

64968-0

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NO. 64968-0-1

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

STATE OF WASHINGTON

Respondent,

v.

CHRISTOPHER A. TAMMAM,

Appellant.

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

The Honorable MICHAEL HEAVEY, Presiding at the Trial Court

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in refusing to give self-defense instructions.

B. ISSUES PRESENTED

1. Did the trial properly refuse to give self-defense instruction where it was supported by facts at trial?

C. STATEMENT OF THE CASE

Appellant was charged with and convicted by jury of Assault, Second Degree, with weapon enhancement. This appeal results.

Appellant was alleged to have assaulted Saskia Gatterson by cutting her hand with a knife at a party where a number of individuals were present, including Chadwick Gatterson. RP at 3, LL 13-14.

Chadwick Gatterson testified that prior to the event that led to Saskia Gatterson's injury, they were standing next to one another in the kitchen of the home where this event occurred. RP at 90. LL 1-2. Then, Chad Gatterson testifies Saskia Gatterson moved towards Appellant and 'basically she ran towards him and was screaming' at Appellant. RP at 90 LL 2-4. Appellant had a knife in his hand as Saskia ran towards Appellant. RP at 90 LL 5, LL 15. Chad Gatterson repeatedly describes Saskia moving towards Appellant prior to her being cut by the knife. RP at 90 LL 17. Further, Chad Gatterson indicates that Saskia moved towards appellant with her hands up in the air. RP at 90 , LL 20-21.

Admitted evidence in this case is that Chad Gatterson offered an opinion that one of the reasons Appellant might have possessed the knife was that ‘he (Appellant) felt really threatened.’ RP at 97. LL 6. Admitted evidence in this case is that Chad Gatterson further stated that Appellant might have ‘felt threatened or cornered’ by the circumstances or persons present at the house or in the kitchen. RP at 97 LL 13-14. Chad Gatterson repeatedly testified, and such evidence was admitted without objection, that Saskia moved towards Appellant and that is when she got cut. RP at 98. LL5-7.

Critically, the admitted evidence in this case is that Chad Gatterson states that due to the actions of Saskia that Appellant may have been acting in “self-defense.” RP at 90 LL 10-11.

The Court declined to give self-defense instructions reasoning that “we only have Chad Gatterson saying that [alleged victim] went towards the defendant.” RP at 9, LL 20-21. The Court further reasons “[w]e have no other testimony from the defendant.” RP at 9, LL 22. The Court invited the defense to re-open its case and present testimony from the defendant if the defense so wished to rectify this perceived evidentiary defect. RP at 9, LL 23-25, RP at 10, LL 1-11.

D. ARGUMENT

1. The trial court erred in refusing to give self-defense instruction.

A defendant is entitled have a jury instructed on the defense theory of the case. State v. Hughes, 106 Wn.2d 176 (1986). The court has held that failure to give such instruction is ‘prejudicial error.’ State v. Riley, 137 Wn.2d 904 (1999). It is reversible error for the trial court to refuse an instruction if the instruction properly states the law and the evidence supports the instruction. State v. Ager, 128 W.2d 85 (1995). The failure to give an instruction is reviewed by abuse of discretion standard. State v. Piccard, 90 Wn.App. 890 (1998). Discretion is abused where it is exercised untenably or on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12 (1971).

Further, to be entitled to an instruction on self-defense, the defendant only need to prove ‘any evidence’ of self-defense. State v. Redwine, 72 Wn.App. 625 (1994). It is axiomatic that such evidence can come from either a state or defense witness. See, WPIC 1.02 (“every party is entitled to the benefit of the evidence whether produced by that party or another party.” Emphasis supplied.) It is the States burden to disprove the

self-defense in order to prove the defendant acted unlawfully. State v. Acosta. 101 Wn.2d 612 (1984).

Instantly, the trial court declined to give the self-defense instruction. RP at 9, LL 12-25.. The trial court's reasoning was that there was no evidence of self-defense produced by the Defendant/Appellant. RP at 9, LL 22. In so reasoning, the Court invited the Appellant that the Court would reconsider its ruling and reconsider giving such instruction *if* the Defendant/Appellant relinquished his constitutional right to remain silent and testified, despite the evidence of self-defense from the State's witnesses(s) already in the record. RP at 9, LL 23.

In particular, offered up by the Prosecution as a reason for not giving the self-defense instructions, the Court relied on the case of State v. Dyson, 90 Wn.App. 433 (1997) for the reason to not give the instruction on the basis that it is the defendant himself that must testify as to evidence of self-defense. RP at 10, LL 3-5 (stating "[t]he defendant has not testified . . . [t]o establish self-defense, the Defendant must produce evidence I'm not saying that forces the defendant to testify, but I'm certainly saying I don't have any of that evidence (good faith belief in the necessity of force) produced in Court. Emphasis supplied.)

