SUPREME COURT NO. 101719-7
COA NO. 82911-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT FLEEKS, JR.,

Respondent.

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

The Honorable Mary Roberts, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. INTRODUCTION

The Court of Appeals correctly recognized that a factual dispute about interpretation of the surveillance video lies at the heart of this case. Because that video is open to more than one interpretation and could be viewed as consistent with Robert Fleeks' revived self-defense claim, he was entitled to jury instructions on the law supporting that defense. Because his attorney was ineffective in raising that defense without requesting the instruction, the Court of Appeals correctly reversed his conviction.

The state's argument for review rests on the false assumption that the video directly and incontrovertibly refutes Fleeks' testimony about revived self-defense. The mere fact that the Court of Appeals viewed it differently is, itself, evidence that the video is open to more than one interpretation. The state's petition also misrepresents the Court of Appeals' opinion, erroneously claiming that the Court failed to correctly cite or

apply the well-known Strickland[1] test for ineffective assistance when the opinion actually cites that language almost verbatim.

The Court of Appeals opinion does not present any conflict with precedent, issue of public interest, or significant constitutional issue. It involves a straightforward application of the well-known Strickland test and a factual dispute about how to weigh and interpret video evidence, a question that the Court of Appeals correctly recognized should have been left to a jury armed with a correct instruction on the applicable law.

B. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Respondent Robert Fleeks, Jr., files this answer to the state's petition for review of the Court of Appeals' published decision in State v. Fleeks, no. 82911-4-I.

C. COUNTERSTATEMENT OF THE ISSUES

1. When the Court of Appeals decision rests largely on a factual assessment of whether the surveillance video can be

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

viewed as consistent with the defense theory of revived self-defense, does the decision fail to implicate concerns for precedent, constitutional rights, or public interest that could merit this court's exercise of discretionary review?

2. Should the petition for review be denied when the Court of Appeals' decision on the opinion on guilt issue is distinguishable from this Court's decision in In re Personal Restraint of Lui[2] and was not essential to the Court's decision to reverse? Alternatively, if review is granted should it be limited to this issue alone?

D. COUNTERSTATEMENT OF THE CASE

After Marlon George stole cocaine from Fleeks during a drug deal, Fleeks chased him down to demand the return of his merchandise. 3RP[3] 1150. Fleeks caught up to George in front of

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[2] In re Pers. Restraint of Lui, 188 Wn.2d 525, 555, 397 P.3d 90, 109 (2017).

[3] The Verbatim Report of Proceedings is referenced as follows: 1RP: Pre- and post-trial motions, sentencing - Dec. 17, 2020, Jan. 11, 12, 13, Feb. 11, Mar. 18, July 23, 2021; 2RP: Jury

the Best Western Hotel. 3RP 1151. George responded with strange hand gestures, incomprehensible mumbling, and pointing for Fleeks to go away. 3RP 1151. Then, Fleeks saw George reach into his sock and saw a glint of light that Fleeks feared was a blade. 3RP 1151-53. As George inched closer to him, Fleeks threw a kick that brushed the side of George's head to stave off an attack. 3RP 1153.

George then began to empty his pockets onto the sidewalk, ask if to show that he did not have the crack. 3RP 1153. As he did so, Fleeks noticed George lining himself up as if preparing to throw a punch. 3RP 1154. George also continued to make strange hand gestures and mumble. 3RP 1155.

At this point, Fleeks testified, he told George he was leaving, and turned to walk away. 3RP 1155. As he left, he looked behind him to see that George was following him. 3RP

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selection - Feb. 16, 17, 18, 2021; 3RP: Trial - Feb. 22, 23, 24, 25, Mar. 1, 2, 3, 4, 5, 8, 9, 10, 2021.

1155. He saw George make a throat cutting gesture, which Fleeks interpreted as a death threat. 3RP 1155-56.

Fleeks then stopped walking because he did not want George behind him. 3RP 1155. As the two faced off, Fleeks saw George reach again into his pocket, at which point Fleeks pulled out his gun and hit George with it. 3RP 1156-57.

When Fleeks hit George with the gun, the base plate fell off and the bullets spilled onto the sidewalk. 3RP 1157-58. As Fleeks tried to pick them up, George began to throw punches at him. 3RP 1157-58. In George's hand, Fleeks saw the same glint he'd seen earlier, and again concluded it was a blade. 3RP 1159. If one of George's strikes had connected, Fleeks believed he would be dead. 3RP 1159. Then, as Fleeks backed away from George, he hit the edge of the curb and lost his balance. 3RP 1159. It was then that Fleeks pulled out his gun and fired once from the hip, with no idea where the bullet had gone. 3RP 1159-60.

