Supreme Court No. 93133-0

Court of Appeals No. 32695-1

THE SUPREME COURT

OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Oscar Alfred Alden, Appellant

RESPONSE TO PETITION FOR REVIEW

Ryan S. Valaas, WSBA #40695
Deputy Prosecuting Attorney
Douglas County Courthouse
P.O. BOX 360
Waterville, WA 98858
(509) 745-8535

Table of Contents

Table of Authorities

Cases

Evidence Rules

Court Rules

I. STATEMENT OF THE CASE

A. Evidence at Trial:

In the early morning of June 9, 2013, Tom Maks (the victim) was down on the ground, on his knees, unarmed, and wearing only a pair of boxer-shorts when Oscar Alden walked up to within a few feet of him, pointed a gun directly at his head, and fired one shot, instantly killing him. *Slip Opinion*, at 2-6. Prior to the incident Dayton Wiseman had invited several friends (including Mr. Alden) to spend the weekend at his family's vacation home to celebrate Mr. Wiseman's birthday. *Id.* Mr. Maks was staying at a vacation home next door to the group. *Id.*

On Saturday, the group spent most of the day drinking. *Id.* at 3. Mr. Maks chatted with the group during the day and at one point exchanged some marijuana for some pistol ammunition. *Id.* That evening the group went out to the bars in Chelan and invited Mr. Maks along with them. *Id.* The group described Mr. Maks as drunk, peculiar, and somewhat aggressive around this time. *Id.* at 4.

Eventually, the group returned home and fell asleep in various rooms of the house. *Id.* Sometime later, Mr. Maks entered the home and confronted the group for leaving him in Chelan. *Id.* Mr. Maks made a number of aggressive and/or threatening remarks to various members of

the group. *Id.* He also put his palm in Ms. Lincoln's face and flipped over the chair Mr. Alden was sleeping in. *Id.*

Finally, the police were called and Mr. Roberts escorted Mr. Maks out of the house. *Id.* at 5. Mr. Maks briefly disappeared but returned shortly thereafter, and a confrontation ensued. *Id.* Mr. Roberts told Mr. Maks, "if you didn't have your gun on you I would kick your ass right now." *Id.* In reply, Mr. Maks lifted his shirt up and spun around to show he was unarmed. *Id.* Mr. Maks then disrobed down to only his underwear. *Id.* Mr. Maks made some vulgar remarks towards Mr. Roberts which led to a physical confrontation resulting in Mr. Roberts punching Mr. Maks multiple times to the point that Mr. Maks was subdued and went down to the ground on his knees. *Id.*

After Mr. Roberts had knocked Mr. Maks to the ground, Mr. Roberts told Mr. Alden to get his gun. *Id.* at 6. Mr. Alden retrieved his gun, walked up to Mr. Maks, and shot him once in the head while Mr. Maks was still down on the ground on his knees. *Id.* at 6-7. Although Mr. Alden testified that Mr. Maks mad a sudden lunging movement towards him before Mr. Alden pulled the trigger, the other witnesses testified that Mr. Maks made no major movements towards Mr. Alden prior to being shot and was still on his knees at the time Mr. Alden pulled the trigger. *Id.*

B. Pretrial Rulings:

During the trial, both parties made a number of evidentiary motions. Alden moved to introduce evidence of the victim's conduct leading up to the point where Alden shot the victim. *Id* at 7-8. The court granted Alden's motion to the extent that Alden had knowledge of these acts. *Id.* The court reasoned that, to the extent Alden knew of the victim's behavior, it would be relevant to show self-defense, but that any of the victim's behavior unbeknownst to Alden would be irrelevant and not part of the res gestae. *Id.*

C. Jury Instructions, Closing Argument, Verdict, and Sentence:

The court's instructions to the jury were based off the Washington Pattern Instructions. *Id.* 9-11. They included an instruction on self-defense, which stated that it was the State's burden to prove that the homicide was not in self-defense. None of these instructions were objected to by either party. *Id.*

In the State's closing argument, the State argued that it bears the burden of showing there was insufficient evidence to support self-defense. *Id.* at 29.

The jury found Mr. Alden guilty of Murder in the Second Degree, and the court sentenced him to 231 months in prison. Mr. Alden then appealed.

