

NO. 39085-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

D'MARCUS GEORGE,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LAW OF SELF DEFENSE.

a. Review is *de novo*, not “abuse of discretion”.

Initially, the State cites law essentially identical to that cited by George:

The standard for review...depends upon whether the trial court’s refusal to grant the jury instructions was based on a matter of law or fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court’s refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. The trial court’s refusal to give an instruction based upon a ruling of law is reviewed de novo.

Brief of Respondent (BOR) at 32 (other internal citations omitted).

The State then asserts that the law about giving jury instructions “may be summarized as:”

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the trier of fact of the applicable law.

BOR at 32, quoting State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521 (1999) (additional internal citations omitted), reversed, 141 Wn.2d 448, 6 P.3d 1150 (2000). Confusingly, the State then goes on to cite Walker twice more on the subject of the possible standards of review, but never takes a recognizable stand on what standard applies in this case. BOR at 34, 36. In an abundance of

caution, George will treat the State's citations of Walker and Fernandez-Medina as an argument that the abuse of discretion standard applies herein.

In reply: first, the version of Fernandez-Medina cited by the State was reversed in 2000 by the Supreme Court, a fact not reflected in the State's brief. BOR at 33 (State identifies Fernandez-Medina only as a case with "review granted"). In the Supreme Court reversal, there is absolutely no mention that an "abuse of discretion" standard should apply to the case. See generally 141 Wn.2d at 449-62.

Second, even the State-cited (and reversed) opinion, Fernandez-Medina, still makes it clear that each party must be able to argue its theory of the case, and the instructions must state the law correctly. 94 Wn. App. at 266. George, on the other hand, was not permitted to argue his self-defense theory at all, and he moreover asserts this was a failure to state the law correctly. See generally Brief of Appellant (BOA) at 30-38.

Third and most importantly, Walker makes it plain that a de novo standard applies whenever a trial court refuses to give a self-defense instruction because it believes that no reasonable person in the defendant's situation would feel threatened. Walker, 136 Wn.2d at 771-72. Although George's situation is very different factually from the Walker defendant, it does not vary legally. The State's possible contention that an abuse of discretion standard applies should thus be rejected.

- b. Taken in the light most favorable to George, he produced more than sufficient evidence that his fear was reasonable.

The State then moves on to what must be seen as the heart of this entire issue – whether George’s fear could be seen as reasonable under the circumstances. In so doing, the State first provides a “summary” of George’s testimony. BOR at 37-43. The State then follows up with a very brief argument that nonetheless leaves out or misstates many key points of the testimony. BOR at 43-46. These will be reviewed in detail below.

The State also avoids mentioning anywhere in its response brief two points critical to evaluation of the issue: 1) when looking at the question of whether George was entitled to self-defense instructions, all the evidence must be taken in the light most favorable to him; see, e.g., State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997); and 2) George is entitled to the benefit of all the evidence, from whatever source; Fernandez-Medina, 141 Wn.2d at 456.

The first several pages of the State's response to the self defense issue are truly summary, and there is no need to directly respond to them. BOR at 37-43. The first actual argument by the State is when it argues that because George had never met Clark before and did not know him, George had no reason to believe Clark was dangerous. BOR at 43.

This argument both belies common sense and also conflicts with the applicable caselaw. In Walker, the defendant knew the victim personally and had socialized with him. 136 Wn.2d at 768-69. The Walker victim had previous verbal altercations with Walker, and had threatened to “kick the shit out of [Walker],” but had never threatened any more serious harm. Id. at 778. In that circumstance, the Supreme Court found that Walker had no reason to believe his victim posed a serious threat. Id. at 778-79.

The State, however, claims George should have assumed the person who assaulted him did not pose a threat because he did not know him. BOR at 43. The fact is, we are naturally more suspicious of a stranger than someone we know personally, as the Supreme Court inherently recognized with the Walker decision. 136 Wn.2d at 778-79.

In the context of a fight between two men, an unprovoked assault by a stranger seems far more volatile than a fistfight between two people who know each other socially and are therefore constrained by at least some social conventions, let alone two people who have interacted aggressively before, with no harm coming to either of them. Contrast Walker, 136 Wn.2d at 778-79. The fact that George did not know the person suddenly assaulting him does not make it less likely that he properly acted in self-defense; under Walker, it makes it more likely.

