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NO. 50584-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRELL WALL,

Appellant.

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

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

Issues pertaining to assignments of error 1

B. STATEMENT OF THE CASE 1

1. Procedural History 1

2. Substantive Facts 2

a. Admission of hearsay over defense objection 6

b. Refusal to instruct on self-defense as to burglary 7

C. ARGUMENT 8

1. IMPROPER ADMISSION OF HEARSAY UNFAIRLY PREJUDICED WALL'S DEFENSE. 8

2. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE AS TO THE BURGLARY CHARGE DENIED WALL HIS RIGHT TO PRESENT A DEFENSE. 11

D. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Cases

Allen v. Hart, 32 Wn.2d 173, 201 P.2d 145 (1948) 14

State v. Adams, 31 Wn. App. 393, 641 P.2d 1207 (1982) 12, 14

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) 12

State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989) 9

State v. Doerflinger, 170 Wn. App. 650, 285 P.3d 217 (2012), *review denied*, 177 Wn.2d 1009 (2013) 9

State v. Graves, 97 Wn. App. 55, 982 P.2d 627 (1999)..... 13

State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000)..... 11

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) 12

State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) 11

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 12, 14

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) 9

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999)..... 11

State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977)..... 12

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997)..... 13, 14

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997)..... 11

State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007) 12

Statutes

RCW 9.94A.530..... 2

RCW 9.94A.533..... 2

RCW 9A.16.020(3)..... 11

RCW 9A.36.011(1) 2

RCW 9A.52.020(1) 2, 13

Rules

ER 803(a)(4) 8

Other Authorities

5A K. Tegland, Wash.Prac. § 367 (2d ed. 1982) 9

A. ASSIGNMENTS OF ERROR

1. Improper admission of hearsay prejudiced the defense.

2. The court's refusal to instruct the jury on self-defense as to the burglary charge denied appellant his right to present a defense.

Issues pertaining to assignments of error

1. Appellant was convicted of two counts of second degree assault. Over defense objection, the attending physician was permitted to testify to statements made by the victims at the hospital, under the medical diagnosis or treatment exception to the hearsay rule. Where the witness testified to statements of blame in addition to statements about the cause of injuries, did this improper admission of hearsay prejudice the defense?

2. Appellant was convicted of first degree burglary, which required the State to prove he was armed with a deadly weapon or assaulted a person during the course of the offense. Where the record contained evidence that appellant was acting in self-defense, did the court's refusal to instruct on self-defense as to burglary deny appellant his right to present a defense?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Terrell Rakai Wall with one count of first degree burglary and two counts of first degree assault. CP 1-3, 40-42; RCW 9A.52.020(1)(a), (b); RCW 9A.36.011(1)(a), (c). The State alleged that Wall was armed with a deadly weapon during each offense. CP 40-42; RCW 9.94A.530; RCW 9.94A.533.

The case proceeded to jury trial before The Honorable Frank Cuthbertson. The jury returned a guilty verdict on the burglary charge and found Wall guilty of the lesser included offenses of second degree assault. CP 183-87. It also returned affirmative special verdicts on the deadly weapon allegations. CP 188-90. The court imposed a low-end standard range sentence of 36 months on the burglary, concurrent with sentences of 20 months on the assaults, and consecutive to 48 months on the deadly weapon sentence enhancements. CP 232. Wall filed this timely appeal. CP 240.

2. Substantive Facts

Wall was charged with first degree burglary and first degree assault of James Heim and Danae Lizotte based on an incident at Lizotte's apartment. CP 40-42. Following the incident Wall called 911 and reported that he had been in a fight with two friends during which he cut his friend's ear with a box cutter and punched his friend in the face, and

his hand was injured. Exhibit 1. He said he threw the box cutter away after he ran off, and he was calling from a park several blocks away. *Id*. The fire department picked Wall up at the park and transported him to the hospital. 8RP[1] 123.

