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Division II
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NO. 50673-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND SHORT,

Appellant.

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

The Honorable William C. Houser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's constitutional right to present a defense was violated when the trial court excluded testimony that was central to his defense.

Issue Pertaining to Assignment of Error

Appellant was charged with assault in the first degree and attempted murder. Appellant testified he discharged his gun to issue a warning shot after fearing the victim would injure him, but he accidently shot the victim. As to the assault charge, he argued self-defense. As to the attempted murder charge, he raised an excusable-homicide defense. Both defenses required the jury to determine whether his use of force was lawful. Use of force is lawful when the defendant reasonably believes he is about to be injured, so long as the force used is not more than necessary. Appellant sought to introduce testimony to establish he reasonably feared injury by the defendant. Specifically, appellant sought to inform the jury that the victim had threatened to kill him in the past, and that the trheat caused him to be fearful of serious injury at the time of the incident. The trial court excluded the evidence as too "attenuated." Was defendant's right to present a defense violated?

B. STATEMENT OF THE CASE

1. Procedural History

On November 3, 2016, the Kitsap County prosecutor charged appellant Raymond Short with one count of first degree assault with a firearm. CP 1-9. The prosecutor later added a charge of attempted murder in the first degree while armed with a firearm. CP 42-45. A jury found Short guilty as charged. CP 107-110. The court merged the assault with the attempted murder conviction. CP 118. Despite an offender score of zero, Short was sentence to 240 months. CP 120-31. Short appeals. CP 133.

2. Substantive Facts

On Halloween of 2016, Short had just finished carving a pumpkin and was sitting down to a traditional but solitary dinner. RP 414. Short was sixty-seven years old and lived alone in a disheveled house. CP 1; RP 420. Short did not expect any trick-or-treaters, since there had not been one in 17 years. RP 415, 491. Indeed, he rarely had any visitors except for an occasional visit from a neighbor. RP 491.

At approximately 4:00 p.m., Short heard an unexpected knock at his backdoor. RP 415. He grabbed his gun, which he always did when someone came unannounced. RP 417. Short

was old and infirm, so he carried a gun to not feel so vulnerable. RP 417, 503. As he walked down the hallway to his back door, Short could not discern who exactly was there because of the coloring of the ambient light outside and the obscuring curtains on his window. RP 417, 498. However, Short saw the back of a person's head with hair pulled back.[1] RP 417-418. He assumed this was a female neighbor who occasionally came by, so he unlocked the door, cracked it open an inch, and then turned to put his gun down on a nearby chair. RP 417-18, 420-21, 500.

Suddenly, the door burst open and Robert Sears was standing there. RP 421. Short was frightened to see Sears at his home because of past events. RP 423, 459, 463.

Short and Sears met through a mutual friend in 2000 and started a friendship. RP 533-35. In 2001, Short started to see aspects of Sears' nature that were concerning and disappointing. RP 535-36. Despite this, between 2001 and 2003, Short attempted to help Sears by loaning him money for a boat to start a fishing business and offering Sears work on his property. RP 433, 537, 539. Short was hoping to keep Sears going in a positive direction.

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[1] Unknown to Short, the victim wore his hair swept back in a ponytail at this time. RP 286.

RP 433.

In 2004, however, Sears and his friends planned a bank robbery in front of Short. RP 448. Sears said he could get a .357 Magnum any time he wanted. RP 448. Short declined to be part of the robbery, and Sears proceeded to swindle Short and extort Short's silence through a threat. RP 461-62. Sears told Short to keep his mouth shut. RP 448. Sears also got a friend to tell Short he could make Short disappear by cutting him up into pieces and scattering him across Mason County. RP 446. Afterward, Sears confirmed that Short had received that message and reiterated that he could follow through on the threat. RP 447. Despite this, at some point, Short spoke with police about Sears, and this caused Short to worry that Sears might follow up on his threat if he found out. RP 423, 446.

Afterward, Short and Sears saw each other only occasionally at a mutual friend's property. RP 540. In 2011, the two ran into each other while collecting firewood, and Short attempted to gage the state of their relationship. RP 541, 556. Short told Sears he didn't care about the money Sears had taken from him. RP 542. Short talked about the importance of friendship and kindness. RP 542. Sears replied, "Fuck friends." RP 543. Short told Sears that

they should not see each other again. RP 544. They did not see each other for years until Sears showed up unannounced on Short's back porch that Halloween night in 2016. RP 421.

After Sears thrust the door open, Short observed Sears to be in a stance which suggested he was ready to draw a weapon. RP 423. Short knew Sears had said he could get a gun any time, and Short believed it. RP 427. Short felt threatened, so he grabbed his gun and fired what he intended to be a warning shot by Sears' ear. RP 423-24. He hoped it would stop Sears from entering the house any further and get him to run away. RP 425. Unfortunately, as Short pulled the trigger, the gun turned in his hand and the bullet struck Sears in the mouth, blowing him back and off the porch.[2] RP 425.

