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Court of Appeals  
Division II  
State of Washington  
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NO. 50796-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DEAN O'NEAL,

Appellant.

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

The Honorable Garold Johnson, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROSECUTOR DID NOT PROPERLY ARGUE THE LAW OF SELF-DEFENSE BUT ARGUED FOR NULLIFICATION IN THE EVENT THE JURY FOUND SELF-DEFENSE

The State claims there was nothing improper about its deputy's repeated arguments that, to justify finding O'Neal acted in self-defense, they would improperly be disregarding the broader consequences of discharging a gun in public, such as hitting a bystander or piercing a gas vein. Br. of Resp't at 25-26; RP 576-77. This is so, the State argues, because "[a] reasonably prudent person would not fire a gun in a crowded parking lot, across lanes of traffic, around gasoline pumps and toward occupied houses at a fleeing car after being shouted at." RP 25-26.

This mischaracterization of its argument should be rejected. First, O'Neal exchanged gunfire with the occupants of the vehicle; he was not the only shooter, so his shots were not the mere result of "being shouted at." Yet the State seems to claim that any reasonably prudent person, even one who is being shot at, would never fire a gun in a place where collateral damage could occur. This is not a reasonable proposition. Washington citizens have long held the right to stand their ground and defend themselves if they are in a place where they have a lawful right to be. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936).

The State's argument on appeal that no reasonably prudent person would exchange gunfire in a public place is contrary to well established law.

And, more importantly, the State's argument was not made in the context of what O'Neal reasonably did or did not do, as the State claims. Rather, the State's argument was that even if O'Neal did act in self-defense, the jury would be "say[ing] that pulling that trigger was justified, consequences be damned." RP 577. The State proceeded to give examples of all the things the jury would be "saying" are irrelevant—bullets hitting people and places or hitting gas veins—if they determined O'Neal acted in self-defense. The State then said the jury would have to be "comfortable with the[] conclusion" that O'Neal acted in self-defense "regardless of the consequences." RP 577.

The State does not address or acknowledge these arguments, or O'Neal's assertion that they amount to nullification. Based on the argument advanced by the prosecutor, even if the jury found O'Neal's actions justified by self-defense, it should convict anyway because of the potential collateral consequences of discharging a firearm in public. This emotionally charged nullification argument deprived O'Neal of a fair trial and requires reversal.

2. THE PROSECUTOR'S ASSERTION DURING CLOSING THAT "SHAMEFUL" WITNESSES, INCLUDING O'NEAL HIMSELF, WERE NOT COOPERATIVE WAS EXPLICITLY EXCLUDED BY THE TRIAL COURT, AND THE STATE'S DECISION TO CONTRAST NONCOOPERATING HILLTOP RESIDENTS WITH STRAIGHTLACED GIG HARBOR RESIDENTS WAS OTHERWISE AN IMPROPER RACIST AND CLASSIST EMOTIONAL APPEAL

The State claims that the prosecutor's "argument that the witnesses were uncooperative was a reasonable inference from the evidence." Br. of Resp't at 23. According to the State, the evidence that supported this inference was Detective Chittick's testimony that sometimes people who are shot at do not cooperate with the State. Br. of Resp't at 23 (citing RP 287-88, 321-22, 334).

It is true that Chittick stated cooperation is "not always the case" among those who are shot at. RP 321. But she said nothing specific about whether any of the witnesses in this case cooperated because, when the State attempted to elicit this evidence, the trial court excluded it. RP 322-27 (following argument, trial court at RP 326-27 stating, "how far to go down why other people in society don't respond to subpoenas, I don't know how insightful that is in this particular case" and, "There could be multiple causes, for this jury to speculate as to why these particular witnesses didn't come, with absolutely no basis whatsoever," and then sustaining the defense objection to such testimony). The State does not acknowledge this ruling or the fact that

case law establishes it is misconduct for the prosecutor to argue the very extraevidentiary speculation that the trial court expressly excluded. See Br. of Appellant at 18-19 (citing State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009); State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937)). The State's lack of acknowledgment should be taken as an implicit concession: It was misconduct for the State to make an emotionally charged appeal disparaging witnesses and O'Neal for their "shameful" refusal to cooperate with law enforcement, which was a "black eye" on society.

The State also glosses over what its deputy actually argued in closing, claiming that the prosecutor was merely comparing Gig Harbor witness Ackley's reasons for being in the gas station (to get gas) and Hilltop O'Neal's reasons (a nonrandom meeting between O'Neal and "the victims"). Br. of Resp't at 24. By ignoring what was actually stated by its deputy, the State claims there "was no argument made involving race or class." Br. of Resp't at 24.

But the State's argument was unmistakably charged with appeals to race and class, albeit in slightly coded language. The prosecutor argued that Ackley's fear upon hearing "hood rap talk" should not be equated with O'Neal's fear upon hearing the same thing because "Mr. Ackley, straightlaced from Gig Harbor is not the defendant. Mr. Ackley, coming over at midnight to the Hilltop to get some gas, doesn't have the same state of mind as the

defendant.” RP 575-76. The prosecutor continued that any “normal, everyday person” who heard that type of talk “would get uncomfortable” like Ackley but unlike O’Neal, who was not a normal, everyday person because of his association with the Hilltop neighborhood. RP 576. The State’s claim that this was not an appeal to race or class and that this did not invoke an us-versus-them message is untenable. The State’s inflammatory argument requires reversal.

B. CONCLUSION

Because prosecutorial misconduct denied him of a fair trial, O’Neal requests that his convictions be reversed and this case be remanded for retrial.

DATED this 25<sup>th</sup> day of January, 2019.

Respectfully submitted,

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