

NO. 45789-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BOBBY JERREL SMITH II,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. Mr. Smith was entitled to have the jury consider evidence relevant to his defense and the court improperly prohibited such evidence

The prosecution's response brief puzzlingly starts by contending that issues raised for the first time on appeal are generally not reviewed by this Court. Response Brief at 8. Yet Mr. Smith litigated this issue in the trial court. Defense counsel objected when the prosecutor moved to prohibit evidence that Mr. Smith's actions during the incident were shaped by his perception of having post-traumatic distress disorder and its root causes from a life-threatening situation that left him permanently disabled. 10/7/13RP 16-20. Defense counsel had not expected any such objection by the prosecution because it had not been raised during prior discussion of redactions. *Id.* The issue of whether the court should have admitted evidence relevant to Mr. Smith's perceptions was squarely presented to the trial court.

The court's ruling prohibiting evidence relevant to Mr. Smith's defense was based on the wrong legal standard. The prosecution insisted that the legal standard for self-defense is only what a "reasonable person" would do, not what he subjectively thought, and claimed evidence about Mr. Smith's personal experiences and mental

state was consequently irrelevant and confusing for the jury. 9/19/13RP 59; 10/7/13RP 21; CP 126-28. As Mr. Smith explained at length in his Opening Brief, self-defense law requires the jury to “place itself in the defendant’s shoes and view the defendant’s acts in light of all the facts and circumstances the defendant knew when the act occurred.” *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). The court endorsed the prosecutor’s mistaken description of the legal standard when it granted the State’s request to prohibit Mr. Smith from using his timely statement to the detective to explain how he felt during the incident when attacked by his neighbor. 10/7/13RP 18-19.

The significance of the court’s ruling is described in Appellant’s Opening Brief. The State claims no error occurs when the jury received an accurate instruction on the law of self-defense but it’s brief never explains how Mr. Smith’s right to present his defense was satisfied when the court excluded relevant evidence that would explain his subjective perceptions at the time of the incident.

Rather than address the impact of the court’s ruling on Mr. Smith’s opportunity to pursue his right to act in lawful defense of himself, the State merely argues on appeal that the no one forced Mr. Smith to seek a self-defense instruction, citing *State v. Lynch*, 178

Wn.2d 487, 309 P.3d 482 (2013). Response Brief at 9-10. This argument misses the point. Mr. Smith was entitled to a self-defense instruction because the evidence affirmatively established that he was attacked in his own home by a neighbor with a knife. But the instruction alone does not satisfy his right to present a defense.

Evidence relevant to a theory of defense may be barred only where it would undermine the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). “Even minimally relevant evidence is admissible.” *Id.* Mr. Smith’s perceptions and subjective beliefs were facts of consequence to the jury’s assessment of whether he acted in lawful self-defense. *See Id.* at 624. Giving an instruction on the law of self-defense does not cure the court’s erroneous ruling prohibiting Mr. Smith from introducing relevant evidence. On the contrary, the court’s evidentiary rulings undermined Mr. Smith’s ability to convince the jury of the lawfulness of his actions and diminished the State’s burden of disproving self-defense beyond a reasonable doubt.

The State does not even address this legal threshold in response brief. The court’s restrictions on Mr. Smith’s ability to offer relevant evidence violated his constitutional right to present a defense and affected the outcome of the trial in a closely contested case involving a

military veteran acting in response to a perceived life-threatening situation in his own home.

2. Refusing to limit the jury's use of a detective's unscientific opinions about forensic evidence critical to whether Mr. Smith acted in lawful self-defense

The State again begins its argument by stating that an issue not raised below is generally waived on appeal. Response Brief at 10. This principle has no application when Mr. Smith objected below, as he did in this case.

Before trial, defense counsel objected to the detective's opinions of the evidence, such as whether there was blood on the knife, and what it showed about Mr. Smith's explanation of events. 10/2/13RP 2-3, 7, 8-9. The court agreed to some redactions, such as discussions of a polygraph, but not the opinion testimony from the detective about his thoughts on the blood evidence. 10/2/13RP 6. During trial, Mr. Smith asked the court to cure the prejudicial effect of Detective Spencer's opinions contained in his interview with Mr. Smith by instructing them that the detective's comments may not be used for the truth of their assertions. The court refused. 10/10/13RP 104-05.

Instead, the court's instructions permitted and encouraged the jury to consider Detective Spencer's claims during an interview with Mr. Smith as true substantive evidence against Mr. Smith, even though the detective was characterizing the strength of the evidence and undercutting Mr. Smith's recollection of events based on dubious science. *See* CP 24-25. The court's instructions required the jury to consider the detective's statements during the recorded interview for their truth, including available inferences from the detective's statements, when deciding whether Mr. Smith acted in justifiable self-defense. CP 24, 25, 28.

