COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondant, v. ALEXANDER JABBAAR KITT, Appellant,	No. 49534-1-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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DIVISION II
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DEPUTY

I, Alexander J. Kitt, 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 for Review when my appeal is reviewed on the merits.

ADDITIONAL GROUNDS

1.) Failure To Give Self-Defense Jury Instructions

2.) Failure To Sever Joint-Trial

3.) Ineffective Assistance of Counsel (Failure To Request A Jury Instruction on Third Party Culpability)

ARGUMENTS & AUTHORITIES

1. The Court made an error by failing to give jury instructions on self defense

"Under RCW 9A.16.020, one can use self-defense to prevent any assault, regardless of whether the assault threatened great bodily harm." WPIC 17.04 cmt. (3d ed. 2008). "The jury should consider the defendant's subjective impressions of all the facts and circumstances and whether he reasonably believed the battery at issue would result in great personal injury - the level of harm that would justify the use of deadly force." State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). "The instructions should allow the jury to put themselves in the defendants shoes and from that perspective determine the reasonableness from all the surrounding facts and circumstances as they appeared to the defendant." State v. Lefaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). "A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." State v. Adam, 128 Wash. 419, 426, 223 P. 9 (1924). "Imminence does not require an actual physical assault." State v. Walker, 40 Wn. App. 658, 665, 700 P.2d 1168 (1985). "The jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant, even those predating the killing." State v. Allery, 101 Wn. 2d 591, 594, 682 P.2d 312 (1984). "This evidence may come from whatever source that tends to show that the defendant is entitled to the instruction." State v. McCullum, 98 Wn. 2d 484, 488, 656 P.2d 1064 (1983). "There is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue." McCullum, 98 Wn. 2d at 488.

In this case, Kitt's defense attorney presented evidence at trial which distinctively showed individuals outside the South 45th Street

market with guns in their hands and aiming the guns as well. During trial, Tucker testified that as they neared the market, he observed Lashaun Alexander with a gun in his hand outside the market. (RP 2518 Line 22-25, RP 2519 Line 1-5). Because of Tucker's positioning in the vehicle, he testified he was unable to have a visual of Lashaun Alexander and his associates at all times. (RP 2626, RP 2631, RP 2706). Tucker did testify that Lashaun Alexander and his associates outside the market may have been hypersensitive to the presence of the SUV driven by Lance Milton-Ausley and taken a shot at the vehicle. (RP 2617, RP 2618, RP 2619). Milton-Ausley testified that he heard the first shot fired from the area outside the market. (RP 1557). Tucker testified that Kitt pulled his gun from his backpack once they observed the subjects outside the market with guns drawn. (RP 2581 Line 21-24). Tucker identified these particular individuals during his testimony when shown exhibits from the surveillance captured of the incident. (RP 2583 Line 3-22, RP 2586 Line 2-12). Milton-Ausley testified that he had it in his mind that Lashaun Alexander would fire shots once he observed him outside the market. (RP 1555, RP 1556). In fact, Anthony Stone testified the first shot came from outside H&L market. (RP 1216 Line 3-12). Moreover, according to Tucker and Milton-Ausley, Kitt returned fire in the direction of Lashaun Alexander and his associates gathered outside the market. (RP 1317 Line 5-10). Milton-Ausley testified that the shooting happened off of reflex and was the independant action of whoever was shooting. (RP 1565) Both Milton-Ausley and Tucker testified nobody inside the SUV was aware anybody was near the carport in the alley as they drove past. (RP 1503 Line 19-23, RP 2600 Line 12-23) Milton-Ausley testified there was no discussion with anybody inside the SUV to shoot at anyone on the day of this incident. (RP 1554, RP 1555, RP 1319 Line 24-25, RP 1350 Line 1-3). The SUV was near the market to find Timpe, who had walked to the market to get cash from the ATM machine. (RP 2514 Line 11-17, RP 2578 Line 19-24).

"[a] person is entitled to act on appearances in defending himself and another, if that person believes in good faith and on reasonable grounds that he and another [are] in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger." WPIC 16.07 - Act on Appearances.

"No duty to retreat exists when one is feloniously assaulted in a place where he or she has a right to be." State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). "Actual danger is not necessary for a homicide to be justifiable". State v. Studd, 87 Wn. App. at 389. "A person using defense of self could use any amount of force -- even unnecessary force in self defense". State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006).

"Evidence of a crime victim's past episodes of violent conduct that are known to the defendant may be admitted to show that the defendant reasonably feared the victim." State v. Birnel, 89 Wn. App. 459 (1998).

In this case, both Milton-Ausley and Tucker testified that they knew LaShaun Alexander to have fired gunshots on several accounts predating this incident. In fact, Tucker testified he had physically ran away from the black Monte Carlo before this date. (RP 2588 Line 2-16, RP 2599 15-18).

