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NO. 67978-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY FLORES,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to make the relevant legal standard for conviction sufficiently clear to the jury.

2. The trial court erred in failing to instruct the jury that to convict it must unanimously reject the proffered affirmative defense.

Issues Pertaining to Assignments of Error

The State charged appellant with unlawful possession of a firearm. Appellant admitted the possession, but claimed the affirmative defense of necessity. During deliberations the jury submitted several inquiries. One of them asked whether a lack of unanimity on the necessity defense meant the jury "automatically agrees to a guilty verdict?" The court responded by directing the jury to reread its instructions.

1. Must a jury unanimously reject an affirmative defense before it may convict?

2. Where it is apparent a jury is confused whether it may convict despite a lack of unanimity regarding an affirmative defense, does a trial court err in failing to specifically instruct the jury it must unanimously reject the affirmative defense in order to convict?

3. Must a conviction be reversed when it is clear the jury did not first unanimously reject the affirmative defense offered?

B. STATEMENT OF THE CASE

1. Procedural Facts

A Snohomish County jury found appellant Gregory Flores guilty of first degree unlawful possession of a firearm. CP 21, 69-70; 2RP 194-96.¹ The trial court imposed a low-end standard range sentence of 21 months. CP 2-12; 3RP 12. Flores appeals. CP 1.

2. Substantive Facts

At trial, Flores admitted briefly possessing a firearm owned by his neighbor, John Archer, despite a prohibition on such possession arising from a prior "serious offense" conviction. CP 43-45 (stipulation); 2RP 115-16, 120-21, 127-29, 135, 137 157. He testified he felt compelled to keep Archer's firearm out of necessity, however, because he feared Archer would use it against his former employer, which had fired him that day. 2RP 119-24, 130. Flores noted that when police showed up he immediately acknowledged taking the gun, promptly turned it over to them, and explained he took it to prevent Archer from harming others. 2RP 129-30.

The jury was instructed on the defense of necessity:

¹ There are three volumes of verbatim report of proceedings referenced as follows: 1RP – October 20, 2011 (pretrial); 2RP October 24-26, 2011 (trial); and 3RP - November 22, 2011 (sentencing).

Necessity is a defense to a charge of unlawful possession of a firearm in the first degree if

- (1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and
- (2) the defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
- (3) the defendant had no reasonable legal alternative; and
- (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 33 (Instruction 6).

At 9:48 a.m. on the second day of jury deliberations, the jury submitted two inquires. One asks, "When does 'reckless' start[?] At the point of entering the house or when the situation transpired or when he took posesion [*sic*] of the gun[?]" CP 24. The other asks, "On Instruction

6: Dose [*sic*] the jury need to be unanimous on all 4 elements w/regard to 'and, 'and', and', or just one element[?]" CP 23.

At 10:33 a.m., after consulting with counsel, the court replied to the question regarding "reckless" as follows: "The jury must exercise it's [*sic*] collective judgment when applying the court's instructions to the facts they find from the evidence admitted in the case." CP 24. At 10:35 a.m., after consulting with counsel, the court replied to the question regarding Instruction 6 as follows: "If the jury unanimously finds that the defendant has proved each of the 4 elements listed in Instruction #6 by a preponderance of the evidence, it will be the duty of the jury to return a verdict of not guilty." CP 23.

At 1:15 p.m. the same day, the jury returned a guilty verdict. Supp. CP __ (sub no. 31, Trial Minutes, 10/24/11) at 8; 2RP 189. The fifth juror polled, however, denied agreeing to the verdict, so the court discontinued polling and directed the jurors to continue deliberations. 2RP 190.

At 1:32 p.m. the same day, the jury submitted a third inquiry, which asks, "[I]f the jury does not unanimously agree on all four aspects of the necessity defense, does that mean the jury automatically agrees to a

guilty verdict? Of instruction 6[.] CP 22. Thereafter the following colloquy ensued:

THE COURT:

I would propose to tell them: "The jury is instructed to re-read the jury instructions. The jury shall apply the Court's instructions to the facts they find from the evidence provided in the courtroom.

