

FILED
Feb 13, 2013
Court of Appeals
Division III
State of Washington

No. 300943

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

TRACY LEE JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH E. REUKAUF, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the court deprived the Appellant, Tracy Johnson, of his constitutional right to present a defense of self-defense when it excluded testimony that the alleged victim, Mr. Mulhair, had previously slapped his wife while in Mr. Johnson's presence?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Mr. Johnson was not prevented from asserting self-defense, as the slapping incident was several months prior to the charged assault, was not relevant to whether Mr. Johnson felt that he was going to be harmed by Mr. Mulhair, and was unduly prejudicial. Further, Mr. Johnson did testify as to his own encounters with Mr. Mulhair which led him to become fearful of him.

II. STATEMENT OF FACTS

The Respondent does not dispute the Appellant's Statement of the Case, but supplements that narrative below. RAP 10.3(b).

At trial, Mr. Johnson testified that he'd had "several reasons to be very fearful" of the victim, Mr. Mulhair. He described an incident at the Golden Wheel restaurant in November 2009 where he encountered Mr. Mulhair, and also found a GPS tracking unit in the trunk of Michelle Mulhair's car. That the tracking unit seemed to explain how Mr. Mulhair found his wife and Mr. Johnson at the restaurant was "pretty concerning" to Mr. Johnson. **(RP 169-171)**

During a discussion outside the presence of the jury, the trial court ruled that it would not allow Mr. Johnson to testify that Mr. Mulhair "slapped or cold-cocked or whatever" Michelle Mulhair during the encounter at the Golden Wheel, because it was "highly prejudicial". The court further indicated that in order to give the self-defense instruction, Mr. Johnson would be limited to "actual instances" directed towards him by Mr. Mulhair. **(RP 175)**

Mr. Johnson also described an incident in 2010, in which Mr. Mulhair pulled his vehicle in behind Mr. Johnson's, blocking his exit from a cul-de-sac. Mr. Mulhair was yelling, obviously angry and upset, prevented from exiting his truck by his own daughter. Mr. Johnson was "very nervous and scared at that point. I didn't really know what he had in the vehicle or what he was about to do." **(RP 182-83)**

Mr. Johnson was sufficiently scared of Mr. Mulhair, that he attempted to speak to him at Mulhair's place of employment, so "there was a public setting and witnesses around to make me feel safe that he couldn't harm me." **(RP 185)** Mr. Johnson wished to inquire as to why Mulhair had been "driving by my house, asking about my son, pretty much trying to figure out who I was and what I was, where I was, my actions, things of that nature." **(RP 186)**

In yet another encounter, Mulhair stopped near Johnson's table at Jackson's and stared at Johnson, making Johnson nervous once again. **(RP 189)**

Finally, Johnson testified that he got out of his truck with the t-ball bat, because: "I just felt overwhelmed that I was going to be – that he had intent to hurt. I was scared. I didn't know what he had in mind." **(RP 190)**

III. ARGUMENT

1. The court properly exercised its discretion in excluding testimony describing the assault on Ms. Mulhair, and the defendant was not prevented from presenting his defense.

The right to present testimony in one's defense is guaranteed by both the Sixth Amendment to the United States Constitution, as well as article I, section 22 of the Washington State Constitution. State v Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). This right is not absolute, as "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." Id., at 15. Given that the threshold to admit relevant evidence is very low, even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

However, a defendant's right to present relevant evidence may be limited by "the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." Darden, 145 Wn.2d at 622. "[T]he State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." Id.

The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view. State v. Martin, 169 Wn. App. 620, 628, 281 P.3d 315 (2012), *citing* State v. Thomas, 123 Wn. App. 771, 778-79, 98 P.3d 1258 (2004); State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Evidence of specific instances of conduct is admissible only if the character trait is “an essential element of a charge, claim, or defense.” Martin, 281 P.3d at 319, *citing* ER 405(b).

A trial court is required to balance the probative value of evidence against the danger of unfair prejudice under ER 403. ER 403, however, cannot be used to exclude “*crucial* evidence relevant to the central contention of a valid defense.” State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (emphasis added). The Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).

It is true that evidence of a victim's prior acts of violence is admissible to establish a defendant's reason for apprehension and the basis for acting in self-defense. State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972). Where self-defense is at issue, , “the defendant's actions are

to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable.” State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account “all the facts and circumstances known to the defendant” and 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 234-35.

However, in self-defense cases, “[s]pecific act character evidence relating to the victim’s alleged propensity for violence is not an essential element of self-defense.” State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998).

Here, as the court pointed out, the assault in November 2009 was not against the defendant, but rather Ms. Mulhair. The court in essence properly utilized ER 403, and determined that the unfair prejudice which could result from admission of that evidence outweighed any probative value. The testimony would have only shown that Mulhair was capable of slapping his wife when angry, but was not relevant to Mr. Johnson’s claimed apprehension of fear that Mulhair would assault *him*. While the court did not address it specifically, it should be emphasized that the assault against Ms. Mulhair occurred at the Golden Wheel in November of 2009, some nine months before the assault at issue here. The evidence

was so prejudicial as to disrupt the fairness of the trial, and the court did not abuse its discretion in excluding it.

Also, Mr. Johnson was not prevented from presenting other testimony relevant to his defense. He testified in some detail as to his fear of Mr. Mulhair, relating the incidents at the cul-de-sac, Mulhair's place of employment, and Jackson's. Johnson told the jury that at the time of the assault in August of 2010, he believed that Mulhair intended to harm him, and that he needed to defend himself. The jury was instructed as to the lawful force defense to second degree assault, but the jury rejected that defense. **(CP 44-46)**

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction.

Respectfully submitted this 13th day of February, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 13th day of February, 2013.

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