While he was at the hospital, Wall spoke to his friend Nicholas Caratachea. 9RP 160. Wall told him that Lizotte had been cheating on Heim, and he was upset about it. 9RP 161. Wall had found some messages on Lizotte's phone, and he was going to show Heim, but he got mad and broke the phone. Then things escalated, he shoved Lizotte, Heim jumped in, and Wall shoved Heim. Wall said something about acting in defense. 9RP 162-63. When he realized how far it had gotten, he ran off. 9RP 163. Wall told Caratachea he was pretty sure Heim had cut him with a knife. 9RP 164, 168.

Wall waited at the hospital a few hours for his injury to be treated and for police to arrive. 8RP 146-47. When Wall was contacted by police, he indicated he knew why they were there, and he was taken into custody. 8RP 143.

At trial Lizotte and Heim gave their descriptions of what happened. Heim testified he and Wall met in high school and they have

[1] The Verbatim Report of Proceedings is contained in thirteen volumes, designated as follows: 1RP—12-16-16; 2RP—1-12-17; 3RP—3-29-17; 4RP—4-27-17; 5RP—5-19-17; 6RP—6-1-17; 7RP—6-5-17; 8RP—6-6-17; 9RP—6-7-17; 10RP—6-8-17; 11RP—6-12-17; 12RP—6-13-17; 13RP—7-7-17.

been friends for about ten years. His girlfriend Lizotte was part of their group of friends, as was Caratachea, and they saw each other often. 9RP 230-31, 313. The evening before the incident, they were all at Caratachea's house. 9RP 232. At some point Wall was rude to Lizotte, and she and Heim left. 9RP 281, 315. They spent the night at Lizotte's apartment. 9RP 233, 318.

In the morning, Wall sent Lizotte a Facebook message apologizing for the night before. 9RP 323. He then texted that he was coming over, and when he arrived he knocked on the window. 9RP 282, 325. Lizotte went to the door to let him in. 9RP 242-43, 326. Heim said that Wall looked startled to see him, and Wall asked Lizotte to step outside. 9RP 245.

Lizotte testified that Wall took her phone and accused her of cheating on Heim. 9RP 327. He cornered her against a wall and refused to move when she told him to. 10RP 368. Wall smashed her phone and pushed her, and when she screamed Heim came outside. 10RP 369.

According to Heim, he heard Lizotte tell Wall to stop hitting her and give her back her phone, so he went out to the front porch. 9RP 248. Heim's clothes were in the bedroom right next to the front door, including his belt with his knife on it, but he did not get dressed before going outside. 9RP 283. When Heim got to the porch, Lizotte and Wall both

looked angry, and Heim saw Wall throw Lizotte's phone to the ground. 9RP 248-49. Heim stood between Wall and Lizotte and told Lizotte they should go back inside. 9RP 250. He walked through the front door and Lizotte followed. 9RP 251; 10RP 369.

Once the door was shut, it was flung open again and Wall entered the apartment. 9RP 255; 10RP 370. Heim testified that Lizotte told Wall to leave, there was a pause, and then Wall shoved Lizotte down the hall. 9RP 255. Lizotte testified that Wall shoved her as soon as he walked in the door. 10RP 370. According to Heim, Wall was standing there staring at Lizotte on the floor, when Heim threw a punch at Wall and landed a blow to his left temple. 9RP 257-58. Heim testified that a brawl broke out between the three of them. 9RP 258-59. Lizotte saw Wall and Heim punching each other, and she tried to get Wall to leave. 10RP 371. Wall hit her multiple times across her head and chest. 10RP 373. After the fighting went on for a few moments, Heim felt a sharp sting on his right ear. 9RP 259. Heim said he never had anything in his hand during the confrontation, and he never threatened Wall. 9RP 276. Neither Lizotte nor Heim ever saw Wall with a weapon either. 9RP 296; 10RP 373.

Wall left, and Heim ran outside. He was bleeding, and he asked Lizotte to call 911. 9RP 260-61. He realized he had injuries to his back as well as his ear. 9RP 266; 10RP 375-76. Lizotte had gashes across her

collarbone and chest. 10RP 378. Heim and Lizotte were taken to the hospital in an ambulance, and their wounds were treated. 9RP 268; 10RP 377.

a. Admission of hearsay over defense objection

Dr. Benjamin Constance was the attending physician at Tacoma General Hospital who treated Heim and Lizotte. 9RP 176, 178-79. Constance testified that Heim had penetrating trauma injury to his neck, with a laceration crossing the base of his skull. 9RP 180, 182. Bleeding was able to be controlled, and a CT scan showed no damage to major blood vessels. 9RP 186, 189. A cut through the cartilage of his ear required surgical repair and would likely result in permanent scarring. 9RP 190-91. Heim also sustained stab wounds to his back which required multi-layer suture repair. 9RP 193-94.

