

FILED
Feb 07, 2017
Court of Appeals
Division III
State of Washington

No. 34394-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

TYREE HOUFMUSE,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-01316-1

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

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.” Br. of Appellant at 1.

Response: The defense attorney made a tactical decision not to emphasize the defendant’s version of events regarding the firearm. The defendant’s story that the victim brought the firearm to a bar, that he obtained control of the firearm after struggling with the victim over it, and then accurately shooting the victim as he was running away, is not supported by any other witness. Only that story would support a necessity instruction. The defense attorney wanted to demonstrate that the defendant was so afraid of the victim that he had to arm himself well in advance of a chance encounter at a bar on the night in question. Further, the defendant would have had the burden of proving the necessity defense. Given the evidence, there is no reasonable probability that he could have sustained that burden.

II. STATEMENT OF FACTS

A romantic triangle between Anthony Asselin, Aquarius Gibbs, and defendant develops.

Anthony Asselin, known as Redd, and Aquarius Gibbs met around the beginning of 2011 and started dating at the end of that year. RP at 204. They had a child together, who was born on May 1, 2012. RP at 205. However, Ms. Gibbs states that Mr. Asselin was physically abusive and she stopped living with him at the end of 2012. RP at 205-06. About in September 2014, she and the defendant began dating. RP at 210. Mr. Asselin did not like this, saying, ““Stop hanging out with my ‘F’ing baby momma, and stay away from my kids.”” RP at 347.

According to the defendant and Ms. Gibbs, Mr. Asselin started threatening them, virtually daily. RP at 212-16; 348. The defendant reports Asselin told him, ““If I run into you with my baby momma, it’s a rap.”” RP at 351. Ms. Gibbs also stated that Asselin threatened to beat up her and the defendant if he saw them together. RP at 212.

Tension escalates after Mr. Asselin participates in an assault against the defendant’s brother in Hermiston, Oregon, leading the defendant to get “protection.”

The defendant’s brother, Rodrell Houfmuse, testified about an assault that occurred the week before Thanksgiving 2014. RP at 333, 358.

Rodrell¹ stated that Mr. Asselin and two others came to his residence in Hermiston. RP at 328-29. All three had pistols and entered the house uninvited. RP at 329. The three men assaulted Rodrell outside the residence and Rodrell told his brother about this. RP at 335.

This led the defendant to feeling he and Ms. Gibbs needed “protection.” RP at 359. Although the defendant said “protection” could mean a rock or knife, Ms. Gibbs stated that the defendant told her he was going to get a gun and displayed a gun to her at her residence before the shooting on Thanksgiving eve. RP at 185-86, 192, 360.

The defendant shoots Mr. Asselin outside the Village Tavern on Thanksgiving eve 2014.

The defendant, Ms. Gibbs, and a Cheryle Dixon went to the Village Tavern on November 25, 2014, Thanksgiving eve. RP at 178, 262. The exact time they arrived is unknown, but the bar security tape shows the defendant entering the bar at 11:10 p.m. RP at 266. Twelve seconds later, Mr. Asselin enters the bar and goes in the same direction as the defendant. RP at 266. Less than one minute later, the defendant leaves the bar, followed immediately by Mr. Asselin, who is followed by a group of men. RP at 266.

¹To avoid confusion, the State will refer to the defendant’s brother by his first name, Rodrell.

Bar patron Felicia Richardson testified that she saw Asselin and the defendant talking. RP at 125. She believed a fight was going to break out, but saw Mr. Asselin start to walk away when the defendant pointed a gun right at him and shot 4-5 times. RP at 126-28.

The defendant writes that, "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." Br. of Appellant at 3. This is not correct. Ms. Richardson's testimony at trial was thus:

19	Q	Well, ma'am, now, you've testified in this matter once
20		before; have you not?
21	A	I have.
22	Q	And do you recall the last time that you testified when
23		Mr. Bloor asked if you saw a gun, you actually said that, "I
24		didn't see no gun"?
25	A	I don't recall all that. I remember seeing the gun. I

RP at 129.

