FILED
FEB 23, 2017
Court of Appeals
Division III
State of Washington

33299-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESUS DUARTE VELA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

The State misapprehends, and as a result grossly misrepresents, Mr. Duarte's proffered defense and the central issue of this appeal. The State appears to believe that Mr. Duarte sought to justify a homicide based on the theory that he was entitled to act in self-defense because Mr. Menchaca was a dangerous man who had physically abused members of Mr. Duarte's family and had made threats to physically harm them as well as Mr. Duarte. (Respondent's Br. at 33-35) The law does not recognize such a defense and Mr. Duarte has not asserted such a defense.

Mr. Duarte's defense is that he justifiably acted in self-defense when confronted by Mr. Menchaca because he reasonably believed Mr. Menchaca intended to kill or greatly injure him. Mr. Duarte testified that this belief resulted from numerous statements made to him by members of his family alleging that Mr. Menchaca had repeatedly assaulted Mr. Duarte's sisters or other family members and made threats to harm them or Mr. Duarte in the future. Defense counsel sought to show that this belief was reasonable because of the number and variety of these statements and the individuals who had made them.

Respondent's brief may be conflating the two different uses of the term "state of mind" in Appellant's Opening Brief. (Resp. Br. at 37, n. 7) The term "state of mind" is sometimes used to refer to the exception

permitting admission of hearsay testimony to show the declarant's state of mind. See ER 803(a)(3) (Appellant's Br. at 19-20).

But in a case where the defense is justifiable homicide, the defendant's state of mind is an element of the defense. That state of mind is central to Mr. Duarte's defense; the trial court erred in excluding evidence that was not hearsay and was directly relevant to this defense. The issue in the case is whether numerous statements had been made to Mr. Duarte as a result of which, at the time of the confrontation with Mr. Menchaca, he believed he had reason to fear bodily harm. (1/20 RP 19) (Appellant's Br. at 7-8, 14-15)

In considering a defense of justifiable homicide, the jury must take into account "*all* the facts and circumstances known to the defendant. . . ." *State v. Wanrow*, 88 Wn.2d 221, 234, 559 P.2d 548 (1977); *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). Because the " 'vital question is the reasonableness of the defendant's apprehension of danger,' " the jury must stand " 'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.' " *Wanrow* at 235 (quoting *State v. Ellis*, 30 Wn. 369, 373, 70 P. 963 (1902)).

The State contends the court properly excluded testimony regarding the statements made to Mr. Duarte because they related to

events that were too remote in time. (Resp. Br at 32-35) But in the context of proving the defendant's state of mind as an element of justifiable homicide, "circumstances predating [an assault] by weeks and months [may be] entirely proper, and in fact essential, to a proper disposition of the claim of self-defense." *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (citing *Allery* at 594).

The State contends that because the statements themselves were not true the trial court properly excluded evidence that various statements were made to Mr. Duarte. (Resp. Br. at 32, 35, 37) The statements were not offered for the truth of the matter asserted. If, as a result of hearing these statements, Mr. Duarte subjectively believed Mr. Menchaca presented an imminent threat of death or serious bodily injury, and his belief was reasonable, and absent evidence that Mr. Duarte knew the statements were untrue, it is entirely irrelevant whether the statements were false. See *State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.2d 176 (1990).

The State seems to suggest that even if the trial court erred in excluding virtually all of the evidence offered to support Mr. Duarte's claim that he acted in self-defense, the error was harmless because the court fully instructed the jury on the elements of justifiable homicide and the State bore the burden of proving that his actions were not justified.

The jury instructions are entirely useless in affording Mr. Duarte his constitutional right to present a defense if he is precluded from presenting any of the evidence that would enable the jury to find that he acted in self-defense as defined in the instructions. Under the State's reasoning, the fact that the State bears the burden of proof in a criminal trial would always permit the court to prevent the defendant from offering any evidence whatsoever.

The State contends that because defense counsel failed to formally object to the court's refusal to give the requested instruction on retreat the issue has been waived and cannot be raised for the first time in this appeal. As a general rule, such an objection may be required. See *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The court rule requires that the party objecting to the trial court's refusal to give a requested instruction must "state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c).

The purpose of CrR 6.15(c) is to give the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977); *State v. Gosby*, 85 Wn.2d 758, 763, 539 P.2d 680 (1975). Where the record demonstrates that a proposed instruction has been brought to the court's attention and the court has demonstrably had an opportunity to

consider whether the instruction should be given, the exception is sufficient and the error is not waived. *Id*.

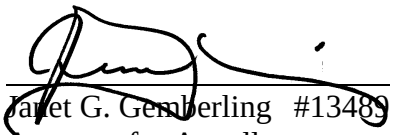
The record here amply demonstrates the trial court's awareness of the requested instruction, and the court's analysis explaining its decision not to give the requested instruction. (RP 747)

B. CONCLUSION

Mr. Duarte's conviction should be reversed and the matter should be remanded so that he may be afforded a trial at which he is permitted to present his defense.

Dated this 23rd day of February, 2017.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 332993-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JESUS DUARTE VELA,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2017, 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:

Karl Sloan
ksloan@co.okanogan.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2017, I mailed a copy of the Appellant's Reply Brief in this matter to:

Jesus D. Vela
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Signed at Spokane, Washington on February 23, 2017.

Janet G. Gemberling
Attorney at Law

JANET GEMBERLING, PS

February 23, 2017 - 11:07 AM

Transmittal Letter

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