Supreme Court No. 93133-0

Court of Appeals No. 32695-1-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OSCAR ALFRED ALDEN,

Petitioner

REPLY IN SUPPORT OF PETITION FOR REVIEW

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A. NEW ISSUE RAISED BY RESPONDENT

In its answer to the Petition for Review, the State has raised a new issue regarding the sustainability of the trial judge's ruling excluding evidence. The State argues that evidence was not excludable for the reason given by the trial judge, it was excludable under ER 403 on the grounds that it would have been "overly cumulative" evidence if it had been admitted. *Response to Petition for Review* at 5.

The trial judge excluded all evidence that the decedent, Tom Maks, attacked two other people earlier in the evening, ruling that this evidence was not relevant because Alden did not know about these two prior attacks and therefore his decision to shoot Maks in self-defense was not influenced by these assaults. RP 112-13. The Court of Appeals acknowledged that the trial judge's determination that the evidence was not relevant was erroneous, because under cases such as *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987), res gestae evidence of assaults committed earlier in the same evening are relevant to show that the victim was the first aggressor, even if the defendant was unaware of the earlier assaults. *Slip Opinion*, at 21.

The Court of Appeals opined that the excluded evidence "should have been subjected to an ER 403 analysis," *id.* at 22, and then went on to state that the error was harmless under the non-constitutional harmless error rule, refusing to apply the *Chapman*[1] harmless error rule applicable

[1] *Chapman v. California*, 318 U.S. 18 (1967).

to errors of constitutional magnitude. *Slip Opinion*, at 22 & n.3. The Court concluded that the error was "harmless" either because it probably did not affect the verdict, or because "it could have been properly excluded under ER 403 as overly cumulative." *Id.* at 23.

The prosecution now contends that even if the Court of Appeals erred by applying the non-constitutional harmless error standard, the decision below should not be disturbed because it rests upon the alternate ground that the evidence was properly excluded because it was "cumulative" evidence. In response to this new issue raised by the State, Petitioner Alden submits the following reply.

B. ARGUMENT IN REPLY

1. The State misrepresents the Court of Appeals' opinion.

In its opposition to Alden's petition for review the State asserts:

> In addition to holding the exclusion of res gestae evidence was harmless, the Court of Appeals additionally held that the evidence **would** "have been properly excluded under ER 403 as overly cumulative." *Id.*

Response to Petition for Review at 5, citing to *Slip Opinion* at 23 (emphasis added).

This is a misrepresentation of what the Court of Appeals said. The State's placement of quotation marks is quite significant. The State places the word "would" immediately *before* the beginning of the quoted portion of the sentence. But the Court of Appeals never used the word "would." Instead, it used the word "could." The complete sentence reads:

> Moreover, even if the evidence was relevant, it **could** have been properly excluded under ER 403 as overly cumulative.

Slip Opinion at 23 (emphasis added). Thus, the Court of Appeals said that it was theoretically possible that the trial judge *could* have excluded this evidence if the argument had been made that the evidence was needlessly cumulative. But evidence is always "excludable" on the ground that it is needlessly cumulative. So when the Court below said the evidence "was excludable," it merely noted that a trial judge always has the discretionary authority to exclude evidence on this basis. *If* the prosecution had made the argument that the res gestae evidence was needlessly cumulative evidence, and *if* the trial judge had realized that the evidence *was* relevant on the contested issue of who was the first aggressor, *no one knows* how the trial judge would have ruled.

In sum, the State mispresents the record when it asserts that the Court of Appeals made a prediction that the trial judge "would" have excluded the evidence on this ground if this ground had been argued by the prosecution.

2. The alternate ground for exclusion – the "needless presentation of cumulative evidence" – was never raised in the Superior Court, and thus is not "within the pleading and proof."

An appellate court "can affirm the decision of the trial court on an alternate theory *which was argued to it.*" *State v. Hudson*, 79 Wn. App.

193, 194 n.1, 900 P.2d 1130 (1995), *aff'd* 130 Wn.2d 48, 921 P.2d 538 (1996) (italics added). *Accord State v. Michielli,* 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Tropiano v. Tacoma*, 105 Wn.2d 873, 876-77, 718 P.2d 801 (1986) (trial court can be affirmed on any ground argued at trial and supported by the record.) But an appellate court may not affirm on the basis of an alternate theory which was never raised in the trial court. *See, e.g., State v. Sondergaard,* 86 Wn. App. 656, 938 P.2d 351 (1997). "This rule may be invoked only when the theory upon which we are asked to rely was established by the pleadings, proof, and arguments presented at trial." *State v. Bryant,* 78 Wn. App. 805, 812, 901 P.2d 1046 (1995).

In this case, the alternate ground was *never* raised in the court below. Although the State filed a motion in limine and argued that the trial judge should exclude all evidence of the unprovoked assaults that Tom Maks committed against two other people earlier that evening, the State *never* argued that the evidence should be excluded because it would be needlessly cumulative. The *only* legal basis for exclusion which the State offered was that the proffered evidence was inadmissible character evidence:

> The State moves to exclude any testimony, evidence or arguments concerning the acts leading up to, during, and after the events set forth above. Admission of these acts is not relevant in establishing any fact at issue in trial, and would serve only in presenting the jury with improper character evidence.