[PROSECUTOR]: . . . Given their earlier question . . ., it seems that they were struggling with if they could not agree - - well, that they were struggling if they didn't find unanimously the defense was proven. So their concern seems to be that they are not unanimously finding that the defense was proven. . . .

Our earlier answer told them if they unanimously find all the elements of 6, they have a duty to return a verdict of not guilty.

They seem to be hung up on if they are essentially rejecting the defense, where does that leave them? It seems they are looking for an answer to what happens if we reject the defense, then where are we?

THE COURT: Well, what other instruction can I give at this point? I don't know that I can give them further instruction at this point because as contained in their instructions, the answer they need to get there is if they look at those instructions.

[DEFENSE COUNSEL]: The defense would ask the Court to adopt what you said earlier as the answer.

THE COURT: . . .

The jury needs to be free to reach the verdict they think is appropriate based upon the evidence and the instructions if they can do so. . . .

3RP 192-93.

The prosecutor eventually agreed with the court's proposed response. 2RP 193. The court provided the jury an answer at 2:04 p.m. that reads: "The jury is instructed to re-read the jury instructions. The jury shall apply the court's instructions to the facts they [*sic*] find from the evidence produced in the court room." CP 22.

At 3:04 p.m., the jury returned a guilty verdict. CP 21.

C. ARGUMENT

THE FAILURE TO CLARIFY THAT IN ORDER TO CONVICT THE JURY HAD TO UNANIMOUSLY REJECT THE NECESSITY DEFENSE REQUIRES REVERSAL.

Flores' jury was confused during deliberations. It was told it had a duty to convict if it unanimously agreed the State proved beyond a reasonable doubt that Flores knowingly possessed a firearm² CP 30 (Instruction 3). Yet it was also told it had a duty to acquit if it unanimously agreed Flores proved by a preponderance of the evidence the four elements of necessity listed in Instruction 6. CP 33. What the jury was not told, however, was what to do in the event there was a lack of

² By agreement, the jury was directed it "must accept as true" a third element, that Flores had been convicted of a serious offense. CP 43-45; 2RP 157.

unanimity about whether Flores proved necessity. Absent appropriate guidance, the jury was left to guess at what the law required.

This Court should hold that when an affirmative defense is presented, a conviction may follow only if the jury unanimously rejects the defense. Any other ruling would allow for conviction without unanimity in violation of article 1, section 21 of the Washington Constitution.³ This Court should also hold that because it is apparent Flores' jury was divided on whether Flores met his burden to prove necessity, reversal is required.

1. Unanimous Rejection of a Proffered Affirmative Defense is Required for a Jury to be Unanimous Regarding Guilt.

Whether a jury must unanimously reject an affirmative defense before it can convict appears to be an issue of first impression in Washington. Resort to precedents from other jurisdictions is therefore appropriate. See State v. Chenoweth, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007) ("In resolving a question of first impression concerning the

³ Article 1, section 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

scope of article I, section 7, we may consider well-reasoned precedents from federal courts and sister jurisdictions.").

Other courts have concluded a unanimous rejection of an affirmative defense is required to support a conviction. For example, a Hawaii appellate court decision provides:

In our view, . . . a defendant's guilt is the ultimate finding that a jury must make after determining whether the defendant has committed all the elements of the offense charged and considering any affirmative defenses raised. In other words, each juror must individually determine whether all the elements of an offense have been established beyond a reasonable doubt and, if so, whether the defendant has established, by a preponderance of the evidence, the existence of the affirmative defense before determining the ultimate issue of the defendant's guilt.

