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COA NO. 67248-7-I

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

REC'D

FEB 15 2012 STATE OF WASHINGTON,

King County Prosecutor Respondent,
Appellate Unit

v.

VALENTE ALVAREZ-GUERRERO,

Appellant.

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to present a complete defense.

2. The court erred by excluding evidence that the deceased was a drug dealer, including evidence that appellant knew the deceased was a drug dealer, that the deceased had a reputation in the community as being a drug dealer, and that a crack pipe was found in the deceased's bedroom.

Issue Pertaining to Assignments of Error

The State needed to prove beyond a reasonable doubt that appellant did not act in self-defense in killing his roommate. Did the court violate appellant's constitutional right to present a complete defense when it excluded evidence that the roommate was a drug dealer?

B. STATEMENT OF THE CASE

a. Procedural Facts

The State charged Valente Alvarez-Guerrero with one count of second degree intentional murder and one count of second degree felony while being armed with a deadly weapon. CP 5-6. A jury acquitted on the intentional murder charge and found him guilty of the lesser offense of first degree manslaughter. CP 17-18. The jury also convicted Alvarez of second degree felony murder and returned a special deadly weapon verdict.

CP 19-20. At sentencing, the court vacated the manslaughter conviction and imposed a total of 170 months confinement for the felony murder conviction and weapon enhancement. CP 70, 72. This appeal follows. CP 98.

b. Trial

Alvarez and Arturo Guillen-Ramirez co-rented an apartment in Seattle. Ex. 30; 4RP¹ 60, 63-64, 84. Alvarez had known Guillen for years and considered him to be a friend. 4RP 82-84, 135. Guillen and the women he brought home often awoke Alvarez at night. 4RP 144-45. On May 27, 2009, Alvarez argued with Guillen after one such incident. 4RP 94-98. Guillen grabbed Alvarez's throat and pushed him against the floor. 4RP 98-99. Guillen pressed his whole weight against Alvarez's throat, which cut off his air supply. 4RP 101. Guillen was about 5'4" tall and weighed 216 pounds. 3RP 135-36, 149. Alvarez was 5'2" tall and was about 50 or 60 pounds lighter. 4RP 102. Alvarez eventually managed to free himself from Guillen's grip. 4RP 101. Alvarez challenged Guillen to fight like a man. 4RP 102-04. Guillen called the police instead. 4RP 104.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/7/11; 2RP - 2/8/11, 2/9/11, 2/10/11; 3RP - 2/14/11; 4RP - 2/15/11, 2/16/11; 5RP - 2/17/11, 2/22/11, 2/23/11; 6RP - 5/20/11.

Seattle police officers Patterson and Sheperd were dispatched to the apartment shortly before midnight. 4RP 7-9; Ex. 22 at 6-7.² Alvarez answered the door and let them inside. 4RP 9. Alvarez had scratches on neck and looked like he was involved in a physical altercation. 4RP 9-10, 20, 30; Ex. 22 at 8-9, 23. Officers also saw that Guillen appeared to have a bloody nose and mouth and scratches on his neck. 4RP 11, 27; Ex. 22 at 9. Officers could not determine who was at fault, but they arrested Alvarez and transported him to the south police precinct. Ex. 22 at 13-14, 28.

Officer Patterson noticed Alvarez had a severe hand injury. Ex. 22 at 14. The hand was swollen. 4RP 30. The previous week, Alvarez, a day laborer, cut his left hand with a machete while working. 4RP 87-88, 152; 5RP 4. The hand hurt when it moved and was painful to the touch. 4RP 90-91. A hand surgeon testified Alvarez had a laceration above the extension tendon on his left index finger, which resulted in the loss of ability to extend the finger. 3RP 56-58, 63, 65. The grasping function was impaired. 3RP 65, 68, 78. Alvarez maintained he could only move two fingers and could not open the injured hand.³ 4RP 90-91; 5RP 4-5.

