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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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In the Court of Appeals of the State of Washington
Division Two

State of Washington,)	No. 35019-0-II
)	
Respondent,)	Statement of Additional Grounds
)	for Review.
vs.)	
)	
Ryna Ra,)	
)	
Appellant.)	

I, Ryna Ra, have received and reviewed the Opening Brief prepared by my attorney. Summarized below are the Additional Grounds for Review that are not addressed in that brief. I understand the court will review this Statement of Additional Grounds when my appeal is considered on the merits.

Questions Presented for Review

Additional Ground One

- a. Did the trial court err by relying on excluded gang evidence when denying Ra's proposed self-defense instruction?

- b. Did the trial court invade the province of the jury by determining Ra's motivation and state of mind when denying his proposed self-defense instruction.

Additional Ground Two

- c. Did vindictiveness play a part in the State's decision to amend the charge of assault in the first degree to attempted murder in the first degree?

Additional Ground Three

- d. Did the trial court err in overruling Ra's objections to the testimony of Huff's war experiences in Iraq?

Additional Grounds for Review and Argument

1. **The Trial Court violated Ra's right to a fair trial and due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 3 and 22 of the Washington State Constitution, by exceeding pretrial rulings excluding gang evidence and invading the province of the jury when refusing his proposed self-defense instruction.**

A defendant in a criminal case is entitled to fully instruct the jury on the law as to the theory of the defense. State v. Walker, 82 Wn.2d 851, 514 P.2d 919 (1973); State v. Ginn, 128 Wn.App. 872, 117 P.3d 1155 (2005).

Ra sought to present a case of self-defense before a jury, Ra bears the initial burden of producing some evidence that his actions occurred in circumstances amounting to self-defense, i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R. 5th 921 (1993).

In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant reasonably believed that he was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

The evidence of self-defense must be addressed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Janes, 121 Wn.2d at 238.

Ra satisfied his burden of producing some evidence that his actions occurred in circumstances amounting to self-defense. At trial Ra establish that Huff ran toward the vehicle with a flashlight in an aggressive manner. There was an attempt to open the door of the vehicle and, to reach through the open window in order to grab Ra. On top of that Ra fired two warning shots into the air, during the incident, however, Huff continued to run toward the vehicle before being shot in the abdomen. RP 888: 25; 889: 1-15. Ra's stature compared to Huff's is some evidence showing reasonable fear of imminent harm.

Viewing the evidence in favor of the defendant, it would not be unreasonable for Ra to believe Huff intended to harm or kill him when he continued running toward Ra aggressively – even after Ra fired two warning shots into the air. Furthermore, add to this Huff's attempt to open the door and grab Ra through the open window. Any reasonable person in Ra's shoes would fear imminent harm or death from such an

enraged person. On the other hand, any reasonable person, after being warned with one [let alone two] warning shots would retreat unless they intended to harm or kill the person firing the gun.

The trial court disregarded all of the foregoing evidence [and logic] when refusing Ra's proposed self-defense instruction. A trial court's refusal to give a proposed instruction is reviewed for (1) an abuse of discretion if the refusal is based on a factual dispute or (2) de novo if the refusal is based on a legal ruling. State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998). A court abuses its discretion when its decision is manifestly unreasonable, or is based on untenable grounds or for untenable reasons. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

The trial court's decision to deny Ra's proposed self-defense instruction is manifestly unreasonable because it was based on gang evidence that had already been excluded in a pretrial ruling. CP 42-60; RP 825-49. Furthermore, the trial court invaded the province of the jury by determining Ra's motivation and state of mind in order to justify its refusal of the proposed self-defense instruction.

In its decision the trial court held:

“It appears to me that it was a lot of bravado involved, some distorted playing big man mentality, showing off in front of the other folks in that vehicle, and that's why he shot. And there wasn't any fear of any harm, great bodily harm or death, either subjectively or objectively. It was he was showing off and egged them on to get him over there so he could show off and kill somebody.”

RP 890: 23-25; 891: 1-5.

“I am quarrelling with what he says his motivation was and that his state of mind was, as I've indicated. So, there will be no self-defense instruction.”

RP 891: 15-17.

The trial court's reliance on its own terms and statements such as "bravado, playing the big man mentality, showing off, egged them on to get him over there so he could show off and kill somebody," as well as "motivation" and "state of mind" describes Ra as a gang member with gang motivation in the crime. The court used similar descriptions in refusing Ra's proposed self-defense instruction when gang evidence was being argued for introduction to show motivation in the crime.

Mr. Green: "But I think it is accurate that the reason he shot was to elevate his status among his peers."

The Court: "Bravado, distorted importance."

Mr. Green: "That's right, and that's elevating his status. And in a gang situation, there are no leaders. The leaders are those who are most violent. The most respected gang leaders are those that are feared the most, those that actually use the gun."

RP 846: 1-18.

When defense counsel argued his objection to gang evidence the trial court stated:

"What about some distorted feeling or motivation that they're big men, that they're very important people and they want to show the rest of their friends that they can take a weapon that makes them feel ten feet tall and kill somebody or attempt to kill somebody; and were showing off for those in our gang, in our group, just how big we are; and we live in a free country and we can get away with it because this country is based on fundamental rights...."

RP 829: 9-17.

