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NO. 63977-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT KOCH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Whether the trial court abused its discretion in refusing to give a supplemental instruction to the jury when the jury inquired about a defense that was not presented to the jury?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Robert Koch was charged by information with the crimes of attempted murder in the first degree and, in the alternative, assault in the first degree. CP 18-19. A jury trial was held and when the jury was unable to reach a verdict, the court declared a mistrial. CP 20. A second jury trial was held and, while unable to reach a verdict as to attempted murder in the first degree, the jury found the defendant guilty of assault in the first degree. CP 34-35, 62. The jury also found that the defendant committed the crime while armed with a firearm. CP 63. The defendant was sentenced to 153 months of total confinement. CP 89.

2. FACTS OF THE CRIME.

On February 29, 2008, 40-year-old Scott Koch was shot twice in the back of the head in room 202 of the Kenmore Inn

motel. 2RP 63, 81; 4RP 14.¹ Scott was alone in the room with his 81-year-old father when the shooting happened. 4RP 67.

Scott Koch lived with his parents, Robert and Sandra Koch, from 2001 until 2008 due to financial problems that were largely caused by his chronic unemployment and his addiction to crack cocaine. 4RP 33-34, 37, 71, 74. Scott's younger brother also lived in the home while recuperating from a liver transplant. 4RP 35.

On December 17, 2008, Scott Koch was arrested and ordered to have no contact with his parents' home or his father. 4RP 37-38. He spent several days in jail, and when released, moved back into his parents' home. 4RP 39. On January 28, 2009, a restraining order was issued and Robert Koch took his son to Kenmore Inn motel, where he paid his son's rent for the next month. 4RP 40. Robert Koch also visited several times a week to bring his son food and clean clothes. 4RP 41.

On February 29, 2008, Robert Koch brought his son dinner at approximately four p.m. 4RP 42. After handing Scott Koch a plate of food, Robert Koch said he was going back to the truck. 4RP 43. As Scott Koch began eating his dinner with his back to the

¹ The Verbatim Report of Proceedings will be referenced as follows: 1RP is May 11, 2009; 2RP is May 20, 2009; 3RP is May 21, 2009; 4RP is May 26, 2009; 5RP is May 27, 2009; 6RP is May 28, 2009; 7RP is May 29, 2009.

motel room door, he suddenly felt like he had been hit in the back of the head with a brick. 4RP 43. He fell to the floor, and saw that he was bleeding profusely. 4RP 45. Robert Koch was standing near the door. 4RP 46. He did not speak. 4RP 47. As Scott Koch stood up and moved toward the door, Robert Koch dropped a gun that he had apparently been holding. 4RP 48-49. Scott Koch took the cylinder out of the gun and proceeded out of the room to the motel office, where the owner of the motel called the police. 2RP 120; 4RP 50, 53. Robert Koch left before the police arrived. 2RP 122.

Police officers arrived and found Scott Koch bloody and confused. 2RP 12-13, 63-64. Scott reported that his father had struck him from behind with a gun. 2RP 64. He also reported that his father was wearing a green glove on his hand. 2RP 70. A .22 caliber revolver was lying on a chair and the cylinder for the gun was in Scott Koch's pocket. 2RP 64.

While the police were at the motel room, Robert Koch called. 2RP 72. When Deputy Coffman answered the phone, an elderly male voice asked "Is this the police?" 2RP 72. The caller informed Deputy Coffman that he was Scott's father and would like to speak with them. 2RP 72.

Scott was transported to the hospital, where it was discovered that he had bullet fragments in his brain and a bullet lodged under his skin and just outside his skull. 4RP 14-18.

When Robert Koch arrived back at the Kenmore Inn motel, he told the police that he had brought Scott food and laundry but never went inside the room, except perhaps to step one foot inside. 2RP 20-21, 78. He said that Scott was fine when he left and he had seen nothing unusual. 2RP 79.

The Kenmore Inn motel has surveillance equipment. 2RP 31, 81. The police reviewed the surveillance tape, which revealed Robert Koch entering Scott's room, Scott exiting the room injured and Robert Koch leaving the room approximately ten minutes later. 2RP 31-32.

In addition to the two bullets that struck Scott Koch in the head, another bullet penetrated the wall and entered into the adjoining room. 2RP 85, 96-97, 101; 5RP 74-78. When the police searched the Koch home, they found a box of green medical gloves. 5RP 64. DNA analysis revealed that blood found on the back of Robert Koch's pants matched Scott Koch's blood. 5RP 100-02.

Robert Koch did not testify at trial. The defense presented no witnesses other than Deputy Jaime Baker, who testified that she took a written statement from Scott Koch at the hospital, portions of which were inconsistent with his testimony at trial. 5RP 118-20. In particular, in his statement to police on the night of the incident, Scott Koch stated that his father struck him with the gun after Scott fell to the ground. 5RP 120. He also stated that Robert Koch tried to block the door. 5RP 120. In his testimony, Scott testified that neither of these things were true. 2RP 92-93, 100.

Defense counsel objected to the alternative offense of assault in the first degree being submitted to the jury. 6RP 9-11. Defense counsel did not offer self-defense instructions.

