

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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No. 64397-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LARRY CORNELIUS JOHNSON,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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**A. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in excluding evidence of the victim's prior acts of violence against the defendant, where the evidence was relevant to support the defendant's claim of self-defense.

2. The trial court's decision to exclude evidence of the complainant's prior acts of violence against the defendant violated his state and federal constitutional right to confront his accuser.

3. The trial court's decision to exclude evidence of the complainant's prior acts of violence against the defendant violated his state and federal constitutional right to defend against the charge.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Evidence that the defendant was aware of specific acts of violence committed by the victim is admissible in a prosecution for assault, if the defendant asserts a claim of self-defense. Exclusion of the evidence violates the defendant's constitutional rights to confront his accusers and to defend against the charge. Did the trial court abuse its discretion and violate Larry Johnson's constitutional rights by excluding evidence of specific acts of

violence by the complaining witness against him, where he asserted a claim of self-defense to the charge of assault?

C. STATEMENT OF THE CASE

The State charged Larry Johnson with one count of second degree assault (RCW 9A.36.021(1)(a)). CP 1. The State alleged Mr. Johnson intentionally assaulted Susan McNeal and recklessly inflicted substantial bodily harm upon her. CP 1. The charge arose out of an incident that occurred on April 18, 2009. CP 1.

At the jury trial, Mr. Johnson testified he and Ms. McNeal were friends and had known each other for about six years.

8/27/09RP 138. On the morning of April 18, Ms. McNeal telephoned him from her residence and said, in an angry voice, "Get over here right now." 8/27/09RP 139. She wanted him to protect her from her landlord, who was in her back yard.

8/27/09RP 139. Mr. Johnson had been helping Ms. McNeal deal with the landlord—he even went to court with her earlier in an attempt to obtain a no-contact order against the landlord.

8/27/09RP 140. That morning, Ms. McNeal also wanted Mr. Johnson to come over and help her move. 8/27/09RP 140. Mr. Johnson had been helping Ms. McNeal move out of her residence.

8/27/09RP 140.

Mr. Johnson went to Ms. McNeal's residence as she requested. 8/27/09RP 140. When he arrived, she asked him to go to the store and get some gasoline for the lawnmower, which he did. 8/27/09RP 142-43. He then offered to mow the lawn but she declined, stating that he always chose the easy work to do. 8/27/09RP 142-43. He asked her to give him some other job to do but she would not, continuing to say he did not help her enough. 8/27/09RP 143-45. Mr. Johnson did not agree—he would often assist her with whatever she needed. 8/27/09RP 144. He sat down on the couch. 8/27/09RP 145. She continued to call him names and say he did not help her enough. 8/27/09RP 146. She was angry and had been drinking gin. 8/27/09RP 157-59.

Tired of Ms. McNeal's abuse, Mr. Johnson got up and prepared to leave. 8/27/09RP 146. At that point, she pushed him down with both hands onto the sofa and jumped on him, pinning his arms to his side with her body. 8/27/09RP 147, 159. Ms. McNeal was a strong woman who outweighed him. 8/27/09RP 156, 159. She then "started scratching [him] and punching [him] with the other hand" and "goug[ed] his eye." 8/27/09RP 147. He brought his hands up forcefully several times in an attempt to pry her body off of him. 8/27/09RP 147-48. He did not punch her intentionally but

might have hit her in the mouth as he was trying to get up.

8/27/09RP 156, 161.

Mr. Johnson ran to the back door but could not unlock the screen door. 8/27/09RP 148. Ms. McNeal ran up to him and he thought she had a steak knife in her hand; he put his left hand out to ward her off. 8/27/09RP 149. He managed to open the door and ran outside. 8/27/09RP 149. His eye still hurt at the time of trial where she had gouged it with her fingers. 8/27/09RP 149.

Ms. McNeal testified Mr. Johnson was angry when he came over but she did not know why. 8/27/09RP 124. He began to call her names and she asked him to leave, but he would not. 8/27/09RP 125-26. He then slapped her on the face and grabbed her by the throat and choked her. 8/27/09RP 127. She punched him in the face and told him to leave and he turned to go out the back door. 8/27/09RP 128. She thought he had left and went to lock the back door, but he was standing in the utility room. 8/27/09RP 129-30. He then punched her three times in the face, injuring her mouth and teeth. 8/27/09RP 129-31.

Ms. McNeal called 911 and hung up but police responded. 8/27/09RP 86-88, 94-96, 100, 129-30. After contacting Ms. McNeal, officers went to Mr. Johnson's residence and arrested him.