D. Court of Appeals Decision:

1. Res Gestae Evidence:

The Court of Appeals held that the trial court's exclusion of a small amount of evidence relating to Mr. Maks aggressiveness, which was unknown to Mr. Alden at the time of the shooting, was either (1) a harmless error, or (2) properly excluded under ER 403. *Id.* 17-23. Specifically, Mr. Alden sought to admit evidence that Mr. Maks acted erratically/aggressively at a convenience store and a bar. *Id.* at 21. Mr. Alden was unaware of both of these incidents at the time of the shooting. *Id.* The Court of Appeals found that this evidence had "slight probative value" but was nonetheless relevant. *Id.* The Court of Appeals then went on to conclude that, "assuming arguendo that the trial court erred [in excluding this evidence] . . . such error was harmless." *Id.* at 22. The court reasoned that the error was harmless primarily because the jury "heard ample evidence concerning Mr. Maks' belligerent and aggressive conduct in the 12 hours leading up to the murder." *Id.* at 23. This admitted evidence included (1) Mr. Maks acting aggressively when he tried to buy Adderall from Mr. Alden, (2) Mr. Maks entering the group's vacation home with a pistol, threatening and assaulting members of the group, (3) Mr. Maks threatening Mr. Alden. *Id.* The Court of Appeals reasoned that based on all this admitted evidence of Mr. Maks' aggressiveness, "the

the trial would not have been affected "within reasonable probabilities" if the jury also heard evidence that Mr. Maks caused a disturbance at a convenience store and a bar. *Id.*

In addition to holding the exclusion of res gestae evidence was harmless, the Court of Appeals additionally held that the evidence would "have been properly excluded under ER 403 as overly cumulative." *Id.*

2. Ineffective Assistance of Counsel:

Mr. Alden also argued to the Court of Appeals that his trial attorney provided ineffective assistance when he failed to object to the State's closing argument regarding the burden of self-defense. The Court of Appeals held that Mr. Alden's claim of ineffective assistance failed because the State's closing argument was not an egregious and obvious misstatement of the law when read in conjunction with the jury instruction; thus the failure to object did not constitute a deficient performance by Mr. Alden's trial attorney. *Id.* at 29.

II. ARGUMENT

A petition for review will only be accepted by the Supreme Court if (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) a significant question of law under the Constitution is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

A. The issue regarding the constitutionality of the right to self-defense is not ripe for review because it has no bearing on Mr. Alden or his case.

In general, a challenge to the constitutionality of a law is not ripe for review unless the person seeking review is harmed by it. *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003).

Mr. Alden's first issue, whether self-defense is a constitutional right, is not ripe for review because resolution of the issue has no impact on him or his case. This is because the trial court fully allowed Mr. Alden to argue self-defense at trial and allowed Mr. Alden to introduce the evidence supporting that theory. As discussed infra, the State agrees that Mr. Alden has a constitutional right to present a defense, and because Mr. Alden's defense was self-defense, the State agrees that Mr. Alden has a right to present evidence supporting this theory.

Because this issue has no bearing on Mr. Alden's case, and is therefore not ripe for review, the court should decline to accept review of the issue.

B. Whether the exclusion of a small portion of slightly relevant evidence was error is not reviewable because it is not of constitutional magnitude.

Although defendants have a constitutional right to present a defense, this right does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810 (2015).

> The defendant's right to present [evidence] is also not absolute . . . 'the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' The defendant's right to present a defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence.' State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.'

Id.

Generally, a trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011). Although there are limited cases where evidentiary rulings rise to constitutional magnitude (e.g., refusing to allow a defendant to call

witnesses[1], admitting evidence in violation of the confrontation clause[2]), most evidentiary rulings do not rise to constitutional magnitude. *See State v. Turnipseed*, 162 Wn. App. 60, 69, 255 P.3d 843 (2011) (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L.Ed.2d 956 (1968)) ("a trial court that limits cross-examination through evidentiary rulings as the examination unfolds does not violate a defendant's Sixth Amendment rights unless its restrictions on examination 'effectively . . . emasculate the right of cross examination itself'"); *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (citing *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)) (holding evidentiary rulings under ER 609(a) are reviewed under the non-constitutional harmless error standard); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (holding a violation of the hearsay rule does not rise to constitutional magnitude).

In the present case, the Court of Appeals held that the excluded evidence was both (1) a harmless non-constitutional error under the trial court's analysis and (2) properly excludable under ER 403 as being cumulative. A closer review of the case makes it clear that the non-constitutional harmless error analysis applies. First, Mr. Alden had wide latitude by the trial court in presenting his self-defense case. As the Court of Appeals noted, the jury heard ample evidence concerning the victim's

[1] *See State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996)
[2] *See State v. Jasper*, 158 Wn. App. 518, 245 P.3d 228 (2010)

erratic and aggressive behavior. Specifically, the jury heard about multiple instances where the victim threatened someone, was assaultive to someone, etc. Additionally, Mr. Alden testified about his fear of the victim and the victim's behavior leading up to the shooting.

