71607-7

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Court of Appeals
Division I
State of Washington

71607-7

NO. 71607-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HELMER, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberly Prochnau, Judge
The Honorable Patrick Oishi, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE SELF-DEFENSE INSTRUCTIONS WERE INSUFFICIENT AND DENIED HELMER A FAIR TRIAL.

Noting that in both State v. Allery[1] and State v. Janes,[2] the defendant killed the individual responsible for the abuse that led to PTSD, the State seeks to convert these facts into a firm rule: for self-defense, a defendant is not entitled to have jurors consider PTSD unless the defendant is accused of using force against the source of that disorder. See Brief of Respondent, at 15-16.

The State cites no authority for its proposed limitation, which would do significant damage to the subjective component of self-defense, converting the inquiry into a largely objective exercise. The State's limitation would undermine Washington's well-established rule on subjectivity that says, "the jury is 'entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

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1 State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984).

2 State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993).

The State's position may be influenced by State v. Riker, 123 Wn.2d 351, 354-358, 869 P.2d 43 (1999), although it does not cite that decision in its brief. Riker was convicted of possessing and delivering cocaine and sought to use expert testimony on one subset of PTSD – battered women's syndrome – to argue the syndrome left her unable to resist what she described as a third party's duress to commit the drug offenses. Id. at 354-358. There was no evidence, however, that the third party had been physically violent toward Riker. The two merely had a business-oriented relationship. Id. at 360. The Supreme Court concluded that Riker's proposed novel use of expert testimony on battered women's syndrome had not yet achieved general acceptance in the scientific community under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and also was inadmissible under ER 702. Id. at 358-366. As part of its discussion, the Court expressly distinguished duress, a defense generally treated with skepticism under the law, from a claim of self-defense. Id. at 365-366.

Neither Riker, which presented a unique set of facts and an extremely novel defense theory, nor any other opinion limits the use of PTSD to negate criminal intent to cases where the alleged victim previously battered the defendant. See State v. Warden, 133

Wn.2d 559, 561, 564, 947 P.2d 708 (1997) (PTSD caused by abusive son relevant to diminished capacity defense to homicide where defendant killed someone other than son); State v. Hamlet, 133 Wn.2d 314, 316-319, 944 P.2d 1026 (1997) (PTSD caused by military and police service admitted as relevant to diminished capacity defense for assaults on wife and family friend); State v. Bottrell, 103 Wn. App. 706, 712-718, 14 P.3d 164 (2000) (PTSD unrelated to actions of homicide victim relevant to diminished capacity defense to intentional murder), review denied, 143 Wn.2d 1020, 25 P.3d 1019 (2001).

While Walden, Hamlet, and Bottrell all involve PTSD in conjunction with diminished capacity, that defense – like self-defense – negates the element of criminal intent. Compare Bottrell, 103 Wn. App. at 712 (evidence of diminished capacity demonstrates inability to form intent necessary for crime) with State v. Acosta, 101 Wn.2d 612, 615-619, 683 P.2d 1069 (1984) (evidence of self-defense negates element of criminal intent). There is no requirement that the alleged victim be the source of the defendant's PTSD as a prerequisite to the jury's consideration of

that evidence. The State's proposed limitation, without supporting authority, should be rejected.[3]

The State also argues WPIC 17.02 is always correct in every self-defense case. See Brief of Respondent, at 11, 16. As support, the State notes that WPIC 17.02 attained judicial approval some 20 years ago in State v. Goodrich, 72 Wn. App. 71, 863 P.2d 599 (1993), review denied, 123 Wn.2d 1029, 877 P.2d 695 (1994), partially abrogated on other grounds as noted in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). But in Goodrich the defendant did not argue that WPIC 17.02 fails to expressly notify jurors they are to consider, in addition to the facts and

