IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 16-1-01001-5
	)	
v.	)	RESPONSE TO STATE'S MOTION
	)	TO PRECLUDE NECESSITY DEFENSE
KENNETH WARD,	)	AND TO STRIKE WITNESSES
	)	
Defendant.	)	
_____	)	

A. PROCEDURAL FACTS

Defendant Kenneth Ward is charged in this case with burglary 2º, criminal sabotage, and criminal trespass 2º. He has notified the State that to these charges, he intends to present the defense of necessity. The State has filed a motion in limine[1] to preclude that defense and to strike all of the witnesses the defense intends to call in support of that defense. For the reasons set forth below, Mr. Ward urges this court to deny the State's motion, and to permit him to present evidence on the issue on the defense of necessity and to offer a jury instruction on that defense.

[1]Although the State has styled its pleading as a response to defense of necessity and defense witnesses, it seeks to preclude the presentation of the defense and all witnesses who would testify in support of that defense. As such, it is in fact a motion in limine and will be referred to as such.

B. SUBSTANTIVE FACTS

Kinder Morgan operates a pipeline which carries tar sands oil from Alberta, Canada to Burlington, Washington. On October 11, 2016, Kenneth Ward entered the locked premises of Kinder Morgan in Burlington. He proceeded to cut a chain locking access to a block valve, and turned the wheel controlling the valve to shut the flow of tar sands oil. He replaced the chain with a new one, and left a bouquet of sunflowers atop the chain. Before Mr. Ward arrived at the Kinder Morgan location, a colleague called Kinder Morgan to advise that Mr. Ward would soon be at the Kinder Morgan location to shut the pipeline by closing the block valve.

C. OFFER OF PROOF

Kenneth Ward makes the following offer of proof in response to the motion in limine by the State of Washington.

Mr. Ward has been involved with environmental issues for more than forty years. During that time, he pursued unsuccessfully legal avenues to impact environmental issues. These measures included drafting legislative bills and testifying before legislative committees, intervening in administrative proceedings on issues of energy efficiency, field coordination in electoral efforts, working for the adoption of platform planks at the national level, lobbying, public education, litigation coordination, public advocacy,

participation in model communities, and testifying before governmental agencies. None of these efforts achieved effective results.

As years of active participation in the environmental movement passed, Mr. Ward came to understand that the issue of climate change would require other than incremental changes to arrest global climate degradation. Ultimately, as a result of his many years and many unsuccessful efforts, he realized that other avenues were necessary to publicize and resist the threat posed by global climate change. He concluded that direct action was necessary to accomplish these goals.

Mr. Ward became aware that tar sands oil represented an elevated level of risk to global climate. The action at the Kinder Morgan location in Burlington on October 11, 2016 was undertaken because tar sands oil from Alberta was arriving in Burlington via the pipeline operated by Kinder Morgan.

Mr. Ward will call expert witnesses in his defense.[2] Richard Gammon, Cecilia Bitz, and Eric De Place are experts in the field of climate science. Their testimony will include

[2]Although Mr. Ward has endorsed seven possible expert witnesses in support of his necessity defense, he is likely to call only three or four of them. The list was expanded to accommodate schedules of the experts in light of the uncertainty in the date that trial will begin. Counsel will endeavor to ensure that overlap between experts at trial is minimized.

how fossil fuel emissions affect climate; anticipated global temperature increase, and the effect of such increase on ecosystems and human life; rise in sea level; the Paris Agreement on climate change; what people need to do in order to stop the advance of global warming, encompassing both current and projected warming in Washington state, ocean acidification, and impacts on local ecosystems and residents; and economics. Tom Hastings, Martin Gilens, Mollie Pepper, and Bill McKibben are experts in the fields of sociopolitics and conflict resolution. They will testify as to the efficacy of civil disobedience, and to the limitations on what an individual can otherwise do to impact public policy.

D. MEMORANDUM OF LAW

WPIC 18.02 sets forth the common law defense of necessity, as recognized in State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979). See also, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.02 (3d Ed). The instruction states the elements of the defense:

> Necessity is a defense to a charge of (fill in crime) if (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
>
> (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
>
> (3) the threatened harm was not brought about by the defendant; and
>
> (4) no reasonable legal alternative existed.

> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

A trial court must instruct on a party's theory of the case if the law and the evidence support it; failing to do so is reversible error. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004, 11 P.3d 825 (2000) (citing State v. Birdwell, 6 Wn. App. 284, 297, 492 P.2d 249, review denied, 80 Wn.2d 1009 (1972)). In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility. May, supra, 100 Wn. App. at 482 (citing State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1034 (1999)). If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. Moyer v. Clark, 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

The first element of WPIC 18.02 is that the defendant reasonably believed the commission of the crime was necessary

to avoid or minimize a harm. Mr. Ward will testify to his belief. It is for the jury, not the judge, to determine whether his belief is reasonable.

The second element is that the harm sought to be avoided (climate change and its effects) is greater than the harm resulting from a violation of the law (trespass, cutting of two chains, and temporary interruption of tar sands oil flow). In other words, the jury must engage the comparison between factors such as substantial species extinction and destruction of eco-systems, versus property rights of the pipeline and oil companies. The jury will be able to assess this comparison with the assistance of the expert testimony in climate science.

The third element is that the threatened harm was not brought about by the defendant. There is no suggestion, even by the State, that Mr. Ward has brought about the risk of harm to global climate.

The fourth element of WPIC 18.02 is that no reasonable legal alternative existed. As with the first element of the instruction, it is for the jury, not the judge, to apply the reasonableness requirement to the question of whether legal alternatives exist. “Reasonable” here means something different than “available.” “Reasonable” means that the other means would be effective. W. LaFave and A. Scott, *Criminal*

Law, 381-383 (1972); Arnolds and Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974). The offer of proof by Mr. Ward presents prima facie evidence that the other legal methods have proved so ineffective in changing the political response to his issues that a reasonable social reformer would feel compelled to resort to another strategy. On the question of "reasonableness" the jury is entitled to weigh the testimony of Mr. Ward and the defense experts as to his futile attempts to address those issues by legal means.

A Washington case which discusses the phrase "no reasonable alternative" supports Mr. Ward's position. State v. Parker, 127 Wn. App. 352, 354, 110 P.3d 1152, 1153 (2005). Parker was charged with felon in possession of a firearm. Parker said that he carried the firearm because he had been shot the previous July and his assailants were still at large. The Court of Appeals said that in order to show he had a reasonable alternative, Parker had to demonstrate "that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative." Id. at 355. Under the reasoning of Parker, Mr. Ward would be entitled to the jury instruction. He tried alternatives and presented evidence of the "illusionary benefits" of these alternatives. In view of the

offer of proof, the necessity defense would be appropriately submitted to the jury for consideration in application of WPIC 18.02.

E. CONCLUSION

For the reasons above, Kenneth Ward urges this court to deny the State's motion in limine, and to permit him to present evidence on the issue on the defense of necessity and to offer a jury instruction on that defense.

Dated this _____ day of January, 2017.

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