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Court of Appeals
Division II
State of Washington

NO. 49317-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOISSELLE,

Appellant.

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

The Honorable Jerry T. Costello, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

In its procedural facts section, the state asserts the findings of fact in the "order Denying Self-Defense Instructions Based on Untimely New Theory" have not been challenged on appeal. Brief of Respondent (BOR) at 2, note 1. This is substantively incorrect.

One of the court's primary findings in refusing appellant Michael Boisselle's justifiable homicide in-resistance-of-a-felony instructions was that the state was not given fair notice of this theory of self defense. CP 320-26. This finding is discussed in Boisselle's statement of facts. Brief of Appellant (BOA) at 14. It is also addressed at length in Boisselle's argument that the court erred in refusing Boisselle's instructions. BOA at 62. Boisselle specifically argued in subsection (iii) that the state had notice of this theory of self defense. BOA at 65 ("Thus, the prosecution knew – well before trial – that justifiable homicide in resistance of a felony was an issue in the case. Moreover, defense counsel's first packet of instructions included this theory of self defense").

Thus, while appellant did not assign error to the court's finding in its assignments of error, it is clear from the argument section that Boisselle challenges the court's finding in that regard. Therefore, Boisselle asks this Court to overlook the technical oversight and treat entry of the finding as

challenged. See State v. Olson, 126 Wn.2d 315, 318-324, 893 P.2d 629 (1995) (failure to assign error in opening brief will be overlooked where issue addressed in brief and nature of argument clear); RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits).

In its facts section relating to the search of the duplex, the state asserts that neither deputy Ryan Olivarez nor Deputy Frederick Wiggins was aware of the Auburn bloody carpet/missing person investigation. BOR at 8. This is partially incorrect. Olivarez testified that after sergeant Erick Clarkson arrived, "I received some information being linked to an Auburn case where a man was seen burning some bloody carpet. So Sergeant Adamson and I walked around the house, noticed there was some carpet missing from the living room area." RP 132. Thus, Olivarez knew about the Auburn investigation. But regardless, it was the sergeants' decision to force entry into the duplex and they both had this information when they made the decision. RP 134.

In its facts section relating to self defense, the state asserts that after Boisselle grabbed the gun:

> Defendant ran to get away from Mr. Zomalt. Id. [9VRP 1395]. Defendant had a choice – run out the front door, or run up the stairs. 9 VRP 1445. Defendant chose to run up the stairs. Id. Defendant started running up the stairs. 9 VRP 1395.

BOR at 17.

However, at RP 1395, Boisselle was merely asked "why" he ran "that way." He responded: "[B]ecause that was the best way to get away from him." RP 1395. And at 1445, the prosecutor merely clarified the relative positions of the stairs and the door. Boisselle may have thought he could not make it to the door before Zomalt reached him.

The state asserts that each of the wounds to Zomalt's head was a contact wound. BOR at 19. That was the opinion of the medical examiner (ME). RP 903. However, ME John Lacey's opinion was based solely on his visual observation of what he believed to be soot. RP 1530. He did no chemical analysis to confirm the presence of gunshot residue. RP 1530.

B. ARGUMENT IN REPLY

1. SEVERAL OF THE COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In finding of fact IV, the court found that neither deputy Olivarez nor deputy Wiggins had heard the anonymous calls about the duplex. CP 354. Whether the deputies actually listened to the calls themselves, Boisselle challenged this finding because it suggested the deputies did not know about the substance of those calls. From their testimony, it is clear both deputies knew "an individual named Mike supposedly shot somebody at that residence." 1RP 127; RP 233.

In finding of fact XVI, the court found "All of the information the deputies gathered prior to their entry into the duplex was done for the purpose of determining the welfare of anyone inside the duplex[.]" CP 358. Whether that was one of the officers' purposes, it was not their only purpose. Through Auburn detective Douglas Faini, Clarkson gathered information his suspicious welfare check could be related to a possible homicide the Auburn police were investigating. RP 36. Clarkson gathered information Faini was investigating a burning incident and would be interested to know if there was any missing carpet at the duplex. RP 37, 71. Faini gave Clarkson the name of Zomalt as the missing person. RP 37-38.