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[3] Like Judge Prochnau, many courts have recognized the relevance and admissibility of PTSD evidence for self-defense claims where the alleged victim was not the source of the defendant's PTSD. See, e.g., U.S. v. Simmonds, 931 F.2d 685, 687-688 (10th Cir.), cert. denied, 502 U.S. 840, 112 S. Ct. 129, 116 L. Ed. 2d 97 (1991); Seidel v. Merkle, 146 F.3d 750, 752, 755-757 (9th Cir. 1998), cert. denied, 525 U.S. 1093, 119 S. Ct. 850, 142 L. Ed. 2d 704 (1999); Shepard v. State, 847 P.2d 75, 76-77, 83 (Alaska Ct. App. 1993); State v. Mizell, 773 So.2d 618, 619-621 (Fla. Dist. Ct. App. 2000); State v. Purcell, 107 Ohio App. 3d 501, 669 N.E.2d 60, 61-63 (Ohio Ct. App. 1995), review denied, 75 Ohio St. 3d 1422, 662 N.E.2d 25 (1996); Commonwealth v. Pitts, 740 A.2d 726, 732-734 (Pa. Super Ct. 1999); but see Bryant v. State, 271 Ga. 99, 515 S.E.2d 836, 838 (Ga. 1999) (evidence of prior abuse by non-victim inadmissible because too difficult for prosecution to rebut); Osby v. State, 939 S.W.2d 787 789-791 (Tex. Ct. App. 1997) (evidence limited to abuse at hands of victim based on statutory restriction imposed by legislature and precedent).

circumstances known to the defendant, the defendant's past *experiences*. See Goodrich, 72 Wn. App. at 74, 76-77.

The Goodrich court merely found WPIC 17.02 sufficient despite a more detailed defense-proposed instruction that also would have told jurors to consider Goodrich's "past and present knowledge, her beliefs, the relative size and strength of the participants, [the decedent's] words and actions prior to the incident, and all other factors bearing on the reasonableness of the defendant's actions and her apprehensions at the time as they appeared to her." Id. at 74. It is also worth mentioning that the instruction used at Goodrich's trial included the language in WPIC 17.02 – missing at Helmer's trial – which instructs jurors to consider all facts and circumstances known "prior to the incident." See id. at 74.

Goodrich is not authority for a point of law never argued or considered. Moreover, a self-defense WPIC can be correct under almost all circumstances but still insufficient under the particular facts of a case by failing to make the legal standard manifestly clear. State v. Irons, 101 Wn. App. 544, 552-553, 4 P.3d 174 (2000) (citing State v. Myers, 96 Wash. 257, 263, 164 P. 926 (1917)). This is precisely what happened at Helmer's trial.

The State notes that even without an instruction expressly informing jurors they should consider Helmer's prior experiences when assessing his subjective and objective fear, defense counsel was able to argue that jurors should consider this evidence. Brief of Respondent, at 17. Without such an instruction, however, jurors could not properly rely on this evidence. See CP 135 ("The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions."). Jurors' questions asking if they could consider what occurred prior to Helmer firing the gun, and asking if they could consider his PTSD specifically, indicate they did not know this evidence was properly considered in deciding whether he acted in self-defense. To quote Wanrow, 88 Wn.2d at 237, "of what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied?"

Defense counsel proposed the language that became instruction 22. As discussed in the opening brief, there are two deficiencies with this instruction. First, it does not inform jurors they are to consider the defendant's past experiences. Second, even if WPIC 17.02 were otherwise sufficient to cover past experiences,

defense counsel failed to request that part of the WPIC directing jurors to consider facts and circumstances "prior to the incident."[4] See Brief of Appellant, at 25-27.

It was because of these deficiencies that Judge Prochnau was required to tell jurors – in response to their questions – that they were to consider Helmer's PTSD in deciding his guilt on the charges. And it was because of these deficiencies that defense counsel was ineffective and denied Helmer a fair trial when she proposed the language found in instruction 22.

The State devotes most of its brief to arguing that WPIC 17.02 is sufficient in all self-defense cases. In contrast, it uses only a footnote to argue harmlessness of the omission of that portion of WPIC 17.02 requiring jurors to consider facts and circumstances

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[4] Although Helmer's opening brief describes these deficiencies in instruction 22, the State complains that the brief does not also contain an example of an adequate instruction. See Brief of Respondent, at 21 n.5. Here it is with modifications to instruction 22 highlighted:

> The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident and taking into consideration the person's prior experiences.

known to the person "prior to the incident" in addition to the facts and circumstances known to the person "at the time of the incident." The State argues:

> it is unclear why facts and circumstances known to a person "at the time of" the incident would not include those facts and circumstances known to the person "prior to" the incident. The optional bracketed language "prior to" seems most relevant in battered persons cases, where the defendant's history of abuse by the victim is especially important." Janes, 121 Wn.2d at 249.

Brief of Respondent, at 23 n.7.

