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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29980-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER OWENS,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable John Hotchkiss, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE IN REPLY

1. THIS COURT MUST VIEW THE EVIDENCE FROM THE DEFENDANT'S PERCEPTIONS, KNOWING ALL HE KNEW AND SEEING ALL HE SAW.

The State makes an impassioned argument of the facts from the point of view of the deceased and his family. Resp. Br. at 1-14. It accurately conveys the State's theory of the case.

The issue at trial, however, was self-defense. To assess the issues presented in this appeal, this Court must view the evidence from the defendant's perspective, knowing all that he knew and seeing all that he saw. App. Br. at 28-32 and authorities there cited.

a. Rick Threatened to Rape Kellie.

It is outrageous and repugnant for the State to claim "Rick never threatened any harm to Ms. Brown." Resp. Br. at 10. Rick's threat to rape Kellie was the basis on which the court entered the protection order. RPII 527; App. Br. at 6-7. A threat to rape under anyone's interpretation is a threat to harm.

Furthermore, the State misleads this Court when it asserts "Owens did not believe Rick Tyler intended to rape his mother," Resp. Br. at 31; and "there was no evidence Owens believed Rick Tyler

had such an intent [to commit a felony]," Resp. Br. at 32. The State's own earlier assertions contradict these statements:

Owens testified his mother told him Rick Tyler had threatened a "sexual assault" and she was afraid of Rick Tyler.

Resp. Br. at 31. The State does not explain how a sexual assault is not a felony. See App. Br. at 44 & n.17.

The State's many citations to the record, Resp. Br. at 31-32, do not support its denial of Chris's perception. Chris told the detective he considered that Rick would "assault" his mother. RPII 746-47. His mother told him Rick threatened to sexually assault her. RPII 668. He was afraid Rick would sexually assault his mother. RPII 754.

The State at trial, and again in this appeal, argues vehemently that Rick never threatened to "beat up" or "kill" Kellie Brown. Resp. Br. at 10; RPII 614, 631, 650. It then sidesteps Rick's threat to rape Kellie by quibbling that he didn't make that threat in the same phone call in which she told him she had the restraining order. Resp. Br. at 6; RPII 405, 419, 420-21, 446.

Chris testified he heard his mother tell Rick she had a restraining order, he was not to enter

the house,¹ yet Rick responded he was going to violate the order and come into the house. RPII 420-21. Chris agreed Rick didn't specifically say in this conversation he was going to come and beat up Kellie. RPII 421. But combined with Rick's prior statements that he would rape Kellie, it was reasonable to perceive this threat to violate the protection order to include the prior threat to rape as well. App. Br. at 6-7; RPII 730-31.

b. Rick Forced the Garage Door and Kicked In the Basement Door.

The fact Rick Tyler's family did not think he was angry when he entered the house does not control this Court's analysis. Resp. Br. at 3. Both Chris and Kellie heard him force open the garage door she had secured with a screwdriver. They felt the floor of the house shake with the force. They heard him kick open the door into the basement so hard they heard the loud "bang" as it hit the wall. RPII 574-76, 658-60, 684-86. Even Rick's father and sister heard a third sound like a gun shot. RPII 287-94.

¹ Knowledge of a restraining order, even without personal service, supports a criminal charge of violating its terms. City of Auburn v. Solis-Marcial, 119 Wn. App. 398, 79 P.3d 1174 (2003).

c. Rick Looked Up at Kellie and Chris and Reached at Chris.

The State claims "Rick did not look up" as he came up the stairs. Resp. Br. at 7. Kellie testified that as he came through the door at the bottom of the stairs, he "looked up at me and kept coming." RPII 576. "[H]e looked up at me, looked over at Chris and his lips, you know, like that and he took another step and he reached up at Chris." RPII 577. Chris acted to protect his mother, Kellie, from Rick. App. Br. at 14; Ex. 66 at 29-30.

d. There Was Evidence Rick Tyler Became Explosive When He Used Oxycontin.

