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Court of Appeals
Division III
State of Washington
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No. 35167-0-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ALFREDO L. SILVA,

Appellant.

BRIEF OF RESPONDENT

GARTH DANO
PROSECUTING ATTORNEY

Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney
Attorneys for Respondent

PO BOX 37
EPHRATA WA 98823
(509)754-2011

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I. ASSIGNMENTS OF ERROR

1. The Court erred in allowing Corrections Officer Grubb to testify that Mr. Silva was previously informed of the jail's no fighting policy.

2. The Trial Court erred in concluding there was no evidence to support a self-defense instruction.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err in allowing CO Grubb to testify Mr. Silva was previously informed of the jail's no fighting policy when the discovery was late, but defense counsel opened the door by asking questions designed to show there was no evidence of such information?

2. Was there any prejudice in allowing that testimony?

3. Did the Trial Court abuse its discretion in concluding there was no evidence to support a self-defense instruction?

III. STATEMENT OF THE CASE

On September 30, 2016 Corrections Officer Justin Grubb was returning an inmate to his assigned cell. RP 60, 70. Grant County inmates in the jail dorms at issue here are locked down 23 hours a day, with a rotating hour out to use the phone, shower, etc. RP 65. The incident was partially recorded on a video in the jail dorm, admitted as Exhibit 12 at trial. CO Grubb was bringing in inmate Miguel Lopez to his cell. As CO

Grubb was unlocking Silva's cell door Joshua Avalos came out of his cell, turned towards Silva's cell and took a defensive stance. Ex. 12. Alfredo Silva was in the same cell as Lopez was being taken to. RP 73. As the cell was open to place Lopez in it Silva dove past Officer Grubb towards inmate Joshua Avalos. CO Grubb attempted to grab Silva as he went by. RP 74. Silva attacked Avalos, and they started fighting. RP 75-76. CO Grubb attempted to get between them and break them up, but was unsuccessful, ending up getting punched himself. RP 76. He also attempted to grab Silva and pull him off Avalos. *Id.* CO Grubb attempted to call for help on his radio, but his radio was knocked off. RP 77. He then stepped back and tased Silva. He then pointed the taser at Avalos, who at that point gave up. RP 77-78. Officer Grubb testified that Silva had several ways to communicate with him before he opened the cell. RP 130. There was no warning to CO Grubb. RP 129-30.

Prior to trial Mr. Silva introduced a motion in limine to keep any evidence of gang affiliation out of the trial. CP 31. The State agreed. RP 8. During cross examination Silva's defense attorney attempted to show that CO Grubb violated jail policies and that exposed Mr. Silva to danger. The State objected to the relevance of that line of questioning. RP 98. The Court took a break for the day and allowed argument on the objection. *Id.* The Court then sustained the objection. RP 103. When the parties came

back the next day there were several issues raised. The first was the motion in limine regarding gangs and the self-defense claim. During this discussion the State pointed out that for a self-defense claim there would not only have to be the opportunity for Avalos to attack Silva, but also an intent Silva was aware of. RP 105, 139.

During the break Officer Grubb brought to the State's attention a prior incident of Silva being sanctioned for fighting. RP 135. The Court sustained an objection to the State's attempt to introduce the evidence in order to show that he had been ordered not to fight. RP 138. The Court did allow the State to elicit the obvious, that fighting was against jail rules. RP 139, 141. Not being satisfied with that defense counsel asked questions to try and imply that Silva had never been informed of the jail policy. RP 144-46. The Court then allowed the State to ask CO Grubb if business records of the jail had shown that Silva had been informed of the policy. RP 155, 177. Defense counsel asked for a mistrial, which the Court denied. RP 157. He also asked for a one day continuance. RP 156. The Court granted the defense attorney an hour recess to review the two page document. RP 158.

IV. ARGUMENT

1. The Court did not err in allowing CO Grubb to testify Silva had been informed of the policy not to fight.

CrR 4.7(7) states “If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” “The trial court has wide discretion in ruling on discovery violations and motions for a new trial. These decisions will not be disturbed on appeal unless the court abused its discretion. Even if the court commits an error, the appellant must demonstrate this error was prejudicial. Thus, error is not reversible unless it materially affects the trial's outcome.” *State v. Linden*, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997) (internal citations omitted).

Linden, and the case it relies upon, *State v. Falk*, 17 Wn. App. 905, 567 P.2d 235 (1977), are similar and on point. In both of those cases, as in this one, an officer revealed useful information to the prosecutor after the trial had started. In both cases the court gave the defense a continuance to deal with the information. Here the court gave the defense the same. While the continuance was only an hour, vice the day requested, there is no showing what difference that would have made, when the document

was only two pages long, and the State was only proposing a couple of questions from it.