"Homicide [or attempted homicide] is justifiable when committed in the actual resistance of an attempt to committ a felony." WPIC 16.03 - Resistance to a Felony.
"Accidental killing or killing in self-defense can be lawful. If a defendant attempts to kill one person and kills someone else instead, the crime the defendant committs, if any, is the same as that committed had he killed the person originally intended." Randell v. Spearman, 585 Fed. Appx. 456 (2014). "It is the rule that the accidental killing of a third person by the accused

acting in self defense would constitute justifiable homicide." State v. Labbee, 134 Wash. 419, 426, 223 P.9 (1924).

In Eggleston, the jury was instructed that justifiable homicide was a defense to a charge of murder, that a person who reasonably believes he is being attacked may use lawful force to defend himself and does not have a duty to retreat, and that a person may act on appearances in defending himself even though it afterwards develops that the person was mistaken about the extent of the danger. These instructions allowed the defense to argue that Eggleston acted lawfully if he armed himself and used deadly force in the reasonable belief that he was being threatened by thugs. State v. Eggleston, 108 Wn. App. 1011 (2001).

In Jenkins, the jury acquitted Jenkins on four counts of attempted murder and four counts of assault charges, presumably accepting the reasonableness of his belief, under the circumstances, that he was firing in self defense at Mexican gang members. United States v. Jenkins, 938 F.2d 934 (9th Cir 1991).

"We review an alleged denial of the Constitutional right to present a defense de novo." State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). It is Constitutional error to relieve the State of its burden of proving the absence of self-defense." State v. L.B., 132 Wn. App. 948 (2006). "An erroneous instruction in a criminal trial is not harmless if it misleads the jury into believing that it may return a verdict of guilty even if its accepts the defense theory of the case." State v. Birnel, 89 Wn. App. 459 (1998). Even if the alibi evidence is weak, insufficient, inconsistent, or of doubtful credibility, the instruction should be given." United States v. Washington, 819 F.2d 221, 225 (9th Cir 1987). "Failure to do so is reversible error." State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). "It is impossible for Courts to contemplate the probabilities any evidence

may have upon the minds of the jurors." State v. Wilcoxon, 185 Wn. 2d 324, 362, 373 P. 3d 224 (2016).

In this case, Kitt's defense attorney requested a self defense jury instruction which the Court denied. For the reasons stated above, the self defense instructions should have been given.

Accordingly, the Court should reverse Kitt's convictions for failing to give jury instructions on self-defense.

2. The Court made an error by failing to sever joint-trial where unfairly prejudicial evidence was admitted.

"There is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes seperately." State v. Harris, 36 Wn. App. 746, 750, 677 P. 2d 202 (1984). "Certain powerfully incriminating extrajudicial statements of a codefendant can be so prejudicial that a limiting instruction cannot correct them." Gray v. Maryland, 523 U.S. 185 192, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). "A codefendants statement may add critical weight to the case against defendant, in a form that was not subject to cross examination." Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). "Our primary concern is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of another crime." State v. Bythrow, 114 Wn. 2d 713, 721, 790 P. 2d 154 (1990).

In this case, Kitt requested severance from the joint trial and was denied by the Court. Gore, who is a codefendant in this trial, had given Tucker a note while in custody of the jail awaiting trial, which stated "Please dont snitch or we will kill your family." The trial judge gave a limiting instruction that

stated the charge of intimidating a witness only applied to Gore. This limiting instruction did not cure the prejudice effect this evidence had on Kitt's jury, regardless of the instruction.

"The jury could readily conclude that the defendant was included in the 'we's' of the codefendants statement." State v. Vannoy, 25 Wn. App. 464, 473-75, 610 P.2d 380 (1980). "The Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." Cruz v. New York, 481 U.S. 186, 193, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987). "The factors the Court deemed relevant in this area [were] the likelihood that the limiting instruction will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these facts in advance of trial." Cruz, 481 U.S. at 193. "If the trial court rules that a nontestifying codefendant's nontestimonial confession is admissible against the defendant, Bruton dictates that the confession either not be introduced or be redacted to eliminate even the existence of an accomplice, or that a severance be granted." Gray, 523 U.S. at 196.

In this case, Kitt's defense attorney requested that at the least, the word "we" be redacted from the note so that the jury would not readily conclude that Kitt was involved in the plan to "kill Tucker's family." That request was denied by the Court and the note was entirely admitted into evidence during the joint-trial. The note was displayed on a projection screen in the courtroom which the jury viewed during hours of testimony. Had the jury been in doubt as of the State's case being proven beyond a reasonable doubt, the jury could conclude the note added critical weight to the case against Kitt because by him being involved in the "we" of the note, he must be guilty of "something" for wanting to harm Tucker's family because of Tucker "Snitching."

"Where the record is so evenly balanced that a judge feels himself in virtual equipoise as to the harmlessness of the error and has grave doubt about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so. O'Neal v. McAninch, 513 U.S. 432, 435-38, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995). "Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendants guilt for another crime or to infer a general criminal disposition." State v. Russell, 125 Wn. 2d 24, 62-63, 882 P.2d 747 (1994).

The admission of the note in a joint trial was improper, unfair, and highly prejudicial. Severance should have been granted, therefore, Kitt's convictions must be reversed.