The State next argues that George had “no knowledge” Clark was armed. BOR at 43-44. George, however, repeatedly stated he thought Clark was armed and that he thought Clark must have hit him with something because Clark’s blow to the back of George’s head was so hard. See 3RP 1288. Given the sudden assault at the station’ 3RP 1071, 1091, 1225, 1285-87, 1325; the checking of Freddie McGrew for weapons by Rickie Millender’ 3RP 1060, 1198, 1209-10; 1264; the fact that Millender was hotly confronting McGrew about the shooting murder of a female friend; 3RP 60-61, 86; the fact that Clark was apparently on drugs; 3RP 1210-11; and the specifically very hard blow to the back of George’s head, so hard seemingly because it was done “with something,” 3RP 1288, it was not unreasonable for George to make this assumption. Saying that there is no reason for George to believe Clark was armed requires ignoring both the record and realities of American life.

Next, the State claims Clark made no “verbal threats” to George. BOR at 44. First, we do not know what Clark said to George, because it was excluded as hearsay. 3RP 1057, 1059, 1198. We do know Clark said something to George that made him stop walking towards the Millender/McGrew conflict. 3RP 1197-98. Realistically, this was likely a threat of some sort. Second and more importantly, the need – if any – for some sort of verbal threat before self-defense can be permitted would

seem to be obviated by an unprovoked attack with a weapon¹ to the back of George's head while George was retreating.

The State next asserts that the difference between the sizes of George and Clark was "not dramatic." BOR at 44. Then the State cites only the weight as found in the medical examiner's report – 207 pounds – which even the medical examiner noted was low because Clark lost so much in body fluid before that measurement was taken. BOR at 44; See also 3P 840-41, 886. In fact, the other witnesses testified that Clark was 229 or 275 pounds, while George was 155-160 pounds. 3RP 840-43, 886, 1028-29, 1066-67, 1211, 1246. The State has therefore taken the route not permitted under the law – taking the evidence in the light least favorable to the defendant. Even at the low end, the difference between Clark's and George's weights was about 70 pounds; at the high end (arguably appropriate here because of Callahan), it was more like 120 pounds. The State's argument that the size difference was not important should be rejected.

The State next argues that because the blow to the back of George's head and Clark's effort to drag George out of the car did not "caus[e] any permanent or long lasting injury to [George]" or require

¹ Again, all the evidence must be taken in the light most favorable to George, and he believed Clark hit him "with something."

medical attention, they cannot support use of lethal force in self defense. BOR at 44; Callahan, 87 Wn. App. at 933. But no law requires a defendant receive a certain degree of injury before self-defense can be invoked. Indeed, such an application of the law would be a nightmare for victims, who would have to judge whether they had received sufficient injury from an unprovoked attack before they chose to defend themselves, despite the obvious peril that they might act too late and thereby forfeit their lives.

The State then makes an argument that George was at a gas station surrounded by other people, so he was presumably less likely to be in danger. BOR at 45. This assumption seems dated at best, and bewilderingly ignorant at worst. Violence is prevalent in our society, and the presence of uninvolved people in a given location hardly precludes the use of violence or weapons, as this Court is well aware. The presence of other people means only that help is more likely to arrive quickly, but help will rarely arrive faster than a gun can shoot, a knife can stab, or a club can crush.²

² The State also writes that “Clark [did] not make any demand for money or property concurrent with this use of force” as part of its argument for why self-defense instructions were unwarranted. BOR at 46. Appellate counsel is at a complete loss to explain why this observation would be relevant, as a robbery attempt is unnecessary to show a need for self-defense, and so this single-sentence “argument” has been skipped.

It bears noting that the State avoids any mention in its argument of the fact that George thought Clark was on drugs,³ or that George's observation was corroborated by the fact that multiple witnesses watched Millender and Krystal Smith going through Clark's pockets to remove money and drugs after the shooting. 12RP 73-74, 299-302, 496-97, 514-15, 527, 1210. The State moreover never mentions in argument that the heated discussion on the far side of the car was about the "brutal" murder of a young woman – a murder accomplished via a shooting. 3RP 60-61, 86.

The unprovoked nature of Clark's assault is also never mentioned in the State's argument, although a person assaulted without warning is naturally going to be very frightened and confused about what is likely to happen next. Finally, no mention is made of the "young white guy" at the gas station, who both George and Tamrah Dickman interpreted as being with Clark, apparently available as backup, as he kept putting his hands behind his back whenever anything "dramatic" happened by McGrew's car. 3RP 1061, 1069-70, 1192-93, 1255. George, who was significantly smaller than Clark, only had Dickman for backup, and Dickman was a very small woman, less than 100 pounds. 3RP 1067, 1076, 1143. The

³ The State briefly notes this belief in its summary, BOR at 39, but never mentions it in the argument section of its brief. See BOR at 43-46.

presence of another person – apparently ready to assist – is also relevant to the use of force in self-defense, and simply ignoring such critical testimony as the State does here does not mean that such testimony ceases to exist.

