

67446-3

67446

No. 67446-3-I

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

STATE OF WASHINGTON,
Respondent,
v.
TYSON S. WHITFORD,
Appellant.

2012 MAR 15 PM 4:21
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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

The Honorable Jay V. White

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE EVIDENCE WARRANTED MR. WHITFORD'S PROPOSED JURY INSTRUCTIONS ON SELF-DEFENSE.

Mr. Whitford was entitled to his proposed jury instructions on the law of self-defense. When a defendant produces "any evidence" to support a claim of self-defense, an instruction on self-defense is warranted to inform the jury that the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997); State v. Adams, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982). Here, Mr. Whitford produced evidence to support his claim of self-defense through cross-examination of State witnesses and the testimony of Ms. Broughton. Mr. McElroy testified that Mr. Mason was enraged minutes before Mr. Whitford arrived at the condominium complex. 6RP 150, 153-54. Ms. Broughton testified that Mr. Mason was angry, confrontational, flailed his arms, and charged at Mr. Whitford. 6RP 84, 86, 87-89. Mr. Wade testified that Mr. Mason was aggressive and explosive when Mr. Whitford arrived and he may have pushed Mr. Whitford first. 3RP 82, 87-88. And Mr. Mason testified that he followed Mr. Whitford as Mr. Whitford was retreating to his van and continued to yell at him.

5RP 109. Therefore, the record does not support the State's assertion that Mr. Whitford did not produce "any evidence" of "an intentional act done in self-defense." Br. of Resp. at 16.

The State relies heavily on the portion of Ms. Broughton's testimony in which she speculated that Mr. Mason was struck by the side mirror of Mr. Whitford's van. Br. of Resp. at 16-19; 6RP 84, 86, 87-89, 98, 124-26, 140. This testimony supported the alternative defense theory of accident. Thus, the State's reliance on this portion of Ms. Broughton's testimony is inapt.

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Here, in light of the evidence to support Mr. Whitford's claim of self-defense, the trial court's failure to properly instruct the jury on the law of self-defense and the State's burden of proof was reversible error per se. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

2. EVIDENCE OF MR. MASON'S REPUTATION FOR AGGRESSIVENESS AND UNTRUTHFULNESS WAS IMPROPERLY EXCLUDED.

The trial court improperly excluded evidence of Mr. Mason's reputation for aggressiveness and untruthfulness within the social community "X Marks the Scot," on the erroneous grounds that the group was not a neutral and general community and the evidence was of untruthfulness was irrelevant. 2RP 118-19; 3RP 26-30; 5RP 66-74. Pursuant to ER 405(a) and ER 608, proof of a person's aggressiveness or untruthfulness may be established by evidence of that person's reputation for such within a "neutral and general" community. State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997); 5A K. Tegland, Wash. Prac., Evidence §§ 405.2, 608.4 at 4, 427-29 (5th ed. 2007).

In his offer of proof, Mr. Whitford asserted that X Marks the Scot is an organization wherein individuals interested in their Scottish heritage connect on the internet and meet regularly for local social events; Mr. Mason had been a member for at least two years and had attended at least twelve social events; Mr. Neilson had met at least one hundred members and spoken to fifteen to twenty-five members regarding Mr. Mason; and, Mr. Mason had a

reputation for aggressiveness and untruthfulness among those members to whom he spoke. CP 7, 17, 42-43.

In this regard, X Marks the Scot is similar to the Boy Scouts, a national organization with local councils that meet regularly, and which has been deemed “a community” for purposes of ER 405(a). In State v. Carol M.D., 89 Wn. App. 77, 94-95, 948 P.2d 837 (1997), the matter was remanded for the defendant to introduce testimony of a witness’ reputation for untruthfulness within the Boy Scout community, without reference to the total national membership or the number of local members. The State fails to address this case.

