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OPINIONS AND ORDERS

OTHER DOCUMENTS

ORDER OF THE SUPREME COURT OF WASHINGTON DENYING PETITION FOR REVIEW (SEPTEMBER 22, 2021)

THE SUPREME COURT OF WASHINGTON

DAVID ZAITZEFF,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

No. 99734-9

Court of Appeals No. 80436-7-I

Before: GONZÁLEZ, Chief Justice.

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener (Justice Johnson sat for Justice Madsen), considered this matter at its August 31, 2021, Motion Calendar and entered an order continuing the matter to the October 4, 2021, *En Banc* Conference. After further consideration of this matter, the Department unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 22nd day of September, 2021.

For the Court

/s/ González
Chief Justice

MANDATE OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON (OCTOBER 5, 2021)

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

DAVID ZAITZEFF,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

No. 80436-7-I

King County Superior Court No. 19-1-02010-1 SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on April 5, 2021, became the decision terminating review of this court in the above entitled case on October 5, 2021. An order denying a petition for review was entered in the Supreme Court on September 22, 2021. This case is mandated to the Superior Court from which the appeal was taken for further proceed-

ings in accordance with the attached true copy of the decision.

cc: Noah E Weil
James Wayne Herr
Taymur Gasanovich Askerov
Richard Edward Greene
Hon. Laura Inveen

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 5th day of October, 2021.

/s/ Lea Ennis
Court Administrator/
Clerk of the Court of Appeals,
State of Washington, Division I

OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON (APRIL 5, 2021)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID ZAITZEFF,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

No. 80436-7-I

Division One

Published Opinion

Before: CHUN, Judge., COBURN, and Smith, Judges.

CHUN, J.

David Zaitzeff walked around Seattle's Green Lake Park with a sheathed sword hanging from his neck. The City of Seattle charged him with violating Seattle Municipal Code (SMC) 12A.14.080(B) for carrying a "dangerous knife." Zaitzeff challenged the constitutionality of this ordinance under article I, section 24 of the Washington Constitution and the Second Amendment to the United States Constitution, which challenge

the municipal court rejected. The municipal court reserved ruling on Zaitzeff's necessity defense, suggesting that it was denying the defense unless more proof came to light during trial. Zaitzeff then agreed to a stipulated facts bench trial. The municipal court found him guilty. Zaitzeff appealed to the superior court, which affirmed. A commissioner of this court then granted Zaitzeff's petition for discretionary review. We hold that while Zaitzeff's sword is constitutionally protected, as applied here, SMC 12A.14.080(B) does not violate either the state or federal right to bear arms. We also hold that the municipal court did not violate Zaitzeff's Sixth Amendment[1] right to present a defense by rejecting his necessity defense. As a result, we affirm.

I. Background

In May 2018, Zaitzeff walked around Green Lake Park with a sheathed sword hanging from his neck. A citizen called 911. The caller said Zaitzeff was wearing a thong, approaching women, and taking photos of them. When police officers arrived, they confirmed he had a sword, which measured about 24 inches long. Zaitzeff acknowledged he was aware of the ordinance against fixed blade knives and that he was not hunting, fishing, or going to or from a job requiring a sword. The officers took the sword and cited him.

The City charged Zaitzeff with unlawful use of weapons under SMC 12A.14.080(B). Zaitzeff moved to dismiss the charge, challenging the ordinance as unconstitutional as applied to his case. The municipal

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[1] U.S. Const. amend. VI.

court denied the motion, concluding that the sword is not a constitutionally protected arm.

Zaitzeff informed the court and the City that he planned to assert a necessity defense. The City moved in limine to prohibit introduction of the defense and all evidence related to it. The court requested an offer of proof from Zaitzeff. He explained that he carried the sword because he had been assaulted in the past. But he conceded that "[t]here was no one imminently threatening me that particular day, no." The court reserved ruling on whether it would allow Zaitzeff to raise the defense, saying that it could revisit the issue if testimony showed that Zaitzeff faced an imminent threat around the time at issue. Zaitzeff then agreed to a bench trial with stipulated facts. The court did not revisit the issue of the necessity defense. And it found Zaitzeff guilty as charged.

Zaitzeff appealed to superior court, claiming that the ordinance is unconstitutional as applied to him, that the trial court violated his right to present a defense under the Sixth Amendment, and that insufficient evidence supported the guilty finding. The superior court affirmed. First, applying intermediate scrutiny, it determined that Zaitzeff had not met his burden of showing that the ordinance violated his constitutional rights under either Washington or United States constitution. It noted that insufficient evidence supported a finding that a sword is traditionally or commonly used as a weapon of self-defense. Next, it determined that the trial court correctly decided that Zaitzeff's offer of proof did not support a necessity defense. And finally, it concluded that sufficient evidence supported the conviction.

Zaitzeff sought discretionary review before this court on the issues of the constitutionality of the ordinance and his ability to present a defense. A commissioner of this court granted review.

II. Analysis

A. The Constitutionality of SMC 12A.14.080(B) as Applied to this Case

Zaitzeff says that as applied here, SMC 12A. 14.080(B) violates article I, section 24 and the Second Amendment. The City responds that neither constitutional provision protects his sword as an arm. And it adds that even assuming such protection, the ordinance is constitutional as applied. We conclude that as applied here, the ordinance does not violate either constitution.

We review de novo constitutional issues. *City of Seattle v. Evans,* 184 Wn.2d 856, 861–62, 366 P.3d 906 (2015). "We presume that statutes are constitutional and place 'the burden to show unconstitutionality . . . on the challenger.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting *In re Estate of Hambleton,* 181 Wn.2d 802, 817, 335 P.3d 398 (2014)). In an as-applied constitutional challenge to an ordinance, a party claims that application of the law to the specific context of their actions is unconstitutional. *Id.* at 862. "'Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.'" *Id.* (internal quotation marks omitted) (quoting *City of Redmond v. Moore,* 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004)).

Under article I, section 24 of the Washington Constitution, "[t]he right of the individual citizen to bear arms in defense of [themselves], or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Under the Second Amendment to the United States constitution, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller,* the United States Supreme Court held that "the inherent right of self-defense has been central to the Second Amendment right." 554 U.S. 570, 628– 29, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008). The Supreme Court applied the Second Amendment to the states through the Fourteenth Amendment in *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010).