CP 116-117. But it *wasn't* character evidence. As the Court of Appeals acknowledged, it was *res gestae* evidence which was relevant and admissible on the issue of who was the first aggressor. *Slip Opinion*, at 21 (stating that Alden's *res gestae* evidence "was relevant").

3. The excluded evidence was not cumulative because it was not evidence of the same kind as the evidence that the jury did get to hear. In a similar manslaughter case the Seventh Circuit found the same cumulative evidence argument to be "virtually frivolous" and the same type of error was held "seriously prejudicial."

Second, the excluded evidence *was not* cumulative. "Cumulative evidence is evidence of the same kind to the same point." *In re Fero*, 192 Wn. App. 138, 162, 367 P.3d 588 (2016); *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918). The crucial disputed issue at trial was whether or not Maks was the first aggressor. Alden testified that Maks lunged towards him right before he fired at Maks. RP 1130. A prosecution witness testified that Maks did not lunge towards Alden before the shot, but that Maks *was* moving and that he was raising his hands right before he was shot. RP 419-20, 461. Evidence that Maks attacked two *other* people that evening is *not* evidence of the same kind as Alden's own testimony about how Maks attacked *him*. Moreover, Alden's own testimony was impeachable on the grounds that Alden had a huge self-interest in portraying Maks as the first aggressor. But the two other people that Maks attacked earlier in the evening had no such self-interest, thus their testimony was not testimony "of the same kind." *See Roe*, at

314 (evidence of an extrajudicial admission by one of the parties was not evidence of the same type as testimony given by the opposing party). While their testimony established that Maks was the first aggressor in his encounters with them, this does not suffice to make it testimony "of the same kind to the same point." *Roe*, 100 Wash. At 314.

In sum, the excluded evidence was not cumulative evidence at all, and thus it cannot be said that the trial judge would have excluded it on the ER 403 ground that it would constitute the "needless presentation of cumulative evidence." And certainly it cannot be said, as required by the constitutional harmless error rule of *Chapman,* that it is clear beyond any reasonable doubt that the trial court would have excluded the evidence if the argument that it was "overly cumulative" evidence had been made to the trial judge.

Petitioner's counsel was actually able to find one case where the prosecution made the exact same "cumulative evidence" argument which the State makes here. In *United States v. Greschner,* 647 F.2d 740 (7th Cir. 1981), a prisoner was tried and convicted for a stabbing assault committed against another prisoner named Logan. Greschner sought to present evidence that Logan had previously attacked and stabbed another prisoner. Greschner argued that evidence of Logan's prior assault tended to support Greschner's claim that he acted in self-defense and simply defended himself when Logan attacked him. As in the present case, the trial judge excluded the proffered evidence of Logan's prior assault on relevancy grounds, reasoning that such evidence was irrelevant because

Greschner had not known about Logan's prior assault. The Fifth Circuit held the exclusion of this evidence was reversible error. Like the Court of Appeals in Alden's case, the Fifth Circuit concluded that the excluded evidence "is relevant to the defendant's theory of self-defense in that it makes his version that the victim attacked him 'more probable.'" *Id.* at 741.

As in the present case, the Government argued that even if the trial judge erred when it concluded that the evidence was not relevant, the evidence "was still properly excluded because it would have been 'distracting,' ***cumulative,*** hearsay, and because the defendant did not lay the proper foundation for his questions." *Id.* at 742 (emphasis added). The Fifth Circuit vehemently rejected the Government's contention:

> ***These arguments are virtually frivolous***. Since evidence of Logan's character is relevant to the defendant's defense, we do not see how it could be "distracting" any more than any other acceptable defense theory. The government's argument that such evidence would be cumulative because "most incarcerated prisoners have committed violent crimes" is totally unsubstantiated. Even if the government could establish that the quoted statement is true, ***that would not indicate that the evidence in the defendant's trial was cumulative.***

Greschner, 647 F.2d at 742 (emphasis added).

The prosecution's "cumulative evidence" argument in this case is every bit as frivolous as the same argument made in *Greschner*. Here as in *Greschner*, the exclusion of the evidence of the alleged victim's prior assaults on others was "seriously prejudicial," and as in Greschner should

have been found to be reversible error. *Id.* at 743. *Accord Gonzales v. State*, 838 S.W.2d 848 (Tex.Ct.App. 1992).[2]

C. CONCLUSION

For the reasons stated above, this Court should reject the State's effort to inject a new issue into the case, and should recognize that the issue which Petitioner Alden has raised is what determined the outcome of this case. Both the U.S. Supreme Court and this Court have held that self-defense is a right of constitutional magnitude. Petitioner urges this Court to grant review to address the critical issue of whether or not the constitutional harmless error rule applies to the erroneous exclusion of evidence which supports the claimed exercise of the constitutional right of self-defense.

Respectfully submitted this 16th day of June, 2016.

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[2] Similarly, in *Gonzales* the appellate court reversed a manslaughter conviction because of the erroneous exclusion of defense proffered evidence that the alleged victim has committed violent assaults against other people: "Given the importance in this trial of deciding whether Ida Delaney was the first aggressor, the exclusion of the evidence was harmful." *Id.* at 864.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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