NO. 45938-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROILAND FERNANDEZ MEDINA,

Appellant.

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

The Honorable John A. McCarthy, Judge

BRIEF OF APPELLANT

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2. The Court's refusal to instruct the jury on self-defense violated appellant's constitutional right to present a defense.

3. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's role in the judicial process.

Issues pertaining to assignments of error

1. Appellant was convicted of first degree burglary arising out of an incident in which an occupant of the allegedly burglarized apartment shot appellant's friend while appellant wrestled with another occupant of the apartment. The trial court excluded evidence that suspected narcotics were found in the apartment. Where the excluded evidence was relevant to the res gestae of the incident, to establish bias of the State's witnesses, and to impeach the thoroughness of the police investigation, did its exclusion violate appellant's rights to present a defense and to confront witnesses?

2. Where there was some evidence in the record from which the jury could have found appellant reasonably believed he was about to

be injured and he used no more force than necessary to defend himself, did the court's refusal to instruct the jury on self-defense violate appellant's constitutional right to present a defense?

3. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On April 9, 2013, the Pierce County Prosecuting Attorney charged appellant Roiland Fernandez Medina with first degree burglary, alleging that Fernandez Medina or an accomplice was armed with a deadly weapon or intentionally assaulted someone, and with second degree assault. The State further alleged that Fernandez Medina or an accomplice was armed with a deadly weapon, either a bat or a knife, during both offenses. CP 1-2; RCW 9A.52.020(1); RCW 9A.36.021(1)(c); RCW 9.94A.825; RCW 9.94A.530. The State charged Jorge Perez Barroso and Barbaro Gener Ono as Co-Defendants. CP 1.

The case proceeded to jury trial before the Honorable John A. McCarthy. The jury found Fernandez Medina guilty of first degree burglary and guilty of unlawful display of a weapon, as a lesser included offense of second degree assault. The jury did not answer the special interrogatories regarding the deadly weapon allegations. CP 159-63. The court imposed a mid-standard-range sentence of 48 months on the burglary conviction, concurrent with a 364-day sentence on the unlawful display charge. CP 242. Fernandez Medina filed this timely appeal. CP 249.

2. Substantive Facts

On April 7, 2013, Snezhana Stetsyuk and DeAngelo White were visiting their friends Dijon Wiley and Kyla King at the Willow Village Apartments in Lakewood. 7RP[1] 343. Travis Swan, a neighbor, was there also, as was Wiley's two-year-old sister. 7RP 346. White was licensed to carry a firearm, and he was armed with a handgun, as he always was. 7RP 345, 397; 8RP 505. That day he was carrying a .44 caliber revolver. 8RP 505.

Sometime in the evening Wiley stepped outside to smoke a cigarette, and he started yelling at someone who had pulled his car in

[1] The Verbatim Report of Proceedings is contained in 14 volumes, designated as follows: 1RP—12/18/13; 2RP—12/19/13; 3RP—1/6/14; 4RP—1/8/14; 5RP—1/9/14 (a.m.); 6RP—1/9/14 (p.m.); 7RP—1/13/14; 8RP—1/14/14; 9RP—1/15/14; 10RP—1/16/14; 11RP—1/21/14; 12RP—1/22/14; 13RP—1/23/14; 14RP—2/21/14.

behind Stetsyuk's car, which was in Wiley's parking space. 7RP 372, 399; 9RP 722. Witnesses identified the man in the car as Roiland Fernandez Medina. 7RP 374; 8RP 499; 9RP 723.

Wiley was pretty rabid about keeping people out of his parking spot, and he was amped up and angry. 8RP 551-52. His yelling and cursing caused such a commotion that he drew a crowd of onlookers in the apartment complex. 7RP 372-73, 403. When Fernandez Medina tried to explain that he would only be there a few minutes, Wiley replied that he could not park there even a few seconds. 8RP 552. Fernandez Medina complied with Wiley's demand that he move his car, and he left, telling Wiley he would be back. 7RP 376; 8RP 493. Wiley retorted that they would be ready for him. 8RP 500, 555.

