

FILED

JAN 21, 2016

Court of Appeals
Division III
State of Washington

No. 33028-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

LISA ELAINE THYSELL,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 14-1-00131-4

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defense counsel's questioning of a witness concerning her boyfriend's use of methamphetamine and that being one of the reasons for the reasons for the altercation between the witness and the defendant opened the door for testimony regarding the defendant's methamphetamine use.
2. The trial court properly denied defense counsel's request for a jury instruction on self defense because the defense failed to produce any evidence demonstrating self defense.
3. The trial court did not improperly impose a condition for a substance abuse evaluation because evidence was produced during trial that the defendant was using methamphetamine at the time of the incident.

B. STATEMENT OF THE CASE

On September 8, 2014, the defendant was charged with Burglary in the First Degree, Domestic Violence and Assault in the Fourth Degree, Domestic Violence, for the assault on her daughter, Ashley Calkins. (CP 1-3).

On September 6, 2014, Deputy Guiney of the Klickitat County

Sheriff's Office responded to a 9-1-1 call made to the dispatch center in which the defendant reported that she was in an altercation with her daughter, Ashley Calkins. Upon responding, Deputy Guiney met the defendant in a field close to her home, she had a shirt wrapped around her finger. She denied medical aid. (Supp. VRP 10).

Upon initially talking with the defendant, the defendant told Deputy Guiney that she thought her daughter had stolen a rifle from her and she wanted to confront Ms. Calkins about that. The defendant went over to the trailer in which Ms. Calkins lived, which was on the same property as the defendant's home. The defendant initially knocked on the door of the trailer, but no one answered. The defendant knew her daughter was inside, so she threatened to break the window if no one answered the door. (Supp. VRP 11).

After threatening to break the window, Ms. Calkins came to the door and opened the door. Ms. Calkins told the defendant that she could not come in, and the defendant kept attempting to enter. Ms. Calkins put her foot out to keep the defendant from entering the trailer. Once Ms. Calkins put her foot out to keep the defendant from entering, the defendant grabbed Ms. Calkins' foot and pulled Ms. Calkins out of the trailer. (Supp. VRP 37).

Once Ms. Calkins was out of the trailer, the two engaged in a physical altercation. During this altercation, the defendant scratched Ms. Calkins, and struck her with a rock. It was during this altercation that Ms.

Calkins bit the tip of the defendant's finger. The defendant's husband broke up the physical altercation by pulling Ms. Calkins by the hair. (Supp.VRP 39). Once the physical altercation was over, the defendant entered Ms. Calkins' trailer and rummaged through the trailer attempting to locate the rifle. (Supp. VRP 39-40).

When Deputy Guiney interviewed Ms. Calkins he noted scratches and bruises on her arms, discoloration that looked like bruising and red marks under her eyes, and scratches on her right foot/ankle. (Supp VRP 17-19).

After interviewing both parties, Deputy Guiney determine that there was probable cause to arrest the defendant. (Supp. VRP 22, lines 6-9).

During the cross-examination of Ms. Calkins, defense counsel questioned Ms. Calkins about her boyfriend's use of methamphetamine and stealing items from the defendant. (Supp VRP 61). On re-direct, the prosecuting attorney question Ms. Calkins about the defendant's methamphetamine use. Ms. Calkins testified that she believed that the defendant was using methamphetamine during the altercation, as well as having a prior history of using methamphetamine. Defense counsel objected to the questions regarding how Ms. Calkins' knew the defendant was using methamphetamine on the basis that there was no foundation as to expert testimony. (Supp. VRP 64-65).

Ms. Calkins testified that her mother was accusatory and paranoid,

(Supp. VRP 66). and that the defendant often accuses Ms. Calkins of stealing items that Ms. Calkins did not steal (Supp. VRP 61-62). Defense counsel objected only on grounds that it was outside the scope of his cross-examination. (Supp. VRP 65).

On recross-examination of Ms. Calkins, defense counsel tried to use the testimony regarding the methamphetamine use of the defendant to discredit and impeach Ms. Calkins. When that was not successful, defense counsel continued to question Ms. Calkins about drug use and her boyfriend selling drugs. (Supp. VRP 67-68).

