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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND THOMAS SHORT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-01351-0

BRIEF OF RESPONDENT

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OF AUTHORITIES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in excluding evidence of an alleged long-past threat by the victim that was long ago communicated to the defendant by a third person where the defendant claims self-defense for shooting the victim in the face as the victim approached the defendant's door?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Raymond Thomas Short was charged by information filed in Kitsap County Superior Court with first degree assault with a firearm special allegation. CP 1-2. A first amended information added a count of attempted first degree murder with a firearm special allegation. CP 43-44.

The jury was instructed on second degree assault as a lesser included of first degree assault. CP 87-90. The jury was instructed as to lawful use of force with regard to the assault count. CP 91-92. The jury was instructed on excusable attempted murder. CP 98-100.

Pretrial, the trial court refused to rule on the issue of the giving of the instructions because the trial court had heard no evidence on the point. 1RP 49-50. The state raised concerns about the particular evidence Short may seek to introduce on this point. 1RP 50. The trial court ruled that if a party sought to prove specific instances of conduct under ER 405, an offer

of proof was required. 1RP 50-51.

Regarding Short's self-defense claims, the defense sought to introduce historical facts of specific instances of the victim's behavior. The trial court's ruling on this point is the sole issue raised in this appeal.

At the close of the state's case, the defense announced that Short would be called as a witness. 4RP 379. The state asked that the defense provide an offer of proof before Short made any remarks about the victim's prior acts or character. *Id.* The trial court ruled that the defense inform the court as to the type of character evidence it intended to elicit. 4RP 382.

In response, the defense first intimated that Short would say that the victim had swindled or extorted him. 4RP 382-83. Second, Short would say of the victim's son, Bronson, was the worst of the bunch. 4RP 383. The state conceded the swindling part primarily because it had been mentioned by Short in an admitted jail phone call. *Id.*

The inquiry continued as the trial court asked the defense what other evidence it might seek to introduce that would go to a charge, claim, or defense, citing to ER 405 (b). 4RP 384. The defense repeated the swindled or extorted assertion and added that Short had been "bullied" by the victim. 4RP 385. Next, the defense wanted Short to say that in the past the victim had said to him that he could get his hands on a .357 any

time he wanted to. 4RP 386. Next, the defense wanted Short to testify that he knew the victim knew karate. *Id.* The trial court made it clear that it was focusing on the evidence establishing Short's state of mind and did not see the evidence as offered for the truth of the matter. 4RP 387. The state was concerned that the victim's alleged statements had no context; the time when the statement was made was not established. 4RP 388.

The trial court recounted the areas of inquiry that the state had moved to exclude in its motion in limine #15¹: the .357 comment, the alleged planning of a bank robbery by the victim, the allegation that the victim belonged to a gang, veiled threats from the victim's son, Bronson, and threats to burn down the defendant's home. 4RP 389. The defense conceded that it would not seek testimony about veiled threats to burn down the house. *Id.* The defense conceded that it would not elicit testimony about an alleged gang. 4RP 390.

The trial court ruled that the bank robbery allegation would not be admitted "because that has nothing to do with the state of mind that would give rise to a self-defense claim...It's not a threat against Mr. Short." 4RP 390. The trial court recognized that by the charges at least Short's state of mind "is directly in issue." 4RP 392. The trial court recognized that evidence going to Short's state of mind was not hearsay. 4RP 391-92.

¹ State's motions were not designated as clerk's papers.

The trial court ruled allowing the .357 comment. 4RP 392.

Then, the trial court inquired further about veiled threats. 4RP 392-93. The defense responded with a new area of testimony: that Short would say that he valued friendship and that the victim had said “F friends.” 4RP 393. Then added more: that the victim had killed someone and tossed the body in a river. 4RP 393.

The trial court gave a comprehensive ruling on what had at that point been brought to its attention. 4RP 403. The court ruled

1. overruling the state’s hearsay objection because the facts were asserted for the purpose of establishing Short’s state of mind and were not therefore hearsay (4RP 403);

2. Short’s state of mind is in issue in the case because he is charged with two intent crimes (4RP 403-04);

3. a valid self-defense claim includes subjective fear that is objectively reasonable and the offered evidence goes to subjective fear (4RP 404);

4. issues of objective reasonableness and initial aggressor are questions for the jury to answer (4RP 404-05);

5. the state’s difficulty in rebutting or inability to rebut specific instances of conduct properly admitted under ER 405 (b) does not affect

the ruling on admissibility (4RP 405);