The defense agrees that the "prior to" language is extremely important in cases like Janes involving PTSD, although it disagrees there is reason to limit its use to abuse at the hands of the alleged victim. The language is extremely important in any case with a traumatic history resulting in PTSD. And although the State chooses to interpret "at the time of the incident" precisely the same as "prior to the incident," the WPIC committee recognized a distinction based on Allery. See Allery, 101 Wn.2d at 594-595 (instruction telling jurors to evaluate conditions as they appeared "at the time" insufficient; instruction must tell jurors to evaluate all circumstances known "at the time and prior to the incident."); Washington Pattern Jury Instructions, comment to WPIC 17.02

(2008) ("The third paragraph, referring to all facts and circumstances, is based upon State v. Allery . . . .").

Under Allery, merely telling jurors they are to consider circumstances as they appeared "at the time" of the incident implies the focus is on the actual event and not prior happenings. In a case with relevant prior experiences, without the "prior to" language, instruction 22 did not "make the relevant legal standard 'manifestly apparent to the average juror.'" State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting Allery, 101 Wn.2d at 595), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

Finally, the State offers two additional arguments against a finding of ineffective assistance of counsel: (1) defense counsel could not reasonably be expected to modify WPIC 17.02 and (2) jurors were going to reject self-defense in any event because Helmer never expressly testified that he feared injury. Brief of Respondent, at 19-23.

Regarding the first argument, the State cites State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), where the Supreme Court declined to find defense counsel's performance deficient for requesting a then-unquestioned WPIC. But counsel can be faulted

where research would have revealed a flaw in the WPIC. See State v. Kyllo, 166 Wn.2d 856, 865-869, 215 P.3d 177 (2009). Allery itself involved a challenge at the trial court level to a previously unquestioned WPIC. See Allery, 101 Wn.2d at 593-595. And, as discussed above, it has long been recognized that not every WPIC will suffice in every factual circumstance. See Irons, 101 Wn. App. at 552-553. An examination of WPIC 17.02, particularly in light of the language in Allery and Janes, should have revealed the flaw in using an unmodified version of the WPIC in Helmer's case where there was relevant evidence of past experiences.

Moreover, even if this Court were to decline to find fault with defense counsel's failure to modify WPIC 17.02 to expressly include past experiences, there still would be the problem with counsel's failure to demand that portion of WPIC 17.02 telling jurors to consider the circumstances "prior to the incident." Since this failure is inconsistent with the WPIC itself, Studd certainly does not control.

Regarding prejudice, the defense offered substantial evidence of fear justifying, with proper instructions, a jury finding that the State had failed to disprove self-defense beyond a

reasonable doubt. Events unfolded quickly and there was utter pandemonium outside the bar. See 5RP 31, 56, 63-65; 7RP 141-142; 10RP 52-53, 124-125. Helmer could not testify to his precise emotional state because he was experiencing the ill effects of his PTSD – he was confused, events were chaotic, and his memory was very spotty as he dissociated.[5] 13RP 41-46, 53-54, 73-76, 170-171, 201-205. Helmer was, however, able to testify that he must have been frightened for his safety when he reached for his gun. 13RP 170. And Dr. McClung concluded Helmer's actions could indeed have been the product of his fear. 13RP 95-96. Based on the evidence and defense arguments at trial, there is a reasonable probability the deficient jury instructions impacted the outcome.

B. CONCLUSION

Instruction 22 was deficient because it did not make it manifestly apparent jurors were to consider Helmer's past experiences, which would include his PTSD. Moreover, even if the WPIC on which instruction 22 was based suffices to make the legal

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[5] The defendant in Janes did not expressly testify he was afraid, either. In fact, he expressly denied fearing imminent harm. But the surrounding circumstances suggested otherwise. Janes, 121 Wn.2d at 227.

standard manifestly apparent, instruction 22 omits the language focusing jurors on past events.

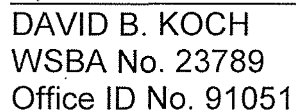
In light of the jurors' questions, the trial court erred in not telling jurors they could consider prior events, including PTSD, when assessing Helmer's guilt. Moreover, defense counsel was ineffective and denied Helmer a fair trial by not demanding adequate instructions at the outset.

For all of the reasons discussed in Helmer's opening brief and above, this Court should reverse his convictions and remand for a new trial.

DATED this 3rd day of June, 2015.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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