The facts here, when taken in the light most favorable to George, indisputably support the giving of self-defense instructions. When a trial court fails to give self-defense instructions where they are warranted, reversal is required. See, e.g., Callahan, 87 Wn.2d at 928. The Court should reverse and remand for a new trial, at George is allowed to properly pursue his self-defense claim.

2. THIS COURT SHOULD REVIEW THE MANY EVIDENTIARY ERRORS MADE BELOW SO THEY DO NOT RECUR ON RETRIAL.

In the first section – the Summary - of the BOA, appellate counsel wrote:

The trial court's refusal to instruct the jury on the law of self-defense is the primary issue for this appeal. Several evidentiary issues are also raised that, standing alone, do not warrant reversal, but should be addressed for purposes of retrial.

BOA at 2.

Despite this clear statement, the State appears to spend a great deal of time arguing that prejudice was not proven for the evidentiary errors and that reversal is not required based on them. This brief will focus

briefly on the fact of the error, and will explore prejudice where necessary to show that such an issue was, in fact, an error, but will not focus on reversibility for an obvious reason; standing alone, these errors do not support reversal, because most of them are most relevant to a self-defense argument. If there is no self-defense argument, then there is no prejudice. If there is a self defense argument - as there should have been - many of these errors become highly prejudicial, as further explored below, along with the discussion of the erroneousness of the errors.

a. The “offer of proof” argument is spurious.

The State also claims George has not preserved errors because he presented no specific offers of proof, but fails to identify which errors this claim is intended to apply. BOR at 14-15. In any event, offers of proof are not required where the nature of the testimony is apparent from the record. State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991). In fact, the only case cited directly by the State in support of its claim is Ray, wherein a trial court assumed generally that a witness would testify so as to exculpate the defendant but excluded the testimony because of alleged discovery violations. 116 Wn.2d at 537. The State later argued that even if the witness’s testimony was improperly excluded, Ray’s offer of proof was insufficient to reverse the conviction. Id. at 538-39.

But the Supreme Court disagreed, holding that the “details” of testimony do not need to be elucidated in a general offer of proof, so long the general substance of them is apparent from the record. 116 Wn.2d at 539. Substance of such questions can be deduced from the questions themselves, the context, “or otherwise.” Id.

Indeed, a different outcome would dramatically slow the trial process, as every single objection would have to be followed by an offer of proof outside the presence of the jury in order to constitute an error on appeal. Such is not the holding of Ray; indeed, it is the opposite. 116 Wn.2d at 539.⁴

Moreover, the State's claim fails to have even an arguable application to most of the errors raised. But in order to maintain the discrete arguments herein, and in order to address any possible application, this argument is addressed briefly with each individual argument below.

- b. The trial court erred by sustaining spurious “speculation,” “relevance,” and unspecified objections to evidence relevant to the question of whether George’s fear was reasonable.

⁴ The Ray Court also extensively reviewed the fact that Ray had raised these issues and preserved them in a motion for new trial, but that primarily focused on whether his objections to the exclusion of testimony were sufficient, rather than whether the offer of proof was sufficient.

This error applies specifically to three sustained objections (or series of objections) to George's testimony, and to two related objections to Dickman's testimony. They are discussed individually.

1) At one point, George testified that Clark "showed no fear" when he saw George's gun, "like he had one of his own." 3RP 1235. The Court sustained the State's objection, and struck this portion of George's testimony as "speculation." 3RP 1235. The State seems to assert this was "speculation" because George was testifying that Clark had a gun of his own. BOR at 16-17.

But George was actually testifying that this made *him* (George) think Clark had a gun, which is not speculation, but rather a statement about George's state of mind, and the reasonableness thereof, at the moment of the alleged crime, something highly relevant in a self-defense case. See, i.e., State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (subjective and objective components of the state of mind necessary for self-defense); Walker, 136 Wn.2d at 772 (same). For this reason, it was neither speculation nor irrelevant, and it should not have been stricken.

The State's argument about an offer of proof does not apply here, because George's testimony was already present but stricken from consideration by the jury, so no offer of proof was necessary.