Through passer-by Christopher Williamson, Adamson gathered information the duplex was Zomalt's last known address and that he was associated with a missing person case Auburn was investigating. RP 110. In his report, Adamson wrote the Auburn case revolved around an unknown individual burning bloody carpet in their jurisdiction. RP 110. Adamson also wrote the blood from the carpet was tested for DNA and came back as a match to Zomalt's. RP 110. Adamson testified this was information Faini related when he spoke to Clarkson. RP 110.

Olivarez testified that after Clarkson arrived, "I received some information being linked to an Auburn case where a man was seen burning some bloody carpet. So Sergeant Adamson and I walked around the house, noticed there was some carpet missing from the living room area." RP 132. Thus, all of the information gathered prior to the officers' entry was not done *solely* for the purpose of determining the welfare of anyone inside but also related to the Auburn investigation.

In finding of fact XIX, the court similarly found the officers entered the duplex solely to determine the welfare of Boisselle and/or Zomalt. CP 359. However, Adamson testified their purpose in entering the duplex was two-fold, to possibly render aid and to determine if they had a crime scene. RP 118. Clarkson similarly testified they entered not necessarily to check on the welfare of occupants but to "figure out what we had." RP 75-76.

Significantly, it is questionable whether the sergeants did not in fact have probable cause to believe a crime had been committed in the duplex when they entered. At the time of entry, the deputies and sergeants knew: the Auburn police department was investigating Zomalt's disappearance as a possible homicide; Zomalt had been living there at the duplex with Boisselle before his disappearance; an anonymous caller

reported a shooting and a dead body at the duplex; the duplex in fact smelled like a dead body; Zomalt's disappearance/homicide concerned an unknown individual burning a pile of bloody carpet in which DNA matching Zomalt's was located; and the carpet in Boisselle's living room was noticeably torn up.[1] Contrary to the sergeants' claimed beliefs, these circumstances suggest there was in fact probable cause to obtain a warrant.

But probable cause aside, it cannot seriously be doubted the officers were acting – at least in part – to see if a crime had been committed inside the duplex. And contrary to finding of fact XXIV, the body was not "the first definitive evidence that a homicide had been committed. CP 360. It was the smell of the dead body that corroborated the 911 calls about a shooting and a dead body and the ripped up carpet that corroborated the Auburn investigation into Zomalt's disappearance/potential homicide.

2. THE WARRANTLESS ENTRY INTO BOISSELLE'S HOME WAS NOT LAWFUL UNDER THE FOURTH AMENDMENT.

The state accuses Boisselle of confusing the exigent circumstances exception, the emergency exception and the community caretaking

[1] In ruling on the motion to suppress, the court also admitted Ex 7, detective Faini's report, as to the Auburn investigation. RP 161. The court made an explicit finding it would be reasonable to infer that detective Faini did in fact convey that Auburn was investigating a homicide or potential homicide.

exception and of proposing a hybrid analysis based on these three concepts. BOR at 33-34. But that's exactly what the federal courts have done. See e.g. McDonald v. Town of Eastham, 745 F.3d 627 (1st Cir. 2015) (noting the courts do no always draw "fine lines" between the community caretaking exception and other exceptions to the warrant requirement, such as emergency aid and exigent circumstances); Ray v. Township of Warren, 626 F.3d 170, 176 (3rd Cir. 2010) (noting cases invoking "community caretaking" exception to uphold warrantless entries into houses but actually applying a modified exigent circumstances test). Importantly, none of the federal circuit courts of appeal have approved of an officer's warrantless entry into a citizen's home based *solely* on community caretaking. BOA at 29-47 (citing cases).

That's because the "community caretaking" exception was intended as an exception for automobile searches, not homes. Cady v. Dombrowski, 413 U.S. 433, 439, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) ("Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office ...."); see also United States v. Pichany,

687 F.2d 204 (7th Cir. 1982) ("[T]he plain import from the language of the Cady decision is that the Supreme Court did not intend to create a broad exception to the warrant requirement to apply whenever the police are acting in an 'investigative' rather than a 'criminal function'"); Ray, 626 F.3d at 177 (community caretaking doctrine cannot override the warrant requirement or the carefully crafted exceptions to that requirement, such as hot pursuit or danger to the lives of others).

Thus, under federal jurisprudence, absent some exigency or emergency, "community caretaking" does not justify a warrantless intrusion into the home. BOA at 47 (summarizing cases). The state does not address any of the cases cited by Boisselle but merely argues "exigent circumstances" and community caretaking are inconsistent with each other and therefore the cases Boisselle cites should be disregarded. What the state fails to understand is that the federal courts have declined to uphold warrantless entries into homes under the guise of community caretaking unless there is also a need for immediate action, whether due to an emergency or exigency. Boisselle is not proposing a "modified exigent circumstances" test. His point is that the federal law requires more than just a routine health and safety check to justify the warrantless entry into the home.