Even so the court initially suppressed the evidence, ruling the State could not admit it. Defense counsel then tried to take advantage and asked questions designed to show that Silva was never informed of the policy against fighting. RP 144-46. The State then asked the Court to revisit its ruling based on the defense questions that opened the door. The Court did so, but limited its ruling to asking whether there was documentation that Silva had been informed of the no fighting policy. RP 153.

A defendant may not take advantage of the court's ruling by asking questions to imply no evidence exists, when it in fact does exist. For example, illegally obtained evidence may be suppressed, but the State may still introduce evidence of that statement to rebut a statement the defendant makes at trial. *See, e.g., Riddell v. Rhay*, 79 Wn.2d 248, 484 P.2d 907 (1971) (defendant's statements); *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968) (admission of suppressed breath alcohol test). *See also State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992), *review denied*, 121 Wn.2d 1005 (1993) (state constitution does not prohibit the use of suppressed evidence for impeachment; its introduction discourages a defendant from perjuring himself directly, thus furthering the goal of preserving the dignity of the judicial process).

Here the defense attorney attempted to take advantage of the Court's ruling by asking questions to establish the evidence did not exist. This perverts the search for the truth that a trial is ultimately about. Defense counsel opened the door for the State to introduce the evidence in a limited form.

Even if it was an abuse of discretion to admit the evidence there was no prejudice. CO Grubb's attempt to stop Silva from attacking Avalos and break up the fight was a clear order to stop what he was doing, and the fact that fighting in the jail was against the rules would be obvious to anyone. There was no prejudice to saying that there were records that Mr. Silva had been informed not to fight.

2. The Court did not err in refusing to give a self-defense instruction.

A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). *See also State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If “[t]he trial court must merely decide whether the record contains the kind of facts to which the doctrine applies” then the review is for abuse of discretion. *Kappelman*, 167 Wn.2d at 6. In this case there is no dispute on the relevant law, the court simply weighed the evidence and

found it insufficient for a self-defense instruction. Thus the standard of review is abuse of discretion. “To determine whether a defendant is entitled to an instruction on self-defense..., the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. When assessing a self-defense claim, the trial court applies both a subjective and objective test.” *State v. Read*, 147 Wn.2d 238, 242-43 53 P.3d 26 (2002).

Here the evidence does not support giving a self-defense instruction for Silva. While there is evidence that Avalos knew Silva’s attack was coming, and even evidence that he agreed to the fight, there is no evidence that Avalos would have attacked Silva had Silva simply done what he was supposed to do and remained in his cell. Avalos did not advance towards Silva’s cell, and while he was prepared to meet Silva’s rush there is no evidence he would have attacked through CO Grubb. In addition, Silva had other options available to him besides force. If he knew Avalos was going to attack him he could have told CO Grubb before he opened the cell door, and Grubb could have locked Avalos down prior to opening Silva’s door. An Officer was immediately available to Silva to resolve the issue. A reasonable person would have informed the Officer of the problem if he thought he was going to be attacked. Silva did not.

At best the evidence shows an agreement to fight; at worst Silva attacked Avalos unprovoked. Nothing justifies a self-defense instruction.

Mutual combat is not a defense to a fight in the jail. *State v. Weber*, 137 Wn. App. 852, 155 P.3d 947 (2007). “Most correctional facilities are fraught with serious security dangers. Prisons are populated by persons who have chosen to violate the criminal law, many of whom have employed violence to achieve their ends. In such a volatile environment, public policy demands that violence between inmates be eliminated where possible.” *Id* at 860 (internal citations omitted). Here public policy requires Silva to take the reasonable action of informing the Officer of the danger, not attacking someone who has not made an aggressive move towards him. The Trial Court did not abuse its discretion when it denied the self-defense instruction.

V. CONCLUSION

The Court did not err in allowing a limited question as to whether Silva had been previously instructed not to fight when defense counsel

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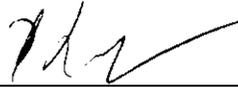
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opened the door. Nor was there sufficient evidence for a self-defense instruction. The trial court should be upheld.

Dated: January 24th, 2018.

Respectfully submitted:

GARTH DANO
Prosecuting Attorney



By: Kevin J. McCrae, WSBA # 43087
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Cathy M. Helman
cathy@burkelg.com
stephanie@burkelg.com

Dated: January 2, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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