The group inside the apartment resumed their activities, eating dinner, hanging out, and playing Xbox. 7RP 407-08; 8RP 503, 512. About 10 to 30 minutes later Fernandez Medina returned with two or three friends, including Lazaro Valle-Matos. 7RP 377; 8RP 505, 642. Stetsyuk looked out the front window and saw one of the men holding a baseball bat on his shoulder. 7RP 381. There was a knocking at the door. Some described it as banging. 7RP 382; 8RP 512, 642. Wiley, who was closest to the door, described it as just a regular knock, like someone coming to visit. 9RP 732, 758.

According to Stetsyuk, White, and King, they shouted to the people at the door that they had a gun and would shoot. They also warned that there was a child inside. 7RP 383; 8RP 523-24, 650. Wiley testified that there was no shouting, however. 9RP 733.

Wiley went to the door and asked who was there. 8RP 516; 9RP 732. When Fernandez Medina answered, Wiley asked "what the F you want?" 9RP 733. Wiley testified that the door was forced open, although he had told police that he opened the door. 9RP 734, 754. King testified that Wiley put his hand on the doorknob, and the door was pushed open. 8RP 643. Wiley admitted it would not take much force to open the door, and Stetsyuk believed that the door came open because it is flimsy. 7RP 383; 9RP 735. Swan testified that Wiley opened the door. 10RP 1069.

When the door opened there was the sound of a slap, following which Wiley and Fernandez Medina began to tussle, moving in and out of the apartment. 7RP 386, 389; 8RP 517, 521. Some witnesses testified that Fernandez Medina hit Wiley, but others did not see who struck the first blow. 7RP 386; 8RP 569, 643-44. Wiley said the hit was more like a brush off than a punch. 9RP 736. Wiley grabbed Fernandez Medina by the shoulders, wrapped his arms around Fernandez Medina's chest, and tried to position himself so he could throw Fernandez Medina to the ground. 9RP 735, 737.

White, who was standing near the refrigerator, kept yelling that he had a license to carry and he would shoot. 7RP 384. As Wiley and Fernandez Medina engaged in this wrestling match, Valle-Matos raised a knife, and White shot him. 7RP 387; 8RP 523, 647. Fernandez Medina, Valle-Matos, and the others with them ran off. 8RP 527; 9RP 741. White called 911, as did King, after first calling her landlord. 7RP 390-91.

Police responded, first contacting four people near a vehicle on a road adjacent to the apartment complex. 7RP 326. Fernandez Medina was kneeling over Valle-Matos, who was lying face down on the ground, bleeding. 7RP 326. Jorge Perez Barroso and Barbaro Gener Ono were with them. Barroso and Ono responded to the officers' commands to get on the ground, but Fernandez Medina kept pleading with the officers to get help for his friend. 7RP 326, 330, 333. One of the officers used a Taser on Fernandez Medina and then placed him in handcuffs. 7RP 330, 334-35. Fernandez Medina, Barroso, and Ono were taken to the police station to be questioned. Valle-Matos was transported to the hospital, where he died from the gunshot wound. 7RP 452; 9RP 851.

Police also responded to the apartment where the shooting occurred. They had everyone exit one at a time, walking backwards with their hands up. 7RP 392, 457. Police then cleared the apartment. 7RP 447.

The forensics detective identified a blood trail from outside the apartment, across the parking lot, to the car where Valle-Matos was found. 9RP 883. He marked the trail with traffic cones and took both close-up and distance photographs of the blood. 10RP 920, 938, 941. More photographs were taken inside the apartment. At trial, the forensics detective showed a photograph of the entryway on which he had drawn circles around spots he believed were blood stains. He had taken no close-up photographs of those marks on the night in question, however, or marked them in any other way. Nor had he done any testing to determine whether the marks were presumptive bloodstains rather than some other substance. 10RP 923, 929, 942, 945. There was evidence at trial that the entryway was filthy, with many substances on the floor, none of which were tested. 10RP 946. There was no indication that the marks circled in the photograph had been disturbed as the occupants of the apartment were removed one by one, walking backward through that area. 10RP 962, 1001, 1003, 1008.

Because witnesses had described seeing a bat, police searched the area near the car and surrounding the apartment complex. 11RP 1217. Witnesses had given conflicting descriptions of the bat, one saying it was brown and another saying it was black or gray. 11RP 1222. No bat matching either description was found, however. 11RP 1217.

