

FILED  
Court of Appeals  
Division III  
State of Washington  
2/23/2018 1:44 PM

NO. 34946-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

COREY BURNAM,

Appellant.

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

The Honorable Raymond F. Clary, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT</u> .....	1
1. BURNAM’S ARGUMENT AND OFFER OF PROOF ARE SUFFICIENT TO SUPPORT HIS CONSTITUTIONAL ARGUMENT .....	1
i. The offer of proof was sufficiently specific. ....	2
iii. The offer of proof provided a clear statement of purpose and legal theory.....	4
iii. The errors were not waived or invited.....	10
2. JURISPRUDENCE CITED BY THE STATE DOES NOT SUPPORT ITS POSITION.....	10
B. <u>CONCLUSION</u> .....	13

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

Mad River Orchard v. Krack  
89 Wn.2d 535, 537, 573 P.2d 796 (1978)..... 2

State v. Adamo  
120 Wash. 268, 207 P. 7 (1922)..... 3

State v. Bell  
60 Wn. App. 561, 805 P.2d 815 (1991)  
review denied, 116 Wn.2d 1030, 813 P.2d 582 (1991) ..... 11, 12

State v. Duarte Vela  
200 Wn.App. 306, 402 P.3d 281 (2017)..... 12, 13

State v. LeFaber  
77 Wn. App. 766, 893 P.2d 1140 (1995)  
reversed on other grounds, 128 Wn.2d 896 (1996) ..... 11, 12

State v. Negrin  
37 Wn. App. 516, 681 P.2d 1287,  
review denied, 102 Wn.2d 1002 (1984)..... 1, 2, 4, 5, 9, 11

State v. Upton  
16 Wn. App. 195, 556 P.2d 239 (1976)..... 12

State v. Walker  
13 Wn. App. 545, 536 P.2d 657 (1975)  
review denied, 86 Wn.2d (1975)..... 12, 13

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 404 ..... 7, 7 nn.1-2, 8, 8 n.4

ER 405 ..... 7, 7 n.2, 8, 8 n.3

U.S. CONST., AMEND. VI ..... 2, 13

WASH. CONST., ART. I, §22 ..... 2, 13

A. ARGUMENT

1. BURNAM'S ARGUMENT AND OFFER OF PROOF ARE SUFFICIENT TO SUPPORT HIS CONSTITUTIONAL ARGUMENT.

The State argues Burnam did not make a sufficient offer of proof and somehow waived or invited error, excusing the constitutional violation. Br. Resp. at 11, 22, 24, 27. As discussed below, these arguments are factually inaccurate and ultimately unpersuasive.

The State argues the defense offer of proof was insufficient in that it was “vague,” “protracted,” never clearly stated that Burnam knew specifically how Sweet was involved in the Bud Brown murder, and never specifically stated he was fearful of Sweet as a result. Br. Resp. at 11; see also Br. Resp. at 22, 24. These arguments grossly mischaracterize the defense position and offer of proof. As discussed below, the offer of proof was clear, robust, and more than adequate.

The State cites to State v. Negrin for various character evidence propositions not relevant here. See Br. Resp. at 20-21 (citing State v. Negrin, 37 Wn. App. 516, 525-26, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984)). However, Negrin is useful insofar as it discusses criteria to determine whether an offer of proof is adequate. “An offer of proof should ‘inform the court of the legal theory under which the offered evidence is admissible ... inform the trial judge of the specific nature of the

offered evidence so the court can judge its admissibility ... [and create] a record adequate for appellate review.” Negrin, 37 Wn. App. at 525 (quoting Mad River Orchard v. Krack, 89 Wn.2d 535, 537, 573 P.2d 796 (1978)). Here, the offer of proof more than met the standard articulated in Negrin because it informed the judge of the nature of the evidence and the theory under which it was offered, allowed for a determination on admissibility and created a record for review.

i. The offer of proof was sufficiently specific.

The defense offer of proof was specific with respect to Burnam’s anticipated testimony and the legal theory under which it was being offered, i.e. the right to present a defense. U.S. CONST., AMEND. VI; WASH. CONST., ART. I, §22.

Prior to trial, the State had asserted there was no evidence Burnam knew of Sweet’s involvement in the homicide prior to her death, but the defense strongly disputed this assertion. “I would note that the State in its initial briefing suggested that there was no evidence that Mr. Burnam was aware of anything to do with the situation involving Bud Brown and Alicia Sweet. However, in their own report on this case, Detective Keyser reference it, and I reference it in my briefing.” RP 218.

