

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

FILED

DEC 02 2016

STATE OF WASHINGTON,

Respondent,

v.

Tyree Q. Houfmuse,

Appellant

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Robert E. Swisher, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial Counsel was ineffective in using the affirmative defense of self-defense as to count one, assault in the first degree, but not using the affirmative defense of necessity as to the second count, unlawful possession of a firearm in the second degree.

2. Issue

Where Appellant's defense is that he necessarily was in possession of a firearm despite having been convicted of a felony because he reasonably believed that he was at risk of death or great bodily injury if he did not protect himself, was trial counsel ineffective for not asserting the affirmative defense of necessity?

B. STATEMENT OF THE CASE

3. Procedural History

On December 5th, 2014, Tyree Q. Houfmuse (Appellant) was charged by amended information with one count of assault in the first degree with a felony firearm offense, and with a notice of firearm allegation and enhancement, and one count of unlawful possession of a firearm in the second degree. RCW 9A.36.011(1) (a); RCW 9.41.010(8); RCW 9.94A.825; 9.94A.533(3); RCW 9.41.040(2)(a)(v); CP 7-8. On June 29, 2015, trial commenced on this matter. CP 23. On July 2nd, 2015, Houfmuse moved for a mistrial due to juror misconduct, which was granted by the court. CP 41. On November 16th, 2015, the second trial on this matter commenced. CP 84. On November 19th, 2015 Houfmuse was found not guilty as to count one, assault in the first degree and guilty as to count two, unlawful possession of a firearm in the second degree. CP 93. On March 25th, 2016 Houfmuse was sentenced to 20 months in prison

and assessed \$2053.75 in fines and costs. CP 99-100. On March 25th, 2016, Houfmuse filed a timely notice of appeal. CP 109.

4. Defense Case

a. Opening Statement

In opening statement, defense counsel laid the groundwork for Houfmuse's self-defense claim, as well as a potential necessity defense as to the second count. In September 2014, Houfmuse began dating Anthony "Redd" Asselin's ex-girlfriend, Aquarius Gibbs, and helping raise the child she had with Asselin. RP 113. This arrangement became a real issue with Asselin, and he began threatening Gibbs and Houfmuse, saying: "I'm going to kill you." RP 114. Houfmuse was aware of Asselin's explosive temper and reputation for violence and became genuinely afraid of him. RP 115. As the barrage of phone calls increased in intensity and frequency, Houfmuse and Ms. Gibbs were forced to become hermits for fear of what Asselin might do if they encountered him. RP 116.

On the Wednesday before Thanksgiving, Houfmuse and Gibbs decide to go out for a drive, and end up at the Village Tavern in Kennewick, Washington. RP 119. Within 15 minutes of arriving at the bar, Asselin entered the bar with some friends. RP 119. Asselin wanted to talk to Houfmuse who was nervous and trying to calm things down. RP 119. Houfmuse suggests, "'Let's go out and talk about this like men," and went outside to talk about the issue. RP 119.

Once outside, Asselin said little or nothing. RP 116. A gun comes out, a struggle starts, and Houfmuse somehow gets the gun away from Asselin. Asselin is not fazed and continues coming towards Houfmuse. RP 119. Houfmuse started running away and shooting wildly behind him. RP 119.

b. Witness Testimony

Several witnesses testified at trial as to what happened between Asselin and Houfmuse leading up to the shooting and who possessed the gun when the shooting happened. Felicia Richardson testified, "There were no hands, fists going up, none of that...it was just back and forth like you could just see them talking back and forth." RP 125. Richardson continued, "Then I heard some people say some things, and then I walked over to try to get Redd (Asselin) to come this way... he turned this way to walk away, and when he went to walk away, all I heard was gunshots." RP 126. She further claimed that she saw Houfmuse pull the trigger, although she was forced to admit that at the first trial she said, "I didn't see no gun." RP 133.

Ariel Mitchell testified, "I saw [Asselin] walking from a car in the parking lot towards the bar door, and I saw [Houfmuse] walking towards him... I just probably got about five, six steps towards the bar door, and then I turned to look at them, and they started squaring up like they were going to fight...[Houfmuse] put his hands up first, and then Asselin just shrugged, and he put his hands up. RP 144-145. Ms. Mitchell continued, "They had just put their hands up, and that's when Tyree went and grabbed the gun, and shot Asselin. RP 146.

