

68605-4

68605-4

NO. 68605-4

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KELLY,

Appellant.

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

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. Mr. Kelly was deprived of his Fourteenth Amendment right to due process by the trial court's failure to instruct the jury on the law of self-defense because there was sufficient evidence to warrant the instruction and the State bears the burden of disproving self-defense beyond a reasonable doubt.

2. The trial court violated ER 402, ER 403, the Fourth Amendment, and article I, section 7 by allowing multiple police officers to testify that Mr. Kelly did not open his door when they first went to his house without a warrant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant produces "some evidence" of self-defense in a case of second-degree assault, he is entitled to a jury instruction requiring the State to disprove self-defense beyond a reasonable doubt. The State bears this burden under the Due Process Clause of the Fourteenth Amendment because the absence of self-defense is an element of the crime. At trial, Mr. Kelly testified that the complaining witness said "you're dead," and Mr. Kelly "thought he was reaching for a weapon or something." Did the trial court violate Mr. Kelly's right to due process by failing to instruct the jury on the State's burden to disprove self-defense?

2. ER 402 prohibits the admission of irrelevant evidence, ER 403 prohibits the admission of evidence which is substantially more prejudicial than probative, and courts may not admit evidence that penalizes the exercise of a constitutional right. Here, the trial court allowed two police officers to testify that Mr. Kelly did not open the door to his home when they first went there without a warrant, so they had to obtain a warrant. Did the trial court's admission of this testimony violate the Fourth Amendment, article I, section 7, and the rules of evidence?

C. STATEMENT OF THE CASE

Michael Kelly is a 62-year-old veteran who had no felony convictions prior to this case. CP 3-42 RP 124. In 2008, Mr. Kelly was dating Sheryl Hinds. 1 RP 69-71. Ms. Hinds was also dating Randy Beckett at the time, and both men were aware of the overlap. 1 RP 71-72. On April 11, 2008, Ms. Hinds hosted a party to celebrate her son's 18th birthday, to which she invited both Mr. Beckett and Mr. Kelly. 1 RP 74. Mr. Beckett showed up early, had several drinks, and felt intoxicated, so Ms. Hinds let him lie down in her bed. 1 RP 77. Ms. Hinds went to bed later. 1 RP 77.

Around midnight, Mr. Kelly went to Ms. Hinds's bedroom because he wanted to talk to her about a problem he had with his

ex-wife. 1 RP 79; 2 RP 126-28. According to Mr. Kelly, as soon as he started talking to Ms. Hinds, Mr. Beckett said, "you're dead." 2 RP 128. Mr. Beckett then started reaching toward the nightstand on his side of the bed, and Mr. Kelly thought he might have been reaching for a weapon. Mr. Kelly swung at him, but only slapped his arm. Ms. Hinds then lunged toward Mr. Beckett, the incident ended, and Mr. Kelly left. 2 RP 129-33.

According to Ms. Hinds, after Mr. Kelly told her he needed to talk to her about his ex-wife, Ms. Hinds said "not now," and told him to go home. 1 RP 79. Mr. Kelly left, and Ms. Hinds and Mr. Beckett went back to sleep. 1 RP 81. Ms. Hinds said she did not see anyone hitting anyone else, even though Mr. Kelly was on her side of the bed and would have had to reach over her to hit Mr. Beckett. 1 RP 87-89.

According to Mr. Beckett, he woke up to Mr. Kelly "standing over him." Mr. Beckett's "face hurt real bad." 1 RP 42. He "assume[d]" Mr. Kelly hit him, but he passed out and did not regain consciousness for 15-20 minutes. 1 RP 42. After he woke up he called 911. 1 RP 42.

Two police officers responded. After talking with Mr. Beckett, the officers went to Mr. Kelly's house and knocked on the

door, but no one answered. They then obtained a warrant, returned, and arrested Mr. Kelly without incident. 1 RP 91-111.

The State charged Mr. Kelly with one count of second-degree assault, alleging he intentionally assaulted Mr. Beckett and recklessly inflicted substantial bodily harm. CP 64. At trial, the parties testified as described above. Over Mr. Kelly's objection, both police officers testified that no one answered the door at Mr. Kelly's house when they sought entry without a warrant, and the prosecutor mentioned this fact in closing argument. 1 RP 93, 104; 2 RP 167. The trial court did not provide the jury with any instructions on the lawful use of force in self-defense. CP 27-41.

Mr. Kelly was convicted as charged. CP 2. At sentencing, he continued to proclaim his innocence. 3/28/12 RP 5. He timely appeals. CP 19.

D. ARGUMENT

1. **The trial court violated Mr. Kelly's Fourteenth Amendment right to due process by relieving the State of its burden to disprove self-defense.**

- a. Failure to give self-defense instructions where evidence supports it violates due process because without such an instruction the trial court relieves the State of its burden to prove each element of the crime beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Mr. Kelly was charged with one count of second degree assault, in violation of RCW 9A.36.021(1)(a), for intentionally assaulting another and thereby recklessly inflicting substantial bodily harm. CP 64. RCW 9A.36.021(1) provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm

Assault is an intentional act. State v. Robinson, 58 Wn. App. 599, 606, 794 P.2d 1293 (1990), rev. denied, 116 Wn.2d 1003 (1991).