Therefore, if all the jurors unanimously believed that the elements of the charged offense have not been proved beyond a reasonable doubt, the defendant would be entitled to an acquittal. If all the jurors unanimously believed that the elements of the charged offense have been proved beyond a reasonable doubt but the affirmative defense has not been established by a preponderance of the evidence, a guilty verdict should be returned. On the other hand, if the jurors unanimously agreed that the elements of the charged offense have been proved beyond a reasonable doubt and that the affirmative defense has been established by a preponderance of the evidence, the defendant would be entitled to an acquittal. Finally, if the jurors unanimously agreed that all the elements of the charged offense have been proved beyond a reasonable doubt but are unable to reach unanimous agreement as to the affirmative defense of entrapment, no unanimous verdict can be reached as to the charged offense because some jurors would vote for conviction and others for acquittal. In such instance, a

mistrial would have to be declared due to the hung jury. Accord State v. Harris, 89 R.I. 202, 152 A.2d 106, 109 (1959) (“If the jury could not agree upon defendant's [affirmative defense of] sanity then no verdict could be reached.”); People v. McIntyre, 222 Cal.App.3d 229, 271 Cal.Rptr. 467, 469 (1990).

State v. Miyashiro, 90 Hawai'i 489, 499, 979 P.2d 85 (1999).

More recently, the Ninth Circuit addressed this issue under circumstances similar to those in Flores' case. In United States v. Southwell,⁴ the district court failed to instruct the jury on whether it was required to reach a unanimous decision on the defendant's insanity defense before it could convict. During deliberations the jury sent an inquiry indicating it unanimously agreed the defendant had committed the conduct constituting the offense, but was unclear what to do if it could not unanimously agree on the defendant's affirmative defense of insanity. Southwell, 432 F.3d at 1052. Rather than address the jurors' confusion, the court advised them to use their “best recollection” of the evidence and the instructions. Id.

The Ninth Circuit determined this was an inadequate response because it failed to answer a jury inquiry on a matter that was not fairly

⁴ 432 F.3d 1050 (9th Cir. 2005).

resolved by the jury instruction. Id. at 1053. Similar to the court in

Miyashiro, the Ninth Circuit noted:

The jury could reasonably have read the instructions one of two ways in this situation. One way would have been to declare itself deadlocked because they could not reach agreement as to sanity. The other way would have been to return a verdict of guilty because they did unanimously agree as to guilt but could not agree whether defendant was insane - as defense counsel pointed out to the district court. Neither result is expressly sanctioned by the instructions nor is either result precluded, which is doubtless why the jury requested a clarification as to how they should proceed in these circumstances.

Rather than recognizing this ambiguity and providing a supplementary instruction, the district court told the jurors to "use your best recollection of the evidence and the instructions of the law you have been given. If you are able to reach a verdict, only one unanimous verdict may be returned." However, for the reasons explained, the instructions did not provide a clear answer - or any answer - to the question the jury asked; thus referring the jury back to the instructions did nothing to clear up the ambiguity. Failure to provide the jury with a clarifying instruction when it has identified a legitimate ambiguity in the original instructions is an abuse of discretion.

432 F.2d at 1053.

Here, Flores admitted possessing the firearm. Thus, the only issue for the jury was whether Flores possessed the gun out of necessity. If the jury unanimously agreed he did, it had a "duty to return a verdict of not guilty." CP 33 (Instruction 6). If it unanimously agreed he did not, it had a duty to enter a guilty verdict. CP 30 (Instruction 3). But as in

Southwell, the jury sought clarification on what to do if there was a lack of unanimity regarding Flores necessity defense. Under Southwell and Miyashiro, the result should be a mistrial. This makes sense because if one or more jurors found necessity sufficiently proven, Flores' firearm possession was not criminal. And if it was not criminal, the result should be a not guilty verdict because an affirmative defense excuses what would otherwise be considered criminal. State v. Fry, 168 Wn.2d 1, 7-8, 228 P.3d 1 (2010).

The jury's final inquiry made clear that it could not reach unanimity regarding necessity. Asking what to do if it could "not unanimously agree on all four aspects of the necessity defense," shows there was a split regarding whether Flores had met his burden, and that a least one juror thought he had.⁵ CP 22. Unfortunately, the court's response -- "re-read the jury instructions" -- provided no meaningful guidance because, as in Southwell, the instructions given failed to provide the answer. CP 22.