Aquarius Gibbs also testified to what happened that night from her perspective and to the endless threats and insults Asselin communicated to herself and Houfmuse. A serious relationship began to develop between Gibbs and Houfmuse around September, 2014. RP 210. Gibbs testified that Asselin would call because he was angry about the relationship and, "there were threats." RP 211. Specifically, Asselin threatened to "beat me up, knock my teeth out so nobody would want me, so [Houfmuse] wouldn't want me anymore, hurt [Houfmuse]...or if he was to see us together, he would beat him, one way or the other. RP 212. These threats were

delivered despite the fact that there was a no contact order against Asselin in Gibbs' favor. RP 208-209.

Houfmuse knew Asselin was a large individual, was six, four; 297 pounds; and thus was afraid that Asselin would follow through on his threats to hurt either himself or Gibbs. RP 209; 215. Gibbs testified: "before we would go out and stuff...after that, we started to stay in the house more and do more things in the house...to avoid seeing [Asselin]." RP 216. Gibbs testified that she saw a gun on her dresser, wrapped in a towel a few weeks before the incident. RP 191. Gibbs did not confirm that it was Houfmuse's gun, stating, "quite a few people," had been over to her house during that time and, "it could have been anybody's." RP 209.

On the night of the incident, Asselin entered the Village Tavern and, "Started yelling at [Houfmuse]...like as soon as he walked in, he started heading towards [Houfmuse], and started yelling." RP 226. Gibbs continued, "[Houfmuse] was telling him basically, 'Just calm down.' and then 'Let's just handle this,' you know, like talk man to man and quiet and not all in front of everybody...and then he went to go walk outside and Asselin followed behind him." RP 226. Gibbs did not see a gun in Houfmuse's possession on the night of the incident. RP 220.

Houfmuse also testified on his own behalf. Houfmuse and Asselin, "didn't have any problems at first," and were acquaintances through Asselin's younger brother. RP 342-343. The issue between them was Houfmuse having a relationship with Gibbs, starting in August, 2014. RP 344. Houfmuse testified to his first conversation with Asselin regarding his relationship with Gibbs:

"I was like, 'Man, if it's a problem, let me know.' And he told me, 'Yes. It's an 'F'ing problem,' and I was like, 'Well, man, you already have a girlfriend. You already have another girlfriend anyways.' 'I don't see the problem now.' 'What am I supposed to do

now?' He said, 'Stop hanging out with my 'F'ing baby momma, and stay away from my kids.' And I gave her the phone."

RP 346-347.

"We continued to hang out, and she would continue to tell him when I was there and put me on the phone. And that's -- and that's where the problem came. That's when all the threats started coming, when she would put me on the phone. And I started -- I don't know. I just -- I started taking them seriously because it was like, everyday like non-stop like blowing up the phone."

RP 348.

Houfmuse testified that the threats got more serious over time: "If you change my daughter -I'm going to kill you if you change my daughter's diaper again... If I run into you with my baby momma, it's a rap." RP 351. Despite Asselin's threats Houfmuse claimed, "I never wanted to go out and get [Asselin]. I never looked for him...I never went anywhere he would be at. I avoided him at all costs. I never called him. RP 359.

Houfmuse testified that finally Asselin was threatening to come over to Gibbs house and start a fight:

He kept threatening. My brother was getting threats. [Asselin] was threatening me. He was -- he started threatening to come over at that point to where -- at first being at the house where his kids were, I was safe there because he wasn't going to come over and do anything. But then he started getting -- he started getting mad, and he started threatening to come. That he was just going to come over there regardless of the contact order, and she would go give the phone to her mom to have her mom try to talk him out and threatened to call the cops if he came over.

RP 358.

On the night of the incident, "There was nobody in the bar at first...it was just older people." RP 263. "Finally like maybe after 10, 15 minutes, and after I got my shot, I noticed black people started coming to the bar...I seen somebody come in the door that I know that [Asselin] is friends with...I went outside to smoke a cigarette, and that's when I seen cars pulling in." RP 264. Once Asselin saw Houfmuse at the bar he "He started yelling right away... he said,

'[w]hat did I tell you I was going to do if I catch you with my baby momma...[y]ou playing daddy with my kid." RP 264. Houfmuse continued: "One of his friends holds him back so he can't get all the way like close enough to hit me. And I'm looking at Aquarius to like, let's go. You know what I'm saying? I'm about to get beat up. Let's go. I'm scared. I'm going -- I'm trying to get outside, and I'm backing up, and he's right behind me." RP 265. At this point Houfmuse testified, "I was trying to actually get to the car...I was wanting to leave... [a]nd so that was my whole point of running in the bar when I first seen him was to get Aquarius so we could leave. RP 374.