Short cautiously went outside to check on Sears, but held on to his gun in case Sears was still armed. RP 429. He observed Sears was injured and went back into his house to find his phone and call 911. RP 430. He heard Sears get into his truck and leave.

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[2] Sears testified to a different course of events. He claimed that he went to the back door, saw Short walking up the hall, and stepped back from the screen so Short could open it. RP 229-32. He claimed that Short said "Oh, it's you, Tyke [Sears' nickname]. I got something for you, you son of a bitch. You're going straight to the devil." RP 232. He claimed that Short then shot him. RO 232-33.

RP 429-30. Short called 911 and reported that he had just shot someone. RP 430. He felt sickened by the circumstances and was compliant the with police. RP 157, 175, 431.

Meanwhile, Sears pulled into a nearby Red Apple parking lot and had someone call 911. RP 146. Aid arrived, and Sears was eventually taken to Harborview hospital. RP 75, 103. It was determined he was shot once in the mouth and the bullet lodged in the vertebrae but with no damage to the spinal cord. RP 98-101. Doctors decided it was best to leave the bullet in place. RP 105.

3. Relevant Trial Facts

At trial, the defense theory was that Short used legal self-defense, intending to fire a warning shot, but he accidently shot Sears. RP 474-475, 641-52. The jury was instructed both as to self-defense for the assault charge and excusable-attempted-homicide for the attempted murder charge. CP 91, 92, 98, 99, 100. Short testified to being very frightened and scared of Sears due to past experiences. RP 421, 428, 443. He was permitted to testify that he heard Sears say that he could get his hands on a .357 Magnum any time he wanted, and that Sears was generally a swindler. RP 427, 436, 461. He was also permitted to testify generally that Sears had made a "veiled threat." RP 436.

However, the trial court did not allow Short to establish the fact Sears had made a specific threat to kill and the circumstances surrounding that threat. RP 451. The trial court excluded that evidence on the ground it was "too attenuated." RP 451.

C. ARGUMENT

SHORT'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED.

Appellant raised both a self-defense and an excusable-attempted-homicide defense. The trial court excluded evidence relevant to establishing the reasonableness of Short's fear that Sears was armed and about to injure him. It did so because it considered the evidence "too attenuated." As explained below, however, the evidence should have been admitted, subjected to cross-examination, and submitted to the jury to determine whether it was weak or false. The trial court's failure to do this was a violation of Short's constitutional right to present a defense.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Hudlow, 99 WN.2d 1, 14, 659 P.2d 514 (1983). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair

opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the right to offer testimony, is basic in our system of jurisprudence. Id.

Evidence that a defendant seeks to introduce need only be of "minimal relevance." State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. No State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value that is central to an articulated defense. State v. Jones, 168 Wn. 2d 713, 721, 230 P.3d 576, 580 (2010). Moreover, even if the evidence is of limited probative value because it is attenuated or otherwise suspect, the trial court should admit the testimony and allow it to be tested through cross examination. State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281, 289 (2017). "In this manner, the jury will retain its role as the trier of fact, and it will determine whether the evidence is weak or false." Id. (emphasis in original).

When the defendant raises self-defense, evidence that establishes the defendant was aware of the victim's past threats to kill him or his family is relevant to establish the reasonableness of his fear. Id. at 320. In Duarte Vela, the defendant was charged with second degree murder to which he raised a self-defense claim. Id. at 313. To prove his state of mind, Duarte Vela sought to introduce testimony establishing the victim's threat to kill his family in order – a threat which had occurred several years prior and had been relayed to him through a third party. Id. The trial court excluded the evidence, finding it was too remote and not particularly probative. Id. at 313-14. Duarte Vela was convicted.

Division Three of this Court reversed, concluding Duarte Vela's Sixth Amendment right to present a defense was violated. Id. at 327. In so holding, Division Three recognized that in a self-defense case the "vital question is the reasonableness of the defendant's apprehension of danger,'" and thus the jury must stand "as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. at 319 (citing State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It concluded that evidence establishing Duarte Vela's knowledge of the victim's threat to kill was "highly probative" of his defense

because it established his state of mind. Id. at 320. As such, it was "the role of the jury, not the trial judge to weigh the reasonableness of Duarte Vera's fear, considering all the facts and circumstances known to him." Id. at 323.

Division Three explained, even if the probative evidence had been weak or suspect, the answer still was not to exclude it. Instead, the answer was to allow it to be tested by cross-examination and permit the jury to determine the weight. Id. at 321. "When it comes to ensuring a defendant's Sixth Amendment right to present a defense, it is best to admit relevant evidence and trust the State's cross-examination to ferret out falsities." Id. at 323-24. Division Three explained that the jury should be permitted to decide such factual questions as whether Duarte Vela's fear was reasonable given the passage of time between the threat and the shooting. Id. at 323.