² Officer Patterson's videotaped deposition was played for the jury. 3RP 150-52; 4RP 5. Exhibit 22 is a transcript of the deposition admitted for illustrative purposes. 3RP 151-52.

³ Alvarez also had a retinal detachment in one eye. 4RP 127.

Surgery was scheduled for May 28, 2009 at 7:30 a.m. 3RP 58-59. 3RP 76-77.

Officer Sheperd decided not to book Alvarez into jail because of the hand injury. 4RP 29. Additional factors influencing that decision were the difficulty in determining who was the primary aggressor and Guillen's lack of cooperation with the investigation. 4RP 32. Police released Alvarez and warned him not to return to the apartment until the following day. 4RP 22.

Police were again dispatched to the apartment at 7 a.m. on May 28. 3RP 7. Police encountered the lifeless body of Guillen lying on the floor. 3RP 8-9, 94. The body was mostly face down in the doorway of the apartment. 2RP 178-79. Two plastic garbage bags containing clothing were in the area, one between Guillen's legs. 2RP 186; 3RP 25-26, 83. There were no weapons found on Guillen or under his body. 3RP 31-32.

Alvarez called Guillen's sister Alondra Vasquez at 5:47 on the morning of May 28. 3RP 14-15. According to Vasquez, Alvarez told her that he had gone to the apartment to pick up some items and an argument ensued. 3RP 17. Alvarez said he shot him with a gun. 3RP 17. He wanted to know if Guillen was alive and also wanted to say he was sorry. 3RP 17.

Alvarez was apprehended in California on May 28. 4RP 42-43. Seattle detectives interrogated him on the 29th. 4RP 44. Alvarez described a struggle in the kitchen and hearing Guillen scream that he had blood on his hand. Ex. 27 at 12.⁴ When asked how that happened, Alvarez said, "I don't know. It was so fast." Ex. 27 at 12. Alvarez said he might have scratched Guillen with a knife. Ex. 27 at 23-24. He thought he cut Guillen's face. Ex. 27 at 29, 33. He may have stabbed Guillen in the chest and back but denied wounding him. Ex. 27 at 29-30. He later acknowledged he probably stabbed him. Ex. 27 at 33. He believed this was the worst incident of losing his temper in his life. Ex. 27 at 30. He told the detectives, "I screw up." Ex. 27 at 34.

An autopsy was performed on Guillen's body. 3RP 94. There was a stab wound over the right eye. 3RP 94, 102-04. The wound track passed through the eye socket and entered the cranial cavity. 3RP 106. This stab wound was the cause of death. 3RP 109, 119, 121. According to the medical examiner, this wound would cause immediate unconsciousness and marked neurological impairment. 3RP 109-10, 147. There was also a stab wound to the left side of the chest and a stab wound

⁴ A recording of the interrogation was played for the jury. 4RP 49-50. Ex. 27 is the transcript of the interrogation.

to the back, neither of which penetrated the chest cavity. 3RP 102, 110-11, 113, 125.

The medical examiner also observed incision wounds on Guillen's right hand, which he initially described as a "defensive injury" resulting from an attempt to grab a knife blade. 3RP 117. On cross examination, the medical examiner testified he was offering no opinion regarding what Guillen was doing with his hand on the blade. 3RP 130.

Alvarez testified in his own defense. According to his trial testimony, he returned to the apartment after being released by police so that he could drive his truck to the hospital for the scheduled hand surgery. 4RP 113-14. He decided to clean himself up in the apartment. 4RP 114-15. Once inside, he noticed two bags of his belongings on the floor. 4RP 116-18. He put one bag in the hallway. 4RP 118. When he turned around to retrieve the other bag, Guillen was standing there. 4RP 118-19. Guillen said he could not be in the apartment. 4RP 119. Alvarez responded that police said he could come back the next day. 4RP 119. Guillen grabbed something from his bed and put it in his pocket. 4RP 119; 5RP 22. Alvarez testified, "I knew him to always carry a knife." 5RP 30.

