

NO. 71531-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

AUSTIN STEIN,

Appellant.

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FILED

June 26, 2015  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Bruce E. Heller, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. OFFICERS WERE PERMITTED TO EXPRESS OPINIONS ON APPELLANT'S GUILT, THEREBY DENYING HIM A FAIR TRIAL.

The State avoids entirely the five-part test our Supreme Court has adopted for determining whether testimony is an impermissible opinion on the defendant's guilt. As discussed in Stein's opening brief, application of those factors to the circumstances at Stein's trial reveals impermissible opinions by Deputy Gagnon and Detective Walford. See Brief of Appellant, at 19-21 (discussing factors set forth in State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008), and State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

The primary disputed issue at trial was whether, on the one hand, Stein was the victim who reasonably feared for his physical safety and acted in lawful self defense or, alternatively, Smith was the victim who had been violently attacked by Stein. Deputy Gagnon's testimony that Stein "was acting opposite of what I have experience in from trauma victims" and Detective Walford's testimony that "he didn't act like a victim" are tantamount to statements that Stein was the attacker and not the victim. Expressions of personal belief as to the guilt or mental state of the

accused – even when based on the facts of the case – are inappropriate opinion testimony in criminal trials. Montgomery, 163 Wn.2d at 591. The testimony at Stein’s trial violated this prohibition.

The State responds by citing multiple cases in which witnesses were permitted to testify to their personal observations of the defendant. Notably, not one of these cases involves (much less approves) expert witnesses expressly declaring that the defendant was not acting like a victim. See State v. Davis, 175 Wn.2d 287, 324, 290 P.3d 43 (2012) (officer testifies nothing about defendant’s post-arrest interview caused him concern over defendant’s mental status), cert. denied, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013); City of Seattle v. Heatley, 70 Wn. App. 573, 576, 854 P.2d 658 (1993) (officer testifies to defendant’s observed intoxication and impairment as grounds for his arrest), review denied, 123 Wn.2d 2d 1011, 869 P.2d 1085 (1994); State v. Craven, 69 Wn. App. 581, 585, 849 P.2d 681 (social worker testifies that defendant’s behavior was “somewhat unusual” while discussing injuries to her child because defendant would not make eye contact, was not crying, and seemed withdrawn), review denied, 122 Wn.2d 1019, 863 P.2d 1353 (1993); State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988) (officers testifies to

defendant's "inappropriate" and "unemotional" reaction to news of his wife's death); State v. Allen, 50 Wn. App. 412, 416, 749 P.2d 702 (detective's testimony that defendant's grief over husband's death did not appear sincere), review denied, 110 Wn.2d 1024 (1988); State v. Crenshaw, 27 Wn. App. 326, 332, 617 P.2d 1041 (1980) (lay testimony in insanity case that defendant "seemed very normal" after decapitating his wife), aff'd, 98 Wn.2d 789, 659 P.2d 488 (1983)).

Based on these and other cases, Deputy Gagnon and Detective Walford would have been well within the bounds of proper testimony had they simply testified to their observations of Stein's behavior. But testifying that Stein's behavior was the opposite of victims' behavior (Gagnon) and that Stein was not acting like a victim (Walford) went well beyond what is permitted under the Sixth Amendment, article 1, § 22, or prior precedent. Under the circumstances of this case, the testimony constituted impermissible opinions on Stein's guilt.

The State also argues that Deputy Gagnon's and Detective Walford's opinions were a fair response to Dr. Megan McNeal's testimony. Brief of Respondent, at 26-27. But Dr. McNeal merely testified that Stein's recalcitrant behavior following the incident and



his failure to articulate everything that happened inside the trailer could have been the consequence of an acute stress response and his negative view of police. See 14RP 5-15, 32-34, 54-55, 90. She certainly did not offer an opinion – on par with those from Gagnon and Walford – that Stein was “acting like a victim.”

Finally, the State argues that even if the deputy and the detective offered what amount to opinions on Stein’s guilt, the errors were harmless. Unfortunately, the State employs the non-constitutional harmless error standard for a constitutional violation. See Brief of Respondent, at 27. The State’s burden is significantly higher and, for the reasons discussed in Stein’s opening brief, it is a burden it cannot meet. See Brief of Appellant, at 21.