The Washington constitution must provide at least as much protection as the federal constitution. State v. Surge, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). Thus, if community caretaking does not justify a warrantless entry into the home – absent some emergency or exigency – under federal jurisprudence, it does not justify a warrantless entry into the home – absent some emergency or exigency – under Washington law, either. The Washington cases that have so held conflict with federal cases interpreting the Fourth Amendment. See e.g. BOA at 57 (arguing this Court's decision in State v. Weller, 185 Wn. App. 913, 344 P.3d 695 (2015), should be reconsidered for that reason).

Under the Fourth Amendment, the state was required to prove one of the carefully delineated exceptions to the warrant requirement, such as exigent circumstances or emergency aid. The state failed to establish either. First, the state concedes "[t]he 'exigent circumstances' exception does not apply to this case[.]" BOR at 36. Nor did the state argue it applied below.

Accordingly, the only applicable exception the state is left with is emergency aid. However, the court's findings belie the applicability of this exception:

> Having conducted a preliminary investigation, the deputies could not confirm that an immediate emergency

> was present. They did not hear or see evidence that a person was alive inside the home and in need of immediate help. Emergency aid was not called to stand by. The deputies chose not to enter the home for approximately 1.5 hours, further confirming their belief that emergency aid was unnecessary.

CP 46.

Because the state failed to establish any exigency or emergency to justify the warrantless intrusion into Boisselle's home, the state failed to meet its heavy burden to prove the officers' entry was lawful under the Fourth Amendment.

3. THE WARRANTLESS ENTRY INTO BOISSELLE'S HOME WAS NOT LAWFUL UNDER ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION.

According to our Supreme Court, the community caretaking function exception encompasses situations involving emergency aid and "routine check[s] on health and safety." State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668, 676 (2000), as corrected (August 22, 2000).

Under the Washington Supreme Court's cases, to justify intrusion under the emergency aid exception, the government must show that: (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; (3) there was a reasonable basis to associate the need for assistance with

the place being searched; (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. State v. Schultz, 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011) (adopting latter three requirements from State v. Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007)).

The state asserts the test for a "routine check on health and safety" is actually easier to satisfy than the emergency aid exception and involves only the first three factors. BOR at 38. In other words, to justify a warrantless entry under this aspect of community caretaking, the state is not obligated to establish an imminent threat of substantial injury to persons or property, that a specific person is in need of immediate help for health or safety or that the claimed emergency is not a pretext for an evidentiary search. However, the state's proposition makes absolutely no sense. Why would the constitution make it easier for police to justify a warrantless search or seizure when there is less urgency than in an emergency? In effect, the routine health and safety check exception would swallow the carefully crafted, well-delineated emergency aid exception to the warrant requirement. The state's proposal conflicts with federal

authorities and carves out an overly broad exception to the warrant requirement.

The state attempts to justify its proposal for a lessened proof requirement for a routine health and safety check on grounds the emergency aid function "involves circumstances of greater urgency and searches resulting in greater intrusion." BOR at 39 (citing State v. Acrey, 148 Wn.2d 738, 750, 64 P.3d 594 (2003) (quoting Kinzy, 141 Wn.2d at 386-87)). But that is certainly not the case here. The search here resulted in the greatest intrusion – a warrantless entry into a citizen's private residence. And why should the standard be easier when there is less urgency? Again, that makes no sense.

And significantly, neither Acrey nor Kinzy involved the warrantless entry of a home. They involved brief, detentions on a public street. The home is afforded special protection. Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 1379-80, 63 L. Ed. 2d 639 (1980). The test proposed by the state does not respect the special protection afforded homes.

The state's citations to State v. Johnson, 104 Wn. App. 409, 413, 16 P.3d 680 (2001), and State v. Menz, 75 Wn. App. 351, 352-355, 880 P.2d 48 (1994) are misleading because they are pre-Schultz decisions

applying the emergency aid exception. The factors relied upon to uphold the searches are no longer sufficient under Schultz. And again, it makes no sense for the home to be afforded less privacy protection when there is less of an urgency, i.e. when officers are making a routine check on health and safety than when they are responding to an emergency. The intrusion into the home is the same.

