

NO. 348156

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

STATE OF WASHINGTON,

RESPONDENT,

V.

ALEX SAMUEL NOVIKOFF

APPELLANT.

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims that the trial court violated the defendant's right to a fair trial by excluding hearsay statements about two victims allegedly discussing drug use and hearsay statements that one victim allegedly made to the defendant regarding another victim making her "feel afraid" in the past
2. Appellant claims that the trial court erred by refusing to instruct the jury on self-defense and defense of others for offenses which do not require an element of force.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court afforded the defendant a fair trial and an opportunity to present a complete defense?

III. STATEMENT OF THE CASE

A. FACTS

Kara Ahlson and Defendant Alex Novikoff had been engaged in an on-again-off-again turbulent relationship that began when they were both in school, just thirteen years old. RP 266; 437. After they first met in Junior High, they dated until their parents got married and they became step-siblings. RP 267. Defendant and Kara remained step-siblings for about twelve years, until their parents divorced, but even so, they remained really close friends. Id.

During the time Kara and Defendant were step-siblings, she became romantically involved with victim Miles Anderson at age 17. RP 263. During their nine-year relationship, Kara and Miles had two children together, Kacie and Austin. RP 262-63; 278; 295. However, in 2013, after some on-again, off-again, Kara and Miles separated for good, and in 2014 Kara and Defendant rekindled their relationship. RP 263; 268; 365.

The relationship between Defendant and Kara was characterized by intense highs and lows. RP 274; 284-85. They tried living in Spokane, Washington, but later moved to Rice, Washington, where Kara's father lived. RP 269-70. While in Rice, they contemplated starting a family, but the relationship soon became too

rocky and they both eventually wound up back in Kara's hometown of Republic, Washington around July of 2015. RP 269-71; 441. At that point, the relationship was no longer stable and was characterized by fights, arguments, lies, rumors, and long periods apart. RP 272-74; 284. After the move to Republic, Kara no longer resided with Defendant, living instead with her mother and sometimes with the Webers, who were friends of the family. RP 264; 273; 367; 442; 461.

Initially following Kara and Miles' separation, they had struggled to agree on a parenting plan; in particular, Miles did not want his children to be around the Defendant, so much so that a provision of their parenting plan specified that the children were not to be around the Defendant. RP 301; 343. However, by the summer of 2015 (when Kara had returned to Republic), Kara and Miles had a mutually-agreed upon plan and had regained a friendly, platonic relationship for the purpose of co-parenting their children. RP 263-64; 343; 366.

During the summer and early fall of 2015, Miles - who was living at 6 Penny Lane in Republic with his and Kara's two children - was employed as a wildfire fighter and sometimes had to leave home around 4:30 in the morning to make it to his job site in Colville. RP 266; 276; 364-65; 367. Although Kara primarily resided elsewhere,

on days when Defendant had to leave early, Kara would come over the night before and stay overnight so that she would be there to put the two children on the school bus at about 7:30. RP 276-77; 367. The morning of September 24, 2015, was one such morning, and Kara had informed the Defendant when she had last seen him the day prior that she would be at Miles' house. RP 276; 283; 285; 368.

The morning of September 24, 2015, Kara was awakened around 4:00 AM from where she was sleeping on couch by Miles making coffee. RP 275-77; 368. Thereafter, she joined Miles in his room for a cup of coffee and a cigarette before he was to leave for work. RP 275-76; 280. They had been awake about 15 minutes when they heard a noise on the back porch, like the sound of a window rattling. RP 277; 280-81; 399. Kara and Miles associated the sound with the sound of someone being on the porch, which was not a normal thing for them to hear at that time of the morning, so Miles left the bedroom to investigate while Kara remained in the bedroom. RP 281-82; 399. Mere seconds later, the door crashed open, breaking the top hinge, and the Defendant stuck his head through and began forcing his way inside the home. RP 282; 373.

