

FILED
Court of Appeals
Division III
State of Washington
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No. 36038-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent

v.

KAZ MCKENZIE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. Mr. McKenzie's statements to the police were in the context of a custodial interrogation while he was unmirandized, and therefore must be suppressed.

Mr. McKenzie was in custody at the time of his statements. This Court examines the totality of the circumstances in determining the custodial nature of a police encounter. *See State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *see also State v. Sakawe*, 2018 WL 3738185 at *7, 4 Wn. App. 2d 1067 (Aug. 6, 2018) (not published)¹ (citing *Rosas-Miranda*). Relevant factors in determining whether an at-home interrogation is custodial include: “(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.” *United States v. Craighead*, 539 F.3d 1073, 1084 (9th Cir. 2008); *Rosas-Miranda*, 176 Wn. App. at 783 (quoting *Craighead*). The prosecution has wholly failed to

¹ *Sakawe* is not reported; Mr. McKenzie cites it and other unreported cases as persuasive authority. *See* GR 14.1(a).

discuss the *Craighead* factors which support the conclusion that the officers engaged in custodial interrogation.

The prosecution states that because the police were still investigating the alleged crime, there is no custodial interrogation. State's Response at 8. This is the incorrect standard. The standard for custodial interrogation is "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004).

In the instant case, Mr. McKenzie testified there were three officers present in the apartment building hallway during his questioning, while Officer Baldwin testified there were at least five officers at the apartment building and "there was a lot of going back and forth and discussion" between him and these other officers. RP 132, 135. One officer blocked the exits in the hallway while another blocked the door to his apartment. RP 135-36. Mr. McKenzie was interviewed alone, and no one informed him of his right to leave. *See* RP 129-132. Application of the *Craighead* factors demonstrates a reasonable person would not feel they were able to walk away. Because Mr. McKenzie was in custody no interrogation could occur without an advisement of his rights.. Any statements solicited during this custodial interrogation are inadmissible. This Court should reverse and remand for a new trial with instructions to

suppress the statements. *See State v. Rhoden*, 189 Wn. App. 193, 203, 356 P.3d 242 (2015).

2. The exclusion of Patrick Kinchler’s testimony was erroneous and denied Mr. McKenzie his right to present a defense.

Mr. McKenzie offered the testimony from Patrick Kinchler, the head building manager, that Mr. Foss had a habit of carrying a large knife prominently displayed on his belt. RP 266. The trial court excluded Mr. Kinchler as a witness on the basis that his observations of Mr. Foss’s knife occurred “at a different location on a different time.” RP 268–70. This ruling incorrect, as Mr. Kinchler’s testimony was both relevant and material to Mr. McKenzie’s defense.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The rules further recognize “[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit.” ER 406. Mr. Kinchler would testify Mr. Foss had a habit of carrying a large knife prominently displayed on his belt. RP 266. This testimony bolsters Mr. McKenzie’s statement that he saw a knife on Mr. Foss at the time of the incident.

The State responds that Mr. McKenzie was the first aggressor and therefore evidence of Mr. Foss possessing a large and prominently displayed knife is unnecessary. State's Response at 15. It is not the prerogative of the prosecution to question the choice of defense Mr. McKenzie pursues, nor is it a valid basis by which to deny evidence. Here, the trial court allowed other evidence of Mr. Foss carrying a knife because it is essential to Mr. McKenzie's claim that he was responding to defend his dog. Mr. Kinchler's testimony bolsters this defense.

The prosecution also fundamentally misunderstands Mr. McKenzie's defense. Mr. McKenzie does not claim self-defense in the middle of a continuous fight as discussed in *Craig*. State's Response at 16 citing to *State v. Craig*, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973). Rather, Mr. McKenzie argues that Mr. Foss's possession of a large knife and threats towards Mr. McKenzie's dog initiated Mr. McKenzie's response. RP at 327—28. All subsequent activity was in defense of his dog, Twyla. *Id.*

Denying evidence of Mr. Foss's practice of carrying a knife hindered Mr. McKenzie's ability to full present a defense. Mr. McKenzie, his brother, and his brother's girlfriend all testified that Mr. Foss was carrying a large knife at the time of the fight. RP 279, 326, 341. However, Mr. Kinchler was the only objective party who was able to testify to Mr.

Foss's habit of carrying a large knife with him in the apartment complex. *See* RP 266. This goes directly to Mr. McKenzie's fear of harm to his dog at the time of the incident.

Mr. Kinchler's testimony was not cumulative. Mr. Foss's finance stated that Mr. Foss "he doesn't always carry [a knife]" while Mr. Kinchler insisted Mr. Foss "always openly" carries this knife. RP 221, RP 266. This is the only objective perspective and definitive statement concerning Mr. Foss's habit of carrying a knife.

Lastly, this argument is preserved. At the trial level, Mr. McKenzie asserted:

"Well, Your Honor, I think, as Mr. Treece himself mentioned, Mr. Kinchler's testimony is that -- I expect it to be that Mr. Foss is *always openly carrying this knife*, that it's a large blade, that it's prominently displayed right in the area of where his belt buckle is, that it is intimidating, and that it has caused apprehension even in Mr. Kinchler when he's interacted with Mr. Foss. And Mr. -- Mr. Kinchler being manager of the building obviously *has had a lot of interactions with Mr. Foss* with collecting the rent. This incident happened at the apartments. To me, there seems to be a pretty clear nexus there."

