NO. 44945-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY GREG O'HAVER,

Appellant.

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

The Honorable John Hickman, Judge

REPLY BRIEF OF APPELLANT

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STATUTES, RULES, AND OTHER AUTHORITY:

A. RESTATEMENT OF THE CASE

Mr. O'Haver testified in his own behalf at trial. He explained that his wife had too much to drink on the night of the incident and became physically aggressive toward him during their argument; she hit him on the head. RP 446, 448-450. He responded to this by trying to hold her away from him. RP 449-450. He decided to spray her face with cold water for a few seconds. RP 450, 453, 487. When she staggered backwards after he did this, Mr. O'Haver believed the incident was over. RP 486.

Mr. O'Haver turned, however, to find that Mr. Dettling had entered the house. RP 488. He testified that he watched Mr. Dettling push his wife towards the door. RP 490. He followed them and watched them enter and close the door to the Dettling house behind them. RP 492-494. As Mr. O'Haver knocked on the door, he heard Mr. Dettling ask Mrs. Dettling to bring him their gun. RP 495-496. He testified that Mr. Dettling threatened that if he kept knocking, he would shoot him through the door. RP 496, 500. It was at that point, Mr. O'Haver explained, that he returned home and fetched his own pistol. RP 500-502. He testified further that he placed his gun on a table outside the door to the Dettlings' house, picked up a baseball bat leaning near the door and kicked and hit the door until he broke the handle and lock on the door. RP 502-504. Mr.

Dettling raised and pointed his gun and Mr. O'Haver then grabbed his gun. RP 505. The police arrived and Mr. O'Haver dropped his weapon as commanded by the officers. RP 505.

Marcus Dettling also testified that he went uninvited into Mr. O'Haver's kitchen and started insulting Mr. O'Haver in order to draw his attention. RP 347-352. Mr. Dettling affirmed that he called to his wife for his gun on entering his own house with Mrs. O'Haver. RP 355. He testified that Mr. O'Haver accused him of kidnapping his wife. RP 360.

The trial court, without objection from the state, gave a self-defense instruction, an instruction that a defendant is entitled to act on appearances in defending himself and a no duty to retreat instruction. RP 623, 628, 631; CP 123-162. The state did not request a first aggressor instruction. CP 25-62; 63-72; 73-85; 86-112.

B. ARGUMENT IN REPLY

1. THE TRIAL COURT'S ERROR IN EXCLUDING MR. O'HAVER'S TESTIMONY ABOUT THE INCIDENTS OF VIOLENCE BY HIS WIFE AND NEIGHBOR WHICH CAUSED HIM TO FEAR INJURY DENIED HIM HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

In his Opening Brief, appellant set forth the law establishing an accused person's rights under the Sixth Amendment and Article 1, sections 21 and 22 of the Washington to present evidence of a victim's

prior acts of violence known to him to support his claim of self-defense. See Opening Brief of Appellant (AOB) 18-22. "[S]uch testimony tends to show the state of mind of the defendant. . . and to indicate whether he, at that time, had reason to fear bodily harm." State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting State v. Adamo, 120 Wash. 268, 269, 207 P. 7 (1922)). Prior specific acts of violence are admissible to show the defendant's basis for acting in self-defense. State v. Woodward, 26 Wn. App. 735, 737, 617 P.3 1039 (1980); State v. Walker, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975), Cloud, 17 Wn. App. at 217.

"[A]ll the facts and circumstances known to the defendant, including those known substantially before the incident" are admissible to support a claim of self-defense. State v. Wanrow, 88 Wn.2d 221, 234, 559 P.2d 548 (1977) (emphasis added); State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 544 (1984); State v. Allery, 101 Wn.2d 591, 594, 682 P.2 312 (1984). These facts and circumstances are admissible because defendants "need not even have been in actual danger of great bodily harm, they are entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger . . . . they were justified in defending themselves." State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) (holding that it was error to exclude evidence that the defendant was told that the decedent carried a gun). Exclusion of

this evidence is constitutional error; it denies the defendant the right to present a defense. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).