2) When George tried to testify, “What they came there for was really serious,” the Court again sustained the State’s “speculation” objection. 3RP 1324. The State argues that this was speculation because “the defendant had no personal knowledge of why Ricky Millender or Isaiah Clark were at the gas station that day, much less that the two were there for the same reason.” BOR at 17-18.

This argument makes no sense. George was listening to the exchange occurring on the other side of the car. We know from Millender’s own testimony that he was confronting McGrew about the “brutal murder” of his friend Ranique Mosely. 3RP 60-61, 86. It was not “speculation” on George’s part that Millender and McGrew were there about something “really serious.” It was a fact.

Moreover, the idea that Millender and Clark might have been at the gas station for independent reasons is absurd. Obviously, the two acted in concert, with Millender approaching McGrew and Clark assisting by keeping the parties effectively isolated from each other. See 3RP 1066, 1069, 1146, 1197-99, 1255, 1321. Even at trial, the State never asserted that Millender and Clark were not acting together at the scene. This argument should be summarily rejected.

Again, the State's "offer of proof" argument does not apply here, because George's testimony was already present but stricken from consideration by the jury.

3) When George was asked on redirect whether he thought another gun was present besides his, he replied, "I didn't see one. I knew somebody had something." 3RP 1339. Again, the State's speculation objection was sustained. 3RP 1339. The defense attorney tried again, asking, "Did you feel as though anyone was armed?" 3RP 1339. The State again objected, arguing, "[I]t is irrelevant and speculative what he was feeling." 3RP 1339. The court sustained the objection. 3RP 1339.

The State asserts these objections were essentially circumvented by other testimony to the effect that George thought Clark was armed but did not see a gun. BOR at 19-20. Notably, the State does not appear to defend the trial court's actions in sustaining these particular objections.

As stated above, these arguments are made largely for purposes of retrial. The fact is, the trial court repeatedly sustained objections to George's testimony that he believed Clark was armed. This belief – and the reasons for it - are relevant testimony in a self-defense case. For purposes of retrial, this Court should make clear that they are permissible so that this same case does not come back before the Court for the same set of misunderstood issues.

For the third time, the State's argument about an offer of proof does not apply here, at least in the first part, because that part of George's testimony was already present but stricken from consideration by the jury. The latter portion was sustained before George responded, but it is clear from George's mostly stricken testimony on this subject that he believed the others were armed, and it should be made clear by this Court that such testimony is relevant in this, a self-defense case.

4) Finally, after Dickman testified that she was "really scared...panicking" during the incident, she then was precluded from testifying about why she was scared when the trial court upheld the State's unspecified objection. 3RP 1071. A short time later in Dickman's direct testimony, the court also upheld a "relevance" objection to the question, "[W]hat was going through your mind as you saw [Clark] approaching the vehicle?" 3RP 1091-92.

These objections to Dickman's testimony are never addressed at all in the State's brief, and George therefore would argue the State is conceding that the witness's fear and the reasons for her fear would be relevant to George's fear – given this was properly a self-defense case, where the reasonableness of George's fear was the primary issue.

Insofar as the State's argument about an offer of proof applies, the Dickman's fear and her reasons for it would be relevant whatever they

were so long as they were based on her observations - because George was standing right next to her. As in Ray, the general nature of the witness's testimony was apparent from the context, and it should have been allowed. Ray, 116 Wn.2d at 539.

As noted previously, on the topic of self-defense, George was entitled to the benefit of all the evidence, from whatever source. Fernandez-Medina, 141 Wn.2d at 456. So even if Dickman's observations (and therefore her reasons to be afraid) varied somewhat from those testified to by George, the jury would be entitled to find that George also noticed those things and was affected by them, but simply did not testify to them. This is the process by which George obtains the benefit of all the helpful evidence, even if he did not produce it himself.

The exclusion of George's and Dickman's testimony as to their fear was error. Moreover, the exclusion of testimony relevant to the defendant's fears and the reasonableness thereof naturally tends to impact George's constitutional right to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). George's convictions should be reversed due to the failure of the trial court to instruct on self-defense, but this Court should review these evidentiary questions, in order to prevent their recurrence upon retrial.

c. The trial court erred by incorrectly classifying statements as “hearsay.”

Both Dickman and George attempted to testify repeatedly about statements made by the participants just prior to the shooting. 3RP 1057, 1059, 1198. For example, Dickman attempted to testify to the words Millender said when he first approached McGrew, 3RP 1057, 1059; and George attempted to testify to the words Clark said to him as he first approached George – words that caused George to stop moving towards Millender and McGrew, 3RP 1197-99.