The defense went on to repeatedly and specifically make offers of proof that Burnam was aware of Sweet’s involvement in the murder, to

explain why it was relevant to the purpose of explaining his state of mind on the night of Sweet's death, and to explain the critical relevance to his self-defense claim. "Mr. Burnam could be in the bedroom knowing, you know what, she killed before or she was involved in a murder before, and she got away with an unranked felony. And it may not have been that precise of thinking, but that's what she walked away from." RP 221. "Mr. Burnam knows that Ms. Sweet has been involved in a prior homicide. Now that goes straight to what Mr. Burnam was thinking that night." RP 210.

Counsel explained that the source, reliability, or accuracy of Burnam's belief was irrelevant; what was relevant was his belief. "In fact ... Adamo stands for the proposition that not only can you rely on what you know, but you can rely on what a third party tells you. Because in Adamo, it wasn't even what a defendant personally knew. He was told by somebody else that this had happened, and he responded based on that secondhand knowledge." RP 222 (citing State v. Adamo, 120 Wash. 268, 207 P. 7 (1922)).

Counsel further explained that Burnam should be able to testify about his own knowledge and beliefs. "[H]e can talk about the fact that he knew that she had been involved in a situation where somebody was killed. That is what's going on in his mind." RP 222. Counsel went on to

state,

[The State is] obviously allowed to present their case. But we get to present why Ms. Sweet had five distinct injuries to her throat, why she had an impression of the shotgun barrel on her forehead, why those injuries were that great. Because when you're in fear for your life and you know somebody had been involved in a homicide before and that they are high on methamphetamine, that's how you defend yourself.

RP 224.

The fact that counsel occasionally sprinkled his offers of proof with softening and colloquial phrases such as “Burnam could be in the bedroom knowing, you know what ...” and “I suspect” shows a Pacific Northwest type of courtesy and indirect speech; it does not undermine the strength of the repeated and clear offer of proof. RP 211, 221; see also RP 210 (I would anticipate that if asked Mr. Anderton would testify to that effect (emphasis added)).

For the reasons discussed above, counsel's offer of proof was specific enough for the trial court to understand the nature of the testimony and make a ruling, and to create a record for review, thus meeting the Negrin standard. 37 Wn. App. at 525.

ii. The offer of proof provided a clear statement of purpose and legal theory.

The defense offer of proof meets the second criteria discussed in Negrin because the defense made a clear statement of the purpose for which the evidence was offered and explained the constitutional legal

theory under which admissibility was required. Negrin, 37 Wn. App. at 525.

In its response brief, the State makes various arguments characterizing the evidence offered by the defense and characterizing the purposes for which that evidence was offered. For example, the State argues the defense “specifically rejected offering any reputation evidence ... to support an argument that the victim was the ‘first aggressor.’” Br. Resp. at 29. The State also appears to argue that because the defense discussed the rules of evidence in briefing and in argument, that it precludes a constitutional claim involving the right to present a defense. See Br. Resp. at 27 (reasoning counsel failed to object to the court’s analysis and so waived error). These arguments misrepresent the statements and arguments of the defense. From the transcript of the hearings, the nature and purpose of the evidence offered by the defense, and as repeatedly stated by the defense, was clear.

Defense counsel repeatedly contrasted its own characterization of the evidence and purpose with the arguments of the State. The defense explained it was offering evidence of a specific act—Sweet’s involvement in the Bud Brown homicide—for the purposes of showing Sweet was the primary aggressor, and for the purpose of showing the reasonableness of Burnam’s fear. E.g. RP 219 (“she was a primary aggressor, and, more

importantly, why it's reasonable that Mr. Burnam would think that"), 224 ("Burnam was in reasonable fear for his life and that his force in responding to the primary aggressor was reasonable"). The State's apparent reasoning, that the defense did not assert that evidence was relevant to Burnam's state of mind or his argument that Sweet was the first aggressor, is factually inaccurate.

The defense repeatedly contrasted what it was offering with what it was not offering: witnesses from the community who could testify to Sweet's general character. RP 219 (We're not going into ... reputation ... what people thought of Ms. Sweet in the community."), 221 ("we're not bringing in a group of people who Ms. Sweet associated with in the community and may have been involved in thefts and drug dealing.").

The defense also repeatedly contrasted the proffered evidence with Sweet's prior criminal history of drug use and theft – again, a type of evidence not being offered. RP 218 ("We're not going into the deliveries, not going to theft"), 219 (not asking the jury to consider a theft from 10 years ago or delivery of controlled substance"), 220 ("I'm not asking the court to [] consider thefts and deliveries).