As the Defendant continued to try to push his way into the home, Miles yelled at him to leave and pushed back on the door to try

to keep him out. RP 376. Eventually, the Defendant was able to reach his arm through the door and strike Miles above his right eye, knocking Miles back and allowing Defendant to gain full entry into the home. RP 376-77. Once in the kitchen, Miles attempted to wrestle with Defendant to defend himself, but was struck two more times in the face. RP 378. As this was happening, Kara was in the bedroom attempting to call 911 with Miles' phone (as she had heard the altercation and recognized Defendant's voice) but she was unsuccessful. RP 287; 292.

After Defendant's last blow, Miles fell back and Defendant turned his attention to Kara, who was now in the doorway of the bedroom and able to see that Miles' shirt was ripped and he was bleeding profusely from the head. RP 288; 380. As Miles attempted to pass the Defendant on his way to the bedroom, Defendant put him in a headlock, telling Kara "look what I can do". RP 380. Kara, meanwhile, had grabbed a shotgun from the bedroom. RP 381. When Defendant made comments to the effect of "if I can't have my kids, you can't have yours", Kara put down the shotgun and began to scream at and hit the Defendant. RP 290-91; 380-81. With Defendant's attention thus diverted, Miles slipped into the bedroom to try to call 911. RP 382.

As Miles talked to the 911 dispatcher, Defendant continued to argue with Kara in the hall outside the bedroom door, periodically looking into the room, seeing Miles, and becoming enraged. RP 383; 294. Defendant repeatedly shouted at Kara “how could she do something like this to him”, and he later told her that he believed he had overheard her and Miles talking about having sex. RP 289-90. He also begged her to come with him. RP 383. Kara and Miles’ two children were right behind her as the argument unfolded. RP 291.

However, when Defendant heard Miles on the phone with 911, he stopped “as if the wind just went out of his sails” and walked out the front door, apologizing to the two children on his way out. RP 291; 295. The children, who had been in their bedroom doorway, were scared and crying, confused and shaking. RP 296; 384. Once outside, Defendant sat on his knees and put his head on the ground, crying. RP 296; 389. He later smoked a cigarette and asked Kara to call his Mom. Id. While Kara and Miles waited for law enforcement (about 5-10 minutes), they stood on the porch to ensure the Defendant did not reenter the home. RP 154; 296-97; 299.

When Deputy Venturo arrived at 6 Penny Lane 5-10 minutes after being dispatched, he found the Defendant, whom he recognized from previous encounters, kneeling in the yard with his hands behind

his head, and Kara and Miles standing on the porch about 15 feet away. RP 156-57; 159. Deputy Venturo, who was familiar with Defendant's vehicle, did not observe it in the driveway or anywhere in the vicinity of Mile's residence. RP 156. In fact, before the police arrived, there were no vehicles at the residence other than Miles' own vehicle. RP 391. Deputy Venturo never observed, on that day or any day thereafter, any indication that Defendant had been injured that evening, and in fact, Defendant's booking photo, taken that day, did not show any injury. RP 158-59; 200. Deputy Venturo did observe that the back door had been broken off the doorframe at the hinges and at the door knob area. RP 161-62. He also observed that Miles' shirt was torn and that he had blood on his face from a cut above his eye, which appeared consistent with a blow to the face. RP 169; 173. Deputy Venturo did not observe anything to indicate that either Miles or Kara was under the influence of intoxicating substance, and did not observe any drug paraphernalia. RP 176; 184.

Detective Rainer, who arrived a few minutes after Deputy Venturo, stayed at the residence after Deputy Venturo had left with the Defendant. RP 212; 216, 299. While at the residence, he watched the entire time as Kara and Miles individually wrote their statements, and then collected the statements. RP 216. Detective

Rainer, who normally does follow-up if there are inconsistencies in statements, did not feel that follow-up was necessary after reviewing the statements. RP 221-22.