The trial court declined to give a self-defense instruction after allowing both counsel to argue their positions. (VRP 28-33).

The jury found the defendant guilty of fourth degree assault, domestic violence. (CP 36-38).

Judgment and Sentence was entered on December 15, 2014. The trial court imposed conditions that required the defendant to undergo an evaluation for domestic violence, substance abuse, mental health, anger management, and fully comply with all recommendations. (CP 39-40).

The defendant filed her Notice of Appeal on December 16, 2014. (CP 41-44).

C. ARGUMENT

1. The court did not err when it ruled that the defense counsel opened the door to allow the prosecuting attorney to question a witness concerning the defendant's use of Methamphetamine

A defendant can “open the door” on a particular subject matter. *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307(2008). “ ‘Opening the door’ is a doctrine that applies to whether otherwise inadmissible evidence may become admissible due to the other party's questioning. *State v. Olsen*, 187 Wn.App. 149, 158, 348 P.3d 816 (2015) (citing *State v. Jones*, 144 Wn.App. at 284). “Opening the door” can be triggered in two ways: “(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.” *State v. Jones*, 144 Wn.App. at 298, (quoting 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 103.14 at 66-67 (5th ed. 2007)). “A mere passing reference in response to a question does not ‘open the door’” *State v. Olsen*, 187 Wn. App. at 158, (citing *State v. Stockton*, 91 Wn.App. 35, 40, 955 P.2d 805 (1998)).

In the case at hand, it is important to note that the defense counsel

raised the issue of methamphetamine use. Defense counsel was questioning Ms. Calkins as to why she had been arguing with the defendant lately. The witness did not volunteer any information about methamphetamine use. Defense counsel specifically inquired about Ms. Calkins' boyfriend, and the allegation from the defendant that the boyfriend stole items from the defendant to sell for methamphetamine.

Defense counsel continued to question Ms. Calkins on prior arguments between Ms. Calkins and the defendant. Defense counsel alleged that Ms. Calkins had stolen items on many different occasions from the defendant, and alleged that was the reason they had been fighting.

Further, the entire altercation started based on the facts that the defendant was looking for a rifle in the trailer in which Ms. Calkins was staying. Ms. Calkins testified that the defendant believed that Ms. Calkins had stolen the rifle, and that was why she came to the trailer in the first place.

Once defense counsel raised the issue concerning stealing property from the defendant to sell for drugs, coupled with alleging that Ms. Calkins had stolen other property in the past, the door was opened for the state to introduce testimony "offered to explain, clarify, or contradict the party's evidence." *Tegland* at 66-67 (5th ed. 2007).

Once defense counsel questioned the witness, and only then, did the prosecution ask Ms. Calkins about the methamphetamine use of the

defendant. When the prosecution asked the question if the defendant used methamphetamine, the defense did not object. (Supp. VRP 64). The prosecution asked if the defendant was using methamphetamine when she came to the trailer, to which Ms. Calkins answered "I believe she was." (Supp. VRP 64, lines 7-9). There was still no objection. The prosecution continued in the line of questioning, asking Ms. Calkins why she suspected the defendant was using methamphetamine at the time of incident. It was only then did the defense object, and the objection was only that there was no "foundation as an expert." (Supp. VRP 64, line 13). The defense does not object in any way to the substance of the questions and answers, he objected on grounds that the witness had not been established as an expert, presumably in how to determine if someone was under the influence of methamphetamine. This is not an objection as to the evidence being inadmissible.

The prosecution continues with the questioning regarding how often the defendant uses methamphetamine and how Ms. Calkins can tell. At this point, the defense objects. But it is not to the question. From the transcript it appears that defense counsel is objecting to where the prosecutor is standing, arguing that the prosecutor is trying to intimidate the defendant. This is evidenced by the Judge telling the prosecutor he can stand somewhere else, just not right next to the defendant. (Supp. VRP 64-65). Again, this is not an objection of the admissibility of the evidence.

When the prosecutor continues the questioning as to how Ms. Calkins can tell when the defendant is using methamphetamine, defense counsel objects that the question is outside the scope of his cross-examination. (Supp. VRP 65-66). Once again, this is not an objection of the admissibility of the evidence.