The defendant's citation to RP 133 is not helpful: it does not contain any testimony from Ms. Richardson.

Another patron, Ariel Mitchell, arrived at the bar parking lot and saw Mr. Asselin walking toward the bar door after talking to the defendant. RP at 144-45. She saw the defendant take a gun out of his coat and shoot Mr. Asselin. RP at 145. She remembers seven shots. *Id.* After

shooting Mr. Asselin, the defendant aimed the gun at her and her boyfriend. RP at 150.

The defendant jumped in his car and drove off with Ms. Gibbs to Hermiston, Oregon. RP at 183, 383.

There were six shell casings recovered at the scene. RP at 278-82. Mr. Asselin had three gunshot wounds, one to his chest, one to his abdomen, and one to his elbow. RP at 165-66. The result is complete paralysis from the fourth thoracic vertebra down. RP at 167.

The defendant stipulated that he had a prior felony conviction. Ex. 23.

The defendant's version of the shooting and motive:

The defendant denied possessing a gun going into the Village Tavern. RP at 371. He claimed that Mr. Asselin pulled out a gun during the confrontation in the Village Tavern parking lot. RP at 379. He stated that he grabbed Mr. Asselin's arm and took the gun from him after a struggle. RP at 380. The defendant claimed that the gun went off two or three times during the struggle and hit the pavement. RP at 380. He stated that he then turned and ran and shot behind him without looking back. RP at 382. The defendant testified that he shot at Mr. Asselin because Mr. Asselin was swinging at him. RP at 382.

However, in a jailhouse recorded phone call the defendant indicated that he shot Asselin out of revenge for the assault of his brother about a week earlier, and it did not have anything to do with a romantic triangle involving Ms. Gibbs. Ex. 22. From the transcript of that recorded phone call. Exhibit 22:

These m-----f----- are leaving state to come to the Hermiston to f--- with my family . . . You don't put your hands on my f----- brother for nobody, you know what I'm saying? I don't give a f---who it is or what she did or what they did, you don't f----- come down here at gunpoint. (Ex. 22 at 4).

...

And they just beat the shit out of my brother and made the other guy stay in the room, and then after they beat him up telling him, "We should kill your bitch ass." (Ex. 22 at 11).

...

I asked the girl [meaning Aquarius Gibbs] why would her baby daddy [meaning Anthony Asselin] do that to my brother, and she asked him and he was like, "what the f---?" He was like, "Man, you tell him that even if I did have something (unintelligible) what the f--- is he or anybody else going to do about it," . . . (Ex. 22 at 15-16).

...

[M]e and him didn't have no problem over the bitch. [Meaning Mr. Asselin and the defendant had no problem regarding Ms. Gibbs] (Ex. 22 at 19).

The jury found that the State had not proven a lack of self-defense beyond a reasonable doubt and found the defendant not guilty of Assault in the First Degree. CP 81. However, the jury found him guilty of Unlawful Possession of a Firearm in the Second Degree. CP 82.

III. ARGUMENT

A. The defendant did not receive ineffective assistance of counsel.

1. Standard on Review

The defendant has the burden of proof on a claim for ineffective assistance of counsel. The defendant must overcome the presumption that his counsel was effective by demonstrating that 1) counsel's representation fell below an objective standard of reasonableness and 2) the deficient performance prejudiced the defense. *In re Gomez*, 180 Wn.2d 337, 347-48, 325 P.3d 142 (2014).

2. The defendant has not proven that his attorney's failure to request a "necessity" instruction fell below an objective standard of reasonableness.

The "necessity" instruction should be considered under both theories presented at trial: 1) the testimony from State witnesses Felicia Richardson, Ariel Mitchell, and Aquarius Gibbs that the defendant had a gun prior to the shooting, which was supported by the defendant's recorded jailhouse telephone call; and 2) the defendant's trial testimony that Mr. Asselin had the gun, the defendant took it away from him in a struggle, and shot Asselin in self-defense.