Guillen said he was going to call the police. 4RP 119. Alvarez grabbed Guillen's phone and said he would give it back after he put his

bags in his truck. 4RP 120. When Alvarez grabbed his other bag, Guillen pulled at it and said, "you're not going anywhere." 4RP 120. Alvarez said he did not want any problems. 4RP 120. Guillen said he already had problems, pushed Alvarez, and hit him in the mouth. 4RP 120-21. Alvarez was propelled backwards towards the kitchen located steps away. 4RP 121; 5RP 25-26.

Alvarez grabbed a knife from the kitchen drawer. 4RP 121; 5RP 26. Holding the knife in his right hand, Alvarez told Guillen not to come near him. 4RP 121; 5RP 29. Alvarez maintained his intent was to keep Guillen at a distance and to avoid another fight so that he could go to the hospital and take care of his hand. 4RP 132.

Alvarez tried to grab the bag with his left hand while holding the knife in the other. 4RP 122. He told Guillen that he was going to put his bags in the truck and come back. 4RP 122-24. Guillen looked at Alvarez and the knife. 4RP 124.

Alvarez turned around and started walking towards the door when he felt a poke on his leg — Guillen was pushing the knife against him. 4RP 124; 5RP 33-34. His leg was cut. 5RP 54. Alvarez's pants, admitted into evidence, had a hole in the leg. 4RP 148, 150; 5RP 57-58.

Alvarez turned around and saw Guillen pulling the knife back and pushing it with more force toward him. 4RP 124. Alvarez realized

Guillen was serious. 4RP 124. Alvarez managed to push away Guillen's repeated attempts to stab him with the knife. 4RP 124-25.

Guillen then pushed Alvarez to the ground onto his back. 4RP 125; 5RP 35. Guillen, while on his knees, hit Alvarez in the face with a closed fist while trying to force the knife into Alvarez with his other hand. 4RP 125-26. Alvarez saw stars when he was hit. 4RP 126, 132. Guillen, while straddling Alvarez's leg, tried to push the knife into Alvarez's stomach. 4RP 127-30. Guillen tried to grab the knife while the two struggled. 4RP 129.

Alvarez gave Guillen a "poke" in the back. 5RP 41-43. Alvarez also made another movement with the knife. 4RP 130. He did not know if he felt the knife go into Guillen's skull because Guillen was holding onto Alvarez's hands. 5RP 46. He thought the knife might cause a little poke or scratch. 5RP 47, 51. He testified, "I was just trying to pull it. Pull it back." 5RP 47.

Guillen looked at his hand and said, "oh shit." 4RP 130, 5RP 46. Alvarez saw something shiny and black and thought it must be blood. 4RP 130-31. He estimated the struggle lasted 10 seconds. 4RP 131-32. As he tried to turn and run, Guillen said, "now you're going to see." 5RP 46. Alvarez extricated himself and ran out. 4RP 130-31. He drove to California. 4RP 133. He did not think he would be treated fairly and was

trying to avoid deportation. 4RP 133; 5RP 52. Alvarez maintained he did not intend to kill Guillen. 5RP 62.

The defense theory of the case was that Alvarez acted in self-defense. 5RP 146-52, 158-63, 168-72. The jury was instructed on the law regarding justifiable and excusable homicide. CP 49-55.

C. ARGUMENT

1. THE COURT VIOLATED ALVAREZ'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED EVIDENCE THAT SUPPORTED THE SELF-DEFENSE THEORY

The court violated Alvarez's right to present a complete defense in excluding the evidence that Guillen was a drug dealer. That evidence was relevant to Alvarez's self-defense theory and no compelling interest justified its exclusion.

a. The Court Excluded Evidence That Alvarez Knew Guillen To Be A Drug Dealer And That Guillen Had A Reputation For Being A Drug Dealer.