SMC 12A.14.080 provides, "It is unlawful for a person to: . . . B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm." A dangerous knife is "any fixed-blade knife and any other knife having a blade more than 3 1/2 inches in length." SMC 12A.14.010. Exceptions apply to SMC 12A.14.080(B) for using a knife for fishing, hunting, or occupational purposes, and carrying a knife to one's home or work in a secure wrapper. SMC 12A.14.100.

1. Whether the federal or state constitution protects Zaitzeff's sword

Zaitzeff says that a sword is constitutionally protected because it is a traditional arm. He asserts that a sword has been historically used for self-defense. The City parries by contending that a sword is an offensive tool of war, not one commonly used for self-defense.[2] We conclude that the federal and state constitutions protect Zaitzeff's sword as an arm.

a. Federal case law

In *Heller*, the United States Supreme Court addressed a District of Columbia statute banning the possession of handguns in the home. 554 U.S. 570. The Court recognized arms as "'[w]eapons of offense, or armour of defence,'" and "'anything that a [person] wears in [their] defense, or takes into [their] hands, or useth in wrath to cast at or strike another.'" *Id.* at 581 (first alteration in original) (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed. 1773) (reprinted 1978); 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)). The Court said that the Second Amendment protects weapons "'in common use at the time'" of the founding.[3] *Id.* at 627 (quoting

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[2] The City seems to conflate the inquiry of whether a sword is an arm traditionally or commonly used for self-defense with that of whether Zaitzeff was in fact using his sword for self-defense and whether such conduct was justified. The two inquiries are distinct and only the former is at issue. Also, Zaitzeff never asserted self-defense.

[3] *See Evans,* 184 Wn.2d at 865 (In *Heller,* "the Supreme Court defined the term 'arms' to encompass all bearable arms that

United States v. Miller, 307 U.S. 174, 179, 59 S. Ct. 816, 818, 83 L. Ed. 1206 (1939)). And the Court noted that "'[i]n the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" *Id.* at 624–25 (second alteration in original) (quoting *State v. Kessler,* 289 Ore. 359, 368, 614 P.2d 94 (1980) (citing G. NEUMANN, SWORDS AND BLADES OF THE AMERICAN REVOLUTION 6–15, 252–254 (1973)). The Court held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 624–25.

Heller addresses handguns[4] and offers no explicit guidance on swords.[5] But *Heller's* definitions of arms

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were common at the time of the founding and that could be used for self-defense").

[4] In *Caetano v. Massachusetts*, the Supreme Court made clear that the scope of Second Amendment protection reaches beyond firearms. ___ U.S. ___, 136 S. Ct. 1027, 194 L.Ed.2d 99 (2016). There, the Court addressed the constitutionality of a statute banning stun guns. *Id.* The Court held that the Second Amendment protects stun guns even though they were not in common use at the time of the founding. *Id.* at 1027–28.

[5] Before *Heller*, one court addressed "swordlike" weapons: In a case involving a defendant who carried two sais on his belt "to be prepared," the Court of Appeals of Texas indicated that the Second Amendment does not grant the defendant "the right to carry 'swords' upon his person in public in the manner and for the purpose stated." *Masters v. State*, 653 S.W.2d 944, 945–46 (Tex. App. 1983), *aff'd*, 685 S.W.2d 654 (Tex. Crim. App. 1985). And an oft-cited 19th century case, *State v. Workman*, 35 W. Va. 367, 14 S.E. 9, 11 (1891), states that the Second Amendment must:

> be held to refer to the weapons of warfare to be used by the militia, such as *swords*, guns, rifles, and muskets,—arms to be used in defending the state and civil

suggest that the Second Amendment protects swords as arms. Historically, swords have been weapons of offense used to strike at others. And while law-abiding citizens do not typically carry swords for lawful purposes today, as further discussed below, swords were common at the time of founding.

b. State case law

In *Evans,* the Washington Supreme Court held that neither the state nor federal constitutions protected the appellant's paring knife. 184 Wn.2d at 873. The court said that "arms" requires that the instrument be a weapon. *Id.* at 865. The court held that under both article I, section 24 and the Second Amendment:

> [T]he right to bear arms protects instruments that are designed as *weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense.* In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that *a weapon does not*

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liberty,—and not to pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls.

(Emphasis added). But the case does not involve a sword.

Heller then altered the landscape of Second Amendment jurisprudence. Yet few cases post-*Heller* seem pertinent to the inquiry here. One is *State v. DeCiccio*, 315 Conn. 79, 128, 105 A.3d 165 (2014), which holds that the Second Amendment protects dirk knives as arms. This opinion further discusses *DeCiccio* below. The other is *State v. Montalvo*, which holds, with little analysis, that the Second Amendment protects the right to possess a machete in the home for self-defense. 229 N.J. 300, 323, 162 A.3d 270, 284 (2017).

> *need to be designed for military use to be traditionally or commonly used for self-defense.* We will also consider the weapon's purpose and intended function.

Id. at 869 (emphasis added).

Evans discusses two cases from other jurisdictions in reaching its conclusion: In *State v. Delgado,* 298 Or. 395, 403, 692 P.2d 610 (1984), the Oregon Supreme Court held that the Second Amendment as well as article I, section 27 of the Oregon constitution protects switchblades.[6] In *State v. DeCiccio,* 315 Conn. 79, 128, 105 A.3d 165 (2014), the Connecticut Supreme Court held that under *Heller,* the Second Amendment protects dirk knives[7] as arms. *Evans* distinguishes these cases by emphasizing that a paring knife's primary purpose is culinary and not for self-defense. 184 Wn.2d at 872.

In *DiCiccio,* the court noted, "as a general matter, fixed, long blade '[k]nives have long been part of American military equipment.'" 315 Conn. at 120 (alteration in original) (quoting KNIVES AND THE SECOND AMENDMENT, 47 U. MICH. J.L. REFORM 167, 192–93 (2013)). The court also noted that, "in New England, the typical choice for persons required to own a bayonet or a sword was the sword." *Id.*

Dirk knives and swords are similar. The court in *DiCiccio* noted that the "double-edged dirk used in early nineteenth century" essentially became "a short

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[6] Article I, section 27 of the Oregon constitution is analogous to Washington's article I, section 24. *Evans,* 184 Wn.2d at 868.