Fleeks testified he acted in self-defense. Much of the interaction, but not the shooting itself, was captured by surveillance cameras and seen by eyewitnesses inside the Best Western Hotel. Exs. 19, 82; 3RP 417-35, 477-83, 497. A hotel guest, alerted by the sound of the gunshot, filmed the aftermath of the shooting as well. 3RP 216; Ex. 5.

The detective on the case testified about his interrogation of Fleeks after his arrest. Fleeks consistently denied shooting George. 3RP 1177-80. Just before ending the interrogation, a recording of which was played for the jury, the detective tells Fleeks this is his last chance to make himself look less "cold-hearted." Ex. 46;[4] 3RP 153-55. The trial court denied Fleeks' motion to redact this portion of the recording because it involved an improper opinion on guilt. 3RP 153-55.

The jury was instructed that a first aggressor may not claim self-defense. CP 469. It was not, however, instructed on the legal

[4] An unredacted transcript of the interview was admitted for pre-trial purposes as pre-trial exhibit 16. This quote is found at page 33 of the transcript.

circumstances under which a first aggressor may, by withdrawing, revive the right to act in self-defense. CP 438-474. The trial court denied Fleeks's motion for a new trial on the grounds that his attorney was ineffective in failing to request instruction on revived self-defense. CP 669-70.

The Court of Appeals reversed Fleeks' conviction for felony murder because it found his attorney was ineffective in failing to request jury instructions on the law supporting the defense theory of the case. The Court first discussed the legal analysis for ineffective assistance of counsel from Strickland, including the test for prejudice: "To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different." Slip op. at 5-6. The Court of Appeals concluded that Fleeks' testimony was the necessary substantial evidence supporting a request for the instruction and the surveillance video was arguably consistent with Fleeks' testimony. Slip op. at 10-11.

The court concluded a correctly instructed jury may have accepted Fleeks' claim of revived self-defense. Slip op. at 11.

The Court of Appeals also reviewed the detective's "cold-hearted" comment at the end of Fleeks' interrogation, finding it to be an improper opinion on guilt that should be redacted from the recording before it is admitted at a new trial. Slip op. at 23-26.

E. ARGUMENT

1. THE COURT OF APPEALS DECISION ON INEFFECTIVE ASSISTANCE OF COUNSEL RESTS LARGELY ON A FACTUAL DETERMINATION THAT DOES NOT WARRANT THIS COURT'S REVIEW.

The Court of Appeals reversed Fleeks' conviction for ineffective assistance of defense counsel. The seminal Washington case applying the Strickland standard involves precisely the same deficient performance as in this case: defense counsel's failure to request jury instructions on the law supporting the defense theory of the case. State v. Thomas, 109 Wn.2d 222, 227-29, 743 P.2d 816 (1987).

Contrary to the state's assertion in its petition for review, the Court of Appeals also correctly applied the second prong of the Strickland test, requiring a showing of prejudice. In its attempt to manufacture a significant issue that might warrant this Court's review, the state misrepresents the legal and factual bases for the Court of Appeals decision. This decision neither conflicts with precedent, nor involves any novel constitutional issue, nor raises an issue of substantial public interest.

a. The Court of Appeals correctly applied the second prong of the Strickland test for ineffective assistance of counsel.

The state claims the Court of Appeals failed to even mention the correct "reasonable probability" standard for prejudice in a claim of ineffective assistance of counsel. Petition at 3. However, the Court of Appeals opinion states, "To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different." Slip op. at 6-7 (citing In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998)).

Merely because the Court cited a different ineffective assistance case, rather than the seminal Strickland case, does not mean it failed to understand or apply the correct law. Although it may explain why the state failed to *notice* that the Court did, in fact, apply the correct prejudice standard. The Court of Appeals inartful use of the word "may" does not indicate that the Court failed to understand or apply the Strickland standard, particularly when it correctly recited it earlier in the opinion. Slip op. at 5-6, 11.

Any problematic nature of the Court of Appeals' opinion involves, at best, inartful wording, not "faulty analysis," as the state claims. Petition at 24. If the state wanted the Court of Appeals to clarify its wording, it could have moved to reconsider. Instead, it seeks this Court's review of a factual dispute best left to a jury, not an appellate court.

b. The Court of Appeals correctly recognized the factual dispute, which would have mandated the trial court give jury instructions on revived self-defense if requested.