The defense trial memorandum included a statement of the case. CP 7-11. According to the defense, Alvarez's fear of Guillen was "based upon Mr. Guillen's larger physical size and knowledge of his primary source of income, drug dealing." CP 8. Guillen's guests were drug purchasers and prostitutes. CP 8. Alvarez reported Guillen invited prostitutes up to smoke crack. CP 8. No illegal substances were found in

Guillen's body, but a used crack cocaine pipe was found in the bedroom closet. CP 8. Guillen's guests were the primary users of the pipe. CP 8. Alvarez also maintained Guillen would also smoke cocaine. CP 8. Alvarez was fearful of Guillen in part because of Guillen's "drug dealing and believed drug use, his connection with drug users and prostitutes, and the reputation for dangerousness that comes with such activities and associations." CP 10.

The defense also made an offer of proof that Sandra Ramirez, a neighbor who lived across the hall, would testify that Guillen had a reputation in the community as a drug dealer and someone to be feared. CP 8-9, 12. Anticipating the State's objection to Ms. Ramirez's proposed testimony, the defense argued the source of Alvarez's fear of Guillen "was in part his known drug dealing and the people he associated with. Absent her testimony, the testimony of an unbiased and well informed observer, the only evidence of [Alvarez's] assertions will be [Alvarez's] assertions." CP 12-13.

The defense argued Ms. Ramirez's testimony was admissible under ER 803(a)(21), ER 404(a) and ER 405(a) and (b). CP 13-14. The defense maintained the reputation of Guillen as a drug dealer and consequent reputation as someone to be feared impacted Alvarez's fear of and claim of self-defense. CP 13. The pertinent nature of the reputation evidence

under ER404(a) was that Guillen engaged in the fear-inducing trade of drug trafficking, giving rise to a reputation of sometime to be feared. CP 14. Alvarez's reasonable apprehension of Guillen made reputation relevant. CP 14. Guillen's reputation as a drug dealer was known to Alvarez and was in part "the reason why his state of mind was what it was, i.e., apprehensive and wary of Mr. Guillen. It is thus pertinent to a claim of self-defense. Ms. Ramirez's testimony should be allowed as legitimate supporting relevant evidence to [Alvarez's] claim of self-defense." CP 14.

The State argued any testimony from Alvarez that did not go to Guillen's "propensity for violence" should be excluded. Supp CP __ (sub no. 81, State's Response To Defense Trial Memorandum, 2/7/11). The State also argued Ms. Ramirez's testimony regarding Guillen's reputation as a drug dealer was inadmissible. Id. According to the State, only evidence and reputation for violence was admissible, and evidence that Guillen was a drug dealer did not show he had a propensity for violence. Id.; 1RP 46-50.

Defense counsel responded it would come as a surprise to the general public that drug dealing did not implicate violence and danger — "that these are really okay folks that we don't need to be worried about, in terms of our personal safety." 1RP 51.

Defense counsel further argued Ms. Ramirez knew of Guillen's reputation from the community in addition to personally observing foot traffic to the apartment. 1RP 52-53, 55. The trial court wanted to know if Ms. Ramirez could "point to a specific issue of conduct." 1RP 55. The court indicated reputation evidence under ER 405 is only admissible if the reputation is for violence or quarrelsomeness. 1RP 55-56. The court directed Sandra Ramirez be brought in to testify outside the presence of the jury as an offer of proof regarding whether Guillen had a reputation for being quarrelsome or violent under ER 405. 1RP 55-57.

Defense counsel indicated he was not able to point to any particular instance of "violence," but that a conclusion of violence stemmed from Guillen's connection with drug dealing. 1RP 56.