[7] A dirk knife is a long, thrusting dagger, similar to, but smaller than, a sword.

sword." 315 Conn. at 94 (quoting E. JANES, THE STORY OF KNIVES (1968) at 55, 67). The court also noted that a "naval dirk" is described as a "companion to and substitute for the sword." *Id.* at 94–95 (quoting H. PETERSON, AMERICAN KNIVES: THE FIRST HISTORY AND COLLECTORS' GUIDE (1958) at 95–101). The court said that "dirk knives bear a close relation to the bayonet and the sword, and have long been used for military purposes." *Id.* at 122–23.

As law-abiding citizens traditionally used swords for self-defense, we conclude that both constitutions protect Zaitzeff's sword as an arm.[8]

2. Whether SMC 12A.14.080(B) is constitutional as applied to this case

Zaitzeff says that strict scrutiny applies to the analysis here and that the ordinance passes neither strict nor intermediate scrutiny. The City responds that a "reasonably necessary" standard applies to the article I, section 24 issue, and that the ordinance meets that test. And the City says that intermediate scrutiny applies to the Second Amendment issue, and that the ordinance is substantially related to an important government interest. We agree with the City.

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[8] "In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life . . . a knife was a constant necessity." *Delgado,* 298 Or. at 401 (citing three books by H. PETERSON: ARMS AND ARMOUR IN COLONIAL AMERICA, 1526–1783 (1956); AMERICAN KNIVES (1958); DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD (1968)).

a. Article I, section 24

"When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first." *State v. Surge*, 160 Wn.2d 65, 70, 156 P.3d 208 (2007).

"The right to bear arms under the state constitution is not absolute but is instead subject to 'reasonable regulation.'" *State v. Jorgenson,* 179 Wn.2d 145, 154, 312 P.3d 960 (2013) (internal quotation marks omitted) (quoting *City of Seattle v. Montana,* 129 Wn.2d 583, 593, 919 P.2d 1218 (1996), abrogated by *Yim v. City of Seattle,* 194 Wn.2d 682, 451 P.3d 694 (2019)). "[A] constitutionally reasonable regulation is one that is 'reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.'" *Id.* at 156 (quoting *Montana,* 129 Wn.2d at 594). "We 'balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.'" *Id.* (alteration in original) (quoting *Montana,* 129 Wn.2d at 594).

As applied to this case, SMC 12A.14.080(B) is a constitutionally reasonable regulation under article I, section 24. In *Montana,* the Washington Supreme Court addressed an older, but functionally similar, ordinance prohibiting the carrying of dangerous knives. 129 Wn.2d at 589. The court concluded that the paring knife at issue was not a constitutionally protected arm, but it held that even if it was protected, the ordinance was constitutional under article I, section 24. *Id.* at 590–91, 593–95. The court stated:

> Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and

> good order. Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed.

Id. at 595. Likewise, an ordinance prohibiting the carrying of 24-inch swords in a public park in Seattle is reasonably necessary to protect public safety and welfare and is substantially related to the goal of preventing sword-related injuries and violence.[9] *See id.* at 592–93 (noting that "street crime involving knives is a daily risk" and that "SMC 12A.14.080 furthers a substantial public interest in safety").

b. Second Amendment

The United States Supreme Court has yet to say how to determine the level of scrutiny for as-applied challenges under the Second Amendment. *Jorgenson*, 179 Wn.2d at 159. In *Heller*, the Court rejected rational basis review and an "interest-balancing" approach. *Heller*, 554 U.S. at 628 n.27, 635. The Court held that the handgun law at issue there was unconstitutional "[u]nder any of the standards of scrutiny." *Id.* at 628.

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[9] Zaitzeff says that the City cannot claim that the ordinance is for the purpose of public safety, given that the City's regulation of firearms is limited compared to its regulation of dangerous knives. He says that this regulatory structure encourages firearm ownership and he emphasizes that firearms are more dangerous than swords. But as the City points out, RCW 9.41.290 preempts cities from enacting laws relating to firearms unless specifically authorized to do so.

In *Kitsap County v. Kitsap Rifle & Revolver Club,* we noted that to determine the appropriate level of scrutiny in Second Amendment cases, we ask "'(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right.'" 1 Wn.App.2d 393, 416, 405 P.3d 1026 (2017) (quoting *Silvester v. Harris,* 843 F.3d 816, 821 (9th Cir. 2016)); *see also Heller v. District of Columbia,* 670 F.3d 1244, 1257 (D.C. Cir. 2011) (*Heller II*). The result of that inquiry

> "is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. That is what was involved in *Heller*. A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate."

Kitsap Rifle, 1 Wn.App.2d at 416 (quoting *Silvester*, 843 F.3d at 821). "[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Heller II*, 670 F.3d at 1257. In Second Amendment cases, "many courts have adopted intermediate scrutiny when evaluating restrictions on gun possession by particular people or in particular places." *Jorgenson,* 179 Wn.2d at 160.

First, the ordinance does not strike close to the core of the Second Amendment right. The core of the Second Amendment right is "the right of law-abiding,

responsible citizens to use arms in defense of hearth and home." *Heller,* 554 U.S. at 635; *see also Drake v. Filko,* 724 F.3d 426, 436 (3d Cir. 2013) ("the core of the right conferred upon individuals by the Second Amendment is the right to possess usable handguns *in the home* for self-defense"). While the ordinance does affect the ability of law-abiding citizens to carry dangerous knives for self-defense in public, it does not apply within the home. *See Jorgenson,* 179 Wn.2d at 158 ("Jorgenson also possessed the firearms while driving, rather than in the home, 'where the need for defense of self, family, and property is most acute.'" (quoting *Heller,* 554 U.S. at 628)); *cf. Young v. State,* ___ F.3d ___, 2021 WL 1114180, at *35 (9th Cir. Mar. 24, 2021) ("Indeed, we can find no general right to carry arms into the public square for self-defense.").

And second, the ordinance does not impose a severe burden on Zaitzeff's Second Amendment rights. Zaitzeff says the ordinance serves as a sweeping ban on his right to bear arms because it contains no self-defense exception or a permitting or licensing scheme. But the ordinance does not completely ban the possession of swords. Most importantly, it does not apply within the home. And among other exceptions, it allows one to purchase a sword and, in a secure wrapper, carry it home, carry it to be repaired, and carry it to abodes or places of business. SMC 12A.14. 100. Prohibiting Zaitzeff from carrying his sword in Green Lake Park does not severely burden his Second Amendment rights to warrant strict scrutiny.[10] Given

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[10] Zaitzeff claims that strict scrutiny applies because the Second Amendment right to bear arms is a fundamental right. *See State v. Sieyes,* 168 Wn.2d 276, 287, 225P.3d 995 (2010) (finding the Second Amendment right a fundamental right); *State v. Haq,*

the foregoing, we apply intermediate scrutiny. *See New York State Rifle & Pistol Ass'n, Inc. v. Cuomo,* 990 F. Supp. 2d 349, 366 (W.D.N.Y. 2013), *aff'd in part, rev'd in part,* 804 F.3d 242 (2d Cir. 2015). ("although addressing varied and divergent laws, courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context.").