3. Kitt received ineffective assistance of counsel where defense attorney introduced evidence of third person being responsible for shooting victim but failed to request a jury instruction on third party culpability.

"To show that counsel rendered ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result would have been different." Strickland v. Washington, 466 U.S. 668, 688-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Reasonable attorney conduct includes a duty to investigate the relevant law." State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). "A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgements." Strickland, 466 U.S. at 690-91.

In this case, Kitt's defense attorney presented

Amber Fechter as a defense witness. Fechter testified that seconds before hearing "he's shot", she heard gunshots being fired from her apartment. She stated that she looked out the window to see a blue Chevy Lumina stopped at the entrance to the alley with a black male firing a gun down the alley. She testified she heard 8 to 10 shots before the blue Chevy Corsica fled the scene. Fechter was able to give a detailed description of the subject shooting from the blue vehicle and that description was a match to Lashaun Alexander. Surveillance footage captured from the scene showed Lashaun Alexander outside the South 45th Street market with a gun, then entering the blue Chevy Corsica and stopping at the alley, which Fechter's testimony confirmed. Fechter testified the shooter was aiming down her alley in the direction of Brandon Morris and his friends, which were all in the alley near Fechter's vehicle that was parked under the carport to Fechters apartments she lived in. Hitt's defense attorney had still photos admitted into evidence during trial which depict Lashaun Alexander in possession of a firearm prior to entering the vehicle parked outside the market. Tucker positively identified Lashaun Alexander as the individual in such photos during his testimony. (RP 2583 Line 3-22, RP 2586 Line 2-12). Detective Vold admitted that witnesses from the scene and surveillance data from the crime scene provided him with information that subjects associated with the blue Chevy Corsica were involved with the shooting but he did not request to investigate these particular individuals. In fact, detective Vold stated "we had a good idea who it may be, but I did not put out a bulletin to investigate that vehicle". (RP 3318 Line 21-25, RP 3319 Line 1-7). Although he later stated he did put out a bulletin for the white SUV allegedly occupied by the defendants in this trial. Shea Wiley testified that there were no trajectories performed at the scene to prove where the shots that struck Brandon Morris were fired from as far as the shooters position. Wiley stated her investigation was limited only to what

was requested by detective Vold, whom was the lead detective. (RP 1126 Line 1-12, RP 1135 Line 8-13). Dyllan Browning testified that the subject inside the SUV driving through the alley never aimed the firearm at him and his friends that were under the carport as the SUV passed by. (RP 1293 Line 18-24, RP 1295 Line 3-8). Browning did state that he observed a firearm sticking out the window of the SUV but it was aiming towards H&L market. (RP 1284 Line 12-21). Browning also testified that the statement written by detectives during his interview on the day of this incident was "not accurate" where it stated "he felt like he may have been targeted by the SUV." (RP 1295 Line 3-25, RP 1296 Line 1-2). Anthony Stone testified he did not hear any bullet impacts as the SUV drove past the carport where Brandon Morris was struck by a bullet. (RP 1228 Line 1-16). Stone indicated during his testimony that the first shots he heard were from the vicinity outside the H&L market. (RP 1214 Line 3-20, RP 1222 Line 5-21) Jordyn Almond also testified that as the SUV neared the carport it never fired a gunshot as it passed by. (RP 1989 Line 3-6, RP 1994 Line 11-25, RP 1995 Line 18-24). In fact, Tucker and Milton-Ausley testified that nobody inside the SUV was aware of the individuals under the carport as they drove down the alley. (RP 1503 Line 19-23, RP 2600 Line 12-23).

"In order to be admissible, evidence of third party culpability must be direct or circumstantial evidence linking the third person to the actual perpetration of the crimes for which the defendant is being prosecuted." People v. Hall, (1986) 41 Cal. 3d 826, 833, 226 Cal Rptr. 112, 718 P.2d 99." Evidence that a third person committed the crime is inadmissible unless it meets minimum standards of relevance and is capable of raising a reasonable doubt as to the defendant's guilt." Evans v. Montgomery, 2016 U.S. Dist LEXIS 81362. "It is well established that the Due Process Clause guarantees a criminal defendant a meaningful opportunity to present a complete defense." Chambers v. Mississippi, 410 U.S. 284, 294,

93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)." Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable". Byrd v. Lewis, 566 F.3d 855, 860 (9th cir 2009).

Furthermore, although two shell casings may have been matched to one of the firearms presented during trial, none of the firearms recovered from the defendants were linked to being responsible for Brandon Morris' death. Moreover, a third party culpability instruction would have given the jury the right to find that the bullet that struck Brandon Morris was fired by individuals outside the market and not the defendants in this trial.

This error raises to the level of ineffective assistance of counsel, therefore Kitt's convictions must be reversed.

Conclusion

For the Court failing to give a self-defense jury instruction, Kitt's convictions must be reversed. Alternatively because the Court failed to sever joint-trial, and because of the ineffective assistance of counsel Kitt received, all of Kitt's convictions should be reversed and his case remanded for a new trial.

DATED: July 5, 2017

Alex Kitt

Alexander J. Kitt
Defendant