Houfmuse testified to the final moments outside the bar leading up to the shooting:

" [Asselin] was right in my face threatening we, you know, yelling at me, and I backed -- I kept getting backed up. No matter what other direction I tried to go, I couldn't go any other direction. I got backed up to where that truck is, where -- where that line is right there. It looks like there's a car, like a rectangle that's right there where a car would have been, a truck. That's when he pulled the weapon out, pulled the gun out. I grabbed his arm. I grabbed -- one of my hands grabbed the arm, and then I grabbed the gun with the other hand. And it was a little -- it was so -- it happened all so fast. It was fast. It was a struggle for like -- it seemed like seconds. It was quick. I grabbed it. His shoe came off, and that's when I obtained -- that's when I got the gun, was right then and there.

RP 375-380.

Despite the fact that Houfmuse was shooting at Asselin, Houfmuse testified, "He was coming after me... [h]e was running towards me in a swinging motion...[getting shot] seemed like it made him madder because we were struggling for it and I got it away, and he still advanced me...[h]e came aggressively at me." RP 382. I shot. I didn't even know if I hit him or not, and I just kept running all the way to right here. I'm like, "Let's go," and I dropped the weapon somewhere in between here and Aquarius, and I jumped in the car and we took off. RP 383.

When asked why he didn't call the police, Houfmuse testified: "He's not afraid of the police," elaborating, "[t]here's already a restraining order. He doesn't care about the restraining order." RP 395. "I was afraid that if I called the police and they didn't do anything about it, I was going to be -- he got a lot of friends out here...he grew up out here... [e]verybody knows him...I would not even be able to walk to the store." RP 395.

C. ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A NECESSITY INSTRUCTION APPLICABLE TO UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.

1. Summary of Argument

Houfmuse's theory as to the charge of assault in the first degree was that he was acting in self defense, i.e that he act on appearances in defending himself, because he believe[d] in good faith and on reasonable grounds that he is in actual danger of injury. In this case, Houfmuse believed based on his interactions with Asselin that Asselin would beat him severely or even kill him because he was dating Asselin's ex-girlfriend. The jury believed Houfmuse was defending himself and acquitted him of the assault in the first degree charge.

However, because counsel failed to raise necessity as an affirmative defense and include it as a jury instruction, the jury never had the ability to consider whether necessity was a viable defense to the charge of possession of a firearm in the second degree. Despite the fact that many of the same facts that support a self-defense claim also support a necessity claim as to the possession of a firearm, there was only a general denial as to that charge. Had the jury been able to consider necessity, they might have found that Houfmuse was justified in possessing the firearm based on the danger he was in.

2. Applicable Legal Standard

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. *Const. Art. 1 §22; US Const. Amend 6; Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Personal Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, a defendant must show that his attorney's representation (1) was deficient and (2) caused prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient representation is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To show prejudice, the defendant must establish a reasonable probability that but for counsel's errors, the outcome would have been different. *Horton*, 116 Wn. App. at 921-22. In reviewing a claim of ineffective assistance of counsel, we presume that counsel's conduct fell within the wide range of reasonable professional assistance. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

More specifically, courts have found counsel ineffective for failing to propose an instruction that would have bolstered a defense theory or proposed an improper instruction that minimized the state's burden of proof. See e.g. *State v. Woods*, 138 Wn. App. 191, 199-202, 156 P.3d 309 (2007) (counsel ineffective and assault conviction reversed where counsel proposed and trial court gave improper "act on appearances" instruction, WPIC 17.04, which reduced state's burden of disproving self-defense); *United States v. Alferahin*, 433 F.3d 1148, 1161 (9th Cir. 2006) (counsel ineffective for failing to obtain instruction on element of charged crime, thereby abandoning "one of his client's most promising defenses.").

3. Failure to assert necessity as an affirmative defense constituted deficient performance.

Like in *Alferahin*, Houfmuse's counsel abandoned his client's most promising defense to the unlawful possession of a firearm charge, necessity. *Alferahin*, 433 F.3d at 1161. "The common law has long recognized the existence of a defense of necessity." *State v. Diana*, 24 Wn. App. 908 (1979) quoting *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834). "Generally, necessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law." *Id.*, [quoting W. LaFave & A. Scott, Handbook on Criminal Law 381-83, 386 (1972)]. "A necessity instruction...can in certain circumstances be a defense to the crime of unlawful possession of a firearm." *State v. Jeffrey*, 77 Wn. App. 222, 226 (1995).