A law survives intermediate scrutiny if it is "'substantially related to an important government interest.'" *State v. Sieyes,* 168 Wn.2d 276, 276, 225 P.3d 995 (2010) (quoting *State v. Williams,* 144 Wn.2d 197, 211, 26 P.3d 890 (2001)).

Preventing crime and ensuring public safety are important government interests. *See United States v. Salerno,* 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) ("the Government's general interest in preventing crime is compelling"); *Schall v. Martin,* 467 U.S. 253, 264, 104 S. Ct. 2403, 2410, 81 L.Ed.2d 207 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." (quoting *DeVeau v. Braisted,* 363 U.S. 144, 155, 80 S. Ct. 1146, 1152, 4 L.Ed.2d 1109 (1960))); *Kitsap Rifle,* 1 Wn.App.2d at 417 ("The County has

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166 Wn. App. 221, 253–54, 268 P.3d 997 (2012), *as corrected* (Feb. 24, 2012) ("Strict scrutiny . . . applies to laws burdening fundamental rights or liberties."). The Supreme Court "has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." *Heller II,* 670 F.3d at 1256. Zaitzeff has cited no opinion, aside from the dissent in *Evans,* applying strict scrutiny in this context. We decline to apply strict scrutiny. *See United States v. Miller,* 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (holding in a Second Amendment case that the defendant "cannot invoke strict scrutiny through a fundamental rights theory.").

an important government interest in public safety"); *State v. Spencer,* 75 Wn.App. 118, 124, 876 P.2d 939 (1994) ("People have a strong interest in being able to use public areas without fearing for their lives" and a statute prohibiting carrying a weapon in a manner that warrants alarm "protects this interest by requiring people who carry weapons to do so in a manner that will not warrant alarm."); *see also Libertarian Party of Erie County v. Cuomo,* 970 F.3d 106, 128 (2d Cir. 2020) ("As it is 'beyond cavil that . . . states have substantial, indeed compelling, governmental interests in public safety and crime prevention,' we consider only 'whether the challenged laws are substantially related to the achievement of that governmental interest.'" (alteration in original) (quoting *New York State Rifle,* 804 F.3d at 261)).

And the ordinance is substantially related to crime prevention and public safety. Swords are weapons. Carrying one around a public park can lead to violence or injuries. Prohibiting people from carrying swords around public parks addresses such risks. While *Heller* does not list parks as sensitive areas, the public safety concerns underlying the sensitive area distinction also apply here, particularly the concern about protecting children. 554 U.S. at 626 ("nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings").

Zaitzeff says that the holdings of *Heller* and *Caetano* require us to find the ordinance unconstitutional. But both cases are distinguishable. *Heller* involved a sweeping ban on all handguns within the home. 554 U.S. at 628–29 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is over-

whelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute."). And in *Caetano,* the Court did not rule on the constitutionality of the law banning stun guns; rather, it held that the lower court erred by concluding that stun guns were not constitutionally protected arms and remanded the issue. 136 S. Ct. 1027.

We conclude that, as applied here, the ordinance operates within the bounds of constitutionality because it is a reasonable regulation and satisfies intermediate scrutiny.

B. Sixth Amendment Right to Present a Defense

Zaitzeff says that the trial court violated his Sixth Amendment right to present a defense when it prohibited his necessity defense, and that a new trial is necessary as a result. He asserts that the trial court erred by ruling on the affirmative defense in limine. He also contends that the trial court failed to discuss all elements of the defense and failed to view the offer of proof in the light most favorable to him. The City responds that the trial court did not err, given that Zaitzeff had not offered any proof of an imminent threat. We agree with the City.

We review de novo a claim of a denial of the Sixth Amendment right to present a defense. *State v. Ward,* 8 Wn.App.2d 365, 370, 438 P.3d 588, *review denied,* 193 Wn.2d 1031, 447 P.3d 161 (2019). Under the Sixth Amendment, "'[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *Id.* at 370–71 (quoting *Chambers v.*

Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973)).

To raise the defense of necessity:

> [T]he defendant must prove, by a preponderance of the evidence, that (1) they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.

Id. at 372.

When a defendant asserts the necessity defense in response to a charge of unlawful possession of a firearm, they must prove that they reasonably believed that they were facing some imminent threat of violence. *State v. Parker,* 127 Wn. App. 352, 355, 110 P.3d 1152 (2005). Though it appears that Washington courts have not addressed this rule in cases involving the unlawful carrying of dangerous knives, we apply the same rule here, given the similarity of the crimes. Zaitzeff does not dispute that this imminent threat standard applies to the charge here.

Before trial, Zaitzeff sought to raise a necessity defense. The City moved in limine to prohibit introduction of the defense and all evidence related to it. The court asked Zaitzeff if he faced an imminent threat at the time of the incident. He responded "[t]here was no one imminently threatening me that particular day, no." The court then requested an offer of proof. He explained that he carried the sword because he had been assaulted in the past. The court began to

rule in favor of the State, but then reserved ruling. It said that it could revisit the issue if later testimony established an imminent threat. Zaitzeff then agreed to a stipulated facts bench trial and presented no evidence. There was no such testimony to establish such a threat and the court did not revisit the issue.

Zaitzeff relies on *Ward* to contend that the trial court erred by ruling on the necessity defense in limine. But *Ward* does not support his position. Rather, it holds that the denial of the necessity defense in limine was error where the defendant "met his initial burden of showing that he would likely be able to submit a sufficient quantum of evidence on each element of necessity." *Ward,* 8 Wn.App.2d at 376. *Ward* is distinguishable because the defendant there did not concede the absence of a required element of the defense. Also, the trial court here did not rule on the necessity defense before trial. It reserved ruling on the issue and stated that it could revisit the issue if testimony at trial established an imminent threat.

Zaitzeff also contends that the trial court erred by not considering all four elements of the necessity defense. But Zaitzeff said that he was not facing an imminent threat of harm on the day of the incident. *See Parker,* 127 Wn. App. at 355 (noting that the defendant "also testified that he was not under any specific or imminent threat of harm at any time on April 9."). Once the trial court noted the absence of a required element—imminent harm—it was not required to decide whether he had satisfied any of the other elements of the defense.