The trial court not only sustained the State’s “hearsay” objections to these, but also instructed the witnesses, “That is hearsay. You can’t testify as to what somebody else said.” 3RP 1059, 1198. Dickman and George took these advisements to heart, not testifying about the content of Millender and McGrew’s conversation, and testifying only that George and Clark “exchanged words” when George tried to go to the back of the car. 3RP 1063, 1066-67, 1078-79, 1211-12, 1263, 1265.

The State never specifically addresses these rulings by the trial court. Presumably, the only argument by the State as to them is that there is an insufficient offer of proof as to their content.

Some of the testimony was actually given, but then stricken by the trial court, so the “offer of proof” simply cannot not apply to those rulings.

3RP 1057, 1059. Other statements, although not explicitly evident from the record, are implicitly evident based on the context, e.g. , Clark’s words to George made him stop walking towards the confrontation between Millender and McGrew, and Millender confronted McGrew about Raylene’s “brutal” murder, even though the substance of Millender’s statements was excluded as hearsay when Dickman and George tried to testify to them. The “offer of proof” argument therefore fails here, as the evidence before the Court was sufficient under State v. Ray to know the substance of the excluded testimony. 116 Wn.2d at 539.

Like the above errors, the erroneous exclusion of this testimony impacted George’s constitutional right to present a complete defense. Crane v. Kentucky, 476 U.S. at 690. After George’s convictions are reversed due to the failure of the trial court to instruct on self-defense, this Court should also review this and the other evidentiary issues, in order to prevent them arising on retrial.

- d. The trial court erred when it admitted evidence tending to show criminal propensity.
 - i. *The trial court erred when it permitted the State to cross-examine George about carrying of a weapon as a minor and characterize that as having “made a choice to break the law.”*

The State argues that because George testified that he began carrying a gun when he was about sixteen years old, the “door was opened” for the State to point out that such carrying of a weapon was a violation of the law. BOR at 20-25. Specifically, after pointing out during cross-examination that a minor carrying a gun was not legal, the prosecutor then asked, “So you, also, made a choice to break the law at that point in time; is that correct?” 3RP 1258. The defense “relevance” objection was overruled, and George answered “yes.” 3RP 1258.

The State argues that the door was opened by George’s own testimony, and it thenceforward had the right to “explain...the initial evidence.” BOR at 20 (citing K. Tegland, 5 WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE, §103.14, at 52-53 (4th ed. 1999)). The State explains the “open door” rule is strong enough to allow in evidence otherwise excluded by other evidentiary rules. BOR at 20-23 (citing, inter alia, State v. Hayes, 73 Wn.2d 568, 571, 439 P.2d 978 (1968); and State v.

Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).⁵ But the cases provided by the State do not support the “opening” the State proposes here.

For example, in State v. Hayes, a defendant claimed he was intoxicated, but asserted that the State could not discuss the results of a breathalyzer given a prior ruling, the exact contents of which were not explored. 73 Wn.2d at 571. The Hayes Court held that Hayes’s use of the intoxication defense certainly opened the door to a breath test:

It is one thing to say the state cannot make affirmative use of evidence which has been suppressed by pre-trial order. It is quite another to say that appellant can turn the pretrial order into a shield against contradiction.

73 Wn.2d at 571. State v. Gefeller is in a nigh-identical position, with the defendant trying to introduce evidence that he was cooperative in a lie-detector test, but wanting to exclude evidence about the outcome of the

⁵ The State makes an argument that even constitutionally impermissible evidence can be admitted under the “open door” rule, but focuses almost entirely on cases in the specific situation where a defendant testifies contrary to a statement given to police without Miranda warnings. BOR at 21-22 (citing, *inter alia*, Harris v. New York, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)). Such cases are intended to specifically thwart the use of constitutional rights as a shield to commit perjury. See Harris, 401 U.S. at 224. Here, George did not use his right not to be attacked with propensity evidence to mislead the jury. In fact, he was very open about a situation that the jury may have been alienated by – the fact that he carried a gun as a minor. This did not, as noted above, “open the door” to the presenting evidence that George was essentially a “criminal” from an early age. Because these cases are not on point, they are not separately addressed herein.

test, which was inconclusive. 76 Wn.2d at 454-55.⁶ Here, George was not hiding behind the evidentiary rules while he misled the jury; in fact, he testified remarkably openly.

