74015-6

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Court of Appeals
Division I
State of Washington

No. 74015-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ALEXANDER,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. The trial court abused its discretion in denying Mr. Alexander's motion to instruct the jury on the lawful use of force in defense of property, and the State misunderstands the legal standards.

As explained in the opening brief, the trial court abused its discretion in refusing to instruct the jury on the lawful use of force in defense of property. *See* RCW 9A.16.020; *State v. Bland*, 128 Wn. App. 511, 513-16, 116 P.3d 428 (2005). Once any evidence is presented to support the instruction, a defendant has a due process right to have his theory of the case presented even if the judge would not credit the evidence were she the trier of fact. U.S. Const. amend. XIV; *See Mullaney v. Wilbur*, 421 U.S. 684, 702-04, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Adams*, 31 Wn. App. 393, 395-97, 641 P.2d 1207 (1982). Ms. Colangelo testified that Mr. Alexander merely "wrestled" with her and tried to "pull" her back to prevent her from opening the door or grabbing the steering wheel while he was driving, and that if he had not done so she may have damaged the car. RP (5/26/15) 142-43, 195. Thus, the trial court erred in denying Mr. Alexander's request to instruct the jury on the lawful use of force in defense of property. Br. of Appellant at 6-11.

In response, the State misstates two legal standards. First, it claims that a defendant is entitled to a jury instruction only if the defense theory

is supported by "substantial" evidence. Br. of Respondent at 7 (citing *State v. O'Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015)). But although this standard may be applicable to *affirmative defenses*, for which the *defendant* bears the ultimate burden of persuasion, it is not applicable to the lawful use of force defense, which the State must disprove beyond a reasonable doubt. *Compare O'Dell*, 183 Wn.2d at 687 (addressing reasonable belief of age defense, for which defendant bears burden of proof) *with Adams*, 31 Wn. App. at 395-96 (addressing defense of lawful use of force, which State bears the burden of disproving). For the defense at issue here, which was lawful use of force, the trial court was required to give the instruction if *any* evidence supported it. *See State v. Werner*, 170 Wn. 2d 333, 336–37, 241 P.3d 410 (2010); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

The second incorrect legal claim the State makes is that Mr. Alexander was required to show Ms. Colangelo had "an evil intent, wish, or design to vex, annoy, or injure another person." Br. of Respondent at 8; *see also* Br. of Respondent at 10 ("There is no evidence that Colangelo harbored an evil intent, wish, or design to injure Alexander"). Contrary to the State's claim, the complaining witness's mental state is not the issue; the issue is whether *Mr. Alexander* reasonably believed he had to use force to protect his property from malicious interference. *See Bland*, 128 Wn.

App. at 513. Furthermore, he did not have to fear injury to *himself* in order to protect *his property*. *Id*. "It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly." *Bland*, 128 Wn. App. at 513 n.1 (quoting *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 506, 125 P.2d 681 (1942)). Because evidence was presented to support this theory, the trial court erred in refusing to instruct the jury on the defense.

The State's proposed rule, which turns on the mental state of the complainant rather than the defendant, would lead to absurd results. For example, if a mentally ill person started bashing a parked car with a hammer – not with evil intent but because he thought the car was a monster – the car's owner could lawfully grab the person's arm and pull him away from the car. Similarly, if a highly intoxicated passenger grabbed the steering wheel of a moving car – not with evil intent but because she was drunk – the car's driver could lawfully grab the passenger's arm and pull it off of the wheel. In either instance, if the person who grabbed another's arm were charged with assault, the State's theory would preclude him from asserting lawful use of force in defense of property. That is not the law. *See Bland*, 128 Wn. App. at 513-17; *cf. State*

v. Janes, 121 Wn. 2d 220, 238-39, 850 P.2d 495 (1993) (explaining reasonably prudent defendant standard in self-defense context).

The State then argues that even if the court erred in refusing to give the instruction, the error was harmless. Br. of Respondent at 11-12. The State is wrong. The State claims the error was harmless because Mr. Alexander's attorney argued in closing that he was defending his car, and the jury convicted him anyway. *Id.* However, the jury was not permitted to consider defense of property, because the instructions did not include this option. CP 70-97; *cf. State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009) (counsel's failure to request instruction on relevant defense prejudiced defendant because absent the instruction jury had no way to give effect to relevant evidence and portions of defense counsel's closing argument). Furthermore, the jury was instructed that the lawyers' arguments were not the law, that the law was contained in the jury instructions, and that the jury was to disregard any argument not supported by the instructions. CP 72. "Juries are presumed to follow instructions absent evidence to the contrary." *State v. Lamar*, 180 Wn. 2d 576, 586, 327 P.3d 46 (2014). Thus, the State is wrong in implying that the jury necessarily rejected the defense.

It is true that the jury rejected self-defense and defense of others. Br. of Respondent at 11-12. But this does not mean it would have rejected

defense of property. It may have rejected the former defenses because no evidence was presented regarding the speed of travel or the presence of others in the area, and thus the danger to Mr. Alexander or other drivers was too speculative. But it was undisputed that Ms. Colangelo interfered with Mr. Alexander's property by grabbing the steering wheel and the car door. RP (5/26/15) 142-43, 162, 195. Thus, the jury may have credited this defense had it been available. Accordingly, Mr. Alexander asks this Court to reverse his conviction and remand for a new trial.

2. The trial court abused its discretion in admitting hearsay statements and improper opinion testimony, and the State fails to address both issues on their merits.

As explained in the opening brief, the trial court abused its discretion in admitting the complete recordings of 911 calls from Annette Weis and Rebecca Kent, because the recordings were filled with statements that were hearsay and were cumulative of live testimony. Most of the statements fell outside of the "excited utterance" and "present sense impression" exceptions to the rule against hearsay, because the declarants were calmly answering questions about past events. Br. of Appellant at 11-19.

