutually exclusive" versions of events. 139 Wn. App. at 889. The prosecutor explained that "[i]f the State's witnesses are correct, the defense witnesses could not be and vice versa. . . . [I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you." 139 Wn.

[9] The additional cases cited by Pegues address a different form of impermissible argument and are inapposite here. See State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010) (determining "fill-in-the-blank" argument to be flagrant misconduct), review denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (same), review denied, 170 Wn.2d 1003 (2010).

App. at 890 (some alterations in original). In each of these cases, we determined that the prosecutor's arguments had impermissibly shifted the burden of proof to the defendant. Miles, 139 Wn. App. 890; Fleming, 83 Wn. App. at 213. Because the jury could believe the State's witnesses and yet continue to entertain a reasonable doubt as to the prosecution's case, such arguments misstated the State's burden of proof.[10] Fleming, 83 Wn. App. at 213. Reversal was thus required.

The jury was presented with no such stark choice here. Instead, the prosecutor merely argued that defense counsel was contending that the officers were lying and that this contention should be rejected. Unlike the impermissible arguments made in Miles and Fleming, there is nothing improper about a prosecutor asking a jury to reject a defendant's argument that the State's witnesses are not credible. A prosecutor enjoys "reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility." State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Moreover, it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory. Russell, 125 Wn.2d at 87. Because the prosecutor did not, in fact, argue to the jury that it must find that the State's witnesses were lying in order to acquit, Pegues has failed to demonstrate that the challenged statements

[10] Conversely, in Miles, the court held that it was misconduct for the prosecutor to suggest that an acquittal required the jury to believe the *defendant's* testimony. Miles, 139 Wn. App. at 890. Because the jury was entitled to conclude that it did not believe the defendant's evidence, but that it was also not satisfied beyond a reasonable doubt that he had committed the crime, the prosecutor's argument impermissibly shifted the burden of proof and constituted reversible misconduct. Miles, 139 Wn. App. at 890.

were improper.

Pegues next contends that the prosecutor committed reversible misconduct by portraying Pegues' general denial or "unspoken" defense as being less legitimate than an affirmative or "spoken" defense. Pegues asserts that this argument impermissibly shifted the burden of proof by implying that a general denial defense was essentially a concession of guilt. Pegues is, of course, correct that it is improper for a prosecutor to make an argument that diminishes or dilutes the State's burden of proof. See, e.g., State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). However, because Pegues failed to object to the prosecutor's remarks at trial, he must demonstrate that these comments were so flagrant and ill-intentioned that the resulting prejudice could not have been neutralized by a curative instruction. McKenzie, 157 Wn.2d at 52. Pegues' claim of prosecutorial misconduct fails under this standard.

As our Supreme Court has recently determined, even where a prosecutor has engaged in far more flagrant and ill-intentioned misconduct, a correct and thorough instruction can be sufficient to cure the resulting prejudice. In Warren, the prosecutor blatantly and repeatedly misstated the State's burden of proof during closing argument. On three occasions, the prosecutor told the jury that "[r]easonable doubt does not mean [that you] give the defendant the benefit of the doubt." Warren, 165 Wn.2d at 24-25. The court had no difficulty in determining that this argument—which "undermined the presumption of

innocence"—was improper. Warren, 165 Wn.2d at 26. The court explained that, "[h]ad the trial judge not intervened, . . . we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error."[11] Warren, 165 Wn.2d at 28. However, because the trial court "interrupted the prosecutor's argument to give a correct and thorough curative instruction," the court determined that any resulting prejudice had been cured. Warren, 165 Wn.2d at 28.

Here, a similar curative instruction would have neutralized any prejudice resulting from the prosecutor's discussion of "spoken" and "unspoken" defenses. These statements are far less likely to have affected the jury's verdict than the prosecutor's comments at issue in Warren. A simple instruction from the trial court on the State's burden of proof would have been sufficient to remedy any jury misconception regarding the legitimacy of a general denial defense. Because the prosecutor's conduct was not so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by a curative instruction, reversal is unwarranted.

IV

Pegues next contends that the trial court erred by ruling, as a matter of

[11] After defense counsel objected for a third time to the prosecutor's use of this argument, the trial court intervened to issue a lengthy curative instruction. Warren, 165 Wn.2d at 25. The court instructed the jury that the "reasonable doubt" standard required that a defendant be afforded the benefit of the doubt. Warren, 165 Wn.2d at 25. The court explained to the jury that "if you still have a doubt after having heard all of the evidence and lack of evidence . . . then the benefit of that doubt goes to the defendant, and the defendant is not guilty." Warren, 165 Wn.2d at 25.

law, that he was not entitled to a self-defense instruction with regard to the charge of harming a police dog. We agree.