Ultimately, Division Three found Duarte Vela's right to present a defense had been violated because the omitted facts, when evaluated in the context of the case, supported a reasonable doubt that did not otherwise exist. Id. at 326-27. The trial court prevented the jury from hearing that Duarte Vela had been told about the victim's threat to kill his family. This evidence was highly

probative of Duarte Vela's defense, going to the reasonableness of his fear of the victim. Its omission violated the Sixth Amendment. Id. at 320, 327.

The circumstances of Short's case are remarkably similar to those in Duarte Vela. As in Duarte Vela, Short raised a self-defense claim and sought to introduce evidence that he had knowledge of a prior threat to kill that had been relayed to some extent through a third party. As in Duarte Vela, the vital question for the jury to consider was the reasonableness of Short's apprehension of danger. As in Duarte Vela, the trial court withheld from the jury testimony establishing Short's knowledge of the prior threat to kill even though it was very relevant and central to his defense. As in Duarte Vela, the trial court excluded the evidence because it was too attenuated. Based on these similar circumstances, Division Three in Duarte Vela held the proffered evidence should have been admitted, subjected to cross examination, and submitted to the jury to determine whether the evidence was weak or false. The same result should be reached here.

Additionally, just as in Duarte Vela, the record shows the omitted facts supported a reasonable doubt that otherwise did not exist. By excluding Short's evidence regarding the threat to kill, the trial court knocked out the foundation of his self-defense claim. Although Short was permitted to testify he feared Sears based on past experiences and that Sears told him he could get a gun anytime, Short was not permitted to give context that was crucial to giving these statements weight. Additionally, although Short was permitted to testify Sears threatened him "in the nature of a veiled threat," this testimony rang hollow without details establishing that Sears had previously threatened to violently kill Short if he talked to police (which Short had done).

Without hearing about the threat to kill, Short simply was unable to give the jury a full account establishing why he was so fearful that Sears would shoot him when he burst through the door. This limited the jury's ability to see the events that occurred that Halloween evening through Short's eyes. For example, Short told the jury he interpreted Sears' stance as if he were ready to draw a weapon. RP 423. Without context of the previous threat to kill, however, the jury was unable to determine – based on all the relevant facts and circumstances known to Short -- whether such

an apprehension of danger was reasonable.

Ultimately, without the threat to kill evidence, Short's explanation to the jury for why he feared Sears was armed and was about to seriously injure him appeared vague and tangential. He simply was unable to present a complete self-defense claim to the assault charge without informing the jury about that key historical event in their relationship. As such, the exclusion of the threat evidence constituted a violation of Short's Sixth Amendment right.

The omitted evidence was not only relevant to Short's defense to the assault charge, but it was also relevant to his defense against the attempted homicide charge. In a case such as this, where a defendant does something in self-defense that leads to an accidental attempted homicide, the applicable defense is excusable-attempted-homicide. State v. Brightman, 155 Wash.2d 506, 525, 122 P.3d 150 (2005). Excusable-homicide is available when the defendant is "doing any lawful act by lawful means." RCW 9A.16.030. Use of force is lawful when the defendant reasonably believes he is about to be injured, so long as the force used is not more than necessary. State v. Slaughter, 143 Wn. App. 936, 943, 186 P.3d 1084, 1087 (2008); RCW 9A.16.020(3). Hence, evidence that is probative of whether the defendant reasonably

believed he was about to be injured is relevant to an excusable-homicide defense.

When considering the attempted murder charge and Short's defense, the jury had to decide whether Short was acting lawfully. The jury again needed to determine the reasonableness of his fear. The evidence pertaining to Sears' threat to kill was thus relevant to his excusable-attempted-homicide defense. Consequently, for reasons explained above, Short's right to present a complete defense to the attempted murder charge was also violated.

In sum, Sears had a right to present a defense to the charges and have the jury consider all evidence relevant to establishing the reasonableness of his fear. The trial court erroneously excluded evidence regarding Short's state of mind – evidence that established Sears had previously threatened to kill him in a very violent way. This evidence was relevant both to his self-defense and excusable-attempted-homicide defenses. Hence, it should have been admitted, tested via cross-examination, and submitted to the jury to determine its weight. The trial court's failure to do so resulted in a violation of Short's constitutional right to present a defense. Consequently, reversal is required.

D. CONCLUSION

For reasons stated above, this Court should reverse appellant's convictions.

Dated this 22nd day of December, 2015.

Respectfully submitted

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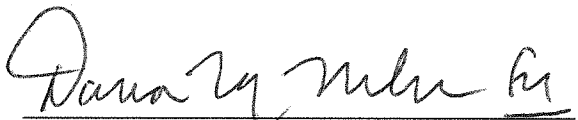

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