8/27/09RP 94-96, 102. Mr. Johnson told police that Ms. McNeal had attacked him. 8/27/09RP 98, 102, 108-09.

During trial, defense counsel moved to admit evidence that Ms. McNeal had assaulted Mr. Johnson on two previous occasions. 8/27/09RP 116-18. In an offer of proof, counsel asserted that on the day before the alleged incident, Ms. McNeal had held a knife to Mr. Johnson's throat. 8/27/09RP 116. About one month prior to the incident, Ms. McNeal had broken an ashtray over his leg. 8/27/09RP 116. The defense offered the evidence in support of Mr. Johnson's claim of self-defense. 8/27/09RP 117.

The court accepted counsel's assertions that Mr. Johnson would testify about the two prior incidents as described. 8/27/09RP 117-18. But the court ruled the evidence was inadmissible because its probative value did not outweigh its potential prejudicial impact. 8/27/09RP 117-18. The court ruled the evidence was not relevant to prove the elements of the crime charged. 8/27/09RP 117-18.

The jury was instructed on Mr. Johnson's claim of self-defense. CP 38-39. Nonetheless, the jury found Mr. Johnson guilty of second degree assault as charged. CP 17.

#### D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. JOHNSON'S CONSTITUTIONAL RIGHTS BY EXCLUDING EVIDENCE OF MS. McNEAL'S PRIOR ACTS OF VIOLENCE AGAINST HIM, BECAUSE THE EVIDENCE WAS RELEVANT TO SUPPORT HIS CLAIM OF SELF-DEFENSE

1. A defendant claiming self-defense in a prosecution for assault has a constitutional right to present evidence of the complaining witness's prior acts of violence against him and to cross-examine her about them. A criminal defendant's right to confront the witnesses against him is guaranteed by both the United States<sup>1</sup> and the Washington Constitutions.<sup>2</sup> In addition, the right to confront witnesses has long been recognized as essential to due process.<sup>3</sup> Chambers v. Mississippi, 410 U.S. 284, 294, 90 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294; U.S. Const.

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<sup>1</sup> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

<sup>2</sup> Article 1, section 22 of the Washington Constitution guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

<sup>3</sup> The Fourteenth Amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law."

amend. 14; Const. art. 1, § 3. A defendant's right to an opportunity to be heard in his defense includes the rights to examine witnesses against him and to offer testimony and is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 230 P.3d 576, 580 (2010) (citing Chambers, 410 U.S. at 294).

These rights are not absolute, however. Jones, 230 P.3d at 580. Evidence that a defendant seeks to admit "must be of at least minimal relevance." Id. (citing State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). A defendant has a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. Jones, 230 P.3d at 580 (citing State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)).

But if the evidence is relevant, the State has the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Jones, 230 P.3d at 580 (citing Darden, 145 Wn.2d at 622). The State's interest in excluding prejudicial evidence must be balanced against the defendant's need for the evidence; relevant evidence can be withheld only if the State's interest outweighs the defendant's need. Jones, 230 P.3d at 580. For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the

Sixth Amendment and Const. art. 1, § 22." Jones, 230 P.3d at 580 (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Evidence is highly probative if its exclusion would deprive the defendant of his ability to testify to his version of the incident.

Jones, 230 P.3d at 580 (citing Hudlow, 99 Wn.2d at 17-18).

It is well settled that, in a prosecution for assault, evidence that the defendant knew of prior acts of violence committed by the complaining witness is admissible to justify forceful acts of the defendant in self-defense. State v. Walker, 13 Wn. App. 545, 549, 536 P.2d 657 (1975); State v. Cloud, 7 Wn. App. 211, 217-18, 498 P.2d 907 (1972); State v. Adamo, 120 Wash. 268, 269, 107 P. 7 (1922). Such testimony is relevant, because it "tends to show the state of mind of the defendant at the time of the [assault], and to indicate whether he at that time had reason to fear bodily harm." Adamo, 120 Wash. at 269.

Use of force in self-defense is justified and lawful "when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary." CP 38; RCW 9A.16.020(3). Evidence that the defendant knew of prior acts of violence committed by the complaining witness is admissible to

show the defendant had reasonable grounds to fear bodily injury and that his use of force in defense was well founded. Cloud, 7 Wn. App. at 218.

Thus, evidence that the defendant knew of the complaining witness's prior acts of violence is relevant, where the defendant asserts a claim of self-defense, to show whether the defendant reasonably feared bodily injury by the complainant. Excluding such evidence precludes the defendant from testifying as to the basis for his state of mind and whether his fear was reasonable. Excluding the evidence therefore deprives the defendant of the ability to testify as to his version of the incident. In that case, the evidence has *high* probative value and no state interest is compelling enough to preclude its admission. Jones, 230 P.3d at 580; Hudlow, 99 Wn.2d at 16-18.

