

FILED
Feb 25, 2013
Court of Appeals
Division III
State of Washington

30094-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TRACY L. JOHNSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S REPLY BRIEF

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A. STATEMENT OF THE CASE

The defense sought to introduce evidence that Mr. Johnson saw Mr. Mulhair slap Mrs. Mulhair. (RP 44-45) The trial court excluded the evidence on the grounds that it was not relevant to Mr. Johnson's claim that he acted in self-defense:

MR. DOLD: In order to satisfy Mr. Chen, I asked Mr. Mulhair about any contacts between my client and him between the day that he slapped his wife outside the Golden Wheel, which he identified as one of those contacts and the incident that occurred on August 28th. He talked about those, and I'm not going to go beyond what he told me. He didn't admit to any other contacts.

THE COURT: I guess I was assuming that. Mr. Dold in opening statement outlined – it's no secret Mr. Johnson has indicated self-defense. That's what gets him the self-defense instruction, what his state of mind was, what Mr. Johnson can testify to. Your concern is Mr. Mulhair being questioned about the behavior.

MR. CHEN: Right. As to what extent also, your Honor, things that are not relevant, prejudicial.

THE COURT: The slapping of the wife, I want to follow up on that. How does that factor into our picture?

MR. DOLD: Mr. Mulhair contacted -- he followed my client and his wife to the Golden Wheel Restaurant. He contacted them in the parking lot. He asked them what was going on. They indicated they were just friends, and he finished the conversation by assaulting her.

THE COURT: That's not relevant, Mr. Dold, as to your client.

MR. DOLD: Anybody who – it’s our position that anybody that would use force in a totally unnecessary fashion at a time that it wasn’t called for because of his anger could use force another time. He could have an equally lack of provocation seeing what he thought was his tool box in the back of my client’s truck and use force.

THE COURT: That’s not coming in.

MR. DOLD: Okay.

(RP 44-45)

B. ARGUMENT

The State recognizes that because a criminal defendant has a constitutional right to present a defense, “even minimally evidence is relevant.” (Resp. Br. at 4) Such evidence may be excluded only if its probative value is outweighed by the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. (Resp. Br. at 4, *citing State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Evidence cannot be excluded on the basis of relevance if it is crucial to the presentation of a valid defense. *State v. Martin*, 169 Wn. App. 620, 628-29, 281 P.3d 315 (2012); *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

Mr. Johnson’s defense was that he feared Mr. Mulhair was going to assault him. The basis of his fear consisted of several instances in

which, by words or demeanor, Mr. Mulhair had expressed anger or hostility towards Mr. Johnson because of Mr. Johnson's relationship with Mr. Mulhair's wife. But the significance of those incidents to Mr. Johnson derived from an incident in which Mr. Mulhair had struck his wife, in Mr. Johnson's presence, in the course of confronting them about their relationship. Absent evidence of this overt act of unprovoked violence respecting Mr. Mulhair's anger about that relationship, a jury might conclude that Mr. Johnson was overreacting and had no reason to fear any actual violence on the part of Mr. Mulhair.

In short, evidence that Mr. Mulhair slapped his wife because he believed that she was having a relationship with Mr. Johnson was crucial to the defense theory that Mr. Johnson believed he too was about to be physically assaulted by Mr. Mulhair.

The State nevertheless argues that this evidence was "so prejudicial as to disrupt the fairness of the trial" and that this prejudicial effect outweighed the probative value of the evidence. (Resp. Br. at 6) Evidence is prejudicial, in the context of a relevance analysis, if it is likely to provoke an emotional response rather than a rational decision, and tends to suggest an improper basis for a jury's decision. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Evidence that he witnessed Mr. Mulhair slapping Mrs. Mulhair would have little tendency to arouse such sympathy for Mr. Johnson, or hostility toward Mr. Mulhair, that the jury would be likely to decide the case on such an emotional basis rather than considering whether the assaultive event was likely to cause Mr. Johnson to fear Mr. Mulhair. The State fails to show how the proffered evidence would have been prejudicial, let alone so prejudicial as to disrupt the fairness of the trial.

Apparently in order to support the naked assertion that evidence of Mr. Mulhair's violence against his wife was highly prejudicial, the State points out that evidence of specific acts of violence is inadmissible to show a victim's "alleged propensity for violence." (Resp. Br. at 5 *citing State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998))

In *Hutchinson*, the defendant sought to present testimony of third-party witnesses regarding specific violent acts of the victim in order to support his claim that he acted in self-defense. The court, relying on ER 404 and 405¹, held that that such evidence was inadmissible: "Specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." *Hutchinson* cited *State v. Alexander*, 52 Wn. App. 897, 900, 765 P.2d 321 (1988), in which

¹ **"(b) Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." ER 405

the court held that while evidence of the victim's reputation for violence is relevant to support a claim that the alleged victim was the first aggressor, evidence of specific instances of violence are inadmissible to support such a claim.

Both cases address the admissibility of evidence of specific acts of violence to prove the character of the victim; the character of the victim is an issue in such cases because the defendant claims the alleged victim was the first aggressor or otherwise acted in a manner consistent with his character for violence.

ER 404 and 405 do not, however, exclude evidence of the alleged victim's prior violent acts when offered to show the defendant's state of mind:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Evidence of an alleged victim's prior assaultive acts may, thus, be relevant to the defendant's state of mind:

The general rule is that prior acts testimony is "not admissible to prove a victim acted in conformity with his character under Rule 405(b)." *United States v. Gregg*, 451 F.3d 930, 935 (8th Cir. 2006). However, evidence of prior bad acts of the victim are admissible under Rule 404(b) to

establish the defendant's state of mind and the reasonableness of the defendant's use of force.

U.S. v. Bordeaux, 570 F.3d 1041, 1049 (C.A.8 (S.D.), 2009)

Evidence of the incident in which Mr. Mulhair assaulted his wife was not offered to show Mr. Mulhair's general propensity for violence. Instead, Mr. Johnson sought to prove that he reasonably believed he was in danger because he had seen Mr. Mulhair assault Mrs. Mulhair when he came upon her in Mr. Johnson's company. The evidence was crucial to the presentation of Mr. Johnson's defense.

C. CONCLUSION

The trial court lacked the discretion to exclude evidence that was central to the defense, based on the remote possibility that evidence of the victim's prior violent act would so inflame the jury's emotions that it could not rationally determine whether the defendant reasonably believed he was in danger and acted in self defense. This conviction should be reversed.

Dated this 25th day of February, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30094-3-III
)	
vs.)	CERTIFICATE
)	OF MAILING
TRACY L. JOHNSON,)	
)	
Appellant.)	

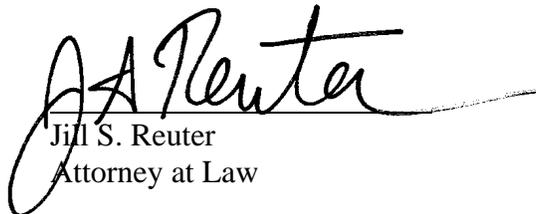
I certify under penalty of perjury under the laws of the State of Washington that on February 25, 2013, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 25, 2013, I mailed a copy of the Appellant's Reply Brief in this matter to:

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Signed at Spokane, Washington on February 25, 2013.


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