Chris testified at the first trial that Rick became explosive when he used oxycontin and drank alcohol. He had experienced his irate yelling on the phone. He heard of other events from this mother. Judge Hotchkiss was the judge for both trials. RPI 466-68; Resp. Br. at 18.

For this Court's purposes, it doesn't matter what Chris personally observed and what he had learned from his mother. Resp. Br. at 13 n.4; see authorities cited at App. Br. at 28-32.

e. Forensic Evidence Does Not Refute Chris's Perception that Rick Tyler Raised His Head and Moved Up the Stairs After the First Shot.

The State claims Rick Tyler fell after the first shot with his head coming to rest on the top step below the landing. Resp. Br. at 15. The evidence was in dispute about that. Certainly that is where he was found after the second shot.

The State claims the trajectory of the rifle shot, the second shot, was in an upward direction and so does not support Chris Owens's claim that Rick Tyler lifted his head. Resp. Br. at 16.

Dr. Fino, the medical examiner, described the path of the bullet through the head. It exited 1/2" "higher" than where it entered. RPII 248-54. But she had no autopsy information to help determine where Rick Tyler's head was or what position he was in when the second shot struck him. RPII 250. She could not determine whether he could have moved upwards on the stairs after the first shot. From the brain injury, she could say his "movement would likely be somewhat impaired. How impaired I can't say." RPII 261.

Thus the forensic evidence does not contradict Chris's perception that Rick rose after the first

shot and moved further up the stairs without fully standing up. RPII 694-95, 734-36, 742. If his head were facing down as he lifted himself up, a shot from behind could still leave an upward trajectory within the brain.

2. THE STATE DID NOT CROSS-APPEAL ON INSUFFICIENT EVIDENCE TO INSTRUCT ON JUSTIFIABLE HOMICIDE.

The State argues:

Self-defense had nothing to do with Owens' second shot that killed Rick Tyler. ... The State took exception to the trial court instructing the jury on self-defense.

Resp. Br. at 14. Despite the prosecutor's passion for his case, the defense theory was justifiable homicide. The trial court found the evidence more than sufficient for jury instructions on that theory. The State did not cross-appeal that ruling.

For purposes of this appeal, self-defense has everything to do with the second shot that killed Rick Tyler. It was the State's obligation to prove beyond a reasonable doubt that the homicide was not justifiable. It was the court's obligation to clearly instruct the jury on that element.

B. ARGUMENT IN REPLY

1. RAPE OR SEXUAL ASSAULT IS A FELONY.

As the State ably conveys in its brief, it believes rape is not "harm." Resp. Br. at 10. Nonetheless the State asks this Court to conclude that a jury would understand that a threat to sexually assault is equivalent to "great personal injury." Resp. Br. at 32.

If the elected prosecutor of the jurisdiction believes that a threat to rape is not a threat to "harm," it is incomprehensible that a jury in that same jurisdiction would perceive rape to be "great personal injury." Obviously its elected officials do not believe so.

Furthermore, it is conceivable for a jury to believe a sexual assault could occur without producing "severe pain and suffering," as required by the definition of "great personal injury." CP 68.

Instructions are not adequate to argue the defense theory of the case if counsel has to argue not only what the facts are, but also what the law is.

[T]he defense attorney is only required to argue to the jury that the facts fit

the law; the attorney should not have to convince the jury what the law is.

State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984).

The law says homicide is justifiable "when there is reasonable ground to apprehend a design on the part of the person slain **to commit a felony.**" RCW 9A.16.050 (emphasis added). The court did not instruct on this aspect of justifiable homicide, and so the jury did not know about it. The instructions were inadequate.

2. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE BY EXCLUDING THE OXYCONTIN EVIDENCE.

a. Standard of Review

The State argues this Court is to review any trial court evidentiary ruling on an abuse-of-discretion standard. Resp. Br. at 17.

The issue here is different than in the State's cited authorities. In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), and State v.

Powell, 126 Wn.2d 244, 893 P.2d 615 (1995),² the issue was whether the trial court erred by admitting the State's evidence against the defendant. That issue properly is assessed by an abuse of discretion.