Neither Kara nor Miles had ever invited Defendant to the residence and both of them told him numerous times to leave, and that he wasn't supposed to be there. RP 282-83; 301; 379; 389-90; 395. Defendant was precluded by Miles and Kara's parenting plan from being around their kids at all. RP 301. Defendant had stated on numerous prior occasions that he wanted to beat Miles up, and the incident was caused by Defendant's jealousy that Kara was spending time with Miles. RP 306; 394-95. Defendant stated that he was justified to be in Miles' house at four in the morning to confront Kara. RP 476.

B. PROCEDURAL FACTS

On September 28, 2015, Defendant was charged in Ferry County Superior Court by an information charging one count of Burglary in the First Degree, Domestic Violence, one count of Assault in the Fourth Degree, and one count of Malicious Mischief in the Third Degree, Domestic Violence. CP 1. On August 26, 2016, an Amended Information was filed which removed the Domestic Violence tags. CP 55.

A jury trial was held September 6-8, 2016. RP 93; 192; 582. As so often happens, the defendant's version of events differed significantly from that of the other witnesses. At trial, Defendant testified that the reason he was at Miles Anderson's residence at four in the morning was because he had not seen Kara all day and was concerned for her. RP 444-45. He further testified that the reason he was concerned about what was going on inside Miles' house was that he heard the repeated flick of a lighter, suggesting Kara was using drugs. RP 448. Defense sought to introduce the hearsay statement that he overheard Miles ask Kara if she wanted to "burn one up", which statement was not allowed as the Court deemed it hearsay that did not meet one of the applicable exceptions. RP 485.

During trial, Defense Counsel also sought to introduce testimony from the defendant that Kara had previously told him that Miles had been menacing towards her and that the reason the Defendant breached the door was that he feared Miles might turn on Kara. RP 459; 483-84. However, what the Defendant testified to was that he broke down the door because he was trying to get his phone back after Kara knocked it out of his hand and locked him outside. RP 457-58. The State objected and the objection was sustained. RP 459. The Court reasoned that the parties (Miles and

Kara) had not been examined or cross-examined about such statements such that the Defendant would need to provide contradictory evidence. RP 484. The court further reasoned that the hearsay statement that the Defendant sought to introduce lacked an independent legal significance [to show Defendant's fear for Kara was sufficient to justify breaking down the door] where the facts presented thus far were that Defendant allegedly heard chatter implicating consensual drug use from where he lurked outside the bedroom window. RP 484.

During trial, the Court issued the self-defense jury instruction relative to the Assault 4 charge. CP 68. Defense requested that the Court modify the self-defense instruction so as to apply it to the charges of Burglary 1 and Criminal Trespass 1. RP 492-93. The State objected, on the basis that self-defense does not apply to offenses that do not require an element of force. RP 493. The Court denied Defendant's request based on his reading of the Washington Pattern Jury Instructions ["WPICs"]. *Id.* The State objected to the inclusion of the defense-of-others language in the self-defense jury instruction based on the fact that no evidence was admitted to show that the Defendant had a reason to fear for the safety of Ms. Ahlson and based on the fact that Washington law does not recognize

defense of a fetus. RP 496. Despite acknowledging that there was no evidence to support that Miles posed a danger to Kara and despite the fact that that Defendant was not allowed to testify as to hearsay statements allegedly previously made by Kara to him, the Court allowed the defense-of-others language based on Defendant's "subjective concern". RP 496, CP 226. Defense agreed not to argue defense-of others as to Kara's unborn child, yet still argued that the Defendant was "in the right 'cause he's gonna put a stop to this. You can't expect a man to have a sense of humor about somebody else getting their pregnant girlfriend high" and claimed that Kara was lying because no one "want[s] to admit that I was a pregnant mom and I was smoking methamphetamine... That is something that we hold in such low regard. Such low regard." RP 496; 544; 547.

The Jury found the Defendant Not Guilty of Burglary 1 but Guilty of the lesser included of Criminal Trespass 1. CP 69-70. The Jury did not arrive at a verdict as to the Assault 4, and convicted the Defendant of Malicious Mischief 3. CP 71-72.