In closing, defense counsel argued that the evidence was so inconsistent and so incredible and so incomplete that the jury should return verdicts of not guilty. 12RP 1384. Counsel pointed out that the eyewitnesses' stories did not match and argued that the police jumped to a conclusion and did little to investigate what really happened. 12RP 1384.

Counsel argued further that Wiley did not feel threatened when he opened the door and in fact it was likely he took a step outside to confront Fernandez Medina. 12RP 1393. Wiley testified that he grabbed Fernandez Medina, and if he pulled Fernandez Medina inside the apartment, there was no burglary. 12RP 1394. Moreover, the evidence did not clearly show that the confrontation took place inside. The spots circled in the photograph of the entryway, which the State argued were bloodstains, were never tested and could have been anything. The fact that the detective made no effort to identify the spots as blood stains on the night of the shooting, as he did with the blood trail outside, suggests that they were not in fact blood stains. 12RP 1395-96.

C. ARGUMENT

1. THE IMPROPER EXCLUSION OF RELEVANT EVIDENCE IMPACTED FERNANDEZ MEDINA'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT WITNESSES AGAINST HIM.

Prior to trial, the State moved to exclude evidence of suspected drugs found in Wiley and King's apartment. 7RP 278. A substance was found on a plate underneath a mattress in the apartment. There were two packets of white powder packaged as drugs on the plate with straws and King's EBT card. 7RP 281. The substance was never sent to the crime lab for analysis. 7RP 279. The prosecutor noted, however, that there was evidence the reason Fernandez Medina was at the apartment complex that day was to deliver cocaine to Wiley's neighbor, and he argued that if evidence of drugs in the apartment came in, that evidence should come in as well. 7RP 280.

Defense counsel argued that the drug evidence was admissible as part of the res gestae of the crime, to explore possible bias on the part of the State's witnesses who were never charged with drug offenses, and to challenge the thoroughness of the police investigation. 7RP 281, 290-91. Counsel also noted that there was evidence Wiley was dealing drugs at the apartment complex and argued that could explain why he was so upset that

Fernandez Medina was there. Counsel argued that all the drug evidence should be admitted at trial. 7RP 282-84.

The court ruled that evidence that drugs were found or that there was any drug dealing going on was irrelevant and that the prejudicial effect of such evidence outweighed any probative value. 7RP 291. It limited the defense to cross examining the witnesses as to whether they had consumed alcohol or drugs on the night in question and in general whether they had been offered anything in exchange for their testimony. 7RP 291-92.

At trial during cross examination, White testified that he does not use drugs or hang around with people who do because he is in treatment and does not want to relapse. 8RP 588-89. Defense counsel argued that this testimony opened the door to the evidence of drugs associated with King found in the apartment. 8RP 599. The court ruled that questioning would be limited to whether he saw any drugs that night. 8RP 602. Defense did not pursue that line of questioning.

Both the state and federal constitutions guarantee a criminal defendant the right to present evidence in his own defense. U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

a. Evidence of drugs in the apartment was admissible as res gestae evidence.

Evidence which completes the story of the crime by proving the context of happenings near in time and place is relevant and admissible as res gestae evidence. State v. Grier, 168 Wn. App. 635, 646-47, 278 P.3d 225 (2012). In Grier, the defendant was convicted of second degree murder. The trial court admitted evidence that on the evening of the killing, the defendant had said in a conversation with her son that she could shoot someone if she wanted to, while waving a gun around. Grier, 168 Wn. App. at 640. This Court affirmed, holding that the evidence was properly admitted as res gestae evidence. It was relevant because it completed the story of the crime on trial, making several facts of consequence more probable, including the defendant's possession of a gun at some point in the evening. Id. at 647-48. Testimony about the defendant's brandishing a gun and acting belligerently before the shooting was relevant because it showed a continuing course of action and helped set the stage for her behavior later that night. Id. at 648. The evidence "'explained parts of the whole story which otherwise would have remained unexplained.'" Id. at 649 (quoting State v. Mutchler, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989)).