In deciding whether to give a jury instruction that correctly states the law, the trial judge is required to do so whenever there is substantial evidence to support giving the instruction. State v. Ponce, 166 Wn. App. 409, 415, 269 P.3d 408 (2012). In determining substantial evidence, the court must view the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez–Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The court may not weigh conflicting evidence. Ponce, 166 Wn. App. at 416. Here, the Court of Appeals recognized that Fleeks' testimony was the necessary substantial evidence supporting the revived self-defense instruction and the video evidence did not defeat that showing because it was open to interpretation and could be viewed as consistent with that testimony. Slip op. at 10.

This Court can view the video evidence for itself. However, the mere fact that the Court of Appeals could view it as

potentially consistent with Fleeks' testimony shows that reasonable jurors could also view it in that way. For example, the state claims the video shows Fleeks walking side by side with George, rather than walking away ahead of him. Petition at 10. This is open to interpretation based on camera angles, for example. The Court of Appeals came to a different conclusion, finding the video shows Fleeks appearing to walk away from George. Slip op. at 10. In another example, what the state describes as an "errant haymaker," by George, the Court of Appeals described as a "hard punch." Slip op. at 5.

The Court of appeals did not ignore the video evidence. Petition for Review at Slip op. at 4-5, 10-11. It merely considered that there was more than one possible interpretation of that evidence, understanding it must be viewed in the light most favorable to Fleeks.

The state claims "it makes little sense for courts to accept testimony as true when it is plainly contradicted by video evidence of undisputed authenticity." Petition at 15. But the

Court of Appeals did not hold that an instruction could not be denied if there were uncontroverted video evidence. Instead, it disagreed with the state's interpretation of this particular video evidence, finding it was open to interpretation consistent with Fleeks' testimony. Slip op. at 10.

The state also misapprehends the Court's decision and claims that, even if Fleeks tried to walk away, his act of hitting George with the pistol meant that it was Fleeks who was again the aggressor. Petition at 19. The state fails to acknowledge the evidence indicating that, before the so-called pistol-whipping, George had both followed Fleeks and made a threatening throat-cutting gesture. Slip op. at 10. The Court of Appeals correctly recognized that even the video, viewed in the light most favorable to Fleeks, supports this sequence of events. Slip op. at 10. After Fleeks tried to walk away, (and before Fleeks hit him with the gun) George not only followed him but made a threatening throat-cutting gesture. Slip op. at 10 ("the Best Western surveillance video shows that Fleeks does appear to break the

aggression and walk away from George. George follows and makes a throat-slashing gesture."). The state ignores this detail when it argues that Fleeks re-initiated hostilities after his attempt to withdraw. The Court of Appeals correctly recognized a factual dispute that, when viewed in the light most favorable to Fleeks, would have supported a jury instruction on revived self-defense.

c. The state has misconstrued the Court of Appeals opinion.

The state frames the issue as whether the court is "permitted" to consider unchallenged video evidence in determining whether the evidence supports a defense-requested jury instruction. Petition at 4-5. This incorrectly portrays the Court of Appeals decision. The Court's opinion does not preclude a trial court from considering such evidence. It merely holds that this particular video recording in this case is not so substantially or completely contradictory of the accused's account as the state would have it.

The state cites Berry v. King County, 19 Wn. App. 2d 583, 501 P.3d 150 (2021), in which summary judgment was granted

where there was uncontroverted video evidence that "blatantly contradicted" contrary testimony by the plaintiff. Petition at 15-16. But this case was also discussed in the briefing before the Court of Appeals. Brief of Respondent at 107; Reply Brief of Appellant at 15. The Court of Appeals apparently agreed with Fleeks that the video in this case simply did not present the type of "blatant contradict[ion]" as Berry. Slip op. at 10.

The state's argument is not really that the Court of Appeals committed errors of law. It is that the Court of Appeals disagreed with the state's interpretation of the video evidence. This disagreement merely demonstrates the correctness of the Court's holding. If a reasonable person could view the video evidence as consistent with Fleeks' testimony, there is a reasonable probability that a correctly instructed jury would have accepted his defense of revived self-defense. The Court of Appeals holding does not implicate any unique constitutional issue and is directly in line with precedent requiring the evidence be viewed in the light most favorable to the party requesting a jury instruction.

d. The petition misrepresents both the Court of Appeals opinion and the evidence in an attempt to manufacture a non-existent issue of public interest pertaining to the prevalence of gun violence.

Contrary to the state's petition, the Court of Appeals' current decision is not "Justifying gun violence under these circumstances" or indeed under any circumstances. Petition at 2-3. It is merely preserving the right to have a jury decide such questions and to do so while being correctly advised of the applicable law.