As established above, the defense offer of proof clearly addressed the purposes for which the evidence was offered. The offer of proof also established the legal theory under which it was offered: the constitutional

right to present a defense. In fact, as discussed below, the defense repeatedly objected to the State and court's reasoning and asserted that the constitutional right to present a defense was the controlling factor in the analysis.

The State reasons that somehow, by discussing the rules of evidence, and making argument regarding those rules, the defense invited error or waived the constitutional right to present a defense. Br. Resp. at 26-28. Again, this argument misstates the defense arguments, and is ultimately unpersuasive.

The State asserted that the rules of evidence, specifically ER 404,<sup>1</sup> applied to prohibit the evidence, because it was improper character evidence and "victim bashing" and was offered to prove propensity. RP 216-17. The State further asserted that ER 405 barred the evidence because under ER 405(b)<sup>2</sup> a specific instance of prior conduct could not be discussed unless it was an essential element of the self-defense claim, and

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<sup>1</sup> "Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" with enumerated exceptions. ER 404(a). "Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) (emphasis added).

<sup>2</sup> "Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." ER 405(b).

case law did not support that position; and under ER 405(a)<sup>3</sup> such evidence was sometimes admissible by means of reputation, but that is not what defense counsel was offering. RP 216-17.

In response to the State's arguments, defense counsel repeatedly argued that these rules of evidence, as discussed by the State, did not apply and did not bar the evidence. "This is one instance that goes to what was going through Mr. Burnam's mind on that night. So I don't believe 405 applies." RP 222. "And the State's reliance on 405 takes away precisely what 404(a)(2)<sup>4</sup> was designed to address, which is, we are arguing that Ms. Sweet was the primary aggressor ... ." RP 218-19.

Although the defense discussed the rules of evidence, and made arguments that they did not bar admissibility, at the hearing counsel did not argue that the rules of evidence should control the analysis. Rather, the defense repeatedly asserted that the offered evidence implicated the right to present a defense, and that this right should control the analysis. "We have asserted self-defense. That transfers the burden to us to show by a preponderance of the evidence that this defense is warranted. That

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<sup>3</sup> "Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct." ER 405(a).

<sup>4</sup> ER 404(a)(2) provides an exception to the general rule prohibiting character evidence, where "evidence of a character trait of peacefulness of the victim [is] offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor."

means in this case the only person that's going to be able to provide that information is Mr. Burnam, and what was going through his mind on that night." RP 220. "Once we have taken on the burden of establishing self-defense or offering self-defense, that gives us room to present evidence." RP 221. "[W]e're alleging that Ms. Sweet was the primary aggressor. ... To take that away from us, to take away what that information was and what was in Mr. Burnam's mind on that night is effectively taking away his right to present the defense of self-defense ... ." RP 223. The defense should not now be penalized on appeal for refining its arguments during the hearing, or for raising alternative arguments designed to address the State's responses and the trial court's concerns.

As discussed above, the defense offer of proof asserted the purposes for which the evidence was offered – to show Burnam's reasonable fear, and to show Sweet was the primary aggressor – and the legal theory under which it was offered – the constitutional right to present a defense, which was not abrogated by the rules of evidence. The specificity of the offer was sufficient to inform the trial and appellate courts regarding the nature of the evidence offered, the purpose for which it was offered, and the legal theory controlling its admissibility. As a result, the offer was sufficient. Negrin, 37 Wn. App. at 525.

iii. The errors were not waived or invited.

In addition, given the nature of the objections and arguments of defense, the constitutional issue of the right to present a defense was adequately raised below, was not waived, and no error was invited.

Even were the manifest error of constitutional magnitude standard to apply to this case, which defense does not concede, the error is manifest. As discussed in depth in the opening brief, and by trial counsel during motions *in limine*, Burnam's entire ability to present a defense was undermined when he was precluded from explaining why he feared Sweet, and why he reacted so strongly when she attacked him. Br. App. at 48-49 (discussing impact of suppression on trial); RP 224 (counsel arguments). This bore out in closing arguments during which the State emphasized the nature of Sweet's injuries and Sweet's and Burnam's relative sizes to challenge the reasonableness of Burnam's fear. RP 1061-63, 1090-91. In contrast, defense counsel was precluded from referencing the reasoning behind Burnam's fear. RP 1065-66. Had the jury had the information offered by defense, there is more than a reasonable probability it would have impacted the outcome of his trial.