Second, the excluded evidence was extremely attenuated from the crime and minimally relevant. The Court of Appeals highlighted how attenuated this excluded evidence was, by referring to it as having "slight probative value" and noting that, based on all the other evidence admitted regarding the victim's aggressive conduct, the introduction of evidence that the victim had "also caused a disturbance at a convenience store and a bar," which Mr. Alden was unaware of, would not have affected the outcome of the trial.

Third, the Court of Appeals found that the evidence was properly excludable under ER 403 as being cumulative. Even if a trial court errs in an evidentiary ruling, the ruling is harmless if there is a separate basis supporting the ruling. *See State v. Gogolin*, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986); *State v. Bond*, 52 Wn. App. 326, 333, 759 P.2d 1220 (1988). Because Mr. Alden was able to get in the vast majority of the evidence relating to the victim's aggressive behavior, and based on the attenuated nature of the excluded evidence, the Court of Appeals concluded that the evidence would have been excludable under ER 403 as

being cumulative. And as discussed above, evidence properly excluded under the rules of evidence does not rise to a level of constitutional magnitude. *Lizarraga* at 553.

Fourth, the cases Mr. Alden cites in support of his constitutional harmless error argument are distinguishable from the present case. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *State v. Cayetano-Jaimes,* 190 Wn. App. 286, 359 P.3d 919 (2015); *State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010); *State v. Kidd*, 57 Wn. App. 95, 786 P.2d 847 (1990). In *Holmes*, the defendant was deprived of his entire third-party guilt defense. *Holmes* at 323. In the present case, Mr. Alden was fully allowed to argue his self-defense case; the court merely excluded a small amount of cumulative, attenuated, conduct by the victim that wasn't even known by the defendant. In *Cayetano*, the defendant was deprived of "relevant and highly probative" evidence that was vital to his case, *Cayetano* at 289; in contrast, the evidence in the present was neither highly probative nor highly relevant, but rather of "slight probative value." The holdings in *Stark* and *Kidd* are distinguishable because, in those cases, the State was relieved of its burden to disprove self-defense based on an erroneously included aggressor instruction. *Stark* at 961; *Kidd* at 101.

Finally, a frank observation of Mr. Alden's argument leads to the conclusion that Mr. Alden seeks to completely abolish the use of the non-

constitutional harmless error analysis for any and all evidentiary rulings related to a defendant's case.

Based on these reasons, the Court should decline review of this evidentiary ruling.

C. Whether Mr. Alden was denied effective assistance of counsel is not reviewable.

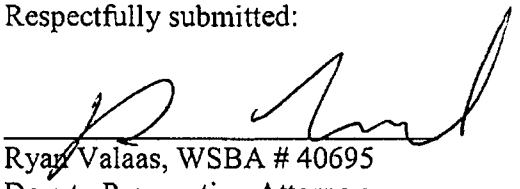
In ruling on Mr. Alden's IAC claim, the Court of Appeals held that trial counsel's failure to object did not constitute deficient performance because the State's closing argument was not an egregious and obvious misstatement of law, particularly when read in conjunction with the jury instruction. Mr. Alden does not provide any reason why this issue should be reviewed by the Supreme Court and the State cannot conceive of any; therefore, review of the issue should be denied.

III. CONCLUSION

Based on the foregoing arguments, the Court should decline Mr. Alden's petition for review.

DATED: June 9, 2016

Respectfully submitted:



Ryan Valaas, WSBA # 40695
Deputy Prosecuting Attorney

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent,	)	NO. 93133-0
vs.	)	AFFIDAVIT OF MAILING
OSCAR ALFRED ALDEN, Defendant/Petitioner.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 9th day of June, 2016, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of the Affidavit of mailing and a copy of the Response to Petition for Review, addressed to:

James E. Lobsenz
Attorney for Appellant
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

SUBSCRIBED AND SWORN to before me this 9th day of June, 2016.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/19.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, June 09, 2016 11:28 AM
To: 'rvalaas@co.douglas.wa.us'
Subject: RE: Filing for 93133-0 State v. Alden: Response to Petition for Review

Received 6/9/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: rvalaas@co.douglas.wa.us [mailto:rvalaas@co.douglas.wa.us]
Sent: Thursday, June 09, 2016 11:10 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Filing for 93133-0 State v. Alden: Response to Petition for Review

Case Name: State of Washington v. Oscar Alfred Alden
Case Number: 93133-0 (CoA No. 32695-1-III)

Ryan S. Valaas, WSBA #40695
Deputy Prosecuting Attorney
Douglas County Prosecutor's Office
PO Box 360
Waterville, WA 98858
Phone: 509.745.8535
Fax: 509.745-8670
rvalaas@co.douglas.wa.us