In this case, however, the issue is whether the Court violated appellant's constitutional right to present a defense by excluding evidence that was relevant to that defense. App. Br. at 28-40. Constitutional challenges are reviewed de novo. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

The State also cites State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011), a case of child rape. There the trial court excluded defense evidence that the complaining witnesses, two teenaged sisters, committed arson by setting fire to the foster home where they were placed after being removed from the defendant's home. The defense argued this evidence was relevant to show

² It is ironic that the State relies on domestic violence prosecutions such as Powell and Magers in which it presented past incidents of domestic violence to prove the reasonableness of the victim's fear, while it completely discounts the reasonableness of Chris's and Kellie's fears here.

the girls' motive to falsely accuse him of rape, by showing they were willing to do something very serious just to be removed from a home they didn't like.

Although the trial court did not permit the defense to refer specifically to an "arson," nonetheless the court permitted the defense to factually establish and argue the girls were removed from the subsequent foster home because they did "something serious" to get themselves removed. 172 Wn.2d at 812.³

Even with this very limited exclusion, only a bare majority of the Supreme Court upheld the ruling on an abuse of discretion standard of review. Perez-Valdez, 172 Wn.2d at 814. Four justices dissented. They would have held due process required admitting the evidence, and that the trial court abused its discretion by excluding it:

³ This ruling would be analogous in this case to the trial court permitting the defense to refer to Chris's and Kellie's concerns about "drugs" they found in Rick's things and why that made them fearful, including the connection with the family member using the same drugs, without identifying the specific drugs. We would have a very different appeal if that evidence had been permitted below.

Rape of a child is a heinous offense. But it is also terrible to send Perez-Valdez to prison for life after depriving him of relevant evidence that the alleged victims had a motive to lie. The presumption of innocence and requirement of proof beyond a reasonable doubt compel us to allow defendants to present relevant evidence in their defense.

Perez-Valdez, 172 Wn.2d at 821, 826 (Wiggins, J., dissenting).

Here the trial court excluded evidence of why Chris was afraid and why that fear was reasonable. This was the only factual issue in the case.

The Constitution guarantees the right to present a complete defense as a fundamental element of due process of law. Thus the standard of review is de novo for constitutional error, not merely an evidentiary ruling. See App. Br. at 28-35 and authorities there cited.

By changing its ruling from the first trial to the second trial to exclude this essential portion of the defense, the court applied the evidence rules in a manner that was "arbitrary" or "disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). It

thus was constitutional error and requires reversal.

b. The Trial Court Abused Its Discretion by Excluding This Evidence.

Even if this Court applies the abuse of discretion standard, the trial court's exclusion of this evidence requires reversal.

"All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976). Evidence Rule 401 provides evidence is relevant if it has

any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence.

The "fact that is of consequence" here is the reasonableness of Chris's fear, based on all he knew and perceived. The State argues Chris's experience with his cousin's use of oxycontin was "too remote." Resp. Br. at 19. But that experience was not at all "remote" the night of the shooting. Chris repeatedly spoke of it to the detective that night to explain why he was afraid. See App. Br. at 13-14.

The State argues if admitted, the evidence would be "unduly prejudicial." Resp. Br. at 19. But there is nothing from the first trial, where it was admitted, that supports this argument.

Judge Hotchkiss heard both trials in this case. At the first trial, he initially excluded evidence that Chris and his mother believed Rick was using oxycontin and they were especially afraid of him because of it. He changed his ruling when the State admitted a portion of Chris's statement that referred to the oxycontin. Yet with exactly the same circumstances at the second trial, he refused to permit the evidence.

The jury's inability to reach a verdict in the first trial with the evidence, and the conviction at the second trial without it, demonstrate a "tendency" to make the reasonableness of his perceptions more probable with the evidence than without the evidence. It also conclusively shows "the outcome of the trial was materially affected by the trial court's evidentiary ruling." Resp. Br. at 20.

This Court should reverse the conviction.