2. THE TRIAL COURT ERRED, AND DENIED STEIN HIS RIGHT TO PRESENT A DEFENSE, WHEN IT PRECLUDED EVIDENCE OF SMITH’S SWASTIKA TATTOOS.<sup>1</sup>

Stein’s opening brief sets forth the proper test for violation of the right to present a defense: relevant evidence may only be

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<sup>1</sup> The State contends that Smith sported only a single swastika tattoo. Brief of Respondent, at 28 n.12. But prosecutors confirmed one on his ankle. 2RP 21. And defense counsel obtained a photo showing a second tattoo on one of his arms. 2RP 24; 3RP 26. The State did not contest the defense offer of proof below. Moreover, whether one or two tattoos, the defense argument is largely the same.

excluded if the State shows the evidence is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

Despite use of this test in Stein’s opening brief, the State repeatedly indicates that Stein is arguing that he can present “any relevant evidence regardless of any other rule of evidence.” See Brief Respondent, at 1, 27, 30. Since Stein has never made this claim, it is not clear why the State attributes it to him. The test is precisely as set out in Jones. Stein has the right to present relevant evidence unless the State can demonstrate the evidence is so prejudicial as to disrupt the fairness of the jury’s fact-finding process. If the State can make this showing with assistance from the rules of evidence, so be it. But short of proving such a disruption, the evidence must be admitted.

The State makes a very brief argument that Stein’s constitutional right to present relevant evidence was waived because the trial court’s exclusion was merely preliminary and defense counsel failed to raise the issue again during trial. See Brief of Respondent, at 29-30. But the court’s ruling was “preliminary” only in the sense that, if the defense could produce

something *e/se* connecting Smith's tattoos to his fight with Stein, the court made it clear it would reconsider the issue. See 3RP 25-26; see also 3RP 28 ("I'm just saying that before I admit it, the defense is going to have to connect that swastika to what happened here."). The issue was not renewed (and not waived) because the defense had already presented, and the court had already heard, all defense evidence and argument concerning the tattoos.

In any event, even if there had been a waiver by defense counsel, this issue involves manifest constitutional error and could have been raised for the first time on appeal. See RAP 2.5(a) (a party may raise for the first time on appeal "manifest error affecting a constitutional right"). It is certainly constitutional in nature. And, an error is manifest where there has been plausible showing that it had practical consequences at trial. See State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Stein has made that showing. See Brief of Appellant, at 26 (describing relevance of evidence and impact of hiding it from Stein's jury).

Addressing the merits of Stein's argument, the State argues that State v. Finch, 137 Wn.2d 792, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999), is particularly

relevant. In Finch, the trial court prohibited the defense from calling a witness to testify that the defendant had told her he did not intend to kill a police officer he shot. The Supreme Court upheld exclusion of the evidence, noting that its admission would permit the defendant to present his side of the story with hearsay while avoiding cross-examination and thereby denying jurors the ability to assess the value of this evidence. Finch, 137 Wn.2d at 824-825. This is a sound decision. Under Jones, allowing such evidence would have disrupted the fairness of the jury's fact-finding process. It was properly excluded.

Finch, however, does not describe the circumstances in Stein's case. Smith's racism – revealed by his recurring use of the slur "nigger" and by the retention of his one or two swastika tattoos – was relevant to demonstrate his intent, his motive to attack Stein, and that he was the attacker during the incident. The evidence was relevant and admissible because it had a tendency to make it more likely that Smith attacked Stein and that Stein responded in self-defense. And, unlike Finch, there was nothing unfair about its use. The State was still free to argue benign reasons for the tattoos (i.e., they were probably youthful indiscretions rather than continuing statements of belief). See State v. Nelson, 152 Wn. App. 755, 759-

762, 219 P.3d 100 (2009), review denied, 168 Wn.2d 1028, 230 P.3d 1060 (2010) (dog tattoos relevant and admissible to prove defendant engaged in animal fighting operation despite opposing interpretation).

The State relies on rules of evidence designed to prevent or limit use of character evidence to demonstrate consistent action at the time of the crime, contending this is what Stein sought below. See Brief of Respondent, at 33-35 (citing ER 404(a) and ER 405). But the evidence Stein sought to admit was not the class of evidence prohibited under ER 404(a), meaning it was not “evidence of a person’s character . . . for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(a). Rather, Smith had the tattoos at issue during the event in question. As argued below, those tattoos made a *current statement* of Smith’s views, motives, and intentions toward Stein, a black man. It was not admissible to show conformity with past character; it was admissible as part of the current event to the same extent any racially charged statement from Smith during or close in time to the fray would be relevant and admissible.

