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COURT OF APPEALS NO. 65944-8-1

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

REC'D  
MAR 01 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON

v.

GLEND A CUMMINS,

Appellant.

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VH

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

The Honorable John Erlick, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court misapplied the law in finding appellant guilty of assault.
2. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. In the state's case against appellant for allegedly assaulting her adult daughter, the evidence showed appellant followed her daughter downstairs to make sure she did not steal anything, after the two argued and appellant told her daughter to leave. Appellant testified that while the two were downstairs, her daughter struck her in the head, at which point, appellant struck back and hit her daughter in the head with a glass to prevent further harm to herself.

The court found appellant's testimony credible, but held the degree of force she used was not reasonable. Because appellant had been able to fend off her daughter with a broom during an earlier scuffle, and because appellant continued the confrontation by going downstairs to her daughter's bedroom, the court found reasonable alternatives to the use of force appeared to exist.

It is well settled there is no duty to retreat in Washington. Yet in rejecting appellant's self defense claim, the court faulted appellant for going downstairs in her own home – where she had the legal right to be. In so doing, did the court misapply the law, wrongly impose a duty to retreat, and thereby ease the state's burden to prove all the elements of the offense?

2. Where the court found appellant reasonably believed she was about to be injured, but that the degree of force she used was unreasonable, did defense counsel's failure to request an exceptional sentence – based on appellant's failed self defense claim – constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

Following a bench trial in King County Superior Court, Glenda Cummins was convicted of third degree assault, allegedly committed against her adult daughter, Brittenee Buckner.<sup>1</sup> CP 1-4; (RCW 9A.36.031(1)(d)), CP 13, 25-31; RP 78-81.<sup>2</sup> At trial, Cummins asserted she acted in self defense. RP 213. The court believed Cummins feared for her safety, but disagreed the amount

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<sup>1</sup> Buckner was 25 years old at the time. RP 162.

<sup>2</sup> The verbatim report of proceedings ("RP") consists of three bound volumes, consecutively paginated, dated June 25, August 3, August 4, August 5, August 12, and August 30, 2010.

of force she used was objectively reasonable under the circumstances. CP 14-22.

At sentencing, the court reiterated Cummins' daughter (Buckner) was not without fault in the altercation. RP 329. As a result, and because the court did not perceive Cummins as a danger, the court sentenced her to 60 days of home detention and 240 hours of community service. CP 25-31; RP 329-330. The sentence is stayed pending appeal. Supp. CP \_\_ (sub. no. 46, Order Setting Bond on Appeal, 8/30/10); Supp. CP \_\_ (sub. no. 50, Appeal Bond, 9/7/10).

Cummins testified that on December 12, 2009, she and Buckner got into an argument about Buckner giving money to her baby's father, who did not reside with them.<sup>3</sup> RP 208-209. Cummins testified she did not become angry or upset until Buckner pushed her. RP 210. When Buckner pushed her, Cummins used a broom to hold her back, as Cummins was in front of the stove. RP 211.

Cummins testified Buckner "was ranting and raving that her money is her money and she didn't go over there." RP 211. As reported by Cummings, Buckner also had a drug problem. When

Cummins tried to show Buckner a treatment brochure, Buckner asserted, "if she wants to smoke pot, that she can smoke pot." RP 210-211. Cummins responded, "not in my home and I've about had it and you can leave." RP 211. Cummins reiterated: "you don't want help, so then you can make it on your own, so you leave." RP 211.

Buckner went downstairs to her bedroom. RP 211. Cummins followed because she was "concerned about [Buckner] taking other things that could be pawned." RP 231-32. Cummins testified Buckner was throwing stuff around, having a fit and destroying her bedroom. RP 211-212. Cummins asked her to stop, but Buckner came up, pushed Cummins and hit her on the right temple. RP 213. Cummins saw stars: "it went black, and there were, like, stars." RP 213. There was also a dresser nearby and Cummins "just grabbed something and hit [Buckner]" on the head. RP 213. As Cummins explained, she hit Buckner "[s]o that she did not harm me, take me down." RP 213.