During defense counsels re-cross examination of Ms. Calkins, counsel attempts to use the testimony about the defendant's drug use to his advantage. He tries to discredit Ms. Calkins, using the testimony regarding the defendant's drug use, by stating that the defendant couldn't possible be a drug addict, because the defendant "has a few extra pounds around." (Supp. VRP 67, lines 1-8). When Ms. Calkins explains that the defendant has a thyroid issue, defense counsel abandons this strategy and goes again to trying to discredit Ms. Calkins by attempting to bring up her own meth use and the fact that her children have been removed from her care.

"Even if a trial judge improperly rules that a witness has opened the door to evidence that is not admissible, reversal is not required unless it was prejudicial." *State v. Avendano-Lopez*, 79 Wn.App. 706, 904 P.2d 324 (1995). The defendant asserts that the introduction of evidence regarding her drug requires reversal because it is prejudicial. However, there was no objection to the evidence during trial.

The defendant argues that because the defense counsel objected, even though it was an objection based on no foundation for an expert,

because the defense objected, it counts. That simply is not true. “A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence.” *Avendano-Lopez*, 79 Wn.App. at 710.

RAP 2.5(a) states that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” “These rules are intended ‘to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.’ They are also supported by considerations of fairness to the opposing party: ‘the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.’” *Avendano-Lopez*, 79 Wn.App. at 710. “Even if a trial judge improperly rules that a witness has opened the door to evidence that is not admissible, reversal is not required unless it was prejudicial.” *Id.* In this case, it has not been shown that it was prejudicial. Defense counsel attempted to use the evidence to discredit Ms. Calkins, insinuating that the testimony about drug use was not true, and that Ms. Calkins was not being truthful. Presumably, the defense wanted to make it look like Ms. Calkins was lying about her entire testimony. Because his defense counsel used the testimony to his own advantage, the defendant cannot now argue that the introduction of this testimony was prejudicial error. *Id.* at 711-712.

Defense counsel opened the door to the testimony regarding methamphetamine use, and even tried to use the testimony to the advantage of the defendant by attempting to discredit Ms.Calkins. The doctrine of opening the door exists because it is “intended to preserve fairness: ‘It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.’” *Avendano-Lopez*, 79 Wn.App. at 711-712.

Defense counsel never specifically objected to the testimony as prejudicial, and never asked for a curative instruction. ““An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.”” *State v. Olsen*, 187 Wn. App. at 158 *citing State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) *quoting State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997).

The decision to admit evidence is reviewed for abuse of discretion. An abuse of discretion exists when the trial courts decision is based upon untenable grounds or is manifestly unreasonable. *State v. Stenson*, 132 Wn.2d at 701. The court did not abuse its discretion when it ruled that the door had been opened. The admitted testimony was not objected to, nor was a curative instruction requested; therefore, it was not prejudicial. Even if the

evidence was wrongfully admitted, there is no showing that the evidence materially affected the outcome.

2. The trial court did not err in denying a self-defense instruction

During the jury instructions conference, the defense requested an instruction on self defense. The prosecution objected, citing to *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993); *State v. Walden* 131 Wn.2d 469, 932 P.2d 1237 (1997); and *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012).

State v. Janes held “[f]or the jury to be instructed on self-defense, the defendant must produce some evidence regarding the statutory elements of reasonable apprehension of great bodily harm and imminent danger.” *State v. Walden* and *State v. McCreven* followed suit, holding that “to be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self defense.”

The defendant argues that the trial court wrongfully ruled that the defendant needed to testify or that the defense needed to present a witness who would testify in order to produce evidence that self defense was at issue. The trial court was correct, and caselaw is clear that the defendant must produce some evidence demonstrating self-defense.