To establish this defense, [defendant must] show: (1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *State v. Stockton*, 91 Wn. App. 35, 41 (1998) quoting *United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987). The defendant must prove the defense by a preponderance of the evidence. *Jeffrey*, 77 Wn. App. at 225; *See WPIC 18.02*.

a. Houfmuse was under unlawful and present threat of death or great bodily injury.

Courts have determined that meeting this element is predicated on whether the threat was imminent. *United States v. Harper*, 802 F.2d 115, 117-18 (5th Cir. 1986). In *Harper*, the defendant bought a gun to protect himself at his business, which had been the object of several

robbery attempts over an 18-month period. *Harper*, 802 F.2d at 117-118. The court found no evidence that the defendant was in danger of imminent bodily harm at the moment he purchased and possessed the gun, he was not entitled to the necessity defense. *Id.*, at 118. By contrast, Division One held that a defendant was entitled to a necessity instruction where the evidence showed that he grabbed an assailant's gun while being beaten, pointed it at his attackers, and ran away. *State v. Stockton*, 91 Wn. App. 35, 38, 44, 955 P.2d 805 (1998).

Here, the facts are either directly in line with *Stockton* if Houfmuse's story is to be believed or between *Harper* and *Stockton* if the other witnesses in the case are believed. Under Houfmuse's version of events, Asselin pulled the gun out, and Houfmuse wrestled the gun away, and fired the gun as he was attempting to get away from Asselin. RP 119; 375-380. This is on point with the facts in *Stockton*, a case where the defendant was able to procure a gun from his attackers and use it to protect himself. *Stockton*, 91 Wn. App. at 38.

Felicia Richardson and Ariel Mitchell testified that they saw Houfmuse draw the gun and fire it at Asselin and Aquarius Gibbs testified that there was a gun in her home, although could not confirm that it was Houfmuse's gun. RP 136; RP 146; RP 209. Even if Richardson and Mitchell were correct in asserting that Houfmuse possessed the gun before the shots were fired and the jury believed that the gun in Aquarius Gibbs's home belonged to Houfmuse, there is a distinction to be made between this case and *Harper*. Asselin threatened Houfmuse: "If I run into you with my baby momma, it's a rap." RP 351; and also threatened to come over to Ms. Gibbs house where Houfmuse was living and either beat up or kill defendant, despite the presence of a no contact order taken out on Gibbs' behalf. RP 358. These threats caused Houfmuse and Gibbs to, "stay in the house more and do more things in the house...to avoid seeing [Asselin]," because of a high likelihood of Asselin starting a violent confrontation. RP 216. The night of the incident was one

of the first occasions they had gone out in weeks, and despite going to an out of the way place, it only took 10-15 minutes for Asselin and his friends to show up at the bar for the specific purpose of confronting Houfmuse. RP 264. In *Harper*, the defendant assumed that because there were robberies in the past there would be more in the future; here, Houfmuse rightly believed that the moment he showed his face in public there was a likelihood of an encounter with Asselin, and in fact that is exactly what happened. RP 264; *Harper*, 802 F.2d at 117-118. Because the threat to Houfmuse was continuous and imminent, it can be described as a present threat.

- b. Houfmuse did not recklessly place himself in a situation where he would be forced to engage in criminal conduct.

The facts on the record show that Houfmuse did everything in his power to either avoid contact with Asselin or defuse the situation. Ms. Gibbs testified: “we started to stay in the house more and do more things in the house...to avoid seeing [Asselin],” RP 216. Houfmuse testified: “I never wanted to go out and get [Asselin]...I never looked for him...I never went anywhere he would be at...I avoided him at all costs...I never called him. RP 359. At the Village Tavern, Houfmuse urged Asselin to ‘Just calm down,’ before walking outside with Asselin followed behind him. RP 226 Far from recklessly placing himself in the situation, Houfmuse was doing everything in his power to calm Asselin down and avoid the conflict that Asselin eventually forced on him.

- c. Houfmuse had no reasonable alternative.

To show the absence of a reasonable alternative to possessing the firearm, the defendant must show that an alternative was actually tried, that there was no time to try an alternative, or that a history of futile attempts revealed the illusory benefits of the alternative. *State v. Parker*, 127 Wn. App. 352, 355 (2005). In *Parker*, the court found that defendant did not try a

reasonable alternative: “he never contacted the police about his shooting, even though the police made several attempts to contact him.” *Parker*, 127 Wn. App. at 355.