Respondent apparently concedes that, under this authority as set out here and in Mr. O'Haver's Opening Brief, a defendant is entitled to present evidence of specific acts of violence known to him in support of his self-defense claim. The only arguments Respondent submits are bare assertions that Mrs. O'Haver's injuring Mr. O'Haver's eye was "too remote" and "possibly . . . unintended" and that Mrs. O'Haver's breaking a window in a passing car while working as a crossing guard at a school might not have been "inappropriate." BOR 10. Such arguments, unsupported by legal authority, should not be considered on appeal. See, e.g., State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). And, in any event, they go only to the weight of the evidence, not its admissibility. In re Detention of Coe, 160 Wn. App. 809, 825, 250 P.3d 1056 (2011) (differences in prior crimes went to weight not admissibility of opinion that they were signature crimes); State v. Birch, 151 Wn. App. 504, 213 P.3d 63 (2009) (differences in description went to weight not admissibility of identification); State v. Price, 143 Wn. App. 480, 490, 228 P.3d 1276 (2010) (discrepancies in note admitted as dying declaration went to weight not admissibility).

Respondent's primary argument that the prior acts of violence by

Mrs. O'Haver and Marcus Dettling were properly excluded is that the trial court erred in giving self-defense instructions. This argument should be rejected. First, the state made no objection below to the giving of the instructions, apparently agreeing that they were proper. RP 623. 628, 631. As such, the self-defense instructions became law of the case. See State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) ("to convict" instruction assuming the burden of proving venue became law of the case and failure to prove venue was reversible error). Further, it appears that in asking this Court to hold that Mr. O'Haver was not entitled to his defense at trial, Respondent is asking for affirmative relief and not just for affirmance of the trial court's ruling excluding evidence below. The state did not cross-appeal on this issue and cannot raise it in its responding brief. See State v. Sims, 171 Wn.2d 436, 442-443, 256 P.3d 205 (2011) ("[N]otice of cross-review is essential if the respondent seeks affirmative relief as distinguished from the urging of additional grounds for affirmance." Robinson v. Khan, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998), quoting Phillips Bldg. Co. v. An, 81 Wn.App. 696, 700 n. 3, 915 P.2d 1146 (1996). While it might appear at first blush that the state is asking only for affirmance of the trial court's exclusion of evidence on different grounds, it is clear that if this Court were to reverse Mr. O'Haver's convictions, on any of the seven other assignments of error he raises on appeal, a holding

that Mr. O'Haver was not entitled to self-defense instructions on retrial would be affirmative relief. As the Court held in Sims, the state must file a Notice of Cross Appeal if it is seeking affirmative relief, which it did not do in this case.

In any event, Mr. O'Haver was entitled to the self-defense instructions. His testimony established that Mrs. O'Haver was the first aggressor, not him; she hit him on the head; he held her by the forearms to keep her from hitting him further and sprayed her with water in an effort to end the physical confrontation. RP 449-454, 487. His testimony that she hit him was uncontested at trial. Second, it was undisputed that Marcus Dettling entered the O'Haver home without invitation (RP 488); and, by his own testimony, began insulting Mr. O'Haver with the express purpose of attracting his anger. RP 347-352. Further, according to Mr. O'Haver, Dettling pushed his wife toward the door, shut the door to his house against Mr. O'Haver with his wife inside, called for his gun and threatened to shoot Mr. O'Haver. RP 490, 492-496. This evidence established that Mrs. O'Haver was the first aggressor, as was Mr. Dettling. An accused person is entitled to a self-defense instruction if he or she "offers credible evidence tending to prove self-defense." State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). Evidence of self-defense is sufficient for an instruction if the defendant shows he had a good faith

belief in the necessity of force and the force was objectively reasonable. Id. Here, Mrs. O'Haver became physically aggressive and Mr. O'Haver tried to hold her away from him; he acted with a good faith belief that spraying her for a few seconds with cold water would end the altercation. Similarly, he had a good faith belief in potential harm arising from Mr. Dettling's deliberate provocation of him and threatening to shoot him.

The facts of this case are like neither State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973), where the defendant was struck with a wrench after he tried to lean over the seat and steal the cab driver's money, nor State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990), where the defendant had broken into an apartment and was in the process of trying to steal drugs when the owner appeared with a gun. Here, Mrs. O'Haver was the first aggressor and Mr. Dettling illegally entered into Mr. O'Haver's home. Certainly there was no evidence that Mr. O'Haver intended to rob Mr. Dettling; Mr. Dettling testified himself that Mr. O'Haver accused him of kidnapping his wife.

