

No. 49676-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

A.P., Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Chris Wickham
No. 16-8-00345-34

REPLY BRIEF OF APPELLANT
A.P.

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I. ARGUMENT

1. The Trial Court's Error in Excluding Threats that the Victim Made to A.P. Was Not Harmless.

A.P. alleges two errors based on the exclusion of D.F.'s prior threats. First, that he was denied his constitutional right to present a defense. And, second, that the statements were improperly excluded as hearsay. The State concedes that the trial court erred by excluding D.F.'s prior threats to A.P., as those statements were not hearsay. (Respondent's Brief, "RB," at 2). The State addresses both arguments, the violation of the constitutional right to present a defense and the inadmissible hearsay, jointly, arguing that in both cases, the error was harmless. (RB at 2-3).

a. *Harmless Error Standard.*

An error relating to an evidentiary ruling, that does not implicate a constitutional right, is subject to harmless error analysis and will only be reversed if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 150 Wash. 2d 821, 871, 83 P.3d 970, 995 (2004), quoting *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981). However, manifest constitutional error is subject to a constitutional harmless error analysis. *State v. Pineda-Pineda*, 154 Wn. App. 653, 672, 226 P.3d 164 (2010). A violation of a defendant's constitutional right to present a defense is a

manifest constitutional error, subject to constitutional harmless error analysis. See *State v. Jones*, 168 Wash. 2d 713, 724, 230 P.3d 576, 582 (2010) (rape conviction reversed where court improperly excluded evidence that the victim had consented to sex, violating defendant's right to present defense, and finding the error was not harmless beyond a reasonable doubt). Under this analysis, a conviction will be reversed unless the appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wash.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wash.2d 708, 728, 801 P.2d 948 (1990)). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007).

b. *A.P. Did Not Knowingly Approach D.F.*

The State argues that the exclusion of D.F.'s prior threats was harmless because A.P. willingly walked up to D.F. to ask for marijuana, which shows that A.P. was not fearful of D.F. (RB at 4). However, that was not the testimony at trial. The testimony from A.P. and his girlfriend was that they walked up to the hill to a group of people and did not realize that D.F. was with the group until he jumped up and started this confrontation.

A.P.'s girlfriend testified that they were walking up the hill towards some people they knew when D.F. jumped up and came at her and A.P. yelling. (RP 35-36). She testified that she did not know D.F. was part of the group until they got up the hill. (RP 46).

A. I mean, like, we had friends there. We knew that we could, like, go to groups and hang out with people, so we just figured, like, we're not ready to go home, let's go hang out with this group of people that we know.

Q. And, at that point, at that time, you knew who Dallas Foy was, right?

A. I knew who Dallas was, yes.

Q. But you hadn't seen him until you said I guess he popped up or something?

A. Yeah.

(RP 46).

A.P. also testified that he did not know D.F. was at the park until he walked up to the group at the top of the hill and D.F. jumped out. (RP 140-41).

Q. Okay. And at what point at the park did you see him?

A. I saw him after I walked up the hill and he approached us.

Q. Did you know he was at the park prior to going there?

A. No.

...

A. Once we cleared the -- cleared, got on the top of the hill, he is like -- we see him spring up and begin to walk towards us. I saw him get up and walk towards me -- walk towards us.

Q. Is that the first time you understood that -- the first point in time you understood that Dallas was in the park?

A. Yes.

(RP 140-41).

c. D.F.'s Prior Threats May Have Proven That the Force A.P. Used Was Not More Than Necessary.

The State argues that the exclusion of D.F.'s prior threats was harmless because A.P. used a force that was more than was required to defend himself. The State argues the only thing D.F. did was push A.P.'s girlfriend. However, D.F. made prior threats. D.F. testified that he had previously told A.P. that he would not hesitate to fight him. (RP 12). However, when defense counsel attempted to elicit prior threats D.F. made, the State objected, and the objections were sustained. (RP 139). Because the trial court erroneously suppressed the prior threats, we do not know what D.F. said to A.P.

The nature of those threats was certainly relevant to whether or not A.P.'s use of force was reasonable or not. It is not possible to determine whether the use of force was excessive without knowing the content of

prior threats. In determining whether or not A.P. acted in self-defense, the court was required to assess the evidence “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wash. 2d 220, 238, 850 P.2d 495, 504 (1993), citing *State v. Allery*, 101 Wash.2d 591, 594, 682 P.2d 312 (1984). Therefore, the exclusion of D.F.’s threats to A.P., in a self-defense case, where the entire case rests on whether or not A.P. acted in self-defense, whether he had reason to fear D.F., and whether the force used was not more than necessary, was not harmless.

d. *The Error Was Not Harmless.*

A.P. stabbed D.F. after a confrontation, and after several prior interactions. The evidence showed that A.P. did not know D.F. was at the park, D.F. approached him, and D.F. was the aggressor in their confrontation. D.F. was yelling, he pushed A.P.’s girlfriend, and was going after A.P. The trial court held that A.P. had not acted in self-defense and that the force used was excessive. However, the trial court did not allow A.P. to introduce prior threats that D.F. made to A.P. Those prior threats are clearly relevant to whether or not A.P. was in reasonable fear and whether any force used was reasonable. Because we do not know what the threats were, there is no way to determine that the threats would

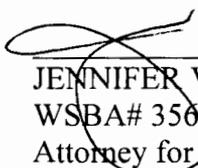
not have affected the verdict in this case. For all these reasons, the error was not harmless beyond a reasonable doubt.

2. CONCLUSION

In conclusion, the error in excluding D.F.'s prior threats was not harmless beyond a reasonable doubt.

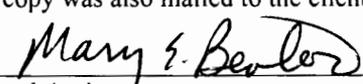
Dated this 11th day of July, 2017.

Respectfully Submitted,


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Certification

I hereby certify that on July 11, 2017, I delivered
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for delivery to the Court of Appeals, Division II and
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Legal Assistant

PIERCE COUNTY ASSIGNED COUNSEL

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