In the same way, the drug evidence excluded in this case would have completed picture of events leading up to the shooting and the actions on which the charges against Fernandez Medina were based. Evidence that the occupants of the apartment were using drugs could explain Wiley's irrational and disproportionally belligerent response to someone momentarily blocking his parking space. This anger directed at Fernandez Medina would explain why Fernandez Medina felt the need to bring friends when he returned to talk things out with Wiley. Drug use could also explain why Wiley would grab Fernandez Medina and pull him inside the apartment to beat him up. Evidence that Wiley was dealing drugs in apartment complex would also explain his aggressive response when Fernandez Medina showed up to sell drugs next door. The excluded drug evidence would have set the scene for the events that followed and made Fernandez Medina's claim of self-defense more probable.

Because the proposed evidence satisfied the foundational requirement of minimal logical relevancy, it could be excluded only to further a compelling state interest. See Hudlow, 99 Wn.2d at 15-16. The court stated it was excluding the evidence as irrelevant and because any probative value was outweighed by the prejudicial effect of the evidence. 7RP 291. On the contrary, the evidence helped to complete the picture of events and served to counter the State's theory that Fernandez Medina was

the aggressor and entered the apartment with intent to commit a crime. Any concern about potential prejudice to the State's witnesses is not a compelling enough reason to thwart Fernandez Medina's constitutional right to present a defense.

b. The evidence was admissible to demonstrate the bias of the State's witnesses.

A criminal defendant has a constitutional right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). The bias of a witness is always relevant to discredit that witness's testimony. Davis, 415 U.S. at 316. Although a trial court's decision to exclude evidence is reviewed for abuse of discretion, that discretion is limited by the defendant's constitutionally guaranteed right to confrontation. See State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. Denying the defendant his constitutional right to impeach a prosecution witness with evidence of bias is reversible error. Spencer, 111 Wn. App. at 408.

Here, there was evidence that drugs were found in the apartment, which were clearly connected with King, but no drug-related charges were ever brought against her or anyone else in the apartment. Defense counsel

argued that this favorable treatment was relevant to establish bias on the part of the State's witnesses, particularly King and her husband Wiley. CP 51-55.

A similar situation was presented in State v. Kimbriel, 8 Wn. App. 859, 510 P.2d 255, review denied 82 Wn.2d 1009 (1973). There, the Court of Appeals found it was prejudicial error for the trial court to deny the defendant the right to establish a key prosecution witness's bias. Kimbriel, 8 Wn. App. at 865-66. Kimbriel was charged with armed robbery and car theft. He testified that he had acted under duress from one of the other participants, Charles Kaiser, and that he had no advance knowledge that Kaiser had planned the robbery. Id. at 861. In rebuttal, the State called Kaiser, who claimed that Kimbriel had in fact been the chief engineer of the robbery and car theft. Id. at 862. Defense counsel attempted to impeach Kaiser with the fact that he had originally been charged with both robbery and car theft, but the robbery charge had been dismissed. The trial court sustained the State's objection to this impeachment, however. Id. at 862. In addition, the court instructed the jury not to consider the fact that Kaiser had received a deferred sentence on his plea of guilty to car theft when determining his credibility. Id. at 863.

In finding reversible error, the Court of Appeals noted that Kaiser, an active participant in the crime, was a crucial prosecution witness. Therefore, why he was allowed to plead to a reduced charge, why the greater charge was dismissed, and why he received a deferred sentence were legitimate areas of cross examination going to his motive in testifying for the State. Id. at 866. The defendant had a right to develop these matters, and the jury had a right to consider them in assessing the witness's credibility. Id.

In this case, as in Kimbriel, crucial prosecution witnesses had received favorable treatment, in the form of criminal conduct going unpunished. Although King was not a participant in the crime charged in this case, she was clearly connected to drug use in her apartment, as evidenced by the presence of her EBT card on the plate with the suspected narcotics. There was also information that Wiley and King were dealing drugs out of the apartment. CP 54. The defense had a right to explore the fact that none of the State's witnesses was charged with a drug offense, as this related to their motive in testifying for the State, and the jury had a right to consider that evidence in assessing their credibility. See Davis, 415 U.S. at 317-18.

This Court has recognized that "the defendant should be afforded broad latitude in showing the bias of opposing witnesses." Spencer, 111

Wn. App. at 411. The court's exclusion of all evidence relating to drugs found in the apartment and drug dealing violates this fundamental principal.

