

FILED

JUL 12 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 346340

BENTON COUNTY SUPERIOR COURT NO. 168000257

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KARION THOMAS,

Appellant.

REPLY BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Thomas received ineffective assistance of counsel.
2. The trial court erred in overruling defense counsel's hearsay and improper rebuttal objections.

B. ARGUMENT

1. Defense counsel was ineffective when it failed to raise a claim of defense of others.

In the instant case, the facts brought forth at trial are similar in nature to those in *State v. Huddleston*, 80 Wn.App. 916, 912 P.2d 1068 (1996). As such, the defenses presented would not have been mutually exclusive and defense counsel was ineffective for failing to raise the defense of others defense.

In Huddleston:

According to the State's witnesses, Huddleston wielded the knife. Anderson said Huddleston lunged at him with a knife and hit him in the stomach; Huddleston failed, however, to break the skin. Beinert said Huddleston stabbed him, and Anderson said he saw Huddleston backing away from Beinert with knife in hand. Dulyea, Tears and Mosley were unable to identify the person who had a knife. Gonzalez testified that neither he nor Miller had wielded the knife, leaving an inference that Huddleston had.

Huddleston, 80 Wn.App. at 918.

Similarly, in Mr. Thomas' case the State's witness testified Mr. Thomas was the individual with his arm around Mr. Lizarraga. RP 26. Ruben Lizarraga and Erica Kauffman could not identify which individual choked Mr. Lizarraga

because they could not see the altercation. RP 42, 16-17. Darion Simon was next to Mr. Lizarraga at the time of the altercation but did not testify as to whether or not he was the individual who had assaulted Mr. Lizarraga. RP 50. Mr. Thomas' counsel specifically questioned whether Mr. Lizarraga had been able to see the skin color of the individual who assaulted him and he was not able to. RP 34-35. Identity of the assailant was clearly an issue.

Much like *Huddleston*, the State asks to “infer that the decision not to present self-defense or defense of others was tactical, because those defenses are inconsistent with the defense of identity.” *Huddleston*, *Huddleston*, 80 Wn.App. at 927. Mr. Thomas would support the reasoning set forth by Mr. Huddleston in that “[d]efense counsel could argue the state failed to meet its burden of proving who the person was that bore the knife, and also argue alternatively that whoever bore the knife had a right to defend himself or his friend...” *Huddleston*, 80 Wn.App. 916 at FN 29. Given that identity was an issue in Mr. Thomas' case, defense counsel could have argued in the same manner and was ineffective for failing to do so.

Mr. Thomas would urge this court to follow the holding in *Huddleston*:

Given only the present record, it would be speculative to pick one assertion over the other, and speculation is not a proper basis for decision. Accordingly, resolution of these arguments much await the development of a full and complete record.

Huddleston, 80 Wn.App. 928. Appellant respectfully requests that this court remand for retrial or, alternatively, for development of a full and complete record on this particular issue as the court did in *Huddleston. Id.*

2. *The court erred in allowing hearsay and improper rebuttal testimony.*

The State called Officer Raby as its first witness and Officer Raby was questioned about his investigation. RP 5-11. The State did not ask any questions about statements that may have been made. The State called Mr. Lizarraga and Ms. Kauffman after Officer Raby. RP 19-47. During that initial testimony, Mr. Lizarraga and Mrs. Kauffman were questioned about whether they made written statements and whether they informed Officer Raby about Mr. Thomas choking Mr. Lizarraga RP 32-35, 46. This included cross examination by defense counsel questioning Mr. Lizarraga's written statements and whether they were consistent with what the Officer was told the night of the event. RP 33-35. It was an abuse of discretion to allow the State to readdress these issues again in rebuttal.

Additionally, the written statement made by Mr. Lizarraga was clearly hearsay under ER 801 (c). *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003). The State argues for the application of ER 801 (d), however, this rule should not apply because there is absolutely no record supporting there was an inference of external pressure. There is no record on this issue at all because the

State at trial never claimed an exception under 801(c) and the trial judge never made a ruling regarding such an exception.

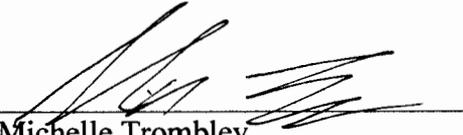
Given that the testimony elicited in the State's rebuttal was both improper rebuttal and hearsay and the contents of that evidence and the importance that witness credibility played in this case and that the admission of this evidence likely had an impact on the outcome of this case, this case should be remanded for retrial.

C. CONCLUSION

Based on the forgoing, Mr. Thomas respectfully requests that this Court remand for re-trial or additional findings regarding ineffective assistance.

July 11, 2017

Respectfully submitted,
TROMBLEY LAW PLLC.


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PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 11 day of July, 2017, I caused a true and correct copy of the Appellant's Reply Brief to be served on the following in the manner indicated below:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 11 day of July, 2017

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