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Court of Appeals
Division II
State of Washington

No. 49676-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

A.P.
Appellant.

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

The Honorable Chris Wickham
Cause No. 16-8-00345-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's application of an erroneous hearsay standard, and subsequent exclusion of A.P.'s testimony constitute harmless error?
2. A.F. requests that this court decline to impose appellate fees, and the State does not contest.

B. STATEMENT OF THE CASE

The facts of this case are fairly straightforward. Bad blood existed between the Appellant, A.P., and another local youth named D.F. RP 10-12. On July 25, 2016, D.F. was spending time at a neighborhood park with a group of friends. RP 8. A.P. and his girlfriend, Jordan Herrera, approached the group, and allegedly asked if they could purchase marijuana. RP 68, 77, 143. An argument ensued, with D.F. pushing Herrera aside.[1] A.P. responded by stabbing D.F. in the chest with a knife. RP 15-17. As a result, D.F. was hospitalized,[2] and A.P. was arrested for assault. RP 18-20.

At his bench trial, A.P. argued self-defense. RP 129-32. He was not successful. RP 199. A.P. now appeals his conviction.

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[1] The testimony regarding the incident varied from witness to witness, but Herrera herself testified that D.F. brushed her aside, he did not injure her, and she did not believe D.F. was trying to hit her. RP 42-43.

[2] The wound suffered by D.F. went well beyond a mere scratch. He was bleeding heavily, and his friends applied pressure to slow the bleeding until paramedics could arrive. RP 78-80, 92. Once paramedics arrived on the scene, D.F. was taken to the hospital where he underwent surgery. RP 18-20.

C. ARGUMENT

1. The Facts Establish Beyond a Reasonable Doubt That A.P. Did Not Act In Self-Defense When He Stabbed D.F. Therefore, His First Two Claims, Which Both Concern the Trial Court's Decision to Exclude Portions of His Testimony as Inadmissible Hearsay, Are Harmless Error, and Must Be Denied.

A.P.'s first two claims arise from the same court ruling, in which the trial court excluded testimony from A.P. on the grounds that it was inadmissible hearsay. Appellant's Brief at 5-9. Based upon this decision to exclude, A.P. claims that 1) he was denied his constitutional right to present a defense, and 2) the court abused its discretion by excluding the testimony. Appellant's Brief at 5-7. As a matter of law, A.P. is correct: the trial court applied an erroneous definition of hearsay when it excluded his testimony.[3] However, while the trial court did err, there is overwhelming evidence to establish that A.P. did not act in self-defense, rendering any error harmless, and because both claims arise from the same ruling, the harmless error analysis can be addressed jointly.[4]

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[3] Defense counsel stated that the testimony was to show A.P.'s subjective state of mind, not to establish the truth of the matter asserted. RP 138-39. The trial court ruled this was not a valid hearsay exception, and excluded the testimony. RP 139.

[4] To further elaborate, while A.P. raises two separate claims, they both raise the same point of error, specifically, that A.P.'s testimony was improperly excluded as hearsay. Therefore, the harmless error analysis for both claims focuses on what prejudice, if any was caused by the exclusion

To begin, the doctrine of harmless error states that a verdict will not be overturned solely due to the presence of immaterial error. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error."). Thus, the question is whether it appears beyond a reasonable doubt that A.P. would have been convicted regardless of the trial court's erroneous exclusion. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) ("the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

In the present case, the excluded testimony would have referenced past threats made by D.F. in order to establish that A.P. was subjectively afraid for his life.[5] Appellant's Brief at 5-9. A.P.'s claim that previous

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of A.P.'s testimony. Because this is the same question, it makes little sense to address the claims separately.

[5] It should be noted that D.F. testified that he had previously told A.P. that he would not hesitate to fight him. RP 12. If A.P. wanted further

threats by D.F. had left him fearful for his life quickly falls apart though, considering that A.P. willingly walked up to D.F. to ask if he and his friends had marijuana for sale. RP 68. An individual fearful for his life does not simply walk up to his oppressor and ask to buy drugs. A.P.'s argument is not persuasive now, and it would not have been persuasive at trial.

Furthermore, regardless of past threats, it is clear that A.P. used a degree of force that went above and beyond what was required to defend himself from D.F. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) ("[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant."). The facts show that D.F. did nothing more than shove aside Herrera. RP 42. In no way does shoving aside A.P.'s girlfriend justify a stabbing.[6] *State v. Walker*, 136 Wn.2d 767, 772-79, 966 P.2d 883 (1998) (holding that using a knife in a fist-fight

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elaboration on those threats, defense counsel was free to cross-examine D.F. on the issue. He declined to do so.

[6] It should also be noted that on the day of the assault, A.F. had a number of mutual friends who were part of D.F.'s group. Moreover, the trial court heard testimony, and concluded that the group was not particularly concerned with the altercation between A.P. and D.F. RP 197. Following his arrest, A.P. even told detectives that he did not fear other members of the group. RP 197. Therefore, there is no reasonable basis for A.P. to believe he would be assaulted by a large number of individuals, but there is ample basis for A.P. to believe that any altercation would be quickly broken up.

constitutes deadly force, and that to use deadly force in self-defense, the defendant must demonstrate a reasonable apprehension of great bodily harm going well beyond ordinary battery). In fact, the trial court stated it was his sense that A.P. "used the knife not so much to protect himself or even Ms. Herrera, but, rather, to retaliate against [D.F.] for using his hand to move Ms. Herrera out of the way," and "that is not self-defense." RP 198. The trial court went on to find that "the use of force in this case goes well beyond the force being used by [D.F.] or the threat presented by [D.F.]." RP 189.

In conclusion, A.P.'s self-defense claim was destined to fail, regardless of the excluded testimony. A.P. reacted to seeing his girlfriend shoved aside by stabbing D.F. in his chest, and no statements from D.F.'s past were going to justify that, or alternatively, establish that A.P. had a reasonable apprehension of great bodily harm. Accordingly, because it is clear beyond a reasonable doubt that the trial court's error did not affect the outcome of the trial, A.P.'s first two claims must be deemed harmless error, and denied.

2. A.P. Requests That This Court Decline To Impose Appellate Costs, and the State Does Not Contest.

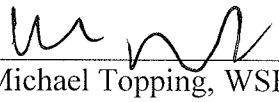
In his third issue, A.P. argues that because he was found indigent at trial, this court should exercise its discretion to waive appellate costs. Appellant's Brief at 9. The State does not contest this claim.

D. CONCLUSION

For these reasons, the State asks that this court affirm A.P.'s conviction.

Respectfully submitted this 14th day of June, 2017.

JON TUNHEIM
Prosecuting Attorney



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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of June, 2017, at Olympia, Washington.

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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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