The defendant argues that this evidence was clear from the testimony of the responding Deputy. However, it is not clear. The Deputy testified that the defendant told him that she went to Ms. Calkins trailer and

knocked. When no one answered, the defendant threatened to break a window of the trailer belonging to Ms. Calkins if no one let her in. Then the Deputy testified that Ms. Calkins came to the door and there was “some sort of altercation” (Supp. VRP 11-12). The Deputy testified that very shortly after the initial statement, the defendant gave a recorded statement, which elaborated the altercation. The Deputy testified that during the recorded statement the defendant stated she “tried to walk in[the trailer] but her daughter pushed her down the stairs.” The Deputy continued, stating “[the defendant] said she did not want to fall off the stairs so she grabbed a hold of [Ms. Calkins] and was trying to hold on and that’s when [Ms. Calkins] was biting her...” (Supp. VRP 14, lines 3-8).

It is clear from the Deputy’s testimony that the defendant went to the trailer in which Ms. Calkins was staying. The defendant threatened to break a window. The defendant tried to enter the trailer without permission. And finally, the defendant grabbed a hold of Ms. Calkins when Ms. Calkins was attempting to prevent the defendant from entering her residence. This shows that Ms. Calkins was acting in self-defense, not the defendant.

The trial court ruled that “[t]here has to be some threshold provided affirmatively by the defendant that there was self-defense and usually that is, in fact, the defendant testifying I was just defending myself; but it doesn’t have to be that, it can be a third party” (VRP 32, lines 13-18). He went on to rule that threshold of producing any evidence of self defense was not met

(VRP 32, line 23). The trial court did not rule that the defendant had to testify, just that evidence had to be produced, and it was not produced sufficiently through the testimony of the officer.

“While the threshold burden of production for a self-defense instruction is low, it is not nonexistent” *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993). Here, the defendant produce no evidence to demonstrate self-defense. The officer’s testimony did not demonstrate self-defense of the defendant, but rather showed that Ms. Calkins was acting in self-defense. Ms. Calkins testified consistently with the deputy. “A trial court is justified in denying a request for a self-defense instruction where no credible evidence appears in the record to support a defendant’s claim of self-defense” *State v. Roberts*, 88 Wn.2d 337, 346, 562 P.2d 1259(1977). Here, there was no evidence of self-defense on the part of the defendant, and the trial court correctly denied giving a self-defense instruction.

3. The trial court not improperly impose conditions for a substance abuse evaluation and mental health evaluation

The trial court may order a defendant, as a part of any term of community custody, to “[p]articipate in crime-related treatment or counseling services” RCW 9.94A.704(c); and/or “[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community” RCW 9.94A.704(d).

At trial, Ms. Calkins testified that she believed that the defendant was under the influence of methamphetamine when the altercation occurred, as well as the fact that the defendant regularly used methamphetamine (Supp. VRP 64, lines 7-20). With this evidence, it is reasonable for the trial court to believe that methamphetamine use contributed to the crime, and that chemical dependency treatment should be ordered of the defendant.

Further, Ms. Calkins testified that the defendant acts paranoid and accusatory towards her, both during the incident in question and multiple other times prior to the incident (Supp. VRP 66, lines 9-16). This is evidence that the defendant could suffer from a mental health problem.

With the testimony of Ms. Calkins, evidence was presented of a drug addiction problem, and that the defendant was using methamphetamine at the time of the altercation; further, evidence of a mental health problem was introduced. The conditions that were ordered were crime-related and not unreasonable.

D. CONCLUSION

Defense counsel opened the door to the evidence of methamphetamine use. Defense counsel did not specifically object, did not request a curing instruction, and attempted to use the testimony to his advantage. There was no prejudicial effect of the testimony regarding methamphetamine use.

The defense did not present any evidence demonstrating self-defense. The trial court properly denied a self-defense instruction.

There is a nexus between the conditions that were ordered by the trial court and the evidence presented. The conditions are reasonable.

The conviction should be affirmed, and the conditions should stand.

Respectfully submitted this 21st day of February, 2016.

KLICKITAT COUNTY
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CERTIFICATE OF SERVICE

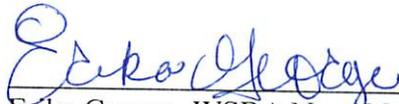
I, Erika George, declare that on January 21, 2016, I emailed per agreement, a copy of the Amended Brief of the Respondent to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of January, 2016.

KLICKITAT COUNTY
PROSECUTING ATTORNEY



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