Counsel later made a further offer of proof that Ms. Ramirez had personally observed Guillen being violent with a woman at the apartment. 1RP 111-16. The court at that time made it clear that "drug dealing is out, because there is no evidence of that, and we don't get drug dealing and use of prostitutes equals violence. There is no case law that supports that. That is 404[b] evidence, and that is not admissible." 1RP 116.

Defense counsel contended in part that Ms. Ramirez's proposed testimony was reputation evidence related to drug dealing. 1RP 116. The court reiterated "Drug dealing and the use of prostitutes does not equal

violence, and that's just 404[b] evidence its propensity evidence. That is not admissible." 1RP 116-17.

The State maintained Ms. Ramirez's proposed testimony about Guillen's violence against the woman was inadmissible under ER 405 because it was an incident as opposed to reputation. 1RP 117. The court responded "Well, like I said, I -- allegations of drug dealing, allegations of prostitution do not equal crimes of violence or allegations of violence, so that clearly is inadmissible." 1RP 118. The court still wanted to hear about Ms. Ramirez's proposed testimony about reputation, but only in light of its ruling that allegations of drug dealing and prostitution were inadmissible. 1RP 118. The court viewed such allegations as a backdoor attempt to "trash the victim." 1RP 118.

After reviewing a recorded interview with Ms. Ramirez, the court noted, "there is nothing here that rises to the level of quarrelsome or violent disposition." 2RP 70-71. At that point, defense counsel informed the court he subsequently talked to Ms. Ramirez and learned that she did not actually observe a physical fight, but only heard a vociferous verbal argument. 2RP 71-72. Ms. Ramirez then testified outside the presence of the jury to the same effect. 2RP 74-75. Defense counsel indicated he would not offer that testimony. 2RP 111.

The defense also argued the crack pipe found in Guillen's bedroom was admissible because it supported Alvarez's fear in connection with Guillen's drug dealing. 1RP 65; 2RP 113-15, 117-18. The State pointed out the court had already found evidence of drug use and drug selling was inadmissible. 2RP 117. The court ruled the crack pipe was inadmissible because it was irrelevant: "We don't have drug use being acquainted with quarrelsome or violent nature. There's been no connection with that. Ms. Ramirez was being offered to make that connection. It failed." 2RP 118. The court continued, "the crack pipe is excluded, and his assumptions that he was drug dealing, that's excluded." 2RP 118.

b. Evidence Of Drug Dealing Was Relevant To The Claim Of Self-Defense.

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit evidence is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Moreover, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right,

such as the right to present a defense, is reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Criminal defendants have the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22.

Alvarez's primary defense was that he acted in self-defense in stabbing Guillen. 5RP 146-52, 158-63, 168-72. Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This approach incorporates both subjective and objective characteristics. Janes, 121 Wn.2d at 238.

It is subjective in that the jury is "entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Janes, 121 Wn.2d at 238. The evaluation is objective in that "the jury is to use this information in

determining 'what a reasonably prudent [person] similarly situated would have done.'" Id. (quoting Wanrow, 88 Wn.2d at 236) (internal quotation marks omitted).

The justification of self-defense should therefore be evaluated in light of all the facts and circumstances known to the defendant. Wanrow, 88 Wn.2d at 236; State v. Allery, 101 Wn.2d 591, 593, 594-95, 682 P.2d 312 (1984). One circumstance known to Alvarez was that Guillen was a drug dealer. The court improperly deprived the jury from taking that fact into consideration in assessing Alvarez's self-defense claim.

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). Relevant defense evidence is inadmissible only if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); Darden, 145 Wn.2d at 621.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts

tending to establish a party's theory are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978).

It is Alvarez's state of mind and actions at the time of the homicide and the reasonableness thereof that is the fact of consequence to the determination of the self-defense claim. In self-defense cases, "[t]he reputation of a particular group for lawlessness may be taken into account if the defendant knew the victim was a member of that group." State v. Despenza, 38 Wn. App. 645, 649, 689 P.2d 87 (citing State v. Smith, 2 Wn. App. 769, 771, 470 P.2d 214 (1970)), review denied, 103 Wn.2d 1005 (1984).