A trial court's refusal to give a jury instruction based on the court's interpretation of the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, the trial court reasoned that, as a matter of law, self-defense applies only to the use of force against persons and not to the use of force against dogs. The court explained that it was unwilling to go "so far as to say the dog is effectively a deadly weapon and an agent of the police." RP (April 7, 2010) at 17. Accordingly, the trial court granted the State's request to preclude Pegues from claiming that he was lawfully defending himself when he stabbed the police dog. The trial court misperceived the law in doing so.

We have long held that a self-defense instruction is warranted where there is evidence that an arresting police officer's use of excessive force created an actual and imminent danger of serious injury or death. See State v. Ross, 71 Wn. App. 837, 842, 863 P.2d 102 (1993); City of Seattle v. Cadigan, 55 Wn. App. 30, 37, 776 P.2d 727 (1989); State v. Westlund, 13 Wn. App. 460, 469, 536 P.2d 20 (1975). Although we have not specifically addressed whether the deployment of a police dog constitutes a use of force by law enforcement officers, we have previously recognized that a dog can be wielded as a weapon for purposes of the Washington criminal code. RCW 9A.04.110(6); State v.

Werner, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010); State v. Hoeldt, 139 Wn. App. 225, 230, 160 P.3d 55 (2007). In Hoeldt, we explained that a "large, powerful dog" may be used as a deadly weapon for purposes of a charge of assault in the second degree.[12] 139 Wn. App. at 230. Moreover, other jurisdictions have recognized that a police dog is an instrument wielded by a police officer. See, e.g., Weekly v. City of Mesa, 888 P.2d 1346, 1352 (Ariz. App. 1994) ("We see no difference between a police officer directing a dog to attack a person and a police officer directing a blow at a person with a baton."). Indeed, although we have not previously addressed the question, several other jurisdictions have explicitly recognized that, under certain circumstances, a person may employ self-defense against the attack of a police dog. See, e.g., Henley v. State, 881 N.E.2d 639, 649 (Ind. 2008); People v. Adams, 124 Cal. App. 4th 1486, 1495-96, 21 Cal. Rptr. 3d 920 (2004).

Here, the evidence adduced at trial clearly demonstrates that the deployment of the police dog against Pegues constituted a deliberate use of force by the arresting officers. As the dog's handler testified, the animal was specifically trained to aid police officers in the apprehension of suspects. The dog was trained, at the direction of a police officer, to bite and hold a suspect evading arrest. Indeed, several officers testified that the Tukwila Police Department classifies the deployment of a police dog as a "use of force" within a

[12] To resolve this case, we need not address whether or under what circumstances a police officer's use of a police dog constitutes the use of deadly force.

"force continuum."[13] RP (April 14, 2010) at 117. Because there is no meaningful difference between a police officer's deployment of a dog and the application of any other form of force, Pegues' right to a self-defense instruction should properly have been evaluated pursuant to the standard utilized to determine whether self-defense may be claimed by a suspect who has resisted arrest. The trial court incorrectly distinguished between the direct application of force by a police officer and an officer's use of a police dog under the officer's control. Thus, the trial court erred in determining, as a matter of law, that a self-defense instruction is never applicable to the charge of harming a police dog.

V

Notwithstanding the trial court's erroneous ruling, the State requests that we affirm the court's decision on alternative grounds. Because the evidence presented at trial does not support Pegues' requested instruction, the State asserts, the trial court properly declined to instruct the jury regarding self-defense to the charge of harming a police dog. We disagree.

Ordinarily, a trial court's refusal to issue a jury instruction based on the evidence in the case is reviewed for abuse of discretion. Walker, 136 Wn.2d at 771-72. A trial court abuses its discretion only where its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). In this case, however, the

[13]According to the Tukwila police officers who testified at trial, the application of pepper spray or a taser is categorized as Level 1, the deployment of a police dog—which may "break the skin"—is defined as Level 2, and the use of deadly force is classified as Level 3.

trial court's ruling precluded any exercise of the court's discretion. As a result of its ruling, the trial court had no opportunity to hear the competing legal arguments of the parties or to evaluate the evidence presented in light of the instruction requested. There was no colloquy on this matter between counsel and the court. Given the absence of a fully-developed record, we are loathe to evaluate the propriety of a discretionary ruling that was never made.