George testified that he started carrying the gun because he was afraid after being shot at while in the presence of his friend, McGrew. 3RP 1177-79, 1214-16, 1256-57. The State cross-examined George on this topic without much incident other than the point raised above; in fact, the State successfully pointed out that George carried the gun rather than stop spending time with McGrew. 3RP 1258. Only when the State sought to introduce evidence that George knowingly broke the law by carrying the gun, was the “relevance” objection raised, 3RP 1258, and indeed, that was when the testimony became propensity evidence.

The State responds to this argument in a remarkably candid way. It argues that after the evidence of the gun was introduced:

[t]he State was free to adduce evidence that showed the defendant was more concerned about his self protection than he was at trying to protect himself within the boundaries of the law.

BOR at 25. This is a frank admission that the evidence was used as propensity evidence – George was someone who tended to break the law

⁶ Currently, lie detector tests are only admissible at all upon stipulation of the parties. See, i.e., State v. Elliott, 121 Wn.2d 404, 407, 88 P.2d 435 (2004). This detail, however, does not affect the State’s base argument.

to protect himself, so in the instant case he also broke the law to protect himself. Propensity evidence is impermissible. See, i.e., ER 404(b); State v. Torres, 151 Wn. App. 378, 212 P.3d 573; State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This Court should prohibit its use on retrial.

ii. The trial court erred when it permitted over objection cross-examination of George about the other shootings he had “been involved with.”

At one point, the State asked George about shootings he had been “involved” with. 3RP 1267. The defense objected, arguing this would mislead the jury, as George had not been “involved” with any shooting, but rather, had been the victim in such instances. 3RP 1267-69. The Court overruled the objection in the presence of the jury, after holding outside the presence of the jury that “involved” and “experienced” could be used interchangeably, but the State still rephrased the question, referring to shootings George had “experienced.” 3RP 1269-71.

The State did, in fact, eventually ask the question in an unobjectionable way. But the Court also, by allowing the previous, objectionable question, could have confused the jury. This is not a question of prejudice, as George noted in his opening brief that this was

not an error by itself worthy of retrial – this is a question of avoiding obvious errors on retrial.

“Involved” and “experienced” are, in fact, distinct words with very distinct meanings, especially in the context of a highly charged object like “shootings.” See BOA at 46-47. This Court should, upon George’s retrial, prohibit the implication that he was an actor in past shootings by simply noting the “involved” language as inappropriate.

iii. The trial court erred by admitting the montage used with witness Monica Johnson, as the montage contained George’s booking photograph.

The State argues that admission of the booking photograph was reasonable because, as George had not yet testified, identity was still at issue. BOR at 31-32. This is correct, so far as it goes, but the fact is, identity will not be an issue on retrial because George has admitted to the shooting while on the stand. See, i.e., 3RP 1253-54. There is therefore no reason to admit something so prejudicial as a photographic montage containing booking photographs upon retrial. See State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005) (booking photographs may raise prejudicial implication of criminal propensity, especially where identity not at issue). This Court should avoid the error on retrial by excluding just the physical montage itself.

B. CONCLUSION

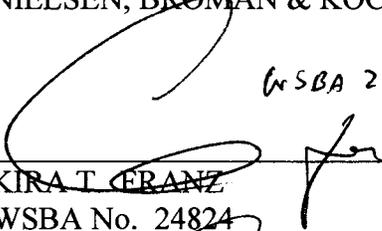
The failure to instruct the jury on self-defense, aggravated by evidentiary errors, requires a new trial. Although the self-defense issue mandates reversal, this Court should also review all the evidentiary issues raised herein, as they are otherwise likely to recur at a new trial.

DATED this 13th day of May, 2010.

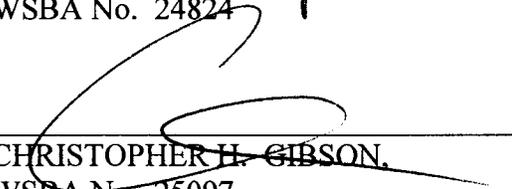
Respectfully Submitted,

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

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COURT OF APPEALS
WASHINGTON

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STATE OF WASHINGTON

BY _____
OFFICIAL

STATE OF WASHINGTON)
Respondent,)
vs.)
D'MARCUS GEORGE,)
Appellant.)

COA NO. 39085-0-II

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 14TH DAY OF MAY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY 2010.

x Patrick Mayovsky