6. that Short has an absolute constitutional right to testify and the trial court was loath to restrict or interfere with that right (4RP 406);

7. thus Short's testimony that he asserts goes to his state of mind is admissible, including the .357 comment, the killing people and throwing them in a river comment, any veiled threats (even though the trial court did not know what they were), anything that the victim's son Bronson might have said along the lines of a threat (4RP 406-408);

8. but not the alleged planning to rob a bank because it does not go to "that kind of state of mind," not the gang allegation both because it does not go toward the kind of state of mind and because the defense said it would not use it, and not the alleged threat to burn Short's house down because the defense conceded that it would not use that evidence (4RP 407);

9. finally, the trial court indicated that in each admissible instance the jury would be given a limiting instruction advising them that the evidence may be used with regard to state of mind only. 4RP 407-08.

Short then testified to the .357 comment (4RP 436), that the victim knew karate (Id.), that he, Short, had perceived a veiled threat that the karate would be used against him (Id.), that Short had mentioned that he

valued friendship and the victim had responded with “f*** friends.” 4RP 437. Short testified that the victim’s son is a “terrible criminal.” 4RP 455. He assailed the victim as hustler, swindler, and extortionist. 4RP 461.

As Short’s testimony progressed, he injected another attack on the victim that had not been revealed, alleging he had turned the victim into police after the victim tried to extort his silence. 4RP 444-45. With the jury out, Short said that this had occurred in 2004. 4RP 446. Then it developed that there had been an alleged threat from this circumstance that was communicated to Short by a third person. 4RP 446. The third person had said that the victim could cut Short up and scatter him across Mason County. *Id.* Allegedly, the victim had later called Short and referred to the third person’s statement, saying “It could happen.” 4RP 447. Short asserted that the victim and the third person were trying to extort his silence because he “knew about them.” 4RP 448. Short then said that it happened in 2003. *Id.* Further inquiry established that this was about the alleged bank robbery plan. *Id.*

This occasioned a further foray into the admissibility of matters that arguably go to Short’s state of mind. 4RP 448-451. The trial court recognized the additional problem of this evidence as having come from the statement of the third party, not the victim, and sustained the state’s objection because the allegations were too attenuated. 4RP 451.

Verdicts of guilty were returned on first degree assault (CP 107 and attempted first degree murder. CP 109. On both, the jury found that Short was armed with a firearm. CP 108. 110. The trial court ordered that the first degree assault conviction merged with the attempted murder conviction. CP 118.

Short moved for an exceptional sentence downward. CP 111 *et seq.* The trial court rejected the downward departure request, finding that the facts in support of that request are not substantial and compelling. RP 11/4/17, 11. The trial court gave Short a low-end standard range sentence of 240 months. CP 121.

B. FACTS

KCSO Corn responded to the Red Apple grocery. Police had received a 911 call from a person saying that he had shot someone. 1RP 74. While responding to that call, the police received another call that a person who had been shot was at the Red Apple grocery. 1RP 74. Medics responded to the grocery and tended to the victim. 1RP 75. No weapons were discovered in the victim's truck or on his person. 1RP 80. The victim, Robert Sears, was transported to the hospital. *Id.*

Dr. Greg Fleischhauer testified as to the injuries that Short caused Mr. Sears. X-rays showed a "metallic foreign body" lodged in Mr. Sears's

neck. 1RP 100. The bullet had passed through Mr. Sears's mouth, through the back of the mouth, and lodged in a vertebra. 1RP 101. The bullet caused cracks in the vertebra. Id. Mr. Sears needed to be referred to a neurosurgeon to evaluate whether the bullet could be removed. 1RP 102-03. Had the bullet traveled a little further, it could have severed the spinal cord. 1RP 107.

Robert Sears had known Short for around ten years. 2RP 220. He thought that he and Short were friends. Id. Sears had worked for Short as a heavy equipment operator. 2RP 221. The two had engaged in selling vehicles to each other. 2RP 222. Sears had not seen Short since a time cutting firewood approximately two and a half years before the incident. 2RP 226. Mr. Sears had never had a fight or a confrontation with Short. 2RP 227. Never any kind of falling-out. 2RP 278.

Mr. Sears went to Short's house on Halloween night. 2RP 228-29. He did not call ahead because he did not know the phone number. 2RP 229. His visit was spur-of-the-moment because he was in the neighborhood. 2RP 229. Mr. Sears went up Short's driveway, turned around, and parked. 2RP 230. He approached the back door of the residence to avoid having to climb the front stairs. 2RP 231.