After retiring to deliberate, the jury sent several inquiries to the court. They first asked to see the written statement that Scott Koch gave to the police and also asked to view the videotape from the surveillance camera again. CP 65, 67. The trial court instructed them that the written statement was not evidence, but allowed them to view the videotape. CP 66, 68. The jury then sent the following inquiry to the court:

If a juror believes that there is a reasonable possibility of the defendant acting in self-defense, can that belief form the basis for "reasonable doubt" of guilt in this

case, despite the fact that the issue of self defense was not raised in the trial.

CP 69. Defense counsel requested that the court either answer the inquiry "yes," or "A juror may consider the facts proved at trial and any reasonable inferences therefrom in reaching his or her decision." 6RP 3, 7. The trial court instructed the jury to "Please reread your instructions." CP 70.

C. ARGUMENT.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A SUPPLEMENTAL INSTRUCTION REGARDING A THEORY THAT WAS NOT PRESENTED TO THE JURY.

The defendant contends that the trial court abused its discretion in refusing to give the jury a supplemental instruction when the jury asked about self-defense. This claim should be rejected. Self-defense was not presented to the jury. While a court has broad discretion regarding supplemental instructions, it should not give the jury supplemental instructions that go beyond matters that were argued to the jury. The court did not abuse its discretion in refusing to answer the question in any way that could be interpreted as allowing them to consider self-defense. The court

did not abuse its discretion in telling the jury to reread its instructions.

The trial court may give the jury additional instructions as to the law after the jury has begun deliberations. State v. Becklin, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008). Generally, the question of whether supplemental instructions should be given to the jury is within the discretion of the trial court. State v. Ng, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988). However, supplemental instructions should not go beyond matters that were argued to the jury. State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

For example, in State v. Ransom, a drug prosecution, the jury sent the court an inquiry about accomplice liability. Id. at 713. The judge responded by giving a supplemental accomplice liability instruction, although the State had not pursued an accomplice theory at trial or requested an accomplice instruction before the jury began deliberations. Id. This Court held that the trial court erred by giving an instruction that went beyond the matters that had been argued to the jury. Id. at 714. This Court held that the effect of the supplemental instruction was to add a theory that the State had not elected and the defense had no chance to argue. Id.

In contrast, in State v. Becklin, a stalking prosecution, the State had not requested the accomplice instruction but both parties addressed in argument the issue of whether the defendant was accountable for the actions of third parties. Becklin, 163 Wn.2d at 524. When the jury inquired as to whether stalking could be accomplished through third parties, the court answered "yes." Id. The Washington Supreme Court distinguished Ransom on the basis that both parties had argued the issue of third party participation to the jury. Id. at 530. In light of the parties' arguments, the court held that the court did not abuse its discretion in answering the question in a way that accurately reflected the law. Id.²

Recently, in State v. Jasper, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 36666997 (Slip Opinion No. 63442-9-I, filed 9/20/10), this Court reaffirmed the holding of Ransom that the trial court should not issue supplemental instructions regarding legal theories that were not argued to the jury. In that case, the trial court improperly

² It should also be noted that as a matter of logic, the court's holding that the trial court did not abuse its discretion in affirmatively answering the question does not mean that the trial court would have necessarily abused its discretion by simply telling the jury to refer back to the original instructions. It is possible that the court would have viewed an answer to "reread the instructions" as a proper exercise of the court's instructions as well.

responded to a jury inquiry without notifying the parties. The court told the jury to reread the instructions. On appeal, the defense argued that it would have requested that the trial court issue a supplemental instruction as to a statutory defense. This Court found that the trial court's failure to confer with the parties was harmless error. This Court concluded that the trial court could not have given a supplemental instruction that would have informed the jury of a statutory defense that had not been raised at trial and had not been argued. Because the only proper response was to tell the jury to reread the instructions, the defendant was not prejudiced by the court's failure to follow proper procedure.

In the present case, the proper procedure was followed and the court conferred with the parties at length on how to respond to the jury's question. 7RP 3-10. To the extent that the jury's question raised the possibility of a self-defense claim, any answer indicating that the jury could consider self-defense would have gone beyond what was presented to the jury. As the trial court noted, self-defense had not been raised, no self-defense instructions had been requested and there was insufficient evidence to support a self-defense claim. 7RP 10. Any answer that could be interpreted as inviting the jury to consider self-defense

would have been a misstatement of the law because self-defense was not available to the defendant. See State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (a defendant is not entitled to self-defense instruction unless some evidence tends to prove act was done in self-defense). As in Ransom and Jasper, the court could not have instructed the jury as to a theory that the defense had not pursued, and the State had no chance to argue.

To the extent that the jury's question simply addressed the meaning of reasonable doubt, the trial court did not abuse its discretion in referring the jury back to its instructions. The jury was properly instructed as to what reasonable doubt meant: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP 42. This instruction was sufficient for the jury to determine that they could acquit the defendant if they had a reasonable doubt as to the elements of the crime arising from the evidence or the lack of evidence. The trial court did not abuse its discretion in electing not to give the jury any supplemental instructions.

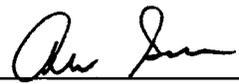
D. CONCLUSION.

The conviction should be affirmed.

DATED this 20th day of October, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Anthony Savage, the attorney for the appellant, at 615 Second Avenue, Suite 340, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. KOCH, Cause No. 63977-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame
Name
Done in Seattle, Washington

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Date

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