- a. **If the defendant's version is not believed, the necessity defense would not apply because he possessed the gun before the necessity arose.**

State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995), was the first case in the State to discuss whether the necessity defense could be available on charges of Unlawful Possession of a Firearm. The *Jeffrey* court held, "the Legislature did not intend for a person threatened with immediate harm to succumb to an attacker rather than act in self-defense." 77 Wn. App. at 226. Mr. Jeffrey's wife had seen a prowler outside their kitchen window at 11:30 p.m. *Id.* at 223. They called the police who did not locate the suspect. *Id.* Mr. Jeffrey called a friend who left his .45 mm handgun behind. *Id.* Sometime later in the night, the Jeffreys heard noises outside their bedroom window. *Id.* Mr. Jeffrey saw a silhouette outside the window, retrieved the gun, and fired a shot through the headboard of the bed. *Id.*

The court held these facts were insufficient to warrant a "necessity" instruction. *Id.* at 227. Even if an individual was lurking outside the residence, there was no threat of imminent serious bodily injury and there was a reasonable alternative: call the police. 77 Wn. App. at 227.

Likewise, in *State v. Parker*, 127 Wn. App. 352, 110 P.3d 1152 (2005), the defendant testified that he carried a firearm because he had been shot at nine months before and the assailants were still at large. This was insufficient to support a “necessity” instruction. 127 Wn. App. at 355. The court cited with approval *United States v. Harper*, 802 F.2d 115, 117-18 (5th Cir. 1986), which affirmed the refusal to give a necessity instruction where the defendant bought a gun to protect himself at his business which had been robbed several times over an 18-month period. *Parker*, 127 Wn. App. at 355

Parker set forth the elements for the necessity defense: 1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical 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. 127 Wn. App. at 354-55.

Therefore, if the defendant’s version is not believed—if he acquired a gun after his brother was assaulted in Hermiston, Oregon, if he took that gun with him to the Village Tavern and shot Mr. Asselin in the parking lot there after an exchange of words—the court would not give a necessity instruction.

The jury could have believed that the defendant felt threatened by Mr. Asselin or that the defendant was concerned for his safety after his brother was assaulted. But that is no different from the belief that a prowler may break into your house (*State v. Jeffrey*), that people who shot at you are still at large (*State v. Parker*), or that your business has been robbed several times (*US v. Harper*); there is no imminent danger. Even if Mr. Asselin followed the defendant out of the bar and exchanged angry words with the defendant in the parking lot, the defendant had no right to possess a firearm while in the bar, leaving the bar, or talking to Asselin. The defendant had the alternatives of calling the police while in the bar or walking away while talking to Asselin in the parking lot.

b. If the defendant's testimony is believed, the defense attorney did not fall below an objective standard of reasonableness by not arguing "necessity" because it was a reasonable trial tactic.

In contrast to the above cases, a felon may arm himself under the circumstances addressed in *State v. Stockton*, 91 Wn. App. 35, 955 P.2d 805 (1998). In that case, the defendant testified that three men approached him, asked him for money, and began assaulting him. 91 Wn. App. at 38. He saw a gun in someone's hand and grabbed it. *Id.* The gun fell to the ground, the defendant picked it up, pointed it in the assailants' direction, and ran away. *Id.* The court said this was sufficient for a necessity defense.

However, at trial the defense attorney made a reasonable tactical decision not to emphasize this statement. Exceptional deference must be given when evaluating trial counsel's strategic decisions. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Evidence that the defendant had a long, well-developed fear of Mr. Asselin would support his claim of self-defense. Likewise, evidence that the defendant armed himself several weeks in advance because he was fearful of the defendant hunting him down would support his claim of self-defense.

Evidence that the defendant had a confrontation with Mr. Asselin in a bar in which there was a struggle over a gun would present problems for the defendant. First, this version of events would be the only one before the jury. No one else, Ms. Gibbs, nor Ms. Richardson, nor Ms. Mitchell, state they saw Mr. Asselin with a gun and the defendant took it from him. Also, the jury would have a highly unlikely version of the shooting: the defendant shooting behind himself as he was running away from Mr. Asselin and hitting him virtually with every shot.