2. The trial court abused its discretion and violated Mr. Johnson's constitutional rights by excluding evidence of Ms. McNeal's prior acts of violence against him and preventing him from cross-examining her about them. Mr. Johnson sought to admit evidence that Ms. McNeal had assaulted him on two occasions prior to the alleged incident in this case—once on the previous day and another time about one month earlier. 8/27/09RP 116-18. In

an offer of proof, counsel asserted that on one occasion, Ms. McNeal held a knife to Mr. Johnson's throat and on another occasion, she broke an ashtray across his leg. 8/27/09RP 116. Counsel asserted the evidence was relevant to show Mr. Johnson reasonably feared Ms. McNeal would injure him and that he therefore acted reasonably in using force to defend himself. 8/27/09RP 117.

The trial court accepted counsel's assertions that Mr. Johnson would testify about the two prior incidents as described. 8/27/09RP 117-18. But the court ruled the evidence was not relevant to prove the elements of the crime charged. 8/27/09RP 117-18. That ruling was erroneous and violated Mr. Johnson's constitutional rights to present his version of the incident and to cross-examine the complaining witness.

The law is well-established that where a defendant claims he acted in self-defense and presents some evidence in support, the *absence* of self-defense is an element of the crime the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-18, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 489-90, 656 P.2d 1064 (1983). The trial court was therefore incorrect in concluding that evidence of Mr. Johnson's state of mind

and whether he reasonably feared bodily injury by Ms. McNeal was not relevant to prove an element of the crime.

Moreover, the trial court's decision to exclude the evidence deprived Mr. Johnson of his constitutional rights to present a defense and to cross-examine his accuser. As stated, the evidence was relevant to show the basis for Mr. Johnson's state of mind and whether he reasonably feared bodily injury from Ms. McNeal. Excluding the evidence precluded Mr. Johnson from testifying as to his version of the incident. The evidence was therefore *highly* probative and no state interest was compelling enough to preclude its admission. See Jones, 230 P.3d at 580; Hudlow, 99 Wn.2d at 16-18. Exclusion of the evidence violated Mr. Johnson's constitutional rights. Jones, 230 P.3d at 580.

3. The constitutional error in excluding the evidence requires reversal. As an error of constitutional magnitude, the trial court's decision to exclude evidence of Ms. McNeal's prior acts of violence toward Mr. Johnson is harmless only if the State proves it is harmless beyond a reasonable doubt. Jones, 230 P.3d at 582 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet that burden here.

In Jones, a prosecution for second degree rape, the defense sought to admit evidence that, on the night of the incident, the victim used alcohol and cocaine and engaged in consensual sex not only with Jones but with two other men. Jones, 230 P.3d at 579. The court acknowledged that Jones's version of the events was "not airtight," as he did not call any of the other members of the alleged sex party as witnesses, the victim's testimony directly contradicted Jones's, and only Jones's semen was found on the victim. Id. at 582. Nonetheless, the court concluded that, because exclusion of the evidence precluded Jones from presenting his version of the events, the error was not harmless beyond a reasonable doubt. Id.

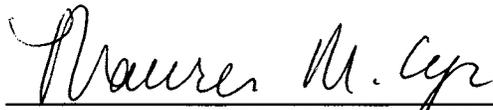
Similarly, here, exclusion of the evidence prevented Mr. Johnson from presenting a full account of his version of events. Had the jury heard that on two prior occasions Ms. McNeal used violence against Mr. Johnson, the jury would be more likely to believe that she was the aggressor during the incident at issue. Moreover, had the jury heard the evidence, it would also be more likely to believe that Mr. Johnson reasonably feared bodily injury and was therefore justified in using force to defend himself.

Exclusion of the evidence was therefore not harmless beyond a reasonable doubt and the conviction must be reversed.

E. CONCLUSION

The trial court's decision to exclude evidence of the complaining witness's prior acts of violence against Mr. Johnson violated his constitutional rights to present a defense and confront his accuser. Because a reasonable jury may have believed Mr. Johnson's use of force was reasonable to defend himself had it heard the evidence, the conviction must be reversed.

Respectfully submitted this 30th day of June 2010.



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64397-5-I
v.	)	
	)	
LARRY JOHNSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] LARRY JOHNSON 11660 RENTON AVE S, APT 19 SEATTLE, WA 98178	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JUNE, 2010.

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