Finally, Zaitzeff contends that the trial court should have viewed the evidence in the light most favorable to him, and it erred in not doing so. But

viewing the evidence in the light most favorable to Zaitzeff, he did not satisfy a requirement for the necessity defense. As stated above, he conceded he was not facing imminent harm.

We affirm.

/s/ Chun
Judge

WE CONCUR:

/s/ Coburn
Judge

Smith
Judge

ORDER OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON (AUGUST 19, 2019)

SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF KING

DAVID ZAITZEFF,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

No. 19-1-02010-1 SEA

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

Before: Laura C. INVEEN, Judge.

This appeal came on regularly for oral argument on August 17, 2019 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Right to Bear Arms: Defendant has not sustained his burden of showing under the intermediate scrutiny test that Seattle's ordinance prohibiting carrying a fixed-blade knife, as applied to his conduct of carrying

a 24-inch sword at a public park, violates his constitutional right to bear arms under the state of federal constitution. Evidence was insufficient to find that such a weapon is traditionally or commonly used as a weapon of self-defense.

6th Amendment claim: The trial court correctly determined that defendant's offer of proof did not support the defense of necessity.

Sufficiency of Evidence: Sufficient evidence was presented to support defendant's conviction for Unlawful Use of Weapons. The exceptions set out in SMC 12A.14.100 are not elements of the crime which must be proved.

IT IS HEREBY ORDERED that the above cause is:

AFFIRMED;

COSTS

REMANDED to Seattle Municipal Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

/s/ Laura C. Inveen
Judge

Dated: August 19, 2019

JUDGMENT AND SENTENCE ORDER OF THE MUNICIPAL COURT OF THE CITY OF SEATTLE (JANUARY 2, 2019)

IN THE MUNICIPAL COURT OF
THE CITY OF SEATTLE

THE CITY OF SEATTLE,

Plaintiff,

v.

DAVID ZAITZEFF,

Defendant.

No. 637319

Before: C. Kimi KONDO, Judge.

☒ Suspended Sentence 24 Months

The defendant has been found guilty of the following charges by

☒ finding of the court

The court imposes the following sentence:

Count 1, charge of unlawful use of weapons 12A. 14.080(B) 364 days in jail and suspends 364 days; and a fine of $5000 with $5000 suspended.

Fine includes statutory assessments

☒ CCFE	☒ PSFE
COST	$43.300
BRTH	$25-Community service
REST	$300 prob/fee
Total	$368.00

Payment of financial obligations and timely reporting to jail/alternative confinement are conditions of suspended/deferred sentence. Failure to comply may result in additional jail time.

CONDITIONS OF DEFERRED OR SUSPENDED SENTENCE

NCLV ☒ Commit no criminal violations of law.

CADD ☒ Report change of address to the Court within twenty-four hours of obtaining a new address.

NOWP ☒ Possess no weapons.

☒ Forfeit weapons by stayed pending appeal

MHDT ☒ Mental health evaluation and complete follow-up treatment as required by treatment agency

CSHS ☒ Perform 16 Hours of Community Service Within ___ days. Other: Forfeiture of Sward stayed pending appeal

PROB ☒ The above-conditions to be monitored by The Pro Action Services Division

Defendant to abide by all of their rules and regulations. Defendant to report

☒ immediately following Court or

DEFENDANT TO PROVIDE INFORMATION IN BOX
/s/ David Zaitzeff Defendant signature 2811 75th Pl SE #406 Defendant Mailing Address MI 98040 206-232-2649 City Zip Phone Number

Dated: 1/2/19

/s/ C. Kimi Kondo
Judge/Pro Tem

/s/ Jamie Leigh Richardson
Prosecuting Attorney
WSBA # 54199

/s/ David Zaitzeff
Defense Attorney (Pro Se)

BENCH RULING ON SECOND AMENDMENT (NOVEMBER 8, 2018)

SEATTLE MUNICIPAL COURT

CITY OF SEATTLE,

Plaintiff,

v.

DAVID ZAITZEFF,

Defendant.

Cause No. 637319

Verbatim Report of Proceedings
November 8, 2018 Volume I

Before: Mary LYNCH, Presiding Judge.

[November 8, 2018 Transcript, p. 6]

> . . . City to respond on the merits because, as the Court notes in the Court's decision in that federal case, Mr. Zaitzeff did not have standing to challenge that statute as unconstitutional at that point.
>
> The Court called it a pre-enforcement challenge, which is exactly what it is. And constitutional law has been very clear that defendants cannot bring pre-enforcement challenges to criminal statutes because they don't have standing unless

there's an imminent risk that they're going to be charged under that statute.

Now, this federal case was happening in September of 2016, and so the City's position in that federal case was that Mr. Zaitzeff was not at any imminent risk of having this statute enforced against him. Now this case was charged in May of 2018, that's almost two years later. I think that supports the City's position that, at that time there were no charges pending and the City had no intention of bringing any charges against Mr. Zaitzeff.

Also, it is not the City's own prerogative when to bring charges and when not to bring charges. First, a defendant would have to be contacted by police and police would have to refer that to our office for charges to be filed; even then, our office would look at that and decide whether they wanted to file charges.

So at the time of the lawsuit, it was absolutely true that there were no pending charges under the statute in our office against Mr. Zaitzeff and at that time, we had no anticipation that there would ever be charges against Mr. Zaitzeff.

Now, there was a material change in circumstances when Mr. Zaitzeff was contacted by police and they referred this case to our office and we chose to file charges. I don't think that those positions are inconsistent and, therefore, the City believes that judicial estoppel is not appropriate in this case.

THE COURT: Okay. Mr. Weil?

MR. WEIL: Well, I guess we disagree on what's inconsistent. I'm not sure what material change of circumstances the City is referring to. Mr. Zaitzeff said in his complaints that, "I'm going to carry a sword in Seattle," and then carried the sword in Seattle. I don't know in what instance that it would change from he wasn't at risk for prosecution to whether he is.

There are different factors involved because this is a Second Amendment issue, and so pre-enforcement challenges are a little bit different on fundamental rights. Again, if the City had gone to a hearing on the merits, I don't think we're here today. Either the ordinance is found unconstitutional or it was and I don't have my other argument to make, but the City dodged the question in their . . . .

[. . .]