Nevertheless, we note that if evidence exists in the record to support a defendant's theory of the case, the defendant is entitled to have the court instruct the jury on that theory. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995); State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Moreover, when determining whether a requested instruction should have been given, we view the evidence in the light most favorable to the party who requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-46, 6 P.3d 1150 (2000). In order to raise self-defense before a jury, "a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense."[14] State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

In attempting to evaluate the availability of a valid self-defense claim on this record, our review is further hampered by the defendant's repeated

[14] "'[T]here is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue.'" State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (quoting State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). Moreover, this evidence need not be produced by the defendant. Rather, "there need only be some evidence admitted in the case from whatever source which tends to prove [that the defendant acted] in self-defense." McCullum, 98 Wn.2d at 488.

misstatements of the applicable law. Pegues correctly concedes that, when claiming self-defense against an arresting police officer, a defendant must show that he or she faced actual and imminent danger of serious injury or death. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). Indeed, our Supreme Court has repeatedly held that a reasonable but incorrect belief that harm is imminent is insufficient to justify the use of force against an officer. Bradley, 141 Wn.2d 743; State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985). However, contrary to Pegues' assertion in his appellate briefing and at oral argument, a defendant must also produce evidence of an officer's use of excessive force before a claim of self-defense may be presented to the jury. See, e.g., Cadigan, 55 Wn. App. at 37; Westlund, 13 Wn. App. at 466.[15] A contrary rule—whereby a suspect would be permitted to meet a police officer's lawful and nonexcessive use of deadly force with corresponding deadly force—would make for poor public policy indeed. Any person upon whom a police officer trains a firearm is in actual danger of serious injury or death, and, pursuant to Pegues' proposed standard, such a person would be justified in

[15] Not all cases decided since Westlund have articulated the "excessive force" requirement. For instance, in Bradley, our Supreme Court held simply that "a person may claim self-defense and use force to resist only when that person is in actual, imminent danger of serious injury." 141 Wn.2d at 733. However, the court acknowledged the excessive force requirement by quoting Westlund for the rationale supporting the actual danger standard. The court reiterated that the "'arrestee's right to freedom from arrest *without excessive force* that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom.'" Bradley, 141 Wn.2d at 737 (emphasis added) (quoting Westlund, 13 Wn. App. at 467). Indeed, at trial, Pegues' proposed self-defense instruction, based on WPIC 17.02.01, stipulated that Pegues was entitled to use force only if the jury determined that he was in "actual and imminent danger of serious injury from *an officer's use of excessive force*." CP at 48 (emphasis added).

slaying the officer in order to protect himself. This, of course, is not the law. Instead, where an officer's use of force is not excessive, a person has no right to resist an arrest by any means. Westlund, 13 Wn. App. at 466.

Nevertheless, the fact that Pegues overreaches on appeal does not end our inquiry. As an initial matter, there is little doubt that Pegues faced actual danger of serious physical injury during his encounter with the police dog. The 100-pound animal charged at Pegues with "full force." RP (April 14, 2010) at 143. Several witnesses testified that Pegues—who by then had been temporarily immobilized by the taser—was bitten repeatedly around the head and neck. The use of police dogs has caused serious injury and even death. See, e.g., Watkins v. City of Oakland, 145 F.3d 1087, 1090-91 (9th Cir. 1998) (victim of police dog attack sustained severe lacerations, fractures, and tendon damage necessitating two skin graft surgeries); Robinette v. Barnes, 854 F.2d 909, 911 (6th Cir. 1988) (victim of police dog attack bled to death after being bitten on the neck). Considering the evidence in the light most favorable to Pegues, there was sufficient evidence of actual danger of serious injury to support the proposed self-defense instruction.

The State contends that, because police officers are authorized to use deadly force to effectuate an arrest, the use of nonlethal force in such circumstances is, by definition, not excessive. To the contrary, however, our courts utilize an "objective reasonableness" standard to assess claims of

excessive force in the context of arrests. See, e.g., Staats v. Brown, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) (citing Graham v. Connor, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)); Estate of Lee ex rel. Lee v. City of Spokane, 101 Wn. App. 158, 167, 2 P.3d 979 (2000). An officer making a lawful arrest may use any force "*reasonably* necessary to secure and detain the offender, overcome his resistance, prevent his escape, and secure him if he escapes." Smith v. Drew, 175 Wash. 11, 18, 26 P.2d 1040 (1933) (emphasis added). In applying the "test of reasonableness," a court should consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he or she is actively resisting arrest or attempting to evade arrest by flight. Staats, 139 Wn.2d at 774 (quoting Graham, 490 U.S. at 396).

Here, the police dog's handler, Officer Sturgill, testified that he released the dog immediately before Pegues was immobilized by the taser. Although Pegues was being held down by several officers when the dog arrived at the scene, Officer Sturgill testified that, at the time of the dog's release, Pegues was upright, armed, and actively resisting arrest. Officer Sturgill further testified that he arrived at Pegues' location only moments before the dog reached Pegues, and that the entire incident "happened real fast." RP (April 14, 2010) at 124. He testified that, after determining that Pegues was "just protecting himself," he gave the "out" command to call the dog off of Pegues. RP (April 14, 2010) at

124-25. Officer Sturgill testified that the dog had released Pegues and backed away prior to being stabbed.