The court believed any evidence that Guillen was a drug dealer was inadmissible on the basis that such evidence did not show a disposition for violence. 1RP 55-56, 116-17; 2RP 70-71, 118. That belief is divorced from reality.

The legislature found over twenty years ago that the unlawful selling of controlled substances was becoming increasingly violent. RCW 9.73.200 (Laws of 1989, ch. 271 § 201). It recognized "drug dealers are using sophisticated weapons . . . to deter the efforts of law enforcement officials to enforce the controlled substance statutes. Dealers of unlawful drugs are employing a wide variety of violent methods to realize the enormous profits of the drug trade." RCW 9.73.200; see also State v.

with two prior drug convictions but no violent felony convictions in light of the established connection between drug dealing and violence); see also United States v. Diaz-Lizaraza, 981 F.2d 1216, 1221 (11th Cir. 1993) ("[d]rug dealing is known to be extremely violent"); United States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999) ("drug dealing is a crime infused with violence"). Common sense recognizes "drug dealing is a dangerous and often violent enterprise." United States v. Brockington, 849 F.2d 872, 876 (4th Cir. 1988), abrogated on other grounds, Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995).

Jurors are quite capable of reaching the uncontroversial conclusion that drug dealers are known to be lawless and violent. See People v. Barnum, 104 Cal. Rptr.2d 19, 24 (Cal. Ct. App. 2001) (jurors are assumed to be intelligent), superseded on other grounds, 29 Cal.4th 1210, 131 Cal.Rptr.2d 499, 64 P.3d 788 (Cal. 2003); People v. Long, 38 Cal. App.3d 680, 689, 113 Cal. Rptr. 530 (Cal. Ct. App. 1974) ("A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box.").

Jurors are expected to bring common sense, insight and deductive reasoning into deliberations to determine the truth from the evidence. State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). The jury here was

instructed on the value of circumstantial evidence. CP 27 (Instruction 3). That Guillen was a drug dealer is circumstantial evidence supporting Alvarez's self-defense theory of the case regarding his fear of Guillen and the justification for his actions. Given the link between drug dealers and violence, evidence that Guillen was a drug dealer supported the defense theory that Guillen was the aggressor and that Alvarez feared he would be hurt.

Again, the jury is entitled to view the incident from the defendant's perspective and from this point of view determine the character of the act in light of all the facts and circumstances known to the defendant. Janes, 121 Wn.2d at 238. The jury must use this information in determining what a reasonably prudent person would have done in that situation. Id.

As set forth above, the widespread perception grounded in common sense is that drug dealers are prone to violence. Alvarez was confronted by and struggled with a drug dealer. That was his perspective. That perspective needed to be taken into account because it informed Alvarez's fear of injury and the reasonableness of his actions in stabbing Guillen. The evidence was relevant because it supported the defense argument that Alvarez acted in lawful self-defense.

In assessing a self-defense claim, the trier of fact must "stand in the shoes" of the defendant. State v. LeFaber, 128 Wn.2d 896, 899-900, 913

P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009). The trial court's ruling prevented the jury from fully standing in Alvarez's shoes as it assessed his self-defense claim.

Moreover, evidence of a crack pipe in Guillen's bedroom was relevant because it provided independent corroboration for Alvarez's belief that Guillen was a drug dealer. It supported the defense theory of the case. The court erred in excluding evidence of the crack pipe because that ruling was based on the improper premise that evidence of drug dealing could not legitimately contribute to Alvarez's self-defense claim.

For similar reasons, the court also erred in excluding testimony from Ms. Ramirez that Guillen had a reputation as a drug dealer. ER 404(a)(2) provides "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused[.]" ER 405(a) states "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation."