. . . was clear that swords, being a Revolutionary War weapon and still used today—it's still carried by Lady Justice and a host of cultures and backgrounds—is a traditional arm, one of the most traditional ones in human history. So under that test of a traditional protected arm, a sword would qualify.

So the three issues for the Court on the Second Amendment analysis is:

1. Was the weapon carried for self-defense, which is the core of the Second Amendment purpose, or was it carried for some other purpose, like to menace somebody or to rob them?
2. Was the weapon a traditional protected arm?

3. And if those first two are met, does the ordinance at issue substantially burden the Second Amendment right to carry the weapon?

In this case the answers are, yes, it was carried for self-defense; yes, it's a traditional arm; yes, the ordinance does utterly ban weapons of this type. The three main cases cited by the defense, and in some places cited by the City are *Heller*, and then *Seattle vs. Evans*, and then *Caetano v. Massachusetts*.

Heller quoted the start of modern Second Amendment jurisprudence, it talked about the fundamental purpose and the fundamental right of Second Amendment, which was . . . .

[. . .]

THE COURT: I mean, I don't know that I've ever seen anybody walking down the street carrying a sword.

MR. WEIL: Sure. The sword is not a bad choice, honestly; and that's kind of like the irony of this whole position from the City is that if Mr. Zaitzeff wants to have something available for self-defense he should buy a gun, which, to me, is a absurd position because guns are much more lethal and much more dangerous than a sword is. A sword is visible. It allows people to know that I am armed, but I'm not—it's not likely to go off or hurt somebody by accident. It's a good—

THE COURT: Yes, but aren't they just alarming to people?

MR. WEIL: As opposed to—

THE COURT: If you see somebody walking down a street—and he was carrying this sword around his neck, correct?

MR. WEIL: Right. It was visibly worn; there's no concealment.

THE COURT: Was he fully clothed?

MR. WEIL: He was not fully clothed.

THE COURT: Don't you think somebody might find that alarming to see somebody walking down the street dressed or undressed as he was, carrying a sword around their neck?

MR. WEIL: I don't think how dressed somebody is any . . . .

[. . .]

. . . constitutionally protected arm, and we are disputing actually that it is a historically protected arm. The City believes that the relevant question for the Court is whether it was historically used for self-defense. And as Your Honor noted, there's a difference between using a weapon for self-defense and using it in a time of warfare. And while the City would agree that swords historically have been weapons and have been used in warfare, it's dubious as to whether they are something that has historically been used in self-defense. Unfortunately, there's very little case law in Washington addressing swords specifically, but there are many cases that address this statute and that explain knives specifically.

The City's position is that the logic in those cases that address the constitutionality of the explained knives, as it pertains to the Second Amendment,

extends to the sword in this case. However, the City did note in their brief a case from the Texas Court of Appeals, and it has very similar facts to this case. The defendant in that matter was found at a busy intersection. He was carrying a sword with him. The Court in that case noted the defendant had indicated that he was carrying it for self-defense purposes. The Court in that case noted that the Second Amendment didn't contemplate a right to carry a sword in situations such as that.

And, Your Honor, defense counsel did touch on the fact that there is a greater interest in restricting or a greater right to restrict access to arms in sensitive places. This case did happen in a public park. It was at Green Lake. There were many people around.

Your Honor inquired as to whether it would be alarming for somebody under the circumstance to be seen with a sword. Your Honor, that is very alarming, that is why this case is here today. Somebody did call 911 on Mr. Zaitzeff because they were alarmed by the weapon that he was carrying. Swords are incredibly dangerous weapons.

The City's other position is even if the sword is a constitutionally protected arm, defense still has the burden of showing that this prohibition violates the constitution. In *State v. Jorgenson* and *State v. Montana* make clear that the Second Amendment analysis regarding regulations on weapons, and specifically fixed blade knives, is a balancing test between regulations that "Are reasonable and necessary to protect the public safety

or welfare and the degree to which it frustrates that purpose of the constitutional provision."

The Court addressed this issue in *State v. Montana*. They concluded in a plurality opinion that this specific ordinance prohibiting carrying fixed blade knives is a reasonable regulation under the Constitution. And the standard that the Court would use to consider that is intermediate scrutiny.

THE COURT: Mr. Weil, did you address *Riggins* in your brief?

MR. WEIL: Which case, Your Honor?

THE COURT: *Seattle v. Riggins*, 63 Wn.App 313–

MR. WEIL: I don't believe either party cited it.

THE COURT:—where it indicates in 12A.14.080(B), regulating the carrying of certain knives is a reasonable restriction of the right to bear to arms.

MR. WEIL: What year did it come out, Your Honor?

THE COURT: 1991. Yeah, Your Honor, the case law has changed a lot since *Heller* in 2008, and *Evans* and *Jorgenson* are all post *Heller* and *Caetano* as well, and that's really like a modern Second Amendment jurisprudence. We're not asking the Court to find those cases wrongly decided or anything like that but at this point, from the United States Supreme Court on down, the analysis of the Second Amendment has changed. And, yes, there are certainly cases in the past. The City referenced a case from Texas from the '80s that banned sword-like weapons, okay; but currently, in the year 2008 and forward, Courts have a

applied a new analysis as passed down from the United States Supreme Court. It's a different analysis. It clarifies what the Second Amendment holds, and what its holding is, and what its fundamental . . .

[. . .]

. . . knives for utility purposes mostly, I would think, on the battlefield. There might be some traditional use, but certainly not in the last hundred years would it be considered a traditionally protected arm.

Now, Mr. Zaitzeff indicated that—and I will take Mr. Weil's word for it—that he was carrying the sword in self-defense, but I don't think we established what standard you used for self-defense in this case when somebody is claiming it where they're not actually using the weapon. When you use a weapon, you can look at the circumstances and say, "Yes, this is being used in self-defense." He's not using the weapon. He's just carrying it preemptively.

MR. WEIL: Your Honor, can I make an offer of proof them to what the testimony would be, that he has been assaulted before, he's been actually assaulted—

THE COURT: I think that was in your brief, wasn't it? Yeah.

MR. WEIL: He's been threatened with assault and he's been robbed before, and the purpose of carrying the sword was a deterrent. It was available for self-defense if he needed it, but it also was visible. This is what the testimony would provide, that

it was visible so that would-be assailants—and he's been a victim before—would not attack him, and he would testify that he has never been assaulted while carrying the sword, that it has never happened, and that it has been an effective deterrent for world-be assailants. So it's not that it's over-the-top use of force; it's that it's there and visible so that he doesn't have to use it.