Because the trial court prohibited Mr. O'Haver from fully presenting his defense and being able to provide the jury with how things appeared to him, knowing what he knew at the time, his Sixth Amendment rights and rights under the state constitution were violated. The jurors did not hear about the serious injury to his eye when Mrs. O'Havor struck him

on a past occasion or that she broke the window of a passing car in anger while she was working as a crossing guard at a school. RP 455-456; 463-464, 466-467. The jurors did not get to hear of Mr. Dettling's prior acts of violence in discharging guns, fighting and claiming that he had killed someone. RP 468-471, 482. For these reasons, Mr. O'Haver's convictions for fourth degree assault and second degree assault should be reversed and remanded for retrial. While the jurors obviously disbelieved much of the state's evidence, they also apparently did not find that he had acted in self-defense. Had the jurors been able to evaluate the situation from his point of view, they likely would not have convicted him of either the fourth degree assault involving his wife or the second degree assault involving Mr. Dettling.

2. THE TRIAL COURT ERRED IN DENYING MR. O'HAVER'S MOTION FOR MISTRIAL AFTER ALERTING THE JURY TO HIS IN-CUSTODY STATUS.

Respondent does not dispute that the right to a fair trial includes the right to the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Or that being associated with jail clothing or restraints can deny a defendant the presumption of innocence. State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); State v.

Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998). See AOB 23-25.

Respondent instead cites the case of State v. Garcia, No. 42890-3-II (Nov. 13, 2013), and comments that "an innocuous comment to a corrections officer [which] did not specifically reference the defendant" did not require reversal of Mr. O'Haver's conviction. BOR at 13.

First, Garcia, is not analogous to Mr. O'Haver's case. In Garcia, the jury was properly told that the defendant had committed a "serious offense," and the appellate court held that knowing that the serious offense was a first degree robbery conviction was not sufficiently prejudicial. Thus, Garcia did not involve the denial of the presumption of innocence.

Second, and most importantly, the statement by the judge -- "So officer, we'll see everybody back here at 9:00, okay?" RP 640 --. was not "innocuous" or a "comment"; it conveyed to the jury precisely what the court intended to convey to the officer – that the officer was being directed to bring Mr. O'Haver from jail to court at 9:00 a.m., the time when counsel and the court would be ready for him.

This directive by the trial judge denied Mr. O'Haver the presumption of innocence by alerting the jurors to his in-custody status. It was particularly prejudicial because a number of people had expressed their belief during voir dire that people held in custody during trial were more likely to be guilty. RP 647.

Under these circumstances, the trial court erred in denying the motion for mistrial and Mr. O'Haver should now be granted a new trial.

3. THE UNTRUTHFUL TESTIMONY THAT MR. O'HAVER HAD COMMITTED DOMESTIC VIOLENCE IN THE PAST DENIED HIM A FAIR TRIAL.

Even though trial counsel moved successfully to exclude the testimony pretrial to avoid the prejudice of having to object in front of the jury, the jury nevertheless heard witness John Hoover testify that he heard Mr. Dettling say, "This is my neighbors and they've done this before." This followed Mr. Hoover's testimony that Mr. O'Haver was trying to "drag" Mrs. O'Haver and hitting her. RP 272-273.

The trial prosecutor admitted that this was improper testimony; it implied that Mr. O'Haver had committed a crime in the past similar to the charged crimes against his wife. 292-293. See AOB 26-27.

Respondent's argument in its Brief of Respondent is that by failing to object again, the issue is waived for appeal and that it is not a "manifest" error which can be raised for the first time on appeal. BOR at 14-15. This argument should not be well-taken.

First, trial counsel moved in limine to exclude evidence of prior convictions, and there were none. RP 21. The state never sought to admit ER 404(b) evidence. Under these circumstances, Mr. Hoover's non-

responsive statement that Mr. O'Haver had assaulted his wife before could not have been prevented or anticipated. The only cure available was an instruction which trial counsel reasonably decided not to request. RP 293. The trial court acknowledged that sometimes it was best "to let sleeping dogs lie." RP 293. Thus, the purpose of an objection – to give the trial judge an opportunity to cure the error – was not undermined. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Second, Respondent did not address the considerable authority that a jury's hearing that a person accused of a crime of violence had committed a similar prior act of violence is the kind of irregularity that has been deemed too prejudicial to be cured by an instruction by the court. State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (1987) (surprise testimony that the defendant charged with an assault with a knife had stabbed someone on a prior occasion); State v. Hopson, 113 Wn.2d 273, 284, 778 P.3d 1014 (1989); State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968); State v. Easter, 130 Wn.2nd 228, 238-39, 922 P.2d 1285 (1996).