A claim of self-defense negates the mental state of intent necessary to establish the crime of assault. State v. Acosta, 101

Wn.2d 612, 616, 683 P.2d 1069 (1984). RCW 9A.16.020 reads, in relevant part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

Reasonably necessary force – the degree of force that a reasonably prudent person would use under similar circumstances – is permissible in self-defense. State v. Fischer, 23 Wn. App. 756, 759, 598 P.2d 742 (1979).

Because self-defense negates the “intent” element of the crime of assault, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 615; State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

By definition, an assault requires the use of unlawful force. Since the use of force in self-defense is lawful, self-defense negates an element of assault. Consequently, where there is any evidence of self-defense, the state bears the burden of proving that the defendant did not act in self-defense.

Seth A. Fine and Douglas J. Ende, 13A Washington Practice: Criminal Law § 307 at 47 (2nd ed. 1998). Thus, once some evidence of self-defense is presented, a defendant is entitled to an instruction on the State's burden to disprove self-defense beyond a reasonable doubt. McCullum, 98 Wn.2d at 500.

A trial court's failure to provide an instruction that allocates the burden of proof to the State is not reversible error per se "so long as the instructions, taken as a whole, make it clear that the State has the burden." Acosta, 101 Wn.2d at 621. But the court must instruct the jury "in some unambiguous way that the State must prove the absence of self-defense beyond a reasonable doubt." Id. In this case, the trial court did not give any instructions at all on self-defense. CP 27-41. As explained below, this was improper.

- b. The failure to instruct on self-defense in this case was error because Mr. Kelly presented evidence of lawful use of force in self-defense.

A defendant is entitled to an instruction on the lawful use of force in self-defense if he produces "any evidence" tending to show self-defense. State v. Adams, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). Mr. Kelly testified that he was talking to Ms. Hinds when Mr. Becktell said, "You're dead." 2 RP 128. Mr. Becktell then

“roll[ed] toward the edge of the bed ... reaching for something, a weapon perhaps.” 2 RP 129. Mr. Kelly believed Mr. Becktell was “more than likely ... reaching for a weapon.” 2 RP 129. This evidence was sufficient to warrant a self-defense instruction.

In Adams, this Court held it was a violation of due process for the trial court to fail to give self-defense jury instructions when the defendant testified that he observed the decedent robbing his trailer, was “very scared,” and “unintentionally fired one fatal shot.” Adams, 31 Wn. App. at 394-96. This Court stated, “only where no plausible evidence appears in the record upon which a claim of self-defense might be based is an instruction on [self-defense] not necessary ... A defendant’s testimony alone is sufficient to raise the issue of self-defense.” Id. at 396 (citing State v. Roberts, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977); State v. Bius, 23 Wn. App. 807, 808, 599 P.2d 16 (1979); State v. Savage, 22 Wn. App. 659, 660, 591 P.2d 851 (1979)).

As in Adams, Mr. Kelly’s testimony alone was sufficient to raise the issue of self-defense. “Once any evidence of self-defense is produced, the defendant has a due process right to have his theory of the case presented under proper instructions.” Adams, 31 Wn. App. at 396. The trial court violated Mr. Kelly’s right to due

process by failing to instruct the jury on lawful use of force in self-defense.

- c. Reversal is required because the State cannot prove beyond a reasonable doubt that the error was harmless.

The State bears the burden of proving a constitutional error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this heavy burden here. Mr. Kelly admitted he swung at Mr. Beckett; thus, in the absence of a self-defense instruction, the jury was required to find intent to assault even if it believed Mr. Kelly's testimony that Mr. Beckett threatened to kill him. The State cannot show beyond a reasonable doubt that the outcome would have been the same had the jury been instructed on the lawful use of force in self-defense. This Court should accordingly reverse the conviction and remand for a new trial.

2. The trial court violated ER 402, ER 403, and Mr. Kelly's Fourth Amendment rights by allowing multiple police officers to testify that Mr. Kelly did not answer the door when officers sought entry to his home without a warrant.

a. Over Mr. Kelly's objections, the trial court allowed two police officers to testify that Mr. Kelly did not open his door when they first went to his home without a warrant.

Before trial, Mr. Kelly moved to exclude evidence that he failed to answer the door when police arrived without a warrant, and to exclude any implication that Mr. Kelly was "fleeing" the scene. CP 50-51; 1 RP 14-17. The State argued the evidence should be admitted as "evidence of flight as consciousness of guilt." 1 RP 15. Mr. Kelly pointed out that all he did was comply with Ms. Hinds's request that he leave her house and go to his own home, two blocks away. 1 RP 15-16, 18-19, 22. The court initially granted Mr. Kelly's motion to exclude the evidence, concluding the evidence of flight was "speculative" and that the prejudice would outweigh the probative value, which was "so minor". 1 RP 17.