The State claims that trial counsel waived the issue. Br. of Respondent at 17-21. The State is wrong. Contrary to the State's claim, Mr. Alexander's trial brief referenced hearsay statements Ms. Colangelo

had made to both Ms. Weis and Ms. Kent. CP 13. Mr. Alexander argued that those hearsay statements, which Ms. Weis and Ms. Kent then relayed to 911 operators, should be excluded. CP 13, 20-24.

Later, before either 911 call was played for the jury, Mr. Alexander objected orally to both calls. RP (5/27/15) 4. He objected to both calls on the bases that they contained hearsay and would be cumulative of live testimony. RP (5/2715) 4. The trial court entertained the objections and overruled them on their merits. RP (5/27/15) 4-5. Thus, the errors were preserved for review. *Cf. State v. Lindsay,* 180 Wn. 2d 423, 441, 326 P.3d 125 (2014) (policy reasons for the contemporaneous objection rule include giving the trial court a chance to correct the problem).

The State does not address the hearsay problem with Ms. Weis's call *at all*, and mentions the hearsay issue with respect to Ms. Kent's call in one conclusory sentence in a footnote. Br. of Respondent at 21 n.7. The failure of the State to present argument on this issue should be construed a concession of error. *See State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) ("By its failure to address E.A.J.'s contention …, the State apparently concedes the issue"); *accord United States v. Caceres-Olla*, 738 F.3d 1051, 1054 n.1 (9th Cir. 2013) ("In his opening brief, Caceres–Olla maintains that his conviction did not constitute 'sexual abuse of a minor,' another enumerated 'crime of violence' within Guideline

2L1.2(b)(1)(A), because section 800.04(4)(a) prohibits sexual conduct with minors of 14 years and older and does not require an element of 'abuse.' The government did not respond to this argument, and so has waived reliance on that 'crime of violence' variant."); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999) (failure of government to defend district court's ruling in appellate brief constitutes implicit concession of error); *see also State v. N.E.*, 70 Wn. App. 602, 607, 854 P.2d 672 (1993) (declining to address argument made only in footnote).

The State similarly fails to address the error in admitting an officer's statements and a detective's statements opining on the cause of Ms. Colangelo's injuries. Br. of Appellant at 19-20. Here again, the State's only claim is that the issue was waived. Br. of Respondent at 22-23. The State is wrong.

To be sure, Mr. Alexander did not use precisely the same language in the trial court that he does on appeal, but he objected to the testimony on the basis that it was speculative and without foundation. RP (5/26/15) 16-17, 82. These objections were appropriate, as explained in the primary case upon which Mr. Alexander relies:

> In order to assure evidence is admitted in an orderly fashion and impermissible opinions are not improperly injected into the trial, certain procedures must be followed by trial

> advocates to *lay proper foundations for opinion testimony*. It is the duty of every trial advocate to prepare witnesses for trial. *See State v. Underwood,* 281 N.W.2d 337, 342 (Minn.1979) (prosecutor has duty to prepare State's witnesses for trial). The preparation will vary depending upon the nature of the trial, the issue, and the type of witness. In normal conversation, people often use phrases like "I believe" or "it's possible." These phrases are likely to draw objections at trial because witnesses are generally not permitted to speculate or express their personal beliefs about the defendant's guilt or innocence. *See, e.g., Bellevue Plaza, Inc. v. City of Bellevue,* 121 Wash.2d 397, 417, 851 P.2d 662 (1993); *State v. McDonald,* 98 Wash.2d 521, 529, 656 P.2d 1043 (1983); *State v. Black,* 109 Wash.2d 336, 348, 745 P.2d 12 (1987). Witness preparation facilitates the smooth and orderly presentation of evidence and the efficient administration of justice. At a minimum, trial advocates must explain to witnesses the decorum of a courtroom, the difference between direct and cross examination, any orders in limine entered by the court, and *the rules against speculation or expression of personal beliefs or opinions* unless specifically requested.

State v. Montgomery, 163 Wn. 2d 577, 592, 183 P.3d 267 (2008) (emphases added); *see also* Br. of Appellant at 20 (citing *Montgomery*). Thus, the issue was preserved, and the State's failure to address the issue on the merits should be construed a concession of error. *E.A.J.,* 116 Wn. App. at 789.

Although it implicitly concedes error on the evidentiary issues, the State avers that any error was harmless. Br. of Respondent at 23-26. It is true that Ms. Weis and Ms. Kent both testified at trial. Br. of Respondent at 23. But as the State admits, both 911 calls were played *three times* for

the jury, indicating the outsized effect this improperly admitted evidence had on deliberations. Br. of Respondent at 15; Br. of Appellant at 22. And as to the officers' opinion testimony, although the State correctly notes that the emergency room doctor testified the injuries were consistent with being punched, the doctor did not reject the possibility that the injuries were caused by a car accident. RP (5/27/15) 61-63, 73. He said, "it's very difficult to rule out any particular injury pattern from a car crash. It's surprising what you can see." RP (5/27/15) 73. Thus, the errors cannot be dismissed as harmless, and this Court should reverse and remand for a new trial.

B. CONCLUSION

Because the trial court abused its discretion in refusing to instruct the jury on a defense theory of the case and in admitting inadmissible evidence, Mr. Alexander asks this Court to reverse his conviction and remand for a new trial..

Respectfully submitted September 6, 2016.

/s Lila J. Silverstein
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DIVISION ONE

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	)	
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	)	
BRIAN ALEXANDER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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