Constance testified that medical professionals rely on medical records in the course of treatment, including annotations of information provided by patients regarding the nature or mechanism of injury. 9RP 196. He testified that Heim's records contained annotations of what Heim said about how his injury occurred. 9RP 197. When the prosecutor asked what Heim said, defense counsel objected that Heim's statements were hearsay. The court overruled the objection on the basis of medical diagnosis or treatment. *Id*. Constance then testified that Heim "alleged

that he was defending a female and was stabbed by what he believed to be a box knife." *Id*.

Constance testified that Lizotte had penetrating wounds and lacerations to her neck, and two distinct lacerations to her chest. 9RP 199-200. Over defense hearsay objection Constance was permitted to repeat statements Lizotte made about how she sustained her injuries. 9RP 206. Constance testified that Lizotte alleged she and Heim were involved in an altercation with another friend, her laceration was caused by a razor, and she was also punched in the face. 9RP 208-09.

b. Refusal to instruct on self-defense as to burglary

At the close of evidence the defense requested self-defense instructions as to all three charges. 11RP 431; CP 95-97. Counsel argued that testimony that the cut on Wall's hand was possibly a defensive injury, that Wall told Caratachea he was acting in defense and he thought Heim had cut him with a knife, and that Heim had his knife that day meets the criteria for presenting self-defense to the jury. 11RP 432. The court agreed that there was sufficient evidence of self-defense to instruct the jury on that issue, but it expressed doubt that the defense applied to burglary. 11RP 431, 433, 444. Defense counsel argued that one of the elements of first degree burglary as charged was that Wall committed an assault or was armed with a deadly weapon, and self-defense would negate

that element. 11RP 433. The court disagreed and instructed the jury on self-defense as to the assault charges but not as to the burglary charge. 11RP 450-51; CP 169.

C. ARGUMENT

1. IMPROPER ADMISSION OF HEARSAY UNFAIRLY PREJUDICED WALL'S DEFENSE.

The trial court admitted statements made by Heim and Lizotte to medical personnel under the medical diagnosis or treatment exception to the hearsay rule. 9RP 197, 206. This hearsay exception applies only to statements that are "reasonably pertinent to diagnosis or treatment" however:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> …
> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

To establish reasonable pertinence and be admissible under this rule, the declarant's motive in making the statement must be to promote treatment, and the medical professional must have reasonably relied on the statement for the purpose of treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012), *review denied*, 177 Wn.2d 1009

(2013); *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). Thus, statements as to causation ("I was hit by a car") would normally be admissible, but statements as to fault ("…which ran a red light") would not. *Butler*, 53 Wn. App. at 217 (quoting 5A K. Tegland, Wash.Prac. § 367 at 224 (2d ed. 1982)).

There are some instances where it is necessary to delete the inadmissible portion of a statement and admit the rest. *Butler*, 53 Wn. App. at 217 (citing Tegland). For example, in *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003), the Court held that the trial court abused its discretion when it failed to redact from the victim's medical records statements attributing fault, where the redaction could have been made while preserving the portions relevant to diagnosis or treatment. *Redmond*, 150 Wn.2d at 497.

In this case, statements of blame as well as causation were presented to the jury. The attending physician testified that medical professionals rely on statements from patients regarding the nature and mechanism of injury in making a diagnosis and anticipating potential injury. 9RP 196-97. His testimony was not limited to statements from Heim and Lizotte regarding the nature and mechanism of their injuries, however. He testified not only that Heim said he was cut with a box cutter, but that the injury occurred while he was defending Lizotte. 9RP

197. And he testified that Lizotte said not only that her laceration was caused by a razor but that she and Heim were involved in an altercation with another friend. 9RP 208-09.