The State claims X Marks the Scot was not a community, on the grounds there was no evidence of the total membership and fifteen to twenty-five members was a “small sub-group.” Br. of Resp. at 25. However, in State v. Land, there was no evidence of the size of the relevant community other than that it was “small” and “close-knit.” 121 Wn.2d 494, 500, 851 P.2d 678 (1993); accord Carol M.D., 89 Wn. App. at 94-95 (no evidence regarding number of national or local members in Boy Scouts).

The State relies on Land for its claim that Mr. Whitford’s offer of proof needed to include the context and substance of Mr.

Neilson's conversations with member of X Marks the Scot. Br. of Resp. at 25. Yet, in Land, the appellate court based its decision on actual testimony regarding the defendant's reputation and, therefore, had a full record for review. 121 Wn.2d at 497.

The State further relies on Land for the argument that Mr. Whitford needed to establish Mr. Mason played a "particular role" within the organization. Br. of Resp. at 25-26. This argument reflects the trial court's comment, "It did not appear he [Mr. Mason] had any leadership role, other than that he was there, he was present, he was seen, and involved in a number of social events." 3RP 30. But Land did not require evidence of a "particular role" within the community. Rather, Land discussed "some relevant factors" which "might include" "the role a person plays in the community." 121 Wn.2d at 500. Here, Mr. Mason was a member of an organization and participated in social activities, similar to Carol M.D., in which the matter was remanded for reputation evidence of a fourteen year-old member of the Boy Scouts. 89 Wn. App. at 80. The State's reliance on Land is misplaced.

The State also argues there was insufficient evidence that Mr. Nielson's testimony would be limited to reputation, rather than his personal opinion of Mr. Mason. Br. of Resp. at 24-25.

However, ER 405(a) and ER 608 require only that the community be neutral, not the witness. Common sense dictates that a witness who is willing to testify that an individual has a reputation for untruthfulness and aggressiveness does not, in all probability, like that individual. So long as the witness limits his testimony to a person's reputation within the community and keeps his personal opinion to himself, that reputation testimony is admissible.

The exclusion of evidence of Mr. Mason's reputation for aggressiveness and untruthfulness was highly prejudicial and requires reversal. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (prejudicial evidentiary error requires reversal).

3. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

The prosecutor's reference in rebuttal argument to a missing State witness, a medical doctor, was both improper and prejudicial. 7RP 78. Although Mr. Whitford's objection was sustained, his motion for either a mistrial or five minutes surrebuttal was denied. 7RP 88, 90.

The State concedes the argument was improper, but claims the reference was not prejudicial. Br. of Resp. at 40. Prosecutorial misconduct is prejudicial where "there is a substantial likelihood the

misconduct affected the jury's verdict." State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). Here, the enduring prejudice of the improper argument was highlighted by the jury inquiry, "Can we see the medical report?" CP 101.

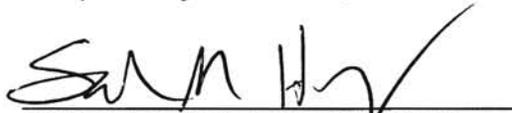
The State argues the "the strength of the State's case" and the sustained objection support its claim of non-prejudice. Br. of Resp. at 47. This argument is belied by the jury's additional request to see police reports and witness statements. CP 101. If, indeed, the State's case was as strong as it now contends, the jury would not have requested additional evidence. In light of the jury inquiry, there is a substantial likelihood the improper remarks affected the jury and contributed to a verdict not based on the evidence, requiring reversal. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (reversal required where there is a substantial likelihood that prosecutorial misconduct affected the verdict).

B. CONCLUSION

Mr. Whitford's right to a fair trial was violated by the individual errors and the cumulative effect of those errors, when the trial court erroneously excluded relevant, admissible evidence and failed to instruct the jury on the law of self-defense, and the prosecutor committed prejudicial misconduct. For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Whitford respectfully requests this Court reverse his conviction for assault in the second degree with a deadly weapon and remand for a new trial.

DATED this 15th day of May 2012.

Respectfully submitted,



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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 15th DAY OF MAY, 2012, 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:

[X] AMY MECKLING, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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x 

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