Because a defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses, any error in excluding such evidence is presumed prejudicial and requires reversal unless the error was harmless beyond a reasonable doubt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). (citing Davis v. Alaska, 415 U.S. at 318). That presumption cannot be overcome in this case. There were significant inconsistencies in the witnesses' testimony, and there was evidence that the police investigation was incomplete. Had the jury been presented with evidence attacking the credibility of the State's witnesses, it might have had a reasonable doubt about the State's theory of events. The court's erroneous exclusion of this evidence denied Fernandez Medina a fair trial, and reversal is required.

c. The evidence was admissible to impeach the thoroughness of the police investigation.

A key element of the defense was the incompetent nature of the investigation, particularly the failure of the police to collect and test potentially relevant evidence found at the scene. As trial counsel argued, the sloppy police work suggested that police developed a theory early on

and failed to conduct further investigation necessary to explore other possibilities. CP 54; 12RP 1384, 1395-96.

It is a legitimate defense tactic to discredit the caliber of the investigation, and evidence of sloppy police work in gathering evidence is generally relevant and admissible. State v. Rafay, 168 Wn. App. 734, 803, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013), cert. denied, 134 S.Ct. 170 (2013). Here, had the jury known that the police discovered suspected drug evidence in the apartment but failed to send it for analysis and further failed to follow up on information that Wiley and King dealt drugs from the apartment, there would have been additional reason to doubt the State's theory of the case. The court's exclusion of this relevant evidence was erroneous and impacted Fernandez Medina's right to present a defense.

The right to present evidence in one's own defense is a fundamental element of due process of law. Maupin, 128 Wn.2d at 924. The criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the 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").

Because the drug evidence was relevant to establish res gestae, to demonstrate the bias of the State's witnesses, and to impeach the thoroughness of the police investigation, the court's exclusion of the evidence denied Fernandez Medina the opportunity to fully defend himself against the State's charges. The court's ruling denied Fernandez Medina a fundamental element of due process of law, and his convictions must be reversed.

2. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE VIOLATED FERNANDEZ MEDINA'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND DENIED HIM A FAIR TRIAL.

At the close of evidence, defense counsel proposed instructions on self-defense. CP 207-11. Counsel pointed out that there was a lack of clarity in the testimony as to who struck whom first. Several witnesses heard a slap but did not actually see it. 11RP 1276. The court declined to give the instructions, saying there was no testimony that Fernandez Medina believed he was in danger of injury and acted to defend himself. 11RP 1277. Defense counsel objected to court's failure to give the proposed instructions. 12RP 1336.

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Irons, 101 Wn. App. 544, 549, 4

P.3d 174 (2000). Jury instructions are constitutionally sufficient only if they permit each party to argue its theory, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219, 1221 (2005); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The court's refusal to give the proposed instructions on self-defense rendered the instructions in this case inadequate. The instructions that were given did not properly inform the jury regarding the lawful use of force or the State's burden of proof. Failure to give the proposed instructions denied Fernandez Medina his right to present a defense.

The parameters of self-defense are set out in RCW 9A.16.020(3). Under that statute, the use of force is lawful "[w]henever used by a party about to be injured...in preventing or attempting to prevent an offense against his or her person…in case the force is not more than is necessary." RCW 9A.16.020(3). "A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim." State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). A defendant is entitled to instructions on self-defense when the record contains some evidence, from whatever source, which tends to prove the defendant acted in self-defense. State v. McCullum, 98 Wn.2d 484, 488,

656 P.2d 1064 (1983); State v. Roberts, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977).

The defense's threshold burden of production is low. The defendant is not even required to present evidence which would be sufficient to create a reasonable doubt; rather, any evidence that the defendant acted out of fear of injury will suffice. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); McCullum, 98 Wn.2d at 488; State v. Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). Once the defendant produces some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191, 199, 156 P.3d 309 (2007).

In determining whether to give self-defense instructions, the trial court must view the evidence in the light most favorable to the defendant. State v. George, 161 Wn. App. 86, 95-96, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011). Only where no plausible evidence appears in the record upon which a claim of self-defense might be based may the trial court refuse a self-defense instruction. McCullum, 98 Wn.2d at 488; Adams, 31 Wn. App. at 395. "Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of

fact.'" Adams, 31 Wn. App. at 396-97 (quoting Allen v. Hart, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)).