Defendant now appeals, claiming that the trial court deprived Defendant of a fair trial by excluding hearsay statements that did not meet any hearsay exceptions and by failing to instruct the jury on self-defense and defense of others, and urges the court to reverse

the convictions for Criminal Trespass 1 and Malicious Mischief 3. For the reasons set forth below, the State respectfully requests that Appellant's motions be denied.

IV. ARGUMENT

A. DEFENDANT WAS NOT ENTITLED TO SELF-DEFENSE OR DEFENSE-OF-OTHERS INSTRUCTION FOR THE CHARGES OF BURGLARY 1, CRIMINAL TRESPASS, OR MALICIOUS MISCHIEF IN THE THIRD DEGREE.

Appellant claims that the trial court hampered the Defendant's ability to present a defense by refusing to give self-defense and defense-of-others jury instructions. However, the Court *did* give these instructions with regard to the Assault 4 charge of which the Defendant was not convicted. Moreover, the trial attorney never requested that the trial court give this instruction with regard to the Malicious Mischief 3:

GRAHAM: I wanted to mention one thing. On the self-defense as it currently reads was---

JUDGE: This is instruction number?

GRAHAM: Yeah, number seventeen, Your Honor.

JUDGE: Seventeen, got it.

GRAHAM: It read it's a defense of the charge in the fourth degree that the force used is lawful and I would ask that the instruction, having heard Mr. Novikoff's testimony, that the instruction be read, it is a defense to the charge of assault in the fourth degree, burglary in the first degree and trespass in

the first degree that the force used was lawful as defined in this section.

RP 492-93. The State objected, on the basis that self-defense is not applicable to crimes that do not require an element of force, and the Court agreed. RP 493.

JUDGE: Right, well you'll find me somewhat slavish in my devotion to the WPICs, counsel, so that would be denied. What else?

RP 493.

Therefore, because the Defendant never requested the instruction as to the Malicious Mischief 3 charge, the appellant cannot now raise this issue on appeal, leaving only the question of whether it was error for the trial court to refuse the self-defense/defense-of-others instruction for the charge of Burglary 1 or the lesser included of Criminal Trespass 1.

1. Standard of Review on Appeal

The standard of review applicable to jury instructions depends on the trial court decision under review. State v. Condon, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). If the decision was based on a factual determination, it is reviewed for abuse of discretion; if it was based on a legal conclusion, it is reviewed de novo. Id. at 316. Here, the trial court decided not to instruct the jury as to self-defense for Burglary 1/Criminal Trespass 1 based on the law, so the standard of

review is de novo. Regardless of whether the trial court made its ruling based on the facts or law, the State contends that *both* the facts and the law support the trial court's decision.

2. Self-Defense/Defense of Others Not Available for Burglary/Trespass

By the very wording of the law, self-defense and defense of others applies when there has been a use, attempt, or offer to use force. RCW 9A.16.020. The defenses of self-defense and defense of others allows a defendant to explain why a use of force which would otherwise be unlawful is actually lawful. Therefore, the trial court allowed Defense to argue self-defense and defense of others as to the Fourth Degree Assault charge, even though the supporting evidence was marginal, to say the least. However, neither Burglary 1 nor Criminal Trespass 1 involve an element of force, and thus, self-defense and defense of others is not an available defense for these offenses.

The elements of Burglary 1 in this case required that the State prove that the Defendant entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein and that while in the building, the Defendant assaulted a person. RCW 9A.52.020; WPIC 60.02. Because assault was alleged as the

predicate crime for the Burglary, the court instructed the jury on self-defense and defense of others as to the assault. The trial court was *not* required to instruct the jury on self-defense and defense of others as to the Burglary, because if the jury did not convict the Defendant (which it didn't) then it likewise could not convict the Defendant of the Burglary, which required the jury to find that an assault occurred. Even had it been error for the court not to instruct on self-defense/defense of others as to the Burglary (which the State contends it was not), this error is harmless because the jury did *not* convict the Defendant of Burglary.