THE COURT: All right. Well, then that's not use of force. That's not self-defense. It's deterrence, which is something different from self-dense.

MR. WEIL: Well, it's both. It's an option to–

THE COURT: No, it's not both.

MR. WEIL: Well, it's an option to defend himself if he needs it, but it's also the hope that he doesn't need to.

THE COURT: Self-defense is actually defending yourself. Deterrence is something very, very different. So if he's using it for deterrence, then the Second Amendment wouldn't apply anyway because he's not using it for self-defense.

MR. WEIL: Well, my offer of proof is that it's both, (a) self-defense if necessary, and also the hope that he wouldn't have to use it in the first place.

THE COURT: Okay. Well, it's not self-defense if he's not actually using it for self-defense. It's deterrence, but it's not self-defense.

And the third part of the Second Amendment analysis does the ordinance ban weapons of this type, which it clearly does. So the *Heller* case seems to support the—the cases cited by the parties, espe-

cially Mr. Weil. The *Heller* case involved, as I said, a weapon in the home being used for self-defense or that is in the home for self-defense. It's not for deterrence; it's for self-defense.

The Evans (sic) case, as I indicated is a stun gun, which that case doesn't support the defense position because all that did was vacate a State ruling because it was wrongly applied.

And then the *Evans* case which is a paring knife which they indicated a paring knife is a utility knife. It's not traditionally used for a lawful purpose such as self-defense. It's a paring knife. The man was using it to—if he was hunting or whatever it was he was doing.

So I think the statute that would apply would be the *Riggins* case, which is cited in the ordinance which states that, in the annotations subsection B regulating the carrying of certain knives is a reasonable restriction of the right to bear arms, and that's *Seattle v. Riggins*, 63 Wn.App 313.

In this case, what was the knife that he was carrying? It was a sword, which is not traditionally used for self defense except maybe on a battlefield a hundred or two hundred years ago, but certainly not a traditional weapon of self-defense in an urban setting. So I do find that the City's restriction which makes it unlawful for a person to knowingly carry, concealed or unconcealed, on such person any dangerous knife or carry on such person any deadly weapon other than a firearm to be constitutional under the Second Amendment.

Is this case currently set for trial?

MR. WEIL: It is. You're hearing this tomorrow.

THE COURT: Okay.

MR. WEIL: Your Honor, not to step on Mr. Carr's toes, I do have a few clarifying questions just in case there is an appeal or Mr. Zaitzeff, pro se, proceeds with his own thing.

Is the Court finding that the sword in this case is not a traditional arm under the Second Amendment?

THE COURT: It's not a traditional arm under the Second Amendment.

MR. WEIL: Okay. And is the Court not making a finding or rejecting the defense's position that he was carrying for both self-defense and deterrence?

THE COURT: I am finding that in the manner that he was carrying it and by your offer of proof that it was, at the time he was stopped with it, it was being carried for deterrence because there was no actual self-defense involved.

MR. WEIL: So then it would only be viable for . . . .

[. . .]

BENCH RULING ON EVIDENTIARY MOTIONS (JANUARY 2, 2019)

SEATTLE MUNICIPAL COURT

CITY OF SEATTLE,

Plaintiff,

v.

DAVID ZAITZEFF,

Defendant.

Cause No. 637319

Verbatim Report of Proceedings
January 2, 2019 Volume I

Before: Mary LYNCH, Presiding Judge.

[January 2, 2019 Transcript, p. 21]

> . . . You're going to have to have advice of counsel about that. You're going to have to ask them about the incident and what they saw, and if the report is inconsistent, then you can use the report to impeach them, but you cannot—I'm not going to tell you how to conduct your examination of a police officer. It's going to have to be within the scope of the direct examination of the City.

No. 14, motion excluding reference to the constitutionality of 12A.14.080(B). I think that's been litigated before, hasn't it? What's the issue here?

MS. RICHARDSON: Your Honor, yes, that was litigated at a motions hearing on November 8. That motion was denied by Judge Lynch, and so the City is just asking that any reference to that be excluded at trial and that we do not re-litigate that issue.

THE COURT: No, we're not going to re-litigate. And Judge Lynch found the statute, 12A.14.080(B), to be constitutional?

MS. RICHARDSON: Yes, Your Honor.

THE COURT: Okay.

MR. ZAITZEFF: I would note that I have a question for reconsideration on my motions in limine with reasons.

THE COURT: But, Mr. Zaitzeff, I am not going to reconsider somebody else's motion.

MR. ZAITZEFF: That's fine.

THE COURT: At this point, you can raise any issues—

MR. ZAITZEFF: On appeal

THE COURT:—on appeal, if you need to, but I can't reconsider someone else's ruling.

Motion prohibiting introduction of necessity defense at trial. Was this something that was addressed at the motion's hearing, Ms. Richardson?

MS. RICHARDSON: This was not, Your Honor.

MR. ZAITZEFF: I object to this motion.

THE COURT: Hold on.

Ms. Richardson?

MS. RICHARDSON: It was not addressed at the motions hearing.

THE COURT: And what's the basis for your argument?

MS. RICHARDSON: Your Honor, Mr. Zaitzeff has indicated to me on a number of occasions and defense counsel at our previous trial date noted that they would be raising a defense of necessity to this charge. The City's position is that necessity is not an appropriate defense to this charge.

My understanding is that Mr. Zaitzeff's argument will be that he was carrying a sword to deter crime against him. The City's argument is that the alleged harm that could have occurred was too attenuated and necessity requires it to be imminent harm, that is for serious bodily harm or even potentially death.

The City's position is that there's case law, while it's not exactly addressing the issue of a weapon like a sword, the case law does address unlawful possession of firearms. In those cases, Washington Courts have been clear that just the generalized notion that there could potentially be harm to somebody is not imminent enough to warrant a necessity defense, there must be some imminent harm that is threatened.

THE COURT: All right. I agree with the City; that's always been the Court's understanding. But I need to know from Mr. Zaitzeff whether he was

claiming self-defense or was there someone who was imminently threatening him at the time that this incident happened.

MR. ZAITZEFF: There was no one imminently threatening me that particular day, no, that's correct.

THE COURT: All right. Well, then the necessity defense isn't available to you. It has to be something that in the pressure of the situation that causes you to believe that breaking the law in the particular circumstance under the events that are present at that time that you felt it necessary to carry a sword, say for self-defense or there was something that was happening around you, but I don't know that I can see any basis for you to use that defense at this time.