Respondent's lone assertion that the error "does not rise to the level of magnitude to ignore the lack of preservation of the error," does not undermine any of this authority. The error denied Mr.O'Haver a fair trial and his convictions should be reversed.

4. THE PROSECUTOR'S STATEMENT THAT HE NEEDED TO TALK TO THE "VICTIM ADVOCATE," WHETHER OR NOT IT WAS INTENDED TO, INDICATED AN OPINION AS TO GUILT AND DENIED MR. O'HAVER A FAIR TRIAL.

The jury heard the prosecutor asked the judge for "a moment to talk to my victim advocate" before conducting redirect examination of witness John Hoover. RP 283. The prosecutor repeated this wish to speak to his victim advocate and then added that, "in this case" it was just a piece of paper. RP 284.

Respondent does not address the authority that holds that a prosecutor's expression of his opinion implying that a witness is credible is constitutional error under the state and federal constitutions. See United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 54 L. Ed. 2d 1 (1985); State v. Lindsley, 171 Wn. App. 171 Wn. App. 808, 288 P.3d 641, 653 (2013; State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Where there is, as here, a substantial likelihood that the error affected the jury, in the context of the record and circumstances of trial, a new trial should be granted. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). See AOB 28-29,

Respondent does not address the authority that a failure to object does not preclude review where "the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice," State

v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and the prosecutor's twice-over breach of the judge's ruling that witnesses should be referred to as "alleged" victims. RP 4.

Instead, Respondent merely asserts that there was no evidence that the error was of consequence and that the prosecutor was merely referring to a piece of paper. BOR at 16.

The prejudice was in communicating to the jury that the prosecutor was working with a victim advocate on behalf of the witness. This certainly implied the belief that Mr. Hoover was a victim. And if the prosecutor was merely looking at a piece of paper, then there is no possible reason for asking to "speak" to someone who was referred to as a victim advocate. At the very least, the jury understood that the prosecutor had notes or instructions from an advocate in the case who was involved because Mr. Hoover was a victim. This was an error which standing alone, and in combination with other errors, denied Mr. O'Haver a fair trial.

5. OFFICER WELSH'S TESTIMONY IMPLYING HIS OPINION THAT, BASED ON INFORMATION HE HAD, CRIMES HAD BEEN COMMITTED INCLUDING ATTEMPTED MURDER, AND THAT THE SITUATION WAS EXTREMELY DANGEROUS AND SERIOUS WAS IMPROPER AND DENIED MR. O'HAVER HIS RIGHT TO A FAIR TRIAL.

Officer Welsh intentionally gave the jury his opinion that Mr. O'Haver was dangerous, put the lives of police officers and others at risk, and, in fact, had actually attempted to or was attempting to kill someone. RP 159-161, 166-167. He implied that his opinion was based on information from others that the jurors might not hear – "witnesses already indicating . . ." RP 166-167. Later he tried to establish Mr. O'Haver's guilt by saying that Mrs. O'Haver's voice sounded as if she had been strangled or choked, essential elements of the assault as it was charged. RP 171. 328-332.

Respondent ignores the substantial authority that such testimony is "unfairly prejudicial to the defendant," "invades the exclusive province of the jury" and denies a defendant his right to a jury trial. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278

(2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 505 (2007); State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby. 144 Wn.2d at 617. This can constitute a manifest constitutional error which can be raised for the first time on appeal even if not, as in this case, objected to at trial. Thach, at 312. See AOB 33-35.

Respondent asserts only that it is a "commonly held belief" that domestic violence calls can be dangerous, that Officer Welsh has personal knowledge of such things, and that other "facts" about the incident were testified about. BOR at 16-17. Under this theory, an officer could always simply resolve the factual issue for the jury in light of the officer's experience and other "commonly held beliefs" about people charged with a crime. No authority is cited, however, to support this view of the law.

Officer Welsh was certainly implying his opinion as to guilt and Mr. O'Haver's intentions. The jury may well have been swayed by Officer Welsh's testimony while doubting the testimony of the lay witnesses. For this reason, this error alone and in combination with the other trial errors should require reversal of Mr. O'Haver's convictions and the granting of a new trial.

