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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY L. CRENSHAW,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF
PIERCE COUNTY

The Honorable D. Gary Steiner, Judge

REPLY BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Appellant relies on the Assignments of Error contained in his brief of Appellant.

B. ISSUES PERTAINING TO ASSIGNMENTS OR ERROR

Appellant relies on the Issues Pertaining to Assignments of Error contained in his brief of Appellant.

C. STATEMENT OF THE CASE

Appellant relies on the Statement of the Case as contained in his brief of Appellant.

D. REPLY ARGUMENT

I. THE DEFENSE OF ACCIDENT, THOUGH NOT ENUMERATED IN THE LIST OF STATUTORY DEFENSES FOUND IN RCW 9A.16, IS RECOGNIZED BY THE APPELATE COURTS OF WASHINGTON, INCLUDING THIS COURT, AS A DEFENSE TO CHARGE OF INTENTIONAL ASSAULT.

a. Respondent, in its brief, is incorrect by arguing that the defense of accident is not recognized by the court's of this state except in the defense of justifiable homicide.

Respondent, in its brief, at pages 23-24 states that the defendant's claim that the defense of accident is recognized as a defense to assault on par with excusable homicide is without merit.

This court specifically recognized the defense of accident in a second-degree assault case. State v. Callahan, 87 Wn.App 925, 943 P.2d 676(1997). In Callahan, the defendant was charged with assault in the

second degree. Defendant Callahan was confronted by three men exiting a car. Callahan grabbed and cocked a handgun as one man approached. The victim struck a martial arts stand and attempted to grab the gun, as he did so, the gun discharged and struck him in the hand.

Callahan, at trial, claimed both the defense of accident and self defense in that the shooting was an accidental unintentional act while acting in self-defense. The issue before this court was whether a defendant who intentionally uses force to defend himself and accidentally and unintentionally causes injury to the victim, can claim self-defense.

This court, realizing that this was an issue of first impression, relied on other jurisdictions, to conclude that the defenses of accident and self -defense are neither mutually exclusive nor inconsistent and can be asserted together at trial. Callahan, supra at 932-33.

In sum, we conclude that defenses of accident and self-defense are not invariably inconsistent and mutually exclusive. Thus, assuming sufficient evidence to support a self-defense claim, the law permitted Callahan to assert defenses of self-defense and accidental infliction of injury.

Callahan was cited with approval by the Washington Supreme Court in a case first decided by this court. State v. Brightman, 155 Wn. 2d 506, 122 P. 3d 150 (2005). Although a homicide case, the court found this court's

ruling in Callahan to be quite relevant. Brightman, supra at 525 note 13.

N13 Even so, we note that a person's claim that he or she was acting in self-defense when the accident occurred is not irrelevant. See State v. Callahan, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997). Excusable homicide is available as a defense only where the slayer is "doing any lawful act by lawful means." RCW 9A.16.030. In turn, RCW 9A.16.020(3) establishes that the use of force is lawful when the person is about to be injured, so long as the force used is not more than necessary. Thus, a defendant could argue that his action that precipitated the accidental killing amounted to lawful self-defense under RCW 9A.