The state's reliance on Gocken is similarly unpersuasive. BOR at 43 (citing State v. Gocken, 71 Wn. App. 267, 857 P.2d 1074 (1993)). It relied on Cady to uphold the officers' warrantless entry into the home. Gocken, 71 Wn. App. at 277. Gocken is outdated as more recent federal authorities have limited Cady's application to the car context.

Alternatively, the state argues the warrantless entry was justified under the emergency aid exception to the warrant requirement. BOR at 45-50. Under this exception, the state must establish inter alia:

> (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.

Schultz, 170 Wn.2d at 754-55.

But the court explicitly found the officers did not believe anyone was in need of immediate help, as evidenced by their delay in entering and by the fact they did not summon aid:

> Having conducted a preliminary investigation, the deputies could not confirm that an immediate emergency was present. They did not hear or see evidence that a person was alive inside the home and in need of immediate help. Emergency aid was not called to stand by. The deputies chose not to enter the home for approximately 1.5 hours, further confirming their belief that emergency aid was unnecessary.

CP 46.

The state argues that the fact an officer lets some time pass before entering a residence does not necessarily negate the application of the emergency exception. BOR at 46. But here, the court found the delay was evidence these officers did not in fact perceive an emergency.

The state also claims courts have found a warrantless entry justified when responding to the report of a dead body. BOR at 47-48 (citing U.S. v. Stafford, 416 F.3d 1068, 1074, 05 Cal. Daily Op. Serv. 6831 (2005); United States v. Salava, 978 F.2d 320, 324-25 (7th Cir. 1992)). However, Stafford did not involve an anonymous call to 911, as was the case here. Rather, Stafford involved an identified witness who was performing a prescheduled fire alarm inspection who called police after observing blood spatter and feces on the wall, among other

suspicious circumstances. Similarly, Salava involved an identified witness who contacted police after dropping someone off at a trailer who was (1) covered in blood and (2) said they shot someone. Hogue also involved identified witnesses. BOR at 49 (citing United States v. Hogue, 283 F. Supp. 846 (N.D. Ga. 1986)).

The state's citation to Holloway and other cases is more on point. BOR at 48-50 (citing United States v. Holloway, 290 F.3d 1331, 1336 (11th Cir. 2002); United States v. Richardson, 208 F.3d 626, 627-31 (7th Cir. 2000); Rasucher v. State, 129 S.W.3d 714, 723 (2004)). The cases are distinguishable, however, because the officers here did not actually perceive that anyone was in need of immediate aid, as the trial court expressly found. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (in absence of finding on factual issue, court must presume party with the burden of proof failed to sustain their burden on the issue). In order for the emergency exception to apply, the officers must believe someone needs immediate assistance. The court's factual findings establish the exact opposite. The state even concedes, "the deputies could not confirm whether an emergency existed." BOR at 49. This concession forecloses application of the emergency aid exception.

As the state also concedes, a search undertaken pursuant to an officer's community caretaking function must be *totally divorced* from a criminal investigation under Cady. BOR at 51. Yet, the state seems to propose that it is sufficient if the officer's "primary purpose" is to determine the occupant's welfare, rather than search for evidence of a crime. BOR at 52 (citing State v. Schlieker, 115 Wn. App. 264, 267-268, 62 P.3d 520 (2003); State v. Link, 136 Wn. App. 685, 696, 150 P.3d 610 (2007); State v. Weller, 185 Wn. App. 913)).

In Schlieker and Link, the court found the officers' primary purpose was investigating crime, not responding to an emergency, and therefore the community caretaking exception did not apply. In Weller, there was no evidence of a criminal investigation and therefore, according to this Court, the warrantless entry into the home was justified under the routine health and safety check aspect of the community caretaking function. But these cases do not stand for the proposition that a warrantless entry is justified under community caretaking – when there is also evidence of a criminal investigation – so long as the officer is more concerned about safety than with the accompanying investigation. Indeed, such a holding would conflict with Cady and its requirement that

community caretaking must be totally divorced from criminal investigation. Such a holding would open the floodgates for abuse.

Next, the state claims that because there was no "seizure," the balance favors the actions of the police:

> When weighing Defendant's privacy interest against the public's interest in having police perform their community caretaking function, the balance tips in favor of the community caretaking function. As no seizure occurred, the balance favors the action of police. See Kinzy, 141 Wn.2d at 387.