The first jury instruction states at least three times that the applicable law is only that contained within the instructions. CP 26-28

⁵ This appears to be precisely what the prosecutor recognized during the colloquy about the jury inquiry. 2RP 192-93 ("Given their earlier question . . . , it seems that they were struggling with if they could not agree - - well, that they were struggling if they didn't find unanimously the defense was

(Instruction 1). The concluding instruction provides, "Because this is a criminal case, each of you must agree for you to return a verdict." CP 38-39 (Instruction 11).

The to-convict instruction states unequivocally, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 30 (Instruction 3) (emphasis added). Similarly, the affirmative defense instruction states, "If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty." CP 33 (Instruction 6).

Given these instructions and Flores' admission he possessed the gun, and absent further guidance on the law, the jury was left with the same conundrum as in Southwell: convict or hang. This involves a specific legal issue that should not have been left to the jury to sort out. The trial court should have instructed the jury that if it did not unanimously reject Flores' necessity defense, a guilty verdict was not possible. The failure to do so warrants reversal of Flores' judgment and sentence.

proven. So their concern seems to be that they are not unanimously

2. Flores May Raise this Issue for the First Time on Appeal

Flores never requested an instruction informing the jury it had to unanimously reject the necessity defense in order to convict. The trial court's failure to provide such an instruction may nevertheless be raised for the first time on appeal because it involves manifest constitutional error.

Manifest errors that affect constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). For an argument to fall within RAP 2.5(a)(3), "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)).

a. The Error Was Constitutional.

Under article 1, section 21, Flores had a right to be convicted only by unanimous jury verdict. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). To satisfy the requirement of a fair trial, the jury instructions, when read as a whole, must correctly set forth applicable law, not be misleading, and permit the defendant to present his

finding that the defense was proven.").

theory of the case. O'Hara, 167 Wn.2d at 105. In O'Hara, the Court noted that failing to require a unanimous verdict is an instructional error "deemed automatically of a constitutional magnitude[.]" 167 Wn.2d at 103. The Court went on to note:

On their face, each of these instructional errors obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict. In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is - not constituting manifest constitutional error - include the failure to instruct on a lesser included offense and failure to define individual terms. In each of those instances, one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion.

O'Hara, 167 Wn.2d at 103.

The error here was in failing to instruct the jury that it had to unanimously reject the necessity defense before it could convict. This constitutes a failure to require a unanimous verdict, which the Supreme Court specifically identified as an instructional error of constitutional magnitude. O'Hara, 167 Wn.2d at 103; See Southwell, 432 F.3d at 1053 (failure to properly instruct the jury on the unanimity requirement is constitutional error that requires reversal unless it was harmless beyond a reasonable doubt).

The failure to instruct Flores's jury that it must unanimously reject the necessity defense in order to convict, particularly in light of the jury's express confusion about this point, resulted in a "flawed deliberative process" that affected Flores' constitutional rights to a unanimous jury verdict. See State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) ("jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law" that created a "flawed deliberative process"). Nothing in any of the other instructions negated or minimized this error. Even when read as a whole, the instructions fail to provide the jury with the correct legal standard. The error was constitutional.

b. The Error Is "Manifest."

Constitutional error is "manifest" if the appellant can show actual prejudice. To establish actual prejudice, the appellant must show the error had "'practical and identifiable consequences[.]'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935). If shown, the State bears the burden to prove harmlessness beyond a reasonable doubt. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

As discussed, a lack of unanimity in rejecting Flores' necessity defense should have resulted in a hung jury. It is at least plausible if not

probable, however, that the jury convicted Flores without reaching unanimity regarding the defense because the court failed to properly instruct the jury once it became apparent it needed guidance on this point of law. Thus, the error was manifest, and the State cannot show it was harmless beyond a reasonable doubt. This Court should reverse.

D. CONCLUSION

For the reasons stated, this Court should reverse Flores' conviction and remand for a new trial.

DATED this 16th day of May 2012.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67978-3-1
)	
GREGORY FLORES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF MAY, 2012.

x 