However, this version of events was contradicted by other witnesses who observed the incident. A store security guard testified that he watched the police "let the K-9 go" after Pegues had been tased and had fallen to the ground. RP (April 12, 2010) at 110. One of the officers who had been preparing to take Pegues into custody testified that Officer Sturgill had sufficient time to order officers to move away from Pegues prior to the arrival of the dog. Other officers at the scene testified that Pegues was still wrestling with the dog when the stabbing occurred or that the dog had let go but was circling Pegues "like he was going to come back in for an arm." RP (April 15, 2010) at 63. No other witness testified that Officer Sturgill ordered the dog to release Pegues at any time during the encounter.

Considering this testimony in the light most favorable to Pegues, there was sufficient evidence of the use of excessive force to support Pegues' proposed self-defense instruction. Although the testimony at trial was conflicting, there was testimony that Pegues was already immobilized by the taser at the time the dog was released and that several officers were already holding Pegues down when the dog began to bite him around his head and neck. Drawing all inferences in favor of Pegues, a jury could find that Pegues neither posed an immediate threat to the safety of the officers nor was actively

resisting arrest at the time the dog was released. Moreover, even were we to assume that Pegues was continuing to resist when the dog was released, given the testimony presented, a jury could find that the use of force became unreasonable when Officer Sturgill failed to immediately recall the dog after Pegues was incapacitated by the taser. Accordingly, on the record before us, Pegues met his burden of producing "some evidence" that deployment of the police dog was done unreasonably and, thus, constituted an excessive use of force.[16] Riley, 137 Wn.2d at 909. Thus, we cannot accept the State's invitation to conclude that the trial court's erroneous ruling constituted harmless error.

VI

Not to be deterred, the State next asserts that, because the evidence adduced at trial supported the issuance of a "first aggressor" instruction, the trial court's erroneous ruling on Pegues' proposed self-defense instruction was, for this reason, harmless. We cannot agree.

Whether to issue a first aggressor instruction based on the evidence adduced at trial is a decision reserved to the trial court's discretion. Walker, 136 Wn.2d at 771-72. Thus, the State again requests that we affirm Pegues' conviction of harming a police dog on the basis of a discretionary ruling that was never made. Essentially, the State would have us determine that, on this record,

[16] Although the evidence in the record before us is sufficient to support Pegues' proposed instruction, it is, of course, a jury question whether the release of the police dog was, in fact, unreasonable and thus excessive under these circumstances. Moreover, the amount of force used by a suspect to resist must be reasonable and proportioned to the injury about to be received. Cadigan, 55 Wn. App. at 37. Whether Pegues' actions in this instance were proportionate to the threat he faced is also a question for the jury.

any reasonable trial court would abuse its discretion by issuing Pegues' proposed self-defense instruction without coupling it with an instruction to the jury regarding the first aggressor rule.[17] We decline to do so.

A first aggressor instruction is appropriate "[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense." Riley, 137 Wn.2d 909-10. However, in this case, such an instruction was never requested. The trial court had no opportunity to assess the evidence and testimony presented in light of this issue. We have no record of such judicial deliberation to review. Nor are we, as an appellate court, well-positioned to conduct such an evaluation in the first instance.[18] Indeed, as our Supreme Court has noted, first aggressor instructions should be used sparingly because other self-defense instructions are generally sufficient to allow the theory of the case to be argued. Riley, 137 Wn.2d at 910 n.2 (quoting State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)). Consequently, it is by no means clear that the trial court would have erred by declining to instruct the jury regarding the first aggressor rule.[19] The trial court's

[17] Pursuant to the first aggressor rule, "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." Riley, 137 Wn.2d at 909.
[18] The State's argument is based on the premise that the jury would have found the facts in the State's favor had it been instructed on the first aggressor rule and, hence, that the trial court's erroneous ruling on the proposed self-defense instruction was harmless. Of course, the jury in this case never considered the question. Courts should be loathe to undercut the right to trial by jury by resorting to overly-expansive views of harmless error. Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277, 279-82 (1995-96).
[19] We make no determination regarding whether, on remand, the trial court should, in exercising its discretion, decide to issue a first aggressor instruction.

erroneous ruling on the availability of a self-defense instruction cannot be deemed harmless on this basis.

Affirmed in part and reversed and remanded in part.

Dwyer, C.J.

We concur:

Spearman, J.

Scleivelas, J.