Heim's statement that he was defending Lizotte and Lizotte's statement that she and Heim were in an altercation with a friend contain attributions of fault. The State presented no evidence that would establish these statements were pertinent to medical diagnosis or treatment. They served only to place blame on Wall and cast doubt on his defense. While there was no question that Wall was the third person involved in the incident or that he used the box cutter, the circumstances under which he did so were disputed. It was the defense position that Wall was acting in self-defense during the encounter. The statements from Heim and Lizotte which were not reasonably pertinent to medical diagnosis or treatment should have been excluded because they did not fall within the hearsay exception. The jury should not have been permitted to consider those statements of blame, and thus the improper admission was unfairly prejudicial to Wall's defense.

2. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE AS TO THE BURGLARY CHARGE DENIED WALL HIS RIGHT TO PRESENT A DEFENSE.

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Jury instructions are constitutionally sufficient only if they permit each party to argue its theory and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The trial court's refusal to instruct the jury on self-defense as to the burglary charge rendered the instructions in this case inadequate, because the instructions did not fully inform the jury regarding the lawful use of force or the State's burden of proof. Failure to give the proposed instructions denied Wall his right to present a defense.

The parameters of self-defense are set out in RCW 9A.16.020(3). Under that statute, the use of force is lawful "[w]henever used by a party about to be injured...in preventing or attempting to prevent an offense against his or her person…in case the force is not more than is necessary." RCW 9A.16.020(3). "A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim." *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). A

defendant is entitled to instructions on self-defense when the record contains some evidence, from whatever source, which tends to prove the defendant acted in self-defense. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Roberts*, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977).

The defense's threshold burden of production is low. The defendant is not even required to present evidence which would be sufficient to create a reasonable doubt; rather, any evidence that the defendant acted out of fear of injury will suffice. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *McCullum*, 98 Wn.2d at 488; *State v. Adams*, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). Once the defendant produces some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 199, 156 P.3d 309 (2007).

Here, although the court determined there was sufficient evidence to present the issue of self-defense to the jury, it did not believe the defense applied to a charge of burglary. 11RP 431, 433, 444. Where the trial court refuses to give a self-defense instruction based on a ruling of law, review is de novo. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

To convict Wall of first degree burglary as charged in this case, the State had to prove that during the course of the burglary Wall was armed with a deadly weapon or assaulted a person. CP 162; RCW 9A.52.020(1)[2]. There was evidence that Wall used a box cutter at the end of the fight, although neither Heim nor Lizotte saw it, and it was not offered in evidence. 9RP 296; 10RP 400. Whether the box cutter constituted a deadly weapon was an issue for the jury. *See* CP 165. There was also evidence that Wall used the box cutter in his job at Costco, and he had come to Lizotte's apartment from work. 9RP 158-59, 252. The jury could infer that he was carrying a work tool, which he used to defend himself, rather than that he was armed with a deadly weapon.

As for the assault element of first degree burglary, the law recognizes that lawful use of force may negate an assault. *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997); *State v. Graves*, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999). The jury should have been instructed that if it found Wall's use of force was lawful, it could not rely on the alleged assault to convict Wall of first degree burglary.

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[2] (1) "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1).

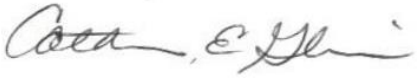
"Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of fact.'" *Adams*, 31 Wn. App. at 396-97 (quoting *Allen v. Hart*, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)). "The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." *McCullum*, 98 Wn.2d at 488. Because the record contains some evidence that Wall acted in self-defense which would have negated an element of first degree burglary, he was entitled to have the jury instructed on that defense to the charge. *See Walden*, 131 Wn.2d at 473-74. The court's failure to so instruct the jury denied Wall his right to present a defense and relieved the State of its burden of proof.

D. CONCLUSION

For the reasons addressed above, this Court should reverse Wall's convictions and remand for a new trial.

DATED January 29, 2018.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Terrell Wall,* Cause No. 50584-3-II as follows:

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

Catherine E. Glinski
Done in Manchester, WA
January 29, 2018

GLINSKI LAW FIRM PLLC

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