74062-8

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Court of Appeals
Division I
State of Washington

NO. 74062-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ACKLEY,

Appellant.

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

The Honorable Susan K. Cook, Judge

REPLY BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ARGUMENT IN REPLY

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT ACKLEY'S SELF-DEFENSE CLAIM.

"To determine whether a defendant is entitled to an instruction on self-defense ... the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." State v. Read, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). When subjectively assessing a defendant's self-defense claim, the trial court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). When objectively assessing a defendant's claim, the trial court must determine what a reasonable person would have done if placed in the defendant's situation. Id.

In making its assessment the trial court must view the evidence in the light most favorable to the defendant. State v. George, 161 Wn.App. 86, 95–96, 249 P.3d 202, *review denied*, 172 Wash.2d 1007, 259 P.3d 1108 (2011). If there is merely some evidence to support a claim of self-

defense the issue is properly raised. State v. Werner, 170 Wn.2d 333, 336–37, 241 P.3d 410 (2010).[1]

The State contends the evidence does not support Ackley's self-defense claim because a reasonable person in Ackley's shoes would not have believed O'Connor posed a threat. Brief of Respondent (BOR) at 12-17. That assertion is both legally and factually incorrect.

One reason that the State argues supports its contention is found in its statement, "Factually, only the defendant alleged there was a gesture from Mr. O'Connor that could have caused fear." BOR at 14. The State then devotes three pages of its brief citing to O'Connor's testimony where he claimed he did not pull up his shirt. Id. at 14-17.

That O'Connor denied he lifted up his shirt is irrelevant on the issue of whether there was sufficient evidence to justify a self-defense claim because it asks this Court to view the evidence in the light most favorable to the State, not the defense. Another reason the argument is fundamentally flawed is because it asks this Court to conclude O'Connor was more credible than Ackley. The trial court and this Court does not weigh the evidence, including witness credibility, in determining whether the evidence supports a self-defense claim. State v. May, 100 Wn. App.

[1] "The defendant's burden of 'some evidence' of self-defense is a low burden." State v. George, 161 Wn.App. 86, 96, 249 P.3d 202, *review denied*, 172 Wash.2d 1007, 259 P.3d 1108 (2011) (quoting State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)).

478, 482-83, 997 P.2d 956 (2000) (citing State v. Williams, 93 Wn.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999)).

The conflicting testimony on whether O'Conner lifted his shirt is not a proper consideration in assessing whether Ackley was entitled to a self-defense instruction. The State's contrary assertion is wrong.

To further support its argument that a reasonable person in Ackley's shoes would not have believed O'Connor posed a threat, the State cites to a statement made by the trial court that it did not "...think that a reasonable person would be afraid of injury, simply by the motion of somebody lifting up the front of their shirt." BOR at 16 (citing 3RP 3). As a broad general proposition that statement might be correct. But, the evidence is not viewed in the abstract devoid of context. Courts must view the evidence from the standpoint of a reasonable person who "knows all the defendant knows and sees all the defendant sees." Read, 147 Wn.2d at 242.

It is undisputed that there was animosity between Ackley and O'Connor because O'Connor revealed the affair Ackley's wife had with O'Connor's brother-in-law to their family. It is undisputed that Ackley and O'Connor spoke on the phone a few months before the incident about O'Connor revealing the affair and that O'Connor told Ackley they would

talk again before he hung up on Ackley. 2RP 113-114; 157. Ackley testified when he saw O'Connor raise his hands in the air he believed O'Connor wanted to talk. 2RP 68. Ackley testified when he got out of the car O'Connor quickly put his hands down to his waist and pulled his shirt up. 2RP 71, 73. Ackley explained he grew up in Los Angeles, that it was a dangerous city when he was growing up, and that what flashed through his mind when O'Connor pulled up his shirt was that O'Connor was going to pull a gun on him. 2RP 72, 120.

Properly viewed from the standpoint of a reasonable person who "knows all the defendant knows and sees all the defendant sees" and in the light most favorable to Ackley, this evidence satisfies the low burden that some evidence support a claim of self-defense.

There was additional evidence, however, that Ackley maintains the court erroneously failed to consider. Brief of Appellant (BOA) at 19-24. That additional evidence was a threatening voice mail message Ackley received from O'Connor a couple months before the incident, and threatening remarks O'Connor made to him during a conversation that occurred about the same time. CP 89; 2RP 107-108; 3RP 3.

The State makes the brief argument that this evidence was irrelevant and properly excluded because the trial court denied Ackley's self-defense claim. BOR at 23-24. That argument puts the cart before the

horse. The issue is whether the court should have considered the evidence in assessing Ackley self-defense claim, not whether in the absence of a self-defense claim the evidence lacked relevancy. BOA at 19-23. The State does not address that issue.