Cummins testified Buckner is five feet and three inches tall, and weighs approximately two hundred and thirty pounds. RP 213.

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<sup>3</sup> Buckner and her young daughter lived with Cummins and Cummins' two other daughters in Cummins' Auburn home. RP 208, 216-17.

In contrast, Cummins is five feet and seven inches tall and weighs approximately 150 pounds. RP 214.

After Cummins hit Buckner with a glass, she called police. RP 215. Officers Christopher Mast and Stanley Adamski responded. RP 89-90, 99, 208. Mast described Cummins as upset, angry and wanting her daughter "to be taken to jail" or removed from the home. RP 100, 114. Mast testified Cummins said Buckner hit her in the head. RP 100-101, 236.

Mast went downstairs to talk to Buckner.<sup>4</sup> RP 92, 103. According to Mast, Buckner was bleeding on the left side of her face. RP 104. There were items strewn about the room and pieces of glass on the floor. RP 105. Mast came back upstairs and took Cummins into custody. RP 92.

Bonnie Courtier treated Buckner at Auburn Regional Medical Center. RP 144. Before assessing Buckner, Courtier read notes written in Buckner's medical chart by nurse Joe Myron, who triaged Buckner when she arrived. RP 152-53. The notes stated Buckner sustained a head injury two hours earlier; that she was struck one

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<sup>4</sup> Mast described Buckner as "fairly heavy" and approximately 230 pounds. RP 119. Similarly, Adamski described her as "a little bit heavier, on the heavier side." RP 93.

time with a glass by her mother, who was currently under arrest.<sup>5</sup>

RP 155. Courtier cleaned Buckner's cut, which was not wide. She described Buckner as alert and oriented. RP 156. Buckner arrived and left in a privately owned vehicle. RP 152.

The court found Cummins' testimony credible, but did not find the degree of force she used was reasonable, as indicated in the court's written findings and conclusions:

12. The force used by Ms. Cummins, in response to the assault she claims was initiated by her daughter downstairs in Brittenee's bedroom, was not reasonable to prevent or attempt to prevent injury to herself. Although Ms. Cummins implies that the physique differential between herself and her daughter caused the concern, this contention is not credible. First, Ms. Cummins was successful in fending off her daughter by using a broom against an earlier assault, allegedly initiated by her daughter. Second, in spite of this earlier alleged assault, Ms. Cummins continued the confrontation by going downstairs to her daughter's bedroom. Third, whatever force used by Brittenee, if any, against Defendant Cummins in the bedroom was not significant enough to be noticed by either of the responding police officers or to be treated by the on-scene medics.

13. Ms. Cummins responded by striking her daughter in the head with a glass, a thing likely to produce bodily harm.

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<sup>5</sup> Although Buckner did not testify, the court admitted her statement to the triage nurse on grounds it was non-testimonial, made for the purpose of medical diagnosis and treatment and admissible through Courtier as a business record. RP 196-200. See e.g. State v. Fisher, 130 Wn. App. 1, 108 P.3d 1262 (2005) (child's statement to physician that defendant hit him was not testimonial and admissible under hearsay exception for statements made for purposes of medical diagnosis and treatment).

14. The action taken by Ms. Cummins, even in response to an alleged assault by her daughter, was not lawful because it was more than necessary to prevent or to attempt to prevent further injury, in that the amount was not reasonable.

19. Defendant Glenda Cummins reasonably believed that she was about to be injured, and acted to prevent or attempt to prevent an offense against herself.

20. The force used by the defendant was more than necessary, in that (1) reasonably effective alternatives to the use of force appeared to exist and (2) the amount of force used was not reasonable to effect the lawful purpose intended.

CP 17-18 (emphasis added).

This appeal follows. CP 24.