The state misunderstands Kinzy. Kinzy involved a seizure, not a search. And the court in that case noted that where an actual seizure occurs, balancing the interests does not necessarily favor an encounter by police. Kinzy, at 387-88. But the court was not differentiating between a search and a seizure and holding that a seizure is afforded higher protection. Rather, the court was talking about the type of police intrusion involved in that particular case.

Here the type of police intrusion was even greater than a seizure, it was a warrantless search of a citizen's residence, which is afforded special protection. Considering the sanctity of the home, balancing the interests likewise does not favor the police intrusion here.

The state claims the officers would have been derelict in their duty if they did not enter the duplex. However, it is clear they did not perceive

an emergency. Under the circumstances, it is not unreasonable to require the police to apply for a warrant. As indicated in the preceding section, it is not a foregone conclusion they would not have been granted one. Additionally, the police could have contacted the anonymous informant, Joseph Jones, which they later did. RP 962, 965, 975; Ex 119.

Lastly, the state claims that "refusing the [sic] apply the community caretaking exception to situations where police officers reasonably believe someone is in danger could result in officers less willing to carry out their community caretaking functions." BOR at 53. But the officers here did not believe someone was in immediate danger, as evidence by their delayed entry and the fact they did not summon aid. That is a verity on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

4. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ABOUT JUSTIFIABLE HOMICIDE IN RESISTANCE TO A FELONY.

In his opening appellate brief, Boisselle argued the court erred in failing to give his requested justifiable homicide in resistance to a felony instructions, because there was evidence at the time of the shooting that he was resisting: (1) an ongoing burglary, because Zomalt remained despite numerous requests to leave and he threatened Boisselle with a gun and

thereby assaulted him and continued to remain unlawfully while armed with a firearm; (2) an ongoing kidnapping and/or unlawful imprisonment because Zomalt threatened Boisselle with a gun to prevent him from leaving and continued yelling and cursing at him while still possessing the gun, thereby preventing him from leaving; (3) an imminent assault once Boisselle grabbed the gun and Zomalt, who was much bigger and prone to violence, ran aggressively toward Boisselle. BOA at 68-71.

In response, the state claims Boisselle was not entitled to the kidnapping or unlawful imprisonment instructions because Boisselle was no longer defending himself against kidnapping or unlawful imprisonment when he shot Brandon Zomalt. BOR at 55. According to the state:

> At the moment Defendant grabbed Brandon Zomalt's pistol, Defendant was no longer a prisoner. The pistol gave him a choice – a choice he actually made: He could leave the apartment or he could go upstairs. 9 VRP 1444-45. He chose to go upstairs. Id. The gun, the choice it provided, and Defendant's exercise of that choice freed him from his imprisonment or kidnapping – all before he shot Brandon Brandon Zomalt dead.

BOR at 55. However eloquent, the state's rendition of the purported choice Boisselle made was no so cut and dried.

As soon as Boisselle grabbed the pistol, Zomalt leaped up off the couch in pursuit, either to assault him or to prevent him from leaving. Boisselle testified Zomalt bragged to him previously about beating

someone into convulsions. RP 1387. Zomalt was much bigger physically than Boisselle. Boisselle may have believed trying to open the door would allow Zomalt enough time to tackle him and wrestle the gun away and keep him from leaving. He may have thought his best bet was up the stairs. In fact, he testified, "that was the best way to get away from him." RP 1395. And even if Boisselle had gone out the front door, it's not as if he would have been home free. It was the middle of the night. Zomalt could have tackled him outside just as easily as inside.

Because Zomalt was still going after Boisselle at the time of the shooting, there is evidence Zomalt was attempting to prevent Boisselle from leaving. That is evidence of a continuing unlawful imprisonment/kidnapping and/or an attempted kidnapping/imprisonment. See e.g. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (evidence that an actor engaged in a series of acts intended to secure the same objective supports a finding that the actor's conduct was a continuing course of conduct, rather than several distinct acts).

Regarding the court's denial of Boisselle's burglary instructions, the state claims he was not entitled to them, because "in Washington, a person cannot kill to prevent a burglary." BOR at 56. That's not what the Supreme Court stated in Brightman, however. State v. Brightman, 155

Wn.2d 506, 122 P.3d 150 (2005). "The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor, are felonies which are committed by violence and surprise; such as murder, robbery, burglary, arson, ... sodomy and rape." Brightman, 155 Wn.2d at 522 (emphasis added) (quoting State v. Nyland, 47 Wn.2d 240, 242, 287 P.2d 345 (1955). In all those felonies, human life can be presumed to be in peril. Nyland, 47 Wn.2d at 243. Accordingly, the state's argument Boisselle was not entitled to an instruction on burglary as part of his resistance-of-a-felony instructions should be rejected.