The state also claims this is a case of public interest because "A fatal shooting in downtown Seattle, filmed by hotel guests from their window, is certainly an issue of substantial public interest." Petition at 21. The state misrepresents the evidence. The hotel guest was alerted to the goings on by the sound of the gunshot. 3RP 216. What the guest filmed was the aftermath of the shooting. Id. The hotel guest film neither the shooting itself nor, more critically here, the altercation that led up to it. Id. Presumably, the state is referring to the surveillance

video (not "filmed by hotel guests"), which did capture much of the lead-up to the shooting. Ex. 19. However, even that did not capture the shooting itself. Ex. 19. And, as mentioned, the surveillance video is arguably consistent with Fleeks' account of events, giving rise to a jury question that should have been informed by a correct instruction on the law.

Moreover, even if the video evidence were as clear and obvious as the state claimed, the state would be engaging in blatant and unrealistic scare tactics. If the video is so obvious, then a correct jury instruction on the law would not "substantially reduce the odds that modern day gunslingers will be successfully prosecuted." Slip op. at 21-22. Instead, if the video were that obvious, then any reasonable jury would convict, even in the face of a correct understanding of the law.

An instruction on the law of revived self-defense would merely have ensured that any guilty verdict occurred because the jury agreed with the state's interpretation of the evidence. On the other hand, without that instruction, the Court of

Appeals correctly recognized that, it is reasonably probable that the jury's verdict rested instead on a failure to understand the law. The state, which has an independent duty to protect the constitutional rights of the accused, should eschew such an outcome.

The state claims that this is a significant constitutional issue because "A defendant's Sixth Amendment right to present a defense often depends on the jury being properly instructed." Petition at 17. The state fails to recognize that the Court of Appeals thoughtfully and carefully protected that constitutional right in this case, in line with prior cases from this Court and the Court of Appeals. There is no need to waste judicial resources on a disputed factual issue.

2. THE COURT OF APPEALS CORRECTLY VIEWED THE DETECTIVE'S PARTING COMMENT AS AN OPINION ON GUILT RATHER THAN CONTEXT FOR THE INTERROGATION.

The Court of Appeals' resolution of the improper opinion testimony is also consistent with precedent and does not

warrant this Court's review. Fleeks objected to the jury hearing a portion of his police interview in which Detective Cooper told him this would be his "last chance to make yourself look not so cold-hearted." Ex. 46;[5] 3RP 153-55. This was just before Cooper ended the interview. Id. The court overruled the objection and allowed that portion of the interrogation to be played for the jury. 3RP 155. The Court of Appeals agreed with Fleeks that this was improper opinion testimony, holding that the comment "improperly commented on Fleeks's intent and effectually directed the jury to not believe Fleeks's self-defense theory." Slip op. at 25.

The state claims the Court of Appeals' decision is inconsistent with In re Pers. Restraint of Lui, 188 Wn.2d 525, 555, 397 P.3d 90, 109 (2017) in which this court declared, "an officer may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the

[5] An unredacted transcript of the interview was admitted for pre-trial purposes as pre-trial exhibit 16. This quote is found at page 33 of the transcript.

interrogation." This issue does not warrant this Court's review for two reasons. First, the Court of Appeals holding on this issue was not necessary to its decision to reverse Fleeks' convictions, which was based entirely on the jury instruction issue discussed above. Slip op. at 26.

Second, the Court of Appeals' opinion does not necessarily conflict with Lui. Cooper's comment regarding Fleeks being cold-hearted occurred just at the end of the interview. It was not a part of the detective's attempt to tease out the meaning of inconsistent statements, as in Lui, 188 Wn.2d at 555-56. Because it came when the interrogation was essentially over, the detective's comment was not part of the "context for the interrogation." It was simply the officer's opinion on Fleeks' state of mind.

Alternatively, if this Court finds the Court of Appeals' decision inconsistent with Lui, it should limit review to this issue alone. Review of the primary issue is not warranted for the reasons discussed above.

F. CONCLUSION

The state's petition for review should be denied. Alternatively, review should be limited to the issue of improper opinion on guilt.

DATED this 15th day of March, 2023.

I certify that this document was prepared using word processing software and contains 3,297 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

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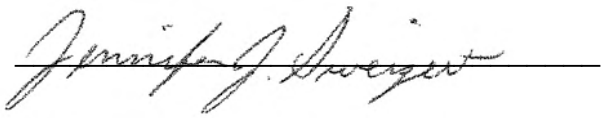

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