But Detective Spencer's opinions about blood evidence and how it demonstrated Mr. Smith did not act in lawful self-defense should not have been admitted without a limiting instruction. The jury would presume his evaluation of the evidence was accurate and is likely to trust it. *See Coffel v. Clallam Cnty.*, 58 Wn.App. 517, 523, 794 P.2d 513 (1990) ("Police officers are presumed to know the penal laws"). Police officers carry an "aura of reliability" when testifying. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). Opinions voiced by police officers are "especially prone to influence" jurors. *State v. Demery*, 144 Wn.2d 753, 772, 30 P.3d 1278 (2001) (Sanders,

J., dissenting); *see also State v. Barr*, 123 Wn.App. 373, 384, 98 P.3d 518 (2004) (“the opinion of a government official, especially a police officer, may influence a jury”).

The need for a limiting instruction is not erased by giving the defense the chance to cross-examine a witness on the matter, as the State claims. The State asserts that the jury was “clearly advised to be wary of accepting” the detective’s opinions of the evidence by hearing the defense question the witness. Response Brief at 11.

The State rightly concedes the jury should have been “clearly advised” of the scant weight it should put on the detective’s analysis of the evidence against Mr. Smith, but a limiting instruction is the necessary vehicle to accomplish such advisement. A limiting instruction is required, when requested, if evidence is admissible but the jury should not be free to use it for any purpose. *State v. Gresham*, 173 Wn.2d 405, 420, 423, 269 P.3d 207 (2012). Court’s instructions, not counsel’s argument, are the necessary mechanism for conveying the law to the jury. *In re Detention of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010) (“lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.”). Here, the court violated these principles by refusing to limit the

jury's use of improper opinion testimony from an experienced detective and because this error directly affected the jury's deliberations on the critical issue of whether Mr. Smith acted in lawful self-defense, it requires a new trial.

3. When rejecting the exceptional sentence request from a military veteran with an unblemished record who defended himself in his own home, the court used the wrong legal standard.

When a judge misunderstands the extent of his sentencing discretion, this misinterpretation of the law is a fundamental defect undermining the validity of the sentence imposed. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007); see *State v. Miller*, 181 Wn.App. 201, 216, 324 P.3d 791 (2014). When a judge relies on "an impermissible basis for refusing to impose an exceptional sentence," it has misapplied the law and a new sentencing hearing is required. *State v. Khanteechit*, 101 Wn.App. 137, 138, 5 P.3d 727 (2000).

In *State v. Graham*, _Wn.2d_, No. 89869-3, 2014 WL 5892955, at *1 (Nov. 13, 2014), the trial court said, "my hands are tied" when the defendant asked for an exceptional sentence below the standard range based the statute requiring consecutive terms for serious

violent offenses. The Supreme Court reversed and ordered a new sentencing hearing because the trial court misunderstood its discretion to impose a sentence below the standard range. *Id.* at *4.

Here, the court refused to impose an exceptional sentence because it believed the request for an exceptional sentence required the court to “disregard the finding of the jury.” 1/14/14RP 37, 40. The court’s statement is contrary to the plain terms of RCW 9.94A.535(1) that requires the court to weigh the individual circumstances of the case when the jury convicts someone, not when the jury acquits him.

The court employed the wrong legal standard. The State asserts that a standard range sentence cannot be erroneous when the court heard argument and decided against imposing an exceptional sentence. Response Brief at 12. But the State does not address the court’s statement that imposing an exceptional sentence would mean the court was disregarding the jury’s verdict. The court said that it was precluded from weighing whether Mr. Smith’s claim of self-defense entitled him to a mitigated term because that would amount to the judge “second guess[ing] the jury” which had rejected self-defense. 1/14/14RP 37.

The State’s brief also ignores the persuasive explanation of the reasonableness of an exceptional sentence put forward by the neutral,

and law enforcement oriented, Department of Corrections which endorsed such a mitigated sentence as appropriate and just punishment. CP 118. This legal error requires reversal for a new sentencing hearing because it was based on a categorical denial of an exceptional sentence for a person whose claim of self-defense does not succeed at trial.

B. CONCLUSION.

Bobby J. Smith's trial was unfair because the court limited his presentation of relevant evidence that made it harder for show that he acted in lawful self-defense and refused to clearly advise the jury that the lead detective's opinions that the evidence forensically undermined Mr. Smith's description of acting in self-defense. Furthermore, the court categorically misunderstood its authority to impose a mitigated sentence because the jury did not find he acted in self-defense to the degree required to be acquitted. A new trial and sentencing hearing are required.

DATED this 20th day of November 2014.

Respectfully submitted,



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