The court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred. Walker, 136 Wn.2d at 772. This additional evidence further supports Ackley's self-defense claim, which the court erroneously failed to consider.

The State also contends Ackley was not entitled to a self-defense instruction for another reason---he "specifically denied the use of intentional force against the victim [O'Conner]." BOR at 20. That was essentially the trial court's reasoning as well. BOA at 24-25. The State, like the trial court, is wrong.

First, Ackley did not "specifically" deny he assaulted O'Conner. Ackley admitted he pulled the knife and clicked open the blade in response to O'Conner lifting his shirt but threw it back into his car when he realized O'Connor did not have a gun. 2RP 72-73, 76. However, even if Ackley had "specifically" denied committing an assault, he is entitled to the benefit of all the evidence, including facts inconsistent with his own testimony. State v. Fisher, 2016 WL 3748944 (July 7, 2016) *5 (citing

State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986) and State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997)). O'Conner testified Ackley reached into his pocket, pulled out a knife, waved it at O'Connor, walked towards him and said, "I will slice you open bitch." 1RP 112, 115, 165, 189-190, 192; RP 165 (8/3/2015). This testimony alone was sufficient to logically infer Ackley intended to create an apprehension of bodily harm. BOA at 25-26.

Second, as discussed in his opening brief, Ackley is entitled to argue inconsistent defenses, and that does not defeat a self-defense claim if the evidence supports the claim. BOA at 27-28. The State fails to address State v. Werner, 170 Wn.2d 333, 241 P.3d 410 (2010), although it was discussed in Ackley's opening brief. In Werner the Court held even though Werner claimed accident and self-defense, because there was sufficient evidence of both he was entitled to have the jury instructed on self-defense. Werner, 170 Wn.2d at 338. Thus, even if Ackley "specifically" denied he assaulted O'Connor, which he did not, that does not defeat his self-defense claim because there was some evidence to support the claim. Id. at 336-37.

Lastly, the State argues the evidence did not support Ackley's "subjective" belief he was in danger because Ackley was the first aggressor. BOAR at 20. In support of its argument the State claims the

court believed a first aggressor instruction would have been appropriate. Id. (citing 2RP 96). The State mischaracterizes the record, and its argument is specious.

The mention of a first aggressor instruction came up during the discussion where the court told Ackley's counsel it did not believe Ackley was entitled to claim self-defense because "in order to put on a defense of self-defense, your client [Ackley] has to testify to facts that support that defense." 2RP 95.[2] Then, in response to the prosecuting attorney's comments, the court told the prosecuting attorney that if Ackley provoked the incident the State could get a first aggressor instruction "but I don't think you can object to a self-defense instruction under those circumstances." 2RP 96. The court was right.

An aggressor instruction may be appropriate if there is conflicting evidence whether the defendant's conduct precipitated a fight. State v. Wingate, 155 Wn.2d 817, 822–23, 122 P.3d 908 (2005). Whether a defendant claiming self-defense was the first aggressor, however, is a question for the jury. State v. Cowen, 87 Wn.App. 45, 52, 939 P.2d 1249 (1997). Indeed, a court would need to improperly engage in weighing the evidence if it were to base its decision to deny a self-defense claim

[2] This further shows the court misunderstood the law. "Although testifying or calling one's own witnesses to support an affirmative defense instruction may be helpful in persuading the jury, we do not require a defendant to do so." State v. Fisher, 2016 WL 3748944 (July 7, 2016) *6.

because there is conflicting evidence whether the defendant provoked the altercation. See State v. Williams, 93 Wn.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999) ("In evaluating the adequacy of the evidence [to support a proposed instruction], the court cannot weigh the evidence.").

If the court had given the requested self-defense instruction the State could have in turn requested a first aggressor instruction if the evidence supported it. But, if there is sufficient evidence to support a first aggressor instruction that is neither determinative nor a consideration in determining whether the defendant has presented some evidence to support a self-defense claim, and the State can cite no authority for the proposition that it is.

Only if no credible evidence supported Ackley's self-defense claim was the trial court justified in the denying his request for self-defense instructions. State v. Fisher, 2016 WL 3748944 (July 7, 2016) *5 (citing, State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). Viewed in the light most favorable to Ackley credible evidence supported his self-defense claim. The court's refusal to instruct the jury on self-defense denied Ackley his constitutional rights to present a defense and to have the jury consider that defense.

B. CONCLUSION

For the above reasons and the reasons in Ackley's opening brief, his conviction should be reversed and his case remanded for a new fair trial where the jury is instructed on his defense of self-defense.

DATED this 21st day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051
Attorneys for Appellant