Here the defense theory was that Fernandez Medina did not throw the punch that preceded the tussling at the door of the apartment, and there was evidence from which the jury could infer Wiley was the aggressor. See 7RP 362. There was evidence that Fernandez Medina told Wiley, in a non-threatening manner, that he would be back after moving his car as Wiley demanded. 9RP 725. Wiley was amped up and ready for a fight, saying they would be ready, and his aggressive stance would put Fernandez Medina on edge. 8RP 500, 552, 555. There was evidence that when Fernandez Medina returned, he knocked on the door in a normal manner, as if coming to visit. 9RP 732, 758. People inside the apartment shouted that they had a gun and would shoot. 8RP 524. Wiley walked to the door and called out, "What the F you want?" 9RP 733. The door then opened unexpectedly, either because previous damage had loosened the lock so that the knocking caused the door to open, or because Wiley opened the door. 8RP 643; 9RP 734-35, 755. Wiley was still amped up from the earlier dispute in the parking lot. 8RP 569. There was the sound of a slap, and Wiley, who is much larger than Fernandez Medina, grabbed Fernandez Medina by the shoulders, preparing to throw him to the floor. 8RP 569; 9RP 737, 761.

Not everyone saw the first slap, and the jury could have found, given the evidence of Wiley's aggression, that Wiley struck first. But even if the evidence could not be interpreted in that way, there is still evidence that Fernandez Medina acted in self-defense. Wiley described Fernandez Medina's initial contact as just a "mush" instead of a punch, "like a brush off type." 9RP 736. Given Wiley's aggressive response to the parking lot incident, the threats from the people inside the apartment, the fact that the door flew open unexpectedly, and Wiley's intimidating size and aggressive stance, the jury could find that Fernandez Medina reasonably believed he was about to be injured and the brush off was a reasonable use of force to defend himself.

"The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." McCullum, 98 Wn.2d at 488. Because the record contains some evidence that Fernandez Medina acted in self-defense, he was entitled to have the jury instructed not only on the law regarding self-defense but also on the State's burden of proving the absence of self-defense beyond a reasonable doubt. See State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). The court's failure to so instruct the jury in this case denied Fernandez Medina his right to present a defense and relieved the State of its burden of proof.

3. THE REASONABLE DOUBT INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF BY ERRONEOUSLY EQUATING THE JURY'S JOB WITH A SEARCH FOR THE "TRUTH" RATHER THAN A TEST OF THE PROSECUTION'S CASE.

The State proposed a reasonable doubt instruction informing the jury that, "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 114; WPIC 4.01. Defense counsel proposed instead that the court give WPIC 4.01 without the optional "belief in the truth" language. CP 204; 11RP 1285. The court rejected the defense proposed instruction and instead instructed the jury using the contested language. 11RP 1285; CP 168. Defense counsel objected to the court's instruction. 12RP 1335.

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. Bennett, 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. The pattern instruction reads as follows:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such*

consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

WPIC 4.01.

The Bennett Court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language, however. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges" is that the defendants are guilty. Emery, 174 Wn.2d at 751. The Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. Id. at 657-58.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. Emery, 174 Wn.2d at 760. Division One of the Court of Appeals recently held that the "belief in the truth" phrase accurately informs the jury of its duty to determine whether the State has proved the charged offenses beyond a reasonable doubt. State v. Fedorov, 181 Wn. App. 187, 200, 324 P.3d 784, review denied, ___ Wn.2d ___ (2014). This Court should decline to follow Fedorov and hold that, like the impermissible argument in Emery, the contested language in the court's instruction inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, appellate courts have a

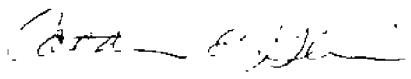
supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

D. CONCLUSION

The trial court's erroneous exclusion of evidence, refusal to instruct the jury on self-defense, and improper reasonable doubt instruction denied Fernandez Medina a fair trial. His convictions must be reversed and the case remanded for a new trial.

DATED October 24, 2014.

Respectfully submitted,



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Today I mailed a copy of the Brief of Appellant in *State v. Roiland Fernandez Medina,* Cause No. 45938-8-II as follows:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
October 24, 2014

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