Looking through the doorway, Mr. Sears saw Short walking down a hallway toward him. 2RP 231-32. Mr. Sears never had time to knock on the door. 2RP 286. Short said "Oh it's you" and Mr. Sears made room for

Short to open the outward opening screen door. 2RP 232. Mr. Sears asked Short how he was doing and Short responded with “I got something for you, you son of a bitch. You’re going straight to the devil.” 2RP 232. Then, “Boom. That was it.” Id. Short shot in a matter of seconds after an exchange of a few words. 2RP 234.

Mr. Sears flew off the porch backward. 2RP 234. He hit his head when he landed. 2RP 235. The bullet “shot a hole through my tongue, went down and tore off my tonsil, went through my talk box, came out the other side, and the bullet is still in there.” 2RP 235. While Mr. Sears was on the ground, Short said “I’m going to shoot you again” and then “I’m going to let you bleed to death.” 2RP 236. Short did not shoot again and Mr. Sears struggled to his truck, got it started, and fled to the Red Apple. 2RP 237-38. Mr. Sears was left with a numb arm and trouble swallowing. 2RP 243.

Mr. Sears had seen a surveillance system in Short’s house that covered the driveway and the back porch. 2RP 247. This device allows Short to see who is coming up the driveway. 2RP 269.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY EXCLUDED 13 OR 14 YEAR OLD ALLEGATIONS OF THE VICTIM THREATENING TO KILL SHORT THAT WERE COMMUNICATED TO SHORT BY A THIRD PERSON.

Short argues that the trial court's evidentiary ruling denied him a fair trial. This claim is without merit because the trial court allowed Short great latitude in accusing the victim of misconduct and bad character but rationally drew the line at allowing Short testify that 13 or 14 years earlier someone else had claimed that the victim would hurt him under circumstances where Short was unable to prove that he was in imminent danger when he shot Mr. Sears.

The United States Supreme Court framed the present issue

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E.g.*, *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The jury was instructed with regard to first and second degree

assault that “[t]he use of force upon or toward the person of another is lawful when used by a person who reasonably believes he is about to be injured.” CP 91 (instruction no. 17). Operable words here are “reasonably” and “about to be injured.” That is, there must be fear of imminent harm and that fear must be reasonable. Further, although actual danger is not required, Short’s belief that there was actual danger must be based on “good faith and reasonable grounds.” CP 92 (instruction no. 18).

The same sort of requirements attend the attempted murder defense of excusable homicide. The defense lies if without negligence or unlawful intent a defendant does a lawful act by lawful means. CP 98 (instruction no. 24). Similarly, the no duty to retreat instruction required that Short had “reasonable grounds for believing that he is being attacked.” CP 100 (instruction no. 26).

The words “about to be injured” are at the heart of the present issue. Short used deadly force against Mr. Sears.

Self-defense is circumscribed under Washington law. The right to use deadly force in self-defense is founded upon the existence of a necessity. The evidence must establish a confrontation or conflict, not instigated or provoked by the defendant, which would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe that there was *imminent* danger of great bodily harm about to be inflicted.

State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985) (internal citation omitted; emphasis by the court), *review denied*, 104 Wn.2d 1012

(1985). Further,

[t]o demonstrate the requisite immediacy of danger to raise the issue of self-defense, there need not be evidence of an actual physical assault. However, our courts have long adhered to the rule that there must be evidence of the appearance of danger prior to the use of force.

Walker, 40 Wn. App. at 662 (internal citation omitted).

In *Walker*, an estranged husband and wife came into contact resulting in the wife stabbing the husband in the back as he looked for his truck key. Although there was no attack on her person at the time, the wife claimed self-defense. She asserted expert testimony on battered wife syndrome and various instances of physical abuse by her husband in the past. *Id.* at 661. On these facts, the Court of Appeals criticized the trial court's giving of self-defense instructions. *Id.* at 662. The court said

While the defendant's testimony may be sufficient in certain circumstances to warrant the giving of a self-defense instruction (*State v. McCullum, supra*), the defendant's testimony of fear alone, without more, is not sufficient to establish the appearance of imminent danger necessary to justify the instruction. Some evidence of aggressive or threatening behavior, gestures, or communication by the victim before defendant's use of force is required to show that the defendant had reasonable grounds to believe there was imminent danger of great bodily harm.