RP at 268 (emphasis added). This statement addresses Mr. Foss's habit of carrying a knife openly over the course of Mr. Kinchler's many interactions with Mr. Foss. Additionally, Mr. McKenzie asserted, through counsel:

“Your Honor, I guess we would just be offering it as just further -- further evidence that he has a *reputation for carrying the knife...*”

RP at 269 (emphasis added). Once again, Mr. McKenzie asserted that the basis for allowing Mr. Kinchler’s testimony was about Mr. Foss’s practice of carrying a knife. This is encompassed by ER 406, which was reasserted before this Court. This objection is sufficiently specific to preserve this matter on appeal. *State v. Guloy*, 104 Wn.2d 412, 423, 705 P.2d 1182 (1985).

3. Repeated prosecutorial misconduct prejudiced Mr. McKenzie’s right to a fair trial.

Because the repeated prosecutorial misconduct in this case was flagrant and ill-intentioned this Court can address it on appeal. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012). Mr. McKenzie’s trial was prejudiced by repeated instances of prosecutorial misconduct: improper questioning as to the credibility of a witness, use of inflammatory language such as “vigilante” to refer to Mr. McKenzie, use of facts not in evidence in closing argument, references to the prosecutor’s own military service to bolster the prosecutor’s credibility in front of the jury and misstatements of law before the jury.

Each of these types of prosecutorial misconduct have been denounced by the Supreme Court of Washington. It is improper to submit

evidence to the jury that has not been admitted at trial. *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). It is well established that a prosecutor cannot use a position of power and prestige to sway the jury. *In re Glasmann*, 175 Wn.2d at 696. The use of inflammatory language is impermissible. *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). In violating each of these mandates, the trial prosecutor committed flagrant misconduct.

In *Glasmann*, the prosecutor questioned the credibility of the defendant, improperly inflamed the jury, introduced facts not in evidence to the jury and misstated the law. 175 Wn.2d at 676. These repeated instances of misconduct could not be cured. “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *Id.* at 696 (citing to *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)).

The instant case concerns similar repeated instances of misconduct which could not have been cured by instruction. Accordingly, this Court should reverse the conviction and remand for a new trial. *In re Glasmann*, 175 Wn.2d at 714.

4. The “first aggressor” jury instruction was improper, and undermined Mr. McKenzie’s self-defense claim.

There is a “high threshold for clarity of jury instructions” pertaining to self-defense. *State v. Irons*, 101 Wn. App. 174, 550, 4 P.3d 174 (2000). Self-defense instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). An instruction that does not make the relevant law manifestly apparent “amounts to an error of constitutional magnitude and is presumed prejudicial.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

A “first aggressor” instruction tells the jury the defendant is not entitled to act in lawful self-defense if he “provoked or commenced the fight.” *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010); *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). If the instruction is erroneously given, it impermissibly denies the accused person the right to act in self-defense. *Id.* The “first aggressor” instruction is disfavored because the law of self-defense is usually explained without need for this instruction. *Id.* “Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be

sufficiently argued and understood by the jury without such instruction.”

Wasson, 54 Wn. App. at 161.

Courts must “take care” when using this instruction and present it sparingly because it relieves the State of its burden of disproving self-defense and deprives an accused person of a long-standing right to defend himself or others. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 n.2 (1999); *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998).

To be the “first aggressor”, the defendant’s own unlawful conduct must provoke the subsequent need to act in self-defense. *State v. Brower*, 43 Wn. App. 893, 901, 721 P.2d 12 (1996). Before the State is entitled to the instruction the evidence must show the defendant’s initial provoking act must be intentional; it must be an act that would reasonably provoke a belligerent response from the victim, and it must be related to the eventual assault for which the claim of self-defense arises. *Birnel*, 89 Wn. App. at 473; *Wasson*, 54 Wn. App. at 159.

The State fundamentally misunderstands Mr. McKenzie’s claim and the “first aggressor” instruction. Mr. McKenzie observed Mr. Foss with the handle of a long knife handle sticking out of his belt. RP at 326. Mr. McKenzie believed Mr. Foss was discussing with Mr. Foss’s cousin how to take possession of Twyla, Mr. McKenzie’s dog. RP at 325. In response

to this situation, Mr. McKenzie defended his property and hit Mr. Foss.
RP at 327—28.

Mr. McKenzie is not claiming that only the ensuing fight was an act of self-defense. Rather, he claims his first act, hitting Mr. Foss, was in response to an observed a threat to his dog. *Id.* This situation is not one addressed or contemplated by the “first aggressor” instruction. Therefore, the instruction was improper. This error warrants a new trial. *State v. Walden*, 131 Wn.2d 469, 479, 932 P.2d 1237 (1997).

B. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and remand for a new trial.

DATED this 16th day of May, 2019.

Respectfully submitted,



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

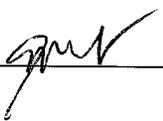
STATE OF WASHINGTON,)	
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v.)	NO. 36038-5-III
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)	
APPELLANT.)	

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