The State persisted, however, and argued that if the court did not admit the evidence to show flight it should admit it "to explain the officers' subsequent actions." 1 RP 23-24. Mr. Kelly pointed out that the officers could simply say they properly arrested

Mr. Kelly pursuant to a warrant, read him the required warnings, and obtained a statement. 1 RP 24-25. The court said, "What I'll do is I'll allow the testimony to come in for purposes ... more in relation to completion of the story and for res gestae." 1 RP 25. Based on this ruling, two police officers testified that no one answered the door at Mr. Kelly's house when they sought entry without a warrant, and the prosecutor mentioned this fact in closing argument. 1 RP 93, 104; 2 RP 167. As explained below, this error.

- b. Contrary to the court's ruling, the evidence does not fall within the "res gestae" doctrine because it is irrelevant, prejudicial, and punishes the exercise of a constitutional right.

The trial court permitted two police officers to testify that Mr. Kelly did not open his door when they went to his home without a warrant, reasoning the "res gestae" doctrine allowed the evidence. The trial court erred. Under the res gestae doctrine, "evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (emphasis added). "Where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding

the charged offense, evidence of that offense is admissible 'in order that a complete picture be depicted for the jury.' Id. (emphasis added).

But Mr. Kelly's failure to open the door to police who did not have a warrant does not constitute a crime or misconduct; on the contrary, he has a constitutional right to refuse consent to police entry absent a warrant. U.S. Const. amend IV; Const. art. I, § 7; See Payton v. New York, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest); id. at 585 ("the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) ("In no area is a citizen more entitled to privacy than in his or her home").

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.

Kentucky of King, ___ U.S. ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011) (emphasis added).

Furthermore, the res gestae doctrine “requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect.” State v. Acosta, 123 Wn. App. 424, 442, 98 P.3d 503 (2004); see ER 401, 402, 403. It is inapplicable here because the fact that Mr. Kelly did not open the door until police obtained a warrant is not relevant to any material issue. See id.; State v. Aaron, 57 Wn. App. 277, 280-81, 787 P.2d 949 (1990) (State argued evidence was admissible “to show the officer’s state of mind in explaining why he acted as he did,” but this Court held evidence inadmissible under ER 401 because the officer’s actions did not make “determination of the action more probable or less probable than it would be without the evidence”).

It is also prejudicial because the implication was that a person would not refuse to answer the door unless he had something to hide. Thus, the admission not only violated ER 403, but also violated the rule that “adverse inferences may not be drawn from constitutionally protected behavior.” State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571, 595 (1984) (reversing where trial court admitted evidence of gun ownership, protected under art. I, § 24); see also Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (drawing adverse inference from

defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) (reversing where trial court admitted evidence that defendant invoked his Fifth Amendment right to silence); State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (prosecutor violated defendant's rights under Sixth Amendment and article I, section 22 by urging the jury to draw adverse inference from defendant's exercise of his constitutional right to proceed pro se); United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir. 1978) (defendant's "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing").

If the State wanted to explain the investigation, it could have elicited testimony that police arrested Mr. Kelly pursuant to a valid warrant, read him the required warnings, and interviewed him. But to reference repeatedly Mr. Kelly's failure to open his door when police did not have a warrant was neither necessary nor proper. The evidence did not fall within the "res gestae" doctrine because it was irrelevant, prejudicial, and burdened the exercise of a constitutional right. This Court should reverse.

c. A new trial should be granted.

The State bears the burden of proving a constitutional error is harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

Because the evidence penalized Mr. Kelly’s exercise of his rights under the Fourth Amendment and article I, section 7, the constitutional harmless error standard should apply. But under either standard, the admission of this evidence prejudiced Mr. Kelly. The evidence in this case was circumstantial. Ms. Hinds did not see Mr. Kelly hit Mr. Beckett, and Mr. Beckett simply “assumed” Mr. Kelly caused his injuries. Mr. Kelly testified that he did not injure Mr. Beckett, but the jury was less likely to believe him given the repeated statements that Mr. Kelly did not open the door to police officers. The jury may well have drawn the inference that Mr. Kelly was not credible and was guilty of the crime because otherwise he

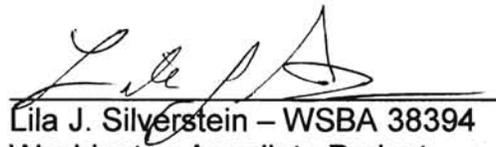
would have opened his door. The admission of this evidence prejudiced Mr. Kelly, and a new trial should be granted.

E. CONCLUSION

For the reasons set forth above, Mr. Kelly respectfully requests that this Court reverse his conviction and remand for a new trial.

DATED this 28th day of September 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", is written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 68605-4-I
)	
MICHAEL KELLY,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2012, 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 _____ 