6. THE TRIAL COURT ERRED IN ADMITTING OFFICER WELSH'S POLICE REPORT AS A RECORDED RECOLLECTION.

Respondent side-steps entirely the issue of whether the trial court erred in admitting Officer Welsh's police report as a recorded recollection (see AOB 36-37) and responds only that the damage of his deliberate misreading of his report was cured:

> when Officer Welsh did not read precisely as written in his report, defense counsel's objection was sustained in the presence of the jury. V: RP 336 BOR at 17. Furthermore, the court instructed the jury "to disregard the particular phraseology, and it will be stricken from the record." *Id.* Whatever alleged damage was done by the officer deviating from his report was clearly cured by the court's ruling and instructions to the jury.

BOR 18.

The side-stepped ER 803(a)(5) issue is the issue on appeal and, as set out in the Opening Brief of Appellant, the requirements for admissibility were not met. See State v. Mathes, 47 Wn.App. 893, 867-68, 737 P.2d 700 (1987). First and foremost, the state failed to show that Mrs. O'Haver's memory was insufficient to provide truthful and accurate trial testimony. She was asked early in her testimony if she recalled the incident and she responded "yes." RP 192. She testified about the day's activities both before and after her husband came home. RP 192, 185, 196, 198, 291, 202, 204. The only thing she did not recall was the alleged statements she made to Officer Welsh. RP210-215.

Second, Mrs. O'Haver did not agree that the report was accurate at the time it was made. She had been drinking at the time, RP 92, 197. She was not able to give a written statement by herself. RP 216, 322.

Third, Mrs. O'Haver did not adopt the report. Welsh read only his notes to her, not the report he wrote sometime later. RP 323.

These facts contrast to the cases holding that prior statements were admissible as recorded recollections. Unlike in this case, in State v. Alvarado, 80 Wn. App. 543, 551-2, 949 P.2d 831 (1998), the witness asserted at the time they were made that the statements were accurate, and made two separate statements to the police. Id. at 552-53. Unlike here, in State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003), the witness provided a written statement to the police signed under penalty of perjury, the accuracy of which she never disavowed. Again in State v. White, 152 Wn.App. 173, 185, 215 P.3d 251 (2009), the witness signed the officers' report under penalty of perjury and noted with her initials where her account began and ended.

Under the totality of the circumstance, there was nothing to show that the report accurately reflected anything Mrs. O'Haver may have said at the time. In fact, Officer Welsh did not testify truthfully in court; he embellished his own report to make it sound more incriminating. His word should not have been sufficient to justify admitting substantive evidence

which was not needed or helpful. Mr. O'Haver's convictions should be reversed and remanded for retrial.

7. THE CUMULATIVE ERROR IN THIS CASE REQUIRES A NEW TRIAL.

Respondent asserts that the cumulative error doctrine does not help Mr. O'Haver because "any error was not so prejudicial to the appellant in that it did not affect the outcome of the case nor to the degree to deprive him of a fair trial." BOR 20.

To the contrary, the errors individually and cumulatively denied Mr. O'Haver a fair trial and should require a new trial. As set out in Mr. O'Haver's Opening Brief of Appellant: (a) the jury heard, untruthfully, that there had been prior domestic violence by Mr. O'Haver against Mrs. O'Haver; (b) the jury heard that the prosecutor needed to consult with a "victim advocate" even though the court ruled in limine that the state and state's witnesses must confine themselves to referring to "alleged" victims; (c) the jury heard Officer Welsh repeatedly describe the seriousness of the situation, the danger to the neighbors and officers and his opinion, which he said was based on what he already knew, that serious crimes including attempted murder had taken place or were taking place; (d) the jury heard Officer Welsh falsely testify about Mrs. O'Haver's statements to him; and (e) the trial court revealed that Mr.

O'Haver had been in custody during trial. At the same time, the jurors were not allowed to hear of the prior acts by Mrs. O'Haver and Mr. Dettling that made Mr. O'Haver fear that he would be injured if he did not defend himself. These errors combined, as well as individually, substantially undermined the fairness of the trial, particularly in light of the weakness of the state's case.

C. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded for retrial.

DATED this 2nd day of December, 2013.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I certify that on the 2 nd of December , 2013, I caused a true and correct copy of Appellant's Opening Brief to be served on the following by e-mail

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