Houfmuse claimed that before the confrontation outside he was, “trying to get outside, and I'm backing up, and he's right behind me.” RP 265. “[Asselin] was right in my face threatening me, you know, yelling at me, and I backed -- I kept getting backed up...no matter what other direction I tried to go, I couldn't go any other direction.” RP 375-380. In other words, in the moment Asselin started the confrontation with Houfmuse, there was no legal alternative; Houfmuse was in a situation where he needed to defend himself in that immediate moment and could not take the time to call the police.

The State argued that Houfmuse should have called the police when Asselin first started threatening him, but Appellant can still rely on *Parker*, specifically, that a history of futile attempts revealed the illusory benefits of the alternative. RP 136; RP 146; RP 209. *Parker*, 127 Wn. App. at 355. Even though Houfmuse did not himself attempt to contact the police, Asselin had a no contact order taken out on behalf of Gibbs, which he willingly violated by calling and texting Gibbs frequently and being within her presence on the night of the incident. RP 208; RP 209; RP 395. Further, Houfmuse believed his life would be more at risk if he called the police: “I was afraid that if I called the police and they didn't do anything about it, I was going to be -- he got a lot of friends out here...he grew up out here... [e]verybody knows [Asselin]...I would not even be able to walk to the store.” RP 395. The disregard Asselin had for the lawful no contact order, “revealed the illusory benefits of the alternative,” of calling the police and it would have likely put Houfmuse in more danger to do so. *Parker*, 127 Wn. App. at 355.

- d. There was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

In *Parker*, the court found that Parker failed to establish a direct causal relationship between his possession of a firearm and the avoidance of the threatened harm, because, his gun possession did not eliminate the possibility of attacks by his assailants. *Parker*, 127 Wn. App. at 356. See also *Harper*, 802 F.2d at 118 (though possession of firearm made robbery attempt less attractive, it did not eliminate the defendant's danger).

The facts in this case are distinct from *Parker* or *Harper*. Gibbs testified: Asselin threatened to “beat me up, knock my teeth out so nobody would want me, so [Houfmuse] wouldn't want me anymore, hurt [Houfmuse]...or if he was to see us together, he would beat him, one way or the other. RP 212. Houfmuse testified that Asselin said: “I'm going to kill you if you change my daughter's diaper again... If I run into you with my baby momma, it's a rap.” RP 351. Asselin started getting mad, and threatening to come over despite the no contact order. RP 356. Houfmuse also knew that Asselin was a large individual at six, four; 297 pounds. RP 209. In other words, Houfmuse knew that Asselin was a large, violent person who threatened Houfmuse’s life on a regular basis. Unlike in *Parker*, where possessing a gun did not eliminate the possibility of attacks by his assailants, possessing a gun at the right moment was the only thing that ensured the Houfmuse did not sustain serious injury. *Parker*, 127 Wn. App. at 356.

4. Counsel’s failure to assert necessity prejudiced the Appellant’s case.

To show prejudice, the defendant must establish a reasonable probability that but for counsel's errors, the outcome would have been different. *Horton*, 116 Wn. App. at 921-22. To be convicted of the charged offense the only had to prove that Houfmuse own[ed], had in his possession, or has in his control any firearm and he If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense. RCW 9.41.040(2)(a)(v). There were three witnesses who testified that Houfmuse possessed a firearm: Felicia Richardson

and Ariel Mitchell both testified that they saw Houfmuse draw a gun in the confrontation with Asselin, and Aquarius Gibbs testified that she saw a gun on her dresser partially wrapped in a towel in the days leading up to the incident at the Village Tavern. RP 133; RP 145; RP 187-188. Even Houfmuse's possession of a gun that he claimed Asselin dropped could be interpreted as unlawful possession of a firearm under the statute. Because counsel only asserted a general denial as to the firearm, the jury merely had to believe the witnesses claim that Houfmuse possessed a firearm to have enough evidence to find Houfmuse guilty on that charge. Had a necessity defense been raised, the jury could have believed that Houfmuse possessed a firearm, but taken into account the elements of the necessity defense. Considering the jury acquitted Houfmuse of the assault in the first degree charge based on self defense there is a reasonable probability that but for counsel's failure to raise necessity as a defense, Houfmuse would have been acquitted on the unlawful possession of a firearm charge. *Horton*, 116 Wn. App. at 921-22.

CONCLUSION

Defense counsel was deficient in not raising an affirmative defense of necessity, and it prejudiced Appellant's case. *McFarland*, 127 Wn.2d. at 334-35. This court should reverse Appellant's conviction and remand for a new trial.

DATED this 29th day of November.

Respectfully submitted,
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