Criminal Trespass in the First Degree requires only that the State prove that the Defendant knowingly entered or remained in a building and that the Defendant knew that the entry or remaining was unlawful. RCW 9A.52.070; WPIC 60.16. The State is not required to prove any element of force which could be negated by a claim of self-defense or defense of another. Therefore, it was likewise not an error, as a matter of law, for the trial court to refuse to give this instruction. In addition, the facts as testified to by the Defendant did not support the giving of such an instruction, even had it been legally available: Defendant testified that the reason he broke down Miles Anderson's door was to retrieve his phone from inside the home after

Kara had slammed the door, leaving him outside. Clearly, breaking down a door to retrieve a phone would not constitute defense of self or others. Moreover, given that it was Kara who allegedly slammed the door on the Defendant, leaving her inside with Miles, there is no indication that she felt that she was in danger such that would justify the Defendant breaking down the door. And, as previously addressed above, although Defendant claimed that he overheard her discussing drug use with Miles, even if this was true, her voluntary choice to consume drugs would not lead to an inference that *Miles* posed a threat to her such to justify breaking down the door.

In short, instructions on defense of self and others were neither legally nor factually supported with regard to the Criminal Trespass charge, and therefore the trial court's refusal to give such instructions was not in error.

B. HEARSAY EVIDENCE WAS PROPERLY EXCLUDED WHERE DEFENDANT DID NOT DEMONSTRATE THAT ANY HEARSAY EXCEPTION APPLIED TO JUSTIFY ITS ADMISSION.

1. Standard of Review on Appeal

A trial court's evidentiary rulings are reviewed for manifest abuse of discretion and an appellate court will defer to those rulings unless no reasonable person would take the view adopted by the trial

court. State v. Clark, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). An abuse of discretion occurs only when the decision of the court is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). However, an appellate court reviews whether or not a statement was hearsay de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

2. The Statements Defendant Sought to Admit were Irrelevant Hearsay

Although the right to present testimony in one’s defense is guaranteed by both the United States Constitution and the Washington Constitution, these rights are not absolute in that the evidence that a defendant seeks to introduce must be of at least minimal relevance. U.S. Const. amend. VI; Wash. Const. art. I, sec. 22; State v. Hudlow, 182 Wn.App. 266, 278, 331 P.3d 90 (2014); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. State v. Gregory, 158 Wn.2d 759, 786, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Hearsay is a statement, other than one made by the declarant

while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. Whether an out-of-court statement is hearsay depends on the purpose for which the statement is offered. State v. Hamilton, 58 Wn.App. 229, 231, 792 P.2d 176 (1990). A statement may not be hearsay if it is used only to show the effect on the listener without regard to the truth of the statement. State v. Hudlow, 182 Wn.App. 266, 278, 331 P.3d 90 (2014).

Here, Appellant claims that the statement he allegedly heard Miles make to Kara “you wanna burn one up before I go to work” served to show why he believed that Miles posed a threat to Kara such to justify the Defendant breaking down the door at 4:00 AM. However, even if true, and even if, as Defendant claims, this statement can only be interpreted as referring to illicit drug use, this statement still would not lead to the reasonable inference that Kara was in danger. An invitation to engage in illegal drug use – which, if the Defendant’s account of events is to be believed, was well received, as he claims he then heard them smoking meth – does not constitute a threat such to justify the use of force to break down a door and/or engage in a physical altercation with the offering party.

In addition, Appellant claims that the statements that Kara allegedly made to him on past occasions that Miles had been menacing towards her and shared dark thoughts with her should have been admitted to show that the Defendant acted to defend Kara. However, these statements – clearly hearsay – are not relevant to any of the charges at hand. First, with regard to the assault charge, Defendant claimed that he was invited in, that Miles attacked him, and that he punched Miles in self-defense. Kara's prior statements were not relevant to this offense as Defendant indicated that he was defending *himself* at this time, not her. Secondly, with regard to the remaining crimes, as discussed above – self-defense and defense of others is not an available defense for Burglary or Criminal Trespass. Therefore, Defendant's alleged belief that Miles could be dangerous to Kara is not relevant to the question of whether he committed Burglary or Trespass. Because the statement is not relevant, and because it is hearsay for which no exception applies, the trial court did not err by excluding such testimony, nor was it an abuse of discretion.