The defense attorney could have emphasized this testimony. It may have helped on the issue of whether the defendant had a defense to the Unlawful Possession of a Firearm charge. However, the seriousness level of the charge of Unlawful Possession of a Firearm in the Second Degree is

III, while the seriousness level of Assault in the First Degree is XII. RCW 9.94A.515.

The defense attorney wanted to emphasize that the defendant had been in fear of Mr. Asselin for weeks. He emphasized that the encounter at the Village Tavern was more than a chance encounter. Without saying in so many words, the defense attorney argued that, "Of course the defendant had a gun because Mr. Asselin was hunting for him."

Given the huge difference in the sentencing possibility between an Unlawful Possession of a Firearm charge and an Assault in the First Degree charge, this is a reasonable strategy.

- B. The defendant cannot demonstrate that there is a reasonable probability that he would have been found not guilty of the crime of Unlawful Possession of a Firearm.**
 - 1. The State concedes a necessity instruction could have been proposed. But the defendant would have risked a greater likelihood of a guilty verdict on the Assault in the First Degree count.**

The defendant is correct in arguing that a necessity defense could have been proposed under WPIC 18.02. However, as stated above, that would have damaged his self-defense claim on the Assault in the First Degree charge.

2. No other witness testified consistently with the defendant and he would not have been able to prove it was necessary for him to have a firearm.

The jury may not have believed the defendant's story that Mr. Asselin brought the gun to the bar and that the defendant grappled it away from him; no one else so testified. The jury may have not believed the defendant's story that he shot blindly at Mr. Asselin while running from him; that seems very unlikely. But, even with these problems, the jury could have concluded that the State did not prove beyond a reasonable doubt that the defendant did not act in self-defense in shooting Mr. Asselin.

The necessity instruction would have changed the burden of proof. The defendant would have to prove by a preponderance that it was necessary for him to shoot at Mr. Asselin. The defendant would have to prove that he was not the one who brought the gun to the bar. The defendant would have to prove that Mr. Asselin posed a danger to him so great that he would be permitted to shoot Mr. Asselin. The defendant would have to prove that there was no reasonable legal alternative to shooting Mr. Asselin.

The State had to prove beyond a reasonable doubt that the defendant did not act in self-defense. While the State had such evidence, the jury found it was insufficient. However, there is no reason to believe

that the defendant could have persuaded the jury by a preponderance of the evidence that it was necessary for him to become armed and shoot at Mr. Asselin.

IV. CONCLUSION

None of the witnesses supported the defendant's version of events. A necessity instruction would not have been given unless the defendant's version was believed. The defense attorney made a good tactical decision not to emphasize the defendant's version of events. That version would have risked a possible conviction for Assault in the First Degree by suggesting that the defendant was not as fearful of Mr. Asselin as he testified, that the shooting at the bar was a chance encounter, and that the defendant took no precautions against a possible assault by Asselin.

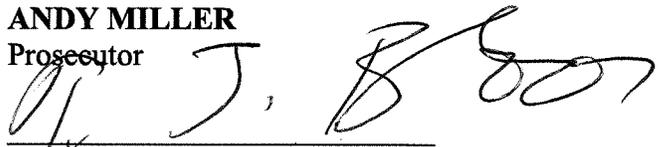
The difference in the burden of proof is very important. There is no reason to believe that the defendant could have proven his actions were necessary.

The conviction should be affirmed.

RESPECTFULLY SUBMITTED this 7th day of February, 2017.

ANDY MILLER

Prosecutor



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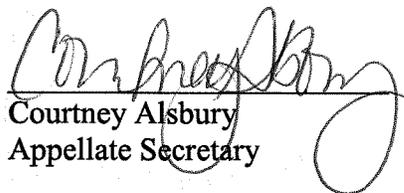
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on February 7, 2017.


Courtney Alsbury
Appellate Secretary