And, Mr. Weil, I caution you that you're volunteering information. I'm not sure that that's within your role. I think he needs to consult with you. I'm not sure that, at this point, you should be initiating.

MR. WEIL: Okay. We did talk about if he had objections to the City ones that he could talk with me.

THE COURT: Yeah, I know, but you were initiating the discussion with him which I can understand if you're counsel of record, but he's expected to act as his own attorney.

MR. WEIL: All right, Your Honor, I apologize. I will wait for him to tap me on the shoulder.

THE COURT: All right. So, Mr. Zaitzeff?

MR. ZAITZEFF: May I consult with my attorney for a few minutes?

THE COURT: You may.

MR. ZAITZEFF: May I speak?

THE COURT: You may.

MR. ZAITZEFF: I have a Sixth Amendment right to present my defense, and the proper time to decide the appropriateness of the necessity defense is at the time of jury instructions, not before.

THE COURT: All right. Ms. Richardson?

MS. RICHARDSON: Your Honor, the City would inquire whether Mr. Zaitzeff has a offer of proof regarding whether there will be any evidence that's that presented in this case that would suggest that there was eminent harm that was presented—

THE COURT: All right. So, Mr. Zaitzeff, can I have an offer of proof?

MR. ZAITZEFF: Do I have an offer of proof?

THE COURT: An offer of proof supporting the request for the use of this defense.

MR. ZAITZEFF: There was a generalized threat against me, and I would like the jury to understand that and the Judge to consider allowing that.

THE COURT: Well, an offer of proof is a request for a specific threat at the time that this incident happened, so do you have that?

MR. ZAITZEFF: Well, what I can say is that I am walking in public. It happens to me several times a year that someone threatens or hits me in some way. I don't necessarily know on which particular day it's going to happen in advance.

THE COURT: Do you have police reports supporting that you've been assaulted in the past?

MR. ZAITZEFF: Yes, I do, many of them.

THE COURT: And have those ever resulted in anybody being prosecuted?

MR. ZAITZEFF: No, because, in general, the person assaults me or threatens me and they disappear and I never see them again.

THE COURT: And so you just, in your mind, have a belief that because something like this—

MR. ZAITZEFF:—has happened in the past, it's likely to happen again in the further, that's correct.

THE COURT: All right. Ms. Richardson?

MS. RICHARDSON: Your Honor, I have received a couple of police reports from Mr. Zaitzeff, and that is part of the City's motion to exclude those. I don't believe that Mr. Zaitzeff is going to have witnesses that will be able to testify to those incidents; they could would come purely through his testimony.

However, again, the generalized "there could possibly be a harm threatened when I go to the park on this day" is not eminent enough for a necessity defense; and if there is no other evidence of more imminent harm, then I don't think the necessity defense is appropriate.

THE COURT: All right. Well, I'm looking at *State vs. Parker*, and in a similar situation a defendant was carrying a gun. He said he had been shot nine months earlier and so he believed that there

was a threat to his person, which is why he was carrying a gun when he was arrested in the Parker case, and the Court upheld the refusal to instruct the jury based on his belief that he was going to be hurt in the future.

What they said is that the defendant was not under any unlawful and present threat of serious bodily injury or death on the date of the incident, and so I don't see that this is really any different than the case law that was cited in defense brief. Do you have contra case law past the 2005 holding in 127 Wn.App 352?

MR. ZAITZEFF: No, I do not.

THE COURT: So the Court's going to deny the introduction of the necessity defense, or, actually, I'll reserve it. If there's testimony that ends up showing that Mr. Zaitzeff was immediately threatened by a specific person that day or around the time then the Court can revisit this, but I'm not sure that you're going to be entitled to the use of the defense on instruction.

Motion to admit defendant's statements to Seattle police officers. I would grant that. Those are admissions or statements by party.

MR. ZAITZEFF: I wish to object to that given the fact that they did not give me a Miranda warning, and also—

THE COURT: Well, hold on. Are you talking about pre-custodial statements?

MS. RICHARDSON: Your Honor, Mr. Zaitzeff was never actually taken into custody on this case.

The officers contacted him and then sent him on his way.

MR. ZAITZEFF: I was detained and not free to leave.

THE COURT: Well, that would have been something that would have been raised in a previous motion hearing if you had that issue come up.

But, at this point, what's the City's position with respect to the admissibility of any of his statements?

MS. RICHARDSON: Your Honor, the City's position is that all the statements would be admissible because, while the officers conducted a Terry stop, they never took him into custody and he was never in custody at any point during their conversation with him.

THE COURT: Okay. All right. Well, at this point, the Court is going to allow the statements absent any previous request for any hearing. Judge Lynch did a motions hearing, and that would have been the time to raise any 3.6 issues on probable cause for stop and arrest or any request to suppress statements on a 3.5, so the Court is going to allow the City to elicit statements made by the defendant to the police officers.

Motion to exclude argument regarding the relative safety of various weapons.

MS. RICHARDSON: Your Honor, if you'd like me to expound on this?

THE COURT: Yes, I don't know what this is about.

MS. RICHARDSON: So, Your Honor, this is in anticipation of Mr. Zaitzeff's motion to introduce a

necessity defense. I've received a number of documents from Mr. Zaitzeff, news articles and other things and emails from Mr. Zaitzeff indicating that he would like to argue the relative safety of self-defense weapons that would be wielded. Part of proving his necessity defense would be to prove there's no reasonable legal alternative.

The City is anticipating argument from Mr. Zaitzeff regarding guns being more dangerous than swords or knives being more dangerous than swords, and so the City's motion would be to exclude any of that argument because I believe that it would confuse the jury and it's not relevant to the case at hand.

THE COURT: All right. Mr. Zaitzeff?

MR. ZAITZEFF: If I'm able to present the defense of necessity, then you might actually go further and agree with that motion so I will not oppose it, although I object to the denial of the defense of necessity.

THE COURT: All right. So the Court's going to grant the City's motion because I'm not likely at this point. And even if I were to allow necessity, the use of other weapons isn't relevant. The only thing that we're going to be concerned about is the weapon that was used or brandished or shown or whatever on this date, so any other issues with respect to use of or the relative safety of is not relevant.

So on the defense motions, Mr. Zaitzeff is going to testify, so I'll put him down as a witness then. And, Mr. . . .

[. . .]

Additional material from this filing is available in the Clerk's Office.