The court's rejection of Boisselle's instructions prevented him from arguing a bona fide theory of the case – that he shot Zomalt while resisting a kidnapping, unlawful imprisonment, burglary or assault. RCW 9A.16.050(1) contemplates justifiable homicide where the defendant reasonably fears the person slain is about to commit a felony on the slayer or inflict death or great personal injury, and there is imminent danger that the felony or injury will be accomplished. This is WPIC 16.02, which Boisselle essentially received, without mention of the felony part. CP 119.

In contrast, RCW 9A.16.050(2) considers a homicide justified where the defendant acted in actual resistance against an attempt to

commit a felony on the slayer. This is WPIC 16.03, which Boisselle requested but did not receive. CP 74. In contrast to the instruction Boisselle received, WPIC 16.03 does not require the slayer to have a reasonable belief in imminent danger of death or great personal injury, although the slayer may only use such force as a reasonably prudent person under the same or similar circumstances. Thus, this instruction would have allowed Boisselle to argue the shooting was justified because he was in actual resistance of a kidnapping and/or burglary and used the same amount of force as a reasonably prudent person would have used under the same circumstances, regardless of fear of imminent danger of death. A person has the right to prevent a felony from being committed against him – especially in the home. The state is therefore incorrect that Boisselle's proposed instruction would have been repetitious. See BOR at 57-58.

Alternatively, the state argues Boisselle's instructions were properly rejected as untimely and prejudicial. In the court's order denying the instructions, the court found: "[T]he state would have conducted trial differently if it had been given notice of this theory of self-defense prior to the presentation of the State's case, including the State's case-in-chief, the State's cross-examination of the Defendant, and the State's potential

rebuttal evidence." CP 223. The state claims Boisselle did not assign error to this finding and that it is therefore a verity on appeal.

The state's argument should be rejected. First, Boisselle argued in his opening brief that the state in fact had notice he would be arguing he was the victim of an unlawful imprisonment or acting in resistance of a felony. BOA at 65. It necessarily follows that Boisselle disputes the state would have tried its case any differently. See Olson, 126 Wn.2d at 318-324 (failure to assign error in opening brief will be overlooked where issue addressed in brief and nature of argument clear); RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits). The state had notice and tried its case accordingly.

That the state would have tried its case differently is also belied by the record. The first day of trial was April 27. The state agreed to have its instructions ready by April 27th if the defense would have its instructions ready by May 9th. 1RP 15. The prosecutor would have been well into his case-in-chief by then. So how can the state legitimately argue it would have tried its case-in-chief differently?

There was plenty of evidence the state had notice of the resistance-to-a-felony theory of self defense. The Declaration for Determination of Probable Cause, which started the case rolling, states that police spoke

with witnesses who were acquainted with Boisselle. "One stated that he had been with Boisselle after the murder and Boisselle admitted to him that he had shot and killed Zomalt. Boisselle claimed that Zomalt had held him hostage all day at gunpoint and that eventually, and when Zomalt set the gun down, Boisselle picked it up and shot Zomalt several times, killing him." CP 3.

And there was evidence the state was well aware of the resistance-to-a-felony theory of self defense in its cross-examination of Boisselle. The prosecutor made a point of asking why he did not try to escape out the window when he was upstairs (RP 1431), why he did not go out the kitchen slider when he came downstairs and why he did not run out the front door when he had the chance. RP 1445.

Regarding rebuttal, there is no different witness the state could have called. Boisselle and Zomalt were the only two people who were there. The state called the only person – the ME – who reasonably could attempt to rebut Boisselle's version of events based on the physical evidence. The state's claim it was surprised by this defense is astonishing, to say the least.

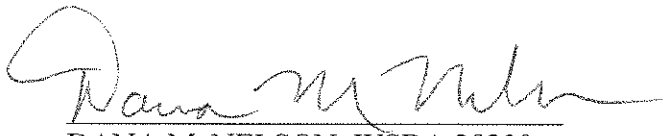
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Boisselle's conviction.

Dated this 13th day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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