First, the trial court patently misapplied the holdings of the controlling cases and the Prosecution's implied, and convincing argument at the time to the trial court, is that it *is* the Defendant who must personally produce the evidence and is completely without merit. It is axiomatic that the criminal defendant, individually, solely or even in the defense case in chief, is never required to produce evidence. U.S. Consitut., 5th Amend., WA State Consit, Art I, Section 9; see also, *State v. Pottorff*, 138 Wn.App 343 (2007) (no ability of government to comment on defendant's right to remain silent).

As significantly, it is further axiomatic that the defendant is *entitled to the benefit of evidence produced from any witness*—or whatever source as long as it is admitted into evidence----whether in State's direct or defense cross of State's witnesses, and likewise, the State would be entitled to evidence produced from any witnesses-whether in defense direct or State's cross. This axiomatic principle of law is so well-settled, well-grounded in our jurisprudence and is reiterated in every single criminal trial in this State in the general omnibus jury instructions. See, WPIC 1.02 (every party is entitled to the benefit of the evidence whether produced by that party or another party." Emphasis supplied.)

Very simply, the Court applied a constitutionally impermissible standard of requiring the Defendant to either be denied his constitutional right to remain silent or be denied the defense, and while simultaneously being denied the defense and the requirement the State disprove the lack of self defense in order to maintain his constitutional right of silence, as well as denying the Appellant the benefit of the evidence produced or elicited from a witness called by the State.

There was clear evidence from which to present the defense theory of self-defense to the jury from State witness Chad Gatterson. Alternativeliy stated: there was clear testimonial evidence of self-defense elicited from State's witnesses on cross-examination. Whether the jury would or would not have found such evidence controlling or dispositive is *not* the issue. The issue is whether the defendant should have been entitled to the instruction that would have permitted counsel to argue the defense theory of the case based upon the admitted evidence.

In particular, it is undisputed that Chad Gatterson, in admitted evidence testified as to the potentially aggressive actions of the alleged victim Saski Gatterson. Chad Gatterson on multiple occassions testified that Saskia Gatterson moved towards Appellant physically before she was cut by the knife. Chadwick Gatterson testified that prior to the event that

led to Saskia Gattersons injury he and Saskia were standing next to one another in the kitchen of the home where this event occurred. RP at 90. LL 1-2. Then, Gatterson testifies Saskia moved towards Appellant and ‘basically she ran towards him and was screaming’ at Appellant. RP at 90 LL 2-4. Appellant had a knife in his hand as Saskia ran towards Appellant. RP at 90 LL 5, LL 15. Gatterson repeatedly describes Saskia moving towards Appellant prior to her being cut by the knife. RP at 90 LL 17. Further, Gatterson indicates that Saskia moved towards appellant with her hands up in the air. RP at 90 , LL 20-21.

Admitted evidence in this case is that Gatterson offered an opinion that one of the reasons Appellant might have possessed the knife was that ‘he (Appellant) felt really threatened.’ RP at 97. LL 6. Admitted evidence in this case is that Gatterson further stated that Appellant might have ‘felt threatened or cornered’ by the circumstances or persons present at the house or in the kitchen. RP at 97 LL 13-14. Gatterson repeatedly testified, and such evidence was admitted without objection, that Saskia moved towards Appellant and that is when she got cut. RP at 98. LL5-7.

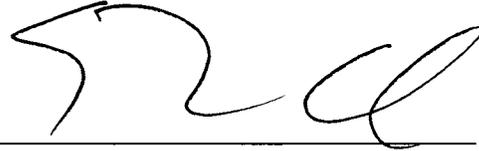
Critically, the admitted evidence in this case is that Gatterson testified that due to the actions of Saskia that Appellant may have been acting in “**self-defense**.” RP at 90 LL 10-11.

Such testimony unequivocally provides the evidentiary basis for the instruction. There is testimony, albeit from a third party, that the facts and circumstances were such that the Defendant/Appellant may have been acting to defend himself---the exact criteria for the giving of self-defense instructions. State v. Redwine, supra. Whether the Prosecution subsequently disagrees with it, the testimony from this witness was admitted as to the objective circumstances whether Appellant may have felt threatened, cornered, and that Saskia Gatterson was the one who was taking physical steps toward the Appellant, while screaming at him, and that one of the reasons that the Appellant may have acted the way he was because he was acting in self-defense. Whether he was acting in self-defense is therefore a question of fact for the jury and the defense was denied it's opportunity to present it's theory of the case based upon the admitted evidence before the Court.

E. CONCLUSION

For all of the above reasons, the Appellant seeks relief as indicated herein.

DATED this 17th day of Oct., 2010



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