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CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

No. 63977-3 - I

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT H. KOCH
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
THE HONORABLE JEFFREY RAMSDELL, JUDGE

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in responding to a jury question that it should merely reread its instructions.
2. The trial court erred in refusing to instruct the jury, in response to its note, as requested by appellant.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the response of the trial court in advising the jury to merely reread its instructions, in response to a query from the jury, was sufficient to apprise it of matters it could consider in reaching its verdict.
2. Whether the trial court should have advised the jury that the answer to its query was either “yes” or “A juror may consider the facts as proved at trial and any reasonable inference there from it reaching his or her decision.”

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The appellant, Robert H. Koch, was charged by Amended Information in Count I with the crime of Attempted Murder in the First Degree as follows:

That the defendant ROBERT HENRY KOCH in King County, Washington on or about February 29, 2008, with premeditated intent to cause the death of another person did attempt to cause the death of Scott Koch, a human being; attempt as used in the above charge means that the defendant committed an act which is a substantial step toward the commission of the above-described crime, with the intention to commit that crime.

Contrary to RCW 9A.28.020, 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

Count I also contained allegations that Koch committed the crime against a family member [his son] and, further, that he was armed with a firearm at the time.

Count II, in the alternative, charged Koch with the crime of Assault in the First Degree as follows:

That the defendant ROBERT HENRY KOCH, in King County, Washington on or about February 29, 2008, with intent to inflict great bodily harm, did assault Scott Koch with a firearm, to-wit: a .22 caliber revolver;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

It also contained domestic violence and firearm allegations. (CP 18-19)

To these charges Koch entered pleas of “Not Guilty” and, accordingly, was brought to trial on May 11, 2009, in the King County Superior Court, the Honorable Jeffrey Ramsdell, presiding with a jury. (RP 5/11/09, pg.1)

[Koch originally underwent a jury trial in Judge Ramsdell’s court in March of 2009, but the jury was unable to reach a verdict. (CP 20) This appeal involves the second trial only].

The trial concluded on May 29, 2009, when the jury found Koch guilty of Count II, Assault in the First Degree and, by special verdicts, that the crime did involve domestic violence and the use of a firearm. (CP 62-64)

On July 10, 2009, Koch was sentenced, inter alia, to a term of 153 months in prison. (CP 86-93)

Notice of Appeal followed.

B. FACTUAL BACKGROUND

On February 29, 2008, Deputy Sheriffs Jaime Beard and John Coffman were dispatched to the Kenmore Inn located in Kenmore, King County, Washington (Exs. 1-3) to investigate a domestic violence matter. (RP 5/20/09, pgs 10, 62-63)

They proceeded to room 202 and found Scott Koch excited, with blood “all over himself”, and the room in disarray. There was a revolver lying on a chair (Exs. 6 and 7) without a cylinder. The cylinder was in Scott Koch’s front pocket and contained four rounds, three spent and one live. (RP 5/20/09, pgs 63-64)

Scott said that he had been hit on the head with the gun by his father [the appellant, Robert Koch] and that he had taken the gun away from him and removed the cylinder. He stated his father was wearing a green kitchen type glove. (RP 5/20/09, pgs 14, 111)

Scott had been living at the Kenmore Inn because he had been arrested on a domestic violence charge the month before in Kirkland and, as a result, had been subject to a court order stating he was to have no contact

with his family's home where he had previously been living. Despite the existence of this no-contact order his parents paid Scott's motel rent, and brought him food and laundry. (RP 5/20/09 pgs 66-67)

On February 29, 2008, Robert Koch had brought over Scott's dinner and laundry. After giving him his dinner, Scott told the officers Robert Koch went back to his truck to get Scott's clothes. Scott was eating with his back to the door when it felt like he was hit in the back of the head. He went to the ground, looked and saw his father standing with a gun in his hand. (RP 5/20/09, pgs 67-69) The father was gone from the motel by the time the police arrived.

Scott was taken to Evergreen Hospital where it was discovered he had been shot twice in the head. From there he was transported to Harborview where he subsequently gave a statement to Deputy Baker that evening in which he stated again his father had hit him with the gun and he had then taken it away from him. (RP 5/20/09, pgs 52, 53; RP 5/27/09, pg 120)

The father phoned the motel while the police were still there. He

agreed to come back. After being Mirandized, he said that he had brought food and clothing to his son and then left. He had stayed approximately 10 minutes, but never entered the room. He made two trips to the room, the first bringing the dinner, the second bringing the clothes. He saw nobody else in the room and Scott was fine when he left. (RP 5/20/09, pgs 75-79)

Robert Koch was then arrested because the motel's surveillance cameras, in the opinion of the deputies, showed that Scott had left the room first (to report the incident to the motel manager) and then Robert left. (RP 5/20/09, pg 32, 81; Ex 49)

Kyung Ja Jun, along with her husband, is the owner of the motel. She stated that Scott, bleeding, came to her office and asked her to call 911. He said that someone had attacked him. (RP 5/20/09, pgs 115, 120) After she finished the call she saw the truck (later identified as Robert Koch's) leave the motel lot. (RP 5/20/09, pg 122)

Scott Koch testified at the trial (RP 5/21/09, pgs 32-114). His trial testimony differed from what he had told the detectives the night of the incident in the following respects. At trial he stated:

1. When Scott first looked at his father, upon his return to the room, his father was holding a newspaper wrapped around the glove (RP 5/26/09, pg 84) and the gun fell out of the paper; (RP 5/26/09, pg 46-47)
2. His father dropped the gun into the chair; (RP 5/26/09, pg 48)
3. Scott then picked up the gun and removed the cylinder; (RP 5/26/09, pg 50)
4. He had ingested crack cocaine and ice beer the night before and was suffering from a hangover at the time of the incident; (RP 5/26/09, pgs. 60-74)
5. He denied making and signing a statement to Officer Baker the night of the incident; and refuted its contents when it was shown to him. (RP 5/26/09, pgs 90-101)

A search of Robert Koch's home revealed that there was a medical box full of green gloves in Scott's brother's room. (RP 5/20/09, pg 104)

A DNA analysis on Robert Koch's pants (Ex. 60) revealed the presence of Scott Koch's blood on a one inch portion of the back left leg. (RP 5/27/09, pgs 93-103)

A further examination of the room showed:

1. Four shots had been fired as follows:
 - A. Two were fired into Scott's head where the bullets still remain; (RP 5/20/09, pg 82; RP 5/26/09, pg 26)
 - B. One was fired into the window frame inside the front door and appeared to have been fired from just inside the front door; (RP 5/21/09, pg 22, Exs. 67-69)
 - C. One was fired into the west wall near the TV set, going through the wall and exiting in the next room – 203; (RP 5/20/09, pgs 85-86, 101, Ex. 42).
2. While three spent casings were found in the gun's cylinder (it was a nine shot revolver (RP 5/21/09, pg 53)), the fourth was located in Scott's bedding under a

blanket (RP 5/20/09, pg 100, Ex 41; RP 5/27/09, pg 74)

3. Scott's dinner had been knocked to the floor during the incident (RP 5/20/09, pg 12)

[It is Robert Koch's contention that the condition of the room indicated a struggle of some proportion had taken place given the food on the floor, the blood in the room, (Exs 1-20) the randomness of the shots and the location of the spent cartridges.]

ARGUMENT ON APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in responding to a jury question that it should merely reread its instructions.

2. The trial court erred in refusing to instruct the jury, in response to its note, as requested by appellant.

Both assignments will be argued together since they involve the same fundamental issue.

After returning the jury sent an inquiry to the court which read as follows:

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.

After listening to argument (RP 5/29/09, pgs. 3-11) the trial court replied as follows:

Please reread your instructions.

It is submitted that this was error and that the answer to the jury's question should have been either "yes" or "a juror may consider the facts

as proved at trial and any reasonable inference there from in reaching his or her decision.” As argued by appellant (RP 5/29/09, pgs. 3-7)

The matter of “Questions from Jury During Deliberations” is controlled by CrR 6.15 (f) which, inter alia, provides:

The court shall respond to all questions from a deliberating jury in open court or in writing. (emphasis supplied)

The procedure mandated by the rule was followed here. (The inquiry and answer is appended to this brief as A-1 and A-2) The rule does not, however, set any guidelines as to the nature of the content of the court’s reply.

It is conceded that whether to give a further instruction to a deliberating jury is within the trial court’s discretion. State v. Becklin 163 Wn. 2d 519, 529 P2d 1, 182 P. 3d 944 (2008); State v. Brown 132 Wn. 2d 529, 612 P2d 546 (1997); State v. Ng, 110 Wn 2d 32, 42-43, 750 P2d 632 (1988).

Here, however, the jury raised an issue which was not covered in the trial court’s initial instructions nor argued by either side. The record

was totally silent regarding self-defense and its possible basis for a reasonable doubt.

Rereading the previous instructions would shed no light on this issue.

In Ng supra, the issue was whether the defense of duress applied to lesser included charges. The defense itself had previously been defined by the trial court and argued by the parties. This certainly was not the case here.

In Brown, supra, the issue concerned the trial court's refusal to give definitions of commonly understood words.

In Becklin, supra, the trial court answered "yes" to a jury inquiry. This was approved because both parties had presented arguments on the theory which was the subject of the jury's question. Here neither party argued self-defense or the lack thereof. The quality and quantity of the State's evidence was the focus of the entire trial.

The appellant was convicted of Assault in the First Degree. The charge alleged "intent to inflict great bodily harm." If the injuries to Scott

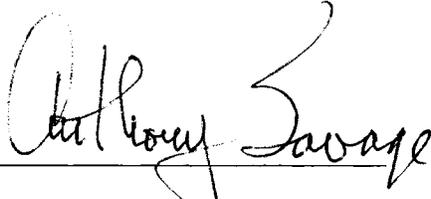
Koch occurred in self-defense during the course of a struggle over the gun this could refute the State's theory of the appellant's intent and form the basis for a reasonable doubt. The jury question should have been answered "yes" as was done in State v. Becklin 163 Wn. 2d 519, 524 P11, 182 P.3d 944 (2008)

The court's reply to the jury, in effect, told the jury that acting in self-defense could not form the basis for reasonable doubt because there was nothing in those instructions to the contrary

CONCLUSION

For the reasons heretofore argued the judgment of the trial court should be reversed and the matter remanded for a new trial.

Respectfully submitted,



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