3. THE SAME LEGAL AUTHORITY REQUIRES REVERSAL FOR EXCLUDING THE FOOTPRINT ON THE DOOR.

The State cites the same legal authority for excluding the footprint on the door. It cites no authority prohibiting defense counsel from arguing inferences from evidence that was admitted -- here, the door showing the footprint that matched Rick Tyler's shoes.

For the reasons stated in the Brief of Appellant at 36-40, this Court should reverse the conviction for excluding this evidence.

4. THE INSTRUCTIONS ON SELF-DEFENSE WERE INTERNALLY INCONSISTENT AND CONSTITUTIONALLY INADEQUATE.

- a. RAP 2.5(a) Permits This Court to Consider The Instructional Errors Raised Here.

The State cites RAP 2.5(a) to support its claim that any error in the jury instructions is waived. Resp. Br. at 26, 29-30. Again, its cited authorities do not support its argument.

State v. O'Hara, 167 Wn.2d 91, 17 P.3d 756 (2009), may have narrowed the broad language of State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369

(1996).⁴ Nonetheless it still requires the appellate court to examine challenges to self-defense instructions on a case-by-case basis to determine whether the instructional error was of constitutional magnitude. O'Hara specifically held that the issues here may be raised for the first time on appeal: shifting the burden of proof to the defendant, failing to define the "beyond a reasonable doubt" standard, and omitting an element of the crime charged. See Brief of Appellant at 41-42.

Similarly, State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005), held whether a "to convict" instruction omits an element of the charge is a "manifest" constitutional error that can be raised for the first time on appeal. An appellate court reviews the adequacy of a "to convict" instruction

⁴ O'Hara was an assault conviction with self-defense based on malicious trespass or malicious interference with property. The appeal challenged an instruction defining "malice," and specifically the court's omission of part of the WPIC definition of "malice" that tells a jury it can consider reasonable inferences from the evidence to determine malice. The Court held the issue of reasonable inferences was covered in other instructions; and challenging the definition of "malice" was not a constitutional issue that could be raised for the first time on appeal, although challenging omission of an element would be.

de novo. Mills, 154 Wn.2d at 7. See Brief of Appellant at 57-62.

- b. The Instructions Were Not Adequate to Permit the Jury Properly to Consider Self-Defense.

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), rejected the State's argument that instructions are adequate "when read as a whole" if the instructions contain an internal inconsistency. Id. at 478. Here, the internal inconsistency is the "to convict" instruction requiring the jury to return a verdict of guilty without regard to self-defense, and the separate self-defense instruction. See App. Br. at 57-62.

Mills also rejected the State's argument that the instructions were adequate if, "when read as a whole," they properly inform the jury of the applicable law. Mills, 154 Wn.2d at 7.

[T]he reviewing court generally 'may not rely on other instructions to supply the element missing from the 'to convict' instruction.

Id.

Mills did not involve self-defense. The Mills Court held in limited situations the court can instruct separately on an element that **elevates** the base crime, there harassment, to a greater crime,

i.e., felony harassment. Nonetheless, it reversed the conviction because even read as a whole, the jury instructions did not adequately convey that the victim must be placed in reasonable fear that the defendant would carry out the threat to kill. Id.

c. State v. Hoffman is Not Good Law.

The State relies on State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). Resp. Br. at 33-34. Hoffman concluded there was no prejudicial error to exclude the lack of self-defense from the "to convict" instruction. But the Court there did not address the language instructing the jury it had a "duty to return a verdict of guilty" without considering the defense.

Other case law developments further challenge the viability of this case. Hoffman involved convictions for aggravated first degree murder and assault in the first degree for killing and shooting two police officers who were trying to arrest the defendants. Under State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997), the law would not permit self-defense in such a case. Thus any discussion of self-defense instructions is at most dictum.

The law of self-defense also has changed enormously in the 21 years since Hoffman, requiring that its holding be reconsidered. See, e.g.: State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993); State v. LeFaber, supra; State v. Walden, supra; State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009); State v. O'Hara, supra. And Mills, supra, has reaffirmed State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953), which conflicts with this language in Hoffman.

d. State v. Acosta Supports Appellant's Position.