40 Wn. App. at 663 (citation omitted). Apply these principles, the court noted that “[i]n the present case, there was no evidence whatsoever in the record that Mr. Walker engaged in any aggressive or threatening behavior toward Mrs. Walker.” *Id.*

The *Walker* court further noted that “Mrs. Walker's ultimate defense rested solely on the bare assertion that she feared for her life because of abuse she allegedly sustained in the past.” *Id.* at 664. Finally, the court observed

That the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury. It is the perceived imminence of danger, based on the appearance of some threatening behavior or communication, which supplies the justification to use deadly force under a claim of self-defense.

Id. at 665. The court held that since Mrs. Walker was not entitled to a self-defense instruction, any error in the given instruction caused no prejudice. *Id.*

Thirteen years later, the Washington Supreme Court considered self-defense principles in *State v. (Timothy) Walker*, 136 Wn.2d 767, 966 P.2d 883 (1998) (En banc). There, the defendant had armed himself with a hunting knife before seeking a confrontation with a neighbor who had been sleeping with his wife. A fistfight ensued and fearing that he was losing, Walker brought out the knife and fatally stabbed the neighbor. 136 Wn.2d at 770-71. Walker appealed the trial court’s refusal to instruct the jury on self-defense. *Id.* at 771.

The Supreme Court noted that a homicide defendant relying on self-defense must produce some evidence to support the claim. 136 Wn.2d at 772. And, “one of the elements of self-defense is the person

relying on the self-defense claim must have had a reasonable apprehension of great bodily harm.” Id. The subjective aspect of self-defense places the trial court in the defendant’s shoes, viewing her acts in the light of all the facts and circumstances known to her. Id. at 773. But under the objective prong, the trial court considers how a reasonable person in the defendant’s position would have behaved. Id. Moreover, “the importance of the objective portion of the inquiry cannot be underestimated.” Id. Subjective beliefs may always justify a homicide: “Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not....” 136 Wn.2d at 772-773, *quoting State v. Janes*, 121 Wn.2d 220, 239, 850 P.2d 495 (1993). Thus, “[i]f the trial court finds no reasonable person in the defendant’s shoes could have perceived a threat of great bodily harm, then the court does not have to instruct the jury on self-defense.”

Objectivity leads to the rule that

If “there is no reasonable ground for the person attacked ... to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner.”

136 Wn.2d at 777, *quoting State v. Walden*, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997). The present case is one where there was no reasonable

ground for Short to believe that he was in imminent danger of death or great bodily harm. In fact the circumstances of the present case show that there was no evidence from which a reasonable person could believe that Mr. Sears was in any manner threatening Short when he walked up to Short's door. The case simply has no fact showing imminent danger to Short. The perceived danger resulted from long-past bad blood, not the imminently threatening behavior of Mr. Sears at the time he was shot in the face.

But the trial court took the subjective element of self-defense to heart in allowing Short to trash Mr. Sears with his recitation of historical bad facts. And the trial court bent toward Short in allowing him the self-defense and excusable homicide instructions when any evidence of an imminent threat is glaringly absent. All the things Short had to say were not imminent, they were historical.

The 13 or 14 year old alleged threat received from a third person had no tendency to prove the imminence of great bodily injury or death just as actual historical assaults and abuse were insufficient in *State v. Walker*. As the trial court ruled, it is too thin to serve its purpose. It certainly was not proven that Mr. Sears ever actually uttered the supposed threat let alone that he arrived at Short's house all those years later to carry it out. Moreover, the lack of evidence that Short was "about to be injured"

is alone a sufficient reason for the jury's verdict.

Short got wide latitude in attacking Mr. Sear's character in attempting to establish his state of mind—his reasonable fear. But he completely failed to establish the imminence of harm because there was none. The excluded testimony was too attenuated in that it was too old, it was based on hearsay, and, in any event, it failed to establish self-defense. The trial court properly excluded the evidence.

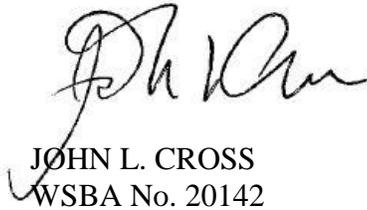
IV. CONCLUSION

For the foregoing reasons, Short's conviction and sentence should be affirmed.

DATED March 6, 2018.

Respectfully submitted,

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

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