The State also points out that, in Nelson, there was an established nexus between the dog tattoos and alleged dog fighting

because there was physical evidence of dog fighting on defendant's property and an expert testified that those involved in the trade often had tattoos on the subject. See Brief of Respondent, at 37 n.16. In contrast, argues the State, Smith's tattoos were very old and there was no expert to explain that racists often have racist tattoos. Brief of Respondent, at 35-38. The State also notes that the swastika is a sacred symbol in Hinduism and Buddhism. Brief of Respondent, at 28 n.13. But expert testimony is hardly necessary for the proposition that racists often sport consistent tattoos. And Smith's repeated use of the racial slur "nigger" while threatening Stein with a hammer and his threat the following day to "blow your fucking head off, you nigger" undercut the probability that Smith was merely Hindu or Buddhist and provide the very nexus the State seeks. See 10RP 23, 41-42; 14RP 127, 144.

Finally, the State points out the potential for prejudice had jurors learned of Smith's racist tattoos. But jurors routinely consider evidence that reflects poorly on a participant's character (usually the defendant). Jurors are presumed to follow limiting instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). This presumption holds true even, for example, when jurors are faced with substantial evidence of multiple prior sex offenses against

multiple prior victims when considering a current sex offense. Lough, 125 Wn.2d at 850-852. Since jurors can follow a limiting instruction even under that scenario, they could have done so at Stein's trial had the State requested one.

Because the State's concern is that jurors could not ignore Smith's history with Nazism (i.e., because he associated with Nazi ideals in the past, he must have been in the wrong here), the instruction could have been some version of the following:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Bill Smith's swastika tattoos and may be considered by you only for the purpose of determining Smith's motive and intent on November 4, 2012, and whether the defendant acted in self-defense. You may not consider it for any other purpose, including for the purpose of concluding that Bill Smith had a particular character and therefore acted in conformity with that character. Any discussion of the evidence during your deliberations must be consistent with this limitation.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.30 (3d ed. 2014); State v. Gresham, 173 Wn.2d 405, 423-424, 269 P.3d 207 (2012).

This instruction, in conjunction with prosecutors' arguments that Smith was no longer motivated by racial hatred, would have sufficiently protected the State's interests while permitting Stein to

exercise his constitutional right to present relevant evidence in his defense.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE JURORS WERE FULLY INSTRUCTED ON SELF-DEFENSE.

Defense counsel performed deficiently by failing to ensure jurors were instructed on the use of deadly force when he intended to argue Stein's justifiable use of that level of force. This prejudiced Stein because it permitted the State to argue convincingly that Stein's use of deadly force was excessive under the law of the case, thereby increasing the likelihood of conviction.

As to performance, the State argues that Stein cannot make the necessary showing because WPIC 17.02 was a correct statement of the law for felony murder. Brief of Respondent, at 45. The problem, however, is that WPIC 17.02 – while correct – did not cover the full range of legal arguments counsel intended to make on Stein's behalf. WPIC 17.02 told jurors that Stein could use "necessary" force in the face of reasonably perceived "injury." CP 136. But without WPIC 16.02, Stein's use of what was clearly "deadly force" left him vulnerable to a State's argument that this level of force was excessive.



Had counsel requested WPIC 16.02, he would have been entitled to it. Jury instructions, including self-defense instructions, must allow the parties to argue their theories of the case and properly inform jurors of the applicable law. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). WPIC 16.02 applies to deadly force, Stein used deadly force, and defense counsel employed a strategy premised on the lawful use of deadly force. His failure to request WPIC 16.02 was therefore deficient.

As to prejudice, the State argues there is no guarantee the trial court would have given WPIC 16.02. Brief of Respondent, at 39, 44-46. However, as just discussed, it was a correct statement of the law and necessary for argument on the defense theory of the case. Therefore, with a timely request, the court was obligated to give the instruction. The State has presented no plausible reason why the court would have refused.

The State also argues there was no prejudice because, even limited to WPIC 17.02, the defense could fully argue its theory of the case. Brief of Respondent, at 46. This is incorrect. Without a jury instruction to support counsel's argument on deadly force, the prosecutor could simply respond that the law did not support that

argument, which is precisely what happened. See 15RP 71. Stein's jury was told to disregard any argument not supported by the law contained in the instructions. See CP 120 ("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."). An attorney's argument, without a correct supportive instruction, is meaningless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

Because Stein has established both deficient performance and prejudice, he was denied his right to effective representation.

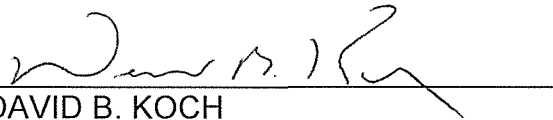
B. CONCLUSION

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

DATED this 26<sup>th</sup> day of June, 2015.

Respectfully Submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71531-3-I
	)	
AUSTIN STEIN,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AUSTIN STEIN  
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WALLA WALLA, WA 9934

SIGNED IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF JUNE 2015.

X Patrick Mayovsky