2. JURISPRUDENCE CITED BY THE STATE  
DOES NOT SUPPORT ITS POSITION.

The State cites to various cases that discuss evidence that was not known to the defendant at the time of the alleged crime. Br. Resp. at 19-

21. As discussed below, this jurisprudence is neither relevant to nor controlling of Burnam's case.

The State cites to LeFaber and Bell to support the proposition that evidence of a victim's prior bad acts or reputation is not relevant to a defendant's state of mind unless there is some evidence that the defendant was aware of the prior bad acts or reputation. Br. Resp. at 19-20 (citing State v. LeFaber, 77 Wn. App. 766, 768-69, 893 P.2d 1140 (1995), reversed on other grounds, 128 Wn.2d 896 (1996); State v. Bell, 60 Wn. App. 561, 564 n. 1, 805 P.2d 815 (1991), review denied, 116 Wn.2d 1030, 813 P.2d 582 (1991)). Similarly, in Negrin, as the State properly concedes, the testimony was that the defendant in that case did not even know the identity of the victim before shooting. Br. Resp. at 20-21 (citing Negrin, 37 Wn. App. at 526)

As discussed above, the defense made an adequate offer of proof that Burnam knew of Sweet's involvement in the Bud Brown murder prior to Sweet's death. Also as discussed above, the primary purpose of the testimony was to establish Burnam's belief that Sweet was the primary aggressor and his fear that she was about to and able to kill him. Thus, LeFaber, Bell, and Negrin, cases cited by the State that address information which has no bearing on the defendant's state of mind, do not control the analysis.

The State also cites to State v. Upton to support its proposition that where evidence is “speculative and ambiguous,” it is properly excluded. Br. Resp. at 21 (citing State v. Upton, 16 Wn. App. 195, 202, 556 P.2d 239 (1976)). The recent case of State v. Duarte Vela fundamentally undermines this proposition. State v. Duarte Vela, 200 Wn.App. 306, 326-27, 402 P.3d 281 (2017). Duarte Vela holds that it is entirely improper for a court to exclude testimony that is deemed “speculative” or for a court in any way to screen a defendant’s or witnesses testimony for reliability, ambiguity, or any other factor bearing on credibility, where that testimony is relevant to the defendant’s right to present a defense. Id. To the extent Upton can be read as excluding the evidence because “it did not appear that the defendant understood or believed the victim had, in fact, killed his wife,” the holding of Upton is in line with LeFaber, Bell and Negrin, and has no bearing on cases such as Burnam’s or Duarte Vela, where the defendants did possess such a belief.

The State also cites to State v. Walker, again to support the same proposition, that where the defense had failed to demonstrate the defendant was even aware of the victim’s criminal record, evidence of the criminal record was inadmissible. Br. Resp. at 21-22 (citing State v. Walker, 13 Wn. App. 545, 549, 536 P.2d 657 (1975), review denied, 86 Wn.2d (1975)). As discussed above, this proposition is not relevant to

Burnam, where his counsel made an adequate offer of proof that he was aware of Sweet's involvement in the prior homicide before her death. However, Walker does have some bearing on Burnam's case because, as the State asserts, "[o]n appeal, the court found *proof* of either of those circumstances [that the defendant was aware of the victim's reputation for violence or the victim's prior acts of violence] would have been admissible regarding the defendant's self-defense claim." Br. Resp. at 21-22. This proposition is in line with the more recent and binding holding of Duarte Vela, and supports the conclusion that the trial court was required to admit the evidence offered by Burnam. See Duarte Vela, 200 Wn.App. at 327 (trial court violated defendant's right to present a defense by precluding him and others from testifying to evidence of the defendant's reasonable fear based on knowledge he possessed at the time of the shooting).

For the reasons discussed above, the additional cases cited by the State are either inapplicable, no longer represent good law, or otherwise do not support the State's position.

B. CONCLUSION

The trial court violated Burnam's Sixth Amendment and article I, section 22 right to present a defense by excluding all evidence of Sweet's prior involvement in a homicide.

Burnam respectfully requests that this Court reverse his conviction for first degree murder and remand for a new trial.

DATED this 23<sup>rd</sup> day of February, 2018.

Respectfully submitted,

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**February 23, 2018 - 1:44 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34946-2  
**Appellate Court Case Title:** State of Washington v. Corey Michael Burnam  
**Superior Court Case Number:** 16-1-00664-8

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