The State also misreads State v. Acosta, supra, to prefer a separate instruction that "the State has the burden of proving the absence of self-defense beyond a reasonable doubt." Resp. Br. at 33-34. Although the Acosta Court made that statement, it is an incomplete statement of its holding. Its full analysis supports appellant's position here.

In Acosta, the defense proposed a "to convict" instruction that included the element:

2. That David Acosta was not acting in self defense, or using lawful force as defined elsewhere in these instructions.

Acosta, 101 Wn.2d at 615. The proposed instruction concluded that if each element was proved beyond a reasonable doubt, the jury would have the duty to return a verdict of guilty. The trial court refused that instruction. Instead, the court limited the "to convict" instruction to:

(1) that the defendant "knowingly assaulted" the victim; (2) that the acts occurred in Clark County; and either (3) that the assault was committed with intent to rape, or (4) that the defendant "knowingly inflicted grievous bodily harm". ... Immediately following this, the court instructed:

It is a complete defense to the charge of second degree assault that the defendant acted in self-defense.

If you find from the evidence, and in accordance with these instructions that the defendant acted in self-defense, then it shall be your duty to return a verdict of not guilty.

Acosta, 101 Wn.2d at 622-23.

The Supreme Court reversed.

We believe that these instructions, when read together, did not adequately inform the jury that the State must prove absence of self-defense. **Unlike Hanton, King, and Savage, the jury was not told in the "to convict" instruction that the force used must be unlawful, wrongful, or without justification or excuse.**

Acosta, 101 Wn.2d at 622-23 (emphasis added) (citing State v. Hanton, 94 Wn.2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980); State v.

King, 92 Wn.2d 541, 599 P.2d 522 (1979); and State v. Savage, 94 Wn.2d 569, 618 P.2d 82 (1980)).

If we were to hold that the defendant bore the burden of proving self-defense, we would be relieving the **State of its obligation to prove that the defendant's use of force was unlawful.**

Acosta at 618 (emphasis added).

The jury should be informed in some **unambiguous** way that the State must prove absence of self-defense beyond a reasonable doubt.

Id. at 621 (emphasis added).

Acosta may endorse having a separate instruction, in addition to the "to convict" instruction, that clearly imposes on the State the burden of proving the absence of self-defense. But without including this mandatory element in the "to convict" instruction, a separate instruction conflicts with its terms.

The separate instruction used in this case is, at best, ambiguous when paired with the "to convict" instruction and the duty to convict without reference to justification. Unlike Hanton, King, and Savage, the "to convict" did not include the element that the **"force used must be unlawful, wrongful, or without justification or excuse."**

Given this ambiguity, this internal inconsistency in the instructions on the essential element of unlawful or wrongful use of force, this Court should reverse this conviction and remand for a new trial.

5. THE COURT'S REASONABLE DOUBT INSTRUCTIONS WERE INCONSISTENT AND VIOLATED THE SUPREME COURT'S CLEAR DIRECTIVE OF WHAT LANGUAGE TO USE.

The State is correct: Appellant did not assign error to the court's written instruction No. 4. Resp. Br. at 26; CP 59. The court erred by three times giving a different and inconsistent instruction on reasonable doubt to the jury earlier in the proceedings, in violation of the Supreme Court's clear directive. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).

The State argues Bennett has not been "extended" to a trial court's comments to a jury venire. However, there can be no question that these "comments" were instructions on the law. The court told the jury what "reasonable doubt" meant as a matter of law. These were not casual comments on the weather or where the jury should go during recesses.

If Bennett needs to be "extended" to instructions made to the venire, this is the case to do it -- when the record of the court's oral instructions is before this Court. See App. Br. at 48-57.

The State does not attempt to distinguish State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009), following Bennett. See App. Br. at 50.

The State cites to State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968), to claim the court's definition was accurate. Resp. Br. at 27. Bennett and the many cases condemning the prosecutor's use of such language belie the legal vitality of this very old case. See App. Br. at 51-57 and authorities there cited.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, and the Statement of Additional Grounds, this Court should reverse appellant's conviction and remand the case for a new trial.

Dated this 7th day of August, 2012.



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