C. ARGUMENT

1. THE COURT MISAPPLIED THE LAW OF SELF DEFENSE AND WRONGLY IMPOSED A DUTY TO RETREAT.

In convicting Cummins of assault, the court imposed a duty to retreat. This was error and relieved the state of its burden to prove all elements of the offense.

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the

State must prove beyond a reasonable doubt. State v. Acosta, 101 Wash.2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. State v. Walden, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997). Thus, this error can be raised for the first time on appeal. See State v. Redwine, 72 Wash.App. 625, 865 P.2d 552 (1994).

The law is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be. State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). An instruction should be given to this effect when sufficient evidence is presented to support it. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984).

The court's opinion in State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003), is instructive. Redmond was convicted of assaulting fellow student Bryan Johnson in the parking lot of their high school. At trial, the state argued that Redmond specifically looked for Johnson intending to start a fight and, after finding him, demanded that Johnson get out of the car and explain statements he believed Johnson had made regarding Redmond's ex-girl friend. The parties exchanged heated words and when Johnson began to

return to his car, Redmond threw a punch fracturing Johnson's jaw. Redmond, 150 Wn.2d at 491.

In his defense, Redmond testified that he met Johnson in the school parking lot by chance while he was at the school picking up his friend's brother. He testified that he did not intend to start a fight with Johnson and punched Johnson in self-defense only after Johnson stepped toward him with clenched fists. Redmond, 150 Wn.2d at 491.

Both parties produced witnesses to support their factual assertions. However, there was no dispute that, during the parties' initial argument and at the time Redmond delivered the punch, Johnson was standing between his car and Redmond. Redmond requested a no duty to retreat instruction as part of his theory of self-defense, but the court refused to give it, and the Court of Appeals affirmed. Redmond, 150 Wn.2d at 492.

In reversing the Court of Appeals, the Supreme Court distinguished its earlier decision in State v. Studd, *supra*, where the court upheld the trial court's refusal to give a no duty to retreat instruction:

Unlike Studd, where the defense presented a defense theory that incorporated the objective fact that the defendant was being held at gunpoint at the time he

shot the victim, clearly making retreat an unreasonable alternative, in this case the undisputed objective facts indicate that during the altercation, Johnson was between his car and Redmond, arguably leaving Redmond with an easy opportunity to retreat. Upholding the trial court, the Court of Appeals looked beyond the fact that Redmond objectively had a reasonable opportunity to retreat, and held that retreat was not an issue because Redmond's testimony included subjective thoughts regarding his ability to outrun Johnson and his characterization of his response as reactionary.

The Court of Appeals' conclusion pushes our reasoning in Studd too far beyond the facts of that case. Where the only objective facts suggest that retreat would be a reasonable alternative to the use of force, the risk that jurors would conduct their own evaluation of the possibility of retreat is not sufficiently diminished by testimony regarding the defendant's speculation about his chances for a successful retreat. To the contrary, such testimony may invite jurors to engage in their own assessment of the defendant's opportunity to retreat. As noted above, where the possibility of such speculation exists, the jury should be instructed that the law does not require a person to retreat when he or she is assaulted in a place where he or she has a right to be.

Redmond, 150 Wn.2d at 494-95 (footnotes omitted).

Significantly, the court noted the risk was exacerbated by the prosecutor's closing argument that "Bryan Johnson's back was up against the car, so if anybody had the way to get out of the situation, it was the defendant." Redmond, 150 Wn.2d at 495 (citation to record omitted). Although the prosecutor's argument was in the context of challenging the credibility of Redmond's claim

he feared Johnson, the court found “the prosecutor’s clear message to the jury was that if Redmond was really afraid of Johnson he would have retreated.” Redmond, at 495 n.3. To the court, the prosecutor’s suggestion highlighted the need for the no duty to retreat instruction in Redmond’s case and required reversal. Redmond, at 495 and n.3.