Evidence of a criminal victim's reputation is admissible under ER 404(a)(2) and 405(a) to show the victim acted in conformity with his character where such evidence is relevant to the defendant's claim of self-

defense. State v. Bell, 60 Wn. App. 561, 564-65, 805 P.2d 815, review denied, 116 Wn.2d 1030, 813 P.2d 582 (1991). As set forth above, evidence that Guillen was a drug dealer is relevant to the claim of self-defense because drug dealers are known to be violent. His reputation in the community would have corroborated Alvarez's belief on the matter.

The trial court believed evidence of drug dealing was inadmissible under ER 404(b). 1RP 116-17. But the driving force behind the prohibition against propensity evidence under ER 404(b) is to protect *the defendant* against the danger of conviction on improper grounds. The bar against using propensity evidence against the accused is "rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); see also State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987) (evidence of other misconduct and criminality strips away the normal presumption of innocence).

Unlike Alvarez, Guillen enjoyed no presumption of innocence. He was not the criminal defendant on trial for murder. Alvarez, not Guillen, has the constitutional right to present a complete defense. The court violated that right by excluding evidence that Guillen was a drug dealer.

The court accused defense counsel of just wanting to "trash the victim." 1RP 118. The defense, however, did not seek to introduce evidence that Guillen was a drug dealer as a broadside smear upon his character. The defense sought to elicit that evidence to corroborate Alvarez's self-defense claim. A limiting instruction could easily have prevented the jury from considering the evidence for any improper purpose and we must presume the jury would have followed such instruction. Thomas v. French, 99 Wn. 2d 95, 104, 659 P.2d 1097 (1983); State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

In light of the availability of a limiting instruction, relevant evidence that Guillen was a drug dealer would not have disrupted the fairness of the fact-finding process. On the contrary, evidence that Guillen was a drug dealer would have enhanced the fact-finding process by allowing the jury to assess the self-defense claim based on a complete understanding of the circumstances Alvarez faced at the time of the homicide.

The court erred in excluding evidence that Guillen was a drug dealer. The State cannot show exclusion of this relevant evidence was necessary to further a compelling interest. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16.

c. The Error Was Not Harmless Beyond A Reasonable Doubt.

The denial of the right to present a defense is constitutional error. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The presumption of prejudice "may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State bears the burden of proving the absence of a valid self-defense claim beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). The State cannot overcome its burden of overcoming a presumption of prejudice here. There was a basis for a

rational trier of fact to conclude the State had failed to prove the absence of lawful self-defense beyond a reasonable doubt. Alvarez testified to facts and circumstances that, if believed, would establish self-defense. These facts and circumstances included Guillen's aggressive confrontation when Alvarez returned to the apartment, Alvarez's attempt to ward off Guillen by displaying a knife, Guillen's initial use of the knife to poke Alvarez as he was walking away, and Guillen's attempts to stab Alvarez with the knife after Guillen initiated a struggle.

The jury determined the State proved beyond a reasonable doubt that Alvarez did not act in lawful self-defense, but it arrived at that conclusion without the benefit of taking into account a circumstance that contributed to Alvarez's self-defense claim. Alvarez's conduct would have appeared more reasonable in light of evidence that Guillen was a drug dealer, given the connection between drug dealing and violence. The jury in that instance would be in a better position to assess whether Guillen was the type of person who would confront and try to stab Alvarez.

Had the jury heard Guillen was a drug dealer, the jury would have been more likely to credit Alvarez's self-defense theory. That evidence would have corroborated and supported his testimony in a case that largely turned on the believability of his account of what happened. In addressing constitutional error, the reviewing court decides whether the actual verdict

"was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical jury faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999). Reversal is required because the State cannot show beyond a reasonable doubt that error in excluding the evidence could not have possibly contributed to the guilty verdict.

D. CONCLUSION

For the reasons stated, Alvarez requests that this Court reverse the convictions and remand for a new trial.

DATED this 15th day of February 2012.

Respectfully Submitted,

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