Although gang evidence was ultimately excluded, the foregoing descriptions and statements by the trial court show that the court had already decided that Ra was a gang member with gang motivation in the crime. Therefore, the trial court abused its discretion by relying on the excluded gang evidence to refuse Ra's proposed self-defense instruction. In a criminal prosecution, a trial court's refusal to instruct the jury on a

defense theory of the case, supported by evidence in the record, constitutes reversible error. State v. Warden, 133 Wn.2d 559, 947 P.2d 708 (1997).

Ra also contends that the trial court invaded the province of the jury by determining his motivation and state of mind when refusing the proposed self-defense instruction. It is the function of the jury [not the court] to determine credibility, motivation, and state of mind (i.e. intent) beyond a reasonable doubt. U.S. Const. Amend. 6; Jury Instruction No. 1, 6, 7, 8, 9, 11, 13, 15, and 15(a); CP 158-195.

Self-defense was evident in this case. Ra's conviction(s) should be reversed and remanded for a new trial with the jury being instructed on self-defense.

2. The State violated Ra's right to a fair trial and due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 3 and 22 of the Washington State Constitution by vindictively amending the charge of assault in the first degree to attempted murder in the first degree.

The Due Process Clause of the Fourteenth Amendment guarantees against judicial and prosecutorial vindictiveness. Adamson v. Ricketts, 865 F.2d 1011, 1017 (9th Cir. 1988). 'Prosecutorial Vindictiveness' is the intentional filing of a more serious charge in retaliation for Ra's exercise of a legal right. State v. Bonisisio, 92 Wn.App. 783, 790-91, 964 P.2d 1222 (1998); Bordenkircher v. Hayes, 98 S.Ct. 663, 668, 434 U.S. 357, 54 L.Ed.2d 604 (1978). "A prosecutor's duty to do justice on behalf of the public transcends mere advocacy of the State's case. The prosecutor's ethical duty is to seek the fairest rather than necessarily the most severe outcome." State v. Korum, 120 Wn.App. 686, 701, 86 P.3d 166 (2004)(citing United States v. Jones, 983 F.2d 1425, 1433 (7th Cir. 1993)). To establish a prima facie case of prosecutorial vindictiveness Ra must show

either direct evidence of actual vindictiveness or facts that warrant the appearance of such. United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995). “No actual showing of malice or retaliatory motive is necessary to assert a vindictive prosecution claim.” Adamson, 865 F.2d at 1017 (citing Blackledge v. Perry, 94 S.Ct. 2098, 2102, 417 U.S. 21, 28, 40 L.Ed.2d 628 (1974)). “The mere appearance of vindictiveness may give rise to a presumption of a vindictive motive sufficient to establish a due process violation.” United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980).

On September 16, 2005, the State filed charges against Ra for assault in the first degree, drive-by shooting, and two counts of unlawful possession of a firearm in the second degree.

Six months later, on March 16, 2006, the State filed an amended information against Ra substituting the charge of assault in the first degree with attempted murder in the first degree. No amended statement of probable cause accompanied this amended information. There is nothing in the record indicating [exactly] what inspired the State to file this amended information. See Opening Brief, at 14, 15.

There was no evidence [old or new] to support [the premeditation element of] the amended charge of attempted murder in the first degree. See Opening Brief, at 42. Add to this the fact that the State was on notice that Ra was pursuing a case of self-defense, and it becomes clear that [at least] one of the reasons the State amended the charge was to relieve itself of the burden of disproving self-defense. “A presumption of vindictiveness may be inferred even in the absence of evidence that the prosecution acted with a retaliatory motive in obtaining the challenged indictment. The presumption arises when the totality of circumstances surrounding the prosecutorial decision at issue suggest

the appearance of vindictiveness.” United States v. Robison, 644 F.2d 1270, 1272 (9th Cir. 1981). Furthermore, the long delay [of six months] in amending the information, without any justifiable explanation, suggests “less than honorable motives.” State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997).

Once Ra has shown a presumption or the appearance of vindictiveness, the burden then shifts to the State to prove that the increased charges were not motivated by malice. Adamson, 865 F.2d at 1019.

The record cites no change in circumstances nor new evidence justifying amending the information to the more serious charge of attempted murder in the first degree and the two fold increase in Ra’s potential sentence.

Ra’s conviction should be dismissed based on the State’s vindictive decision to increase the charge of assault in the first degree to attempted in the first degree. This Court should remand this case to the trial court for a new trial on the initial charge of assault in the first degree.

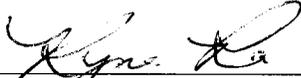
3. The trial court violated Ra’s right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution, and Article 1, Section 22 of the Washington State Constitution, when it overruled defense counsel’s objections to Huff’s testimony regarding his war experiences in Iraq.

The trial court erred in overruling Ra’s repeated objections to Huff’s testimony regarding his war experiences in Iraq. Huff was allowed to testify about a car bombing incident he was injured in while serving in the Iraq war. RP 317-19. The trial court’s decision to overrule defense counsel’s repeated objections to the car bombing incident in

Iraq was manifestly unreasonable. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

Huff's testimony to the car bombing incident in Iraq created an undue prejudice given the sympathy and passion that reasonable people of our society have towards the troops in Iraq.

Because Ra was severely prejudiced by Huff's testimony this Court should reverse the conviction and remand this case for a new trial.



Ryna Ra, Appellant