Moreover, Defendant's explanation of why he allegedly feared for Kara was not reasonable. A past threat is not the same as an imminent threat. The fact that Miles may have shared "dark thoughts"

with her in the past does not require the inference that the “dark thoughts” pertained to violence or threats. Kara was clearly in Miles’ home – with her kids – voluntarily. Even to the extent that she was allegedly engaged in consensual drug use, this evinces merely poor decision-making on her part, not threats on the part of Mr. Anderson. In short, the alleged statements simply were not probative.

On the other hand, these hearsay statements are incredibly prejudicial in that they paint the victims, Kara and Miles, as drug-addled and abusive – neither which traits are relevant to any of the charges at issue.

Lastly, Appellant takes issue with the trial court’s decision not to allow the Defendant to testify to the above hearsay statements because neither Kara nor Miles were examined or cross examined about such statements. When read in context, it appears that the trial court was merely pointing out that if Defense counsel was trying to offer the statement as impeachment, the other witnesses would have had to have been asked about the statements beforehand. The trial court immediately goes on to reiterate that the hearsay statement would have to have some independent legal significance, *i.e.* something that causes them to fall under a hearsay exception or exemption in order to be admissible. RP 484.

E. CONCLUSION

The statements excluded by the trial court were hearsay because they were out of court statements offered for the truth of the matter asserted. Self-defense and defense of others are not available defenses to Burglary and Trespass, and therefore, statements offered to show that the Defendant entered because of fear for Kara were not relevant. Moreover, the Defendant's alleged fear based on these alleged statements is still unreasonable given the facts as they appeared to him at the time, and thus, the statements were not probative and merely served to prejudice the jury and were properly excluded as hearsay.

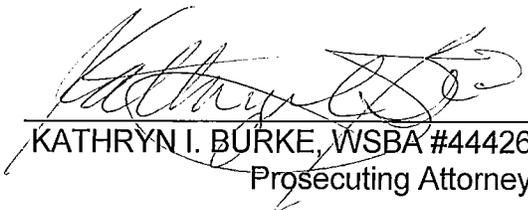
The trial court's refusal to instruct the jury as to self-defense and defense of others with regard to the Burglary was appropriate, given that Burglary 1 does not require an element of force, and in any event, such refusal was irrelevant where the jury acquitted the Defendant of such charge. The trial court was never asked to instruct the jury on defense of self and others with regard to the malicious mischief, and therefore the court's failure to do so cannot be addressed on appeal or be grounds for reversal of that conviction. Finally, the trial court's refusal to instruct the jury on self-defense and defense of others with regard to Criminal Trespass in the First

Degree was not error where the defense was not legally available because Criminal Trespass does not contain an element of force, and where the Defendant's own testimony did not indicate that the offense was committed in defense of himself or others, but rather so that he could retrieve his phone. The facts simply did not support that it was reasonable for Defendant to fear for Kara where there was no testimony that Miles offered any threats or harm to her and where she repeatedly told *Defendant* to leave, called 911 on *Defendant*, and allegedly locked *Defendant* out of the house, choosing to remain inside with Mr. Anderson.

For all the reasons above, the State respectfully requests that this Court deny Appellant's motion to reverse the convictions for Criminal Trespass 1 and Malicious Mischief 3.

Dated this 15th day of October, 2017

Respectfully Submitted by:


KATHRYN I. BURKE, WSBA #44426
Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on October 15, 2017, I mailed and/or e-mailed a copy of the BRIEF OF RESPONDENT in this matter, pursuant to the parties' agreement, to:

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