There were no jury instructions in Cummins’ case, as she agreed to a bench trial. Nonetheless, the trial court entered written findings markedly similar to the prosecutor’s closing argument in Redmond. Just as the prosecutor in Redmond argued Redmond’s claimed fear was not credible because he “had the way to get out of the situation,” the court here found Cummins’ claimed fear was not credible because she continued the confrontation by going downstairs:

The force used by Ms. Cummins, in response to the assault she claims was initiated by her daughter downstairs in Brittenee’s bedroom, was not reasonable to prevent or attempt to prevent injury to herself. Although Ms. Cummins implies that the physique differential between herself and her daughter caused the concern, this contention is not credible. First, Ms. Cummins was successful in fending off her daughter by using a broom against an earlier assault, allegedly initiated by her daughter. Second, in spite of this earlier alleged assault, Ms. Cummins continued the confrontation by going downstairs to her daughter’s bedroom.

CP 17 (emphasis added).

The court's finding is no different than the argument made in Redmond. The court essentially found that if Cummins were really afraid of Buckner, she would have retreated. That such was the gist of the court's finding is further buttressed by the court's subsequent finding that "reasonably effective alternatives to the use of force appeared to exist." CP 18. The court's findings evince a profound misapprehension of the law. Cummins was in her own house trying to ensure that Buckner would not steal anything. She was in a place she had every lawful right to be. The court's misapprehension of the law appears to have effected its decision in this case. Cummins' conviction should be reversed.

2. CUMMINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Assuming this Court does not agree the trial court misapplied the law in convicting Cummins, it should nevertheless remand for a new sentencing hearing, because defense counsel's failure to request an exceptional sentence below the standard range based on Cummins' failed self defense claim constituted ineffective assistance of counsel. The state and federal constitutions guarantee criminal defendants reasonably effective

representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003).

Failure to request an exceptional sentence may constitute deficient and prejudicial representation. In State v. McGill, 112 Wn. App. 95, 98, 47 P.3d 173 (2002), the defendant was sentenced within the standard sentence range for convictions on two cocaine delivery and one possession with intent to deliver counts. The drug purchases happened within a seven-day period and each involved a small amount of cocaine. Each delivery from McGill to a confidential informant (CI) occurred at the same location. Id. Each purchase was controlled by the investigating officers, who

used the same CI. Based upon the purchases, officers obtained a search warrant and served it on McGill eight days after the first purchase. They seized two small bindles of cocaine from McGill. Id.

After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. Id. On appeal, McGill argued that failure to request the exceptional sentence was ineffective assistance, relying on State v. Sanchez, 69 Wn. App. 255, 256-57, 848 P.2d 208, rev. denied, 122 Wn.2d 1007 (1993); and State v. Hortman, 76 Wn. App. 454, 886 P.2d 234 (1994), rev. denied, 126 Wn.2d 1025 (1995). This Court agreed, holding that the failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was ineffective and prejudicial. McGill, 112 Wn. App. at 101-02.

In Cummins' case, there was a valid basis to depart from the standard range as well. The court found Cummins was credible, that she "reasonably believed that she was about to be injured, and acted to prevent or attempt to prevent an offense against herself." CP 18. The court also found Buckner was not without fault in the matter. RP 329. Nonetheless, the court found the force Cummins used was more than necessary. CP 18. In other words, the court

found Cummins had a failed self defense claim, which made her less culpable than others convicted of the same offense. See e.g. State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997) (self defense is considered a failed defense mitigating circumstance).

As in McGill, the failure to inform the court of the proper scope of its discretion was ineffective and prejudicial. In light of the court's sentence – imposing no jail time and setting an appeal bond – the court likely would have imposed an exceptional sentence, were it not for counsel's failure to inform it of its ability to do so. This Court should accordingly remand for resentencing to allow the court to exercise its discretion.

D. CONCLUSION

Because the court misapplied the law in convicting Cummins, this Court should reverse her assault conviction. Alternatively, this Court should remand for resentencing because Cummins received ineffective assistance of counsel.

Dated this 1<sup>st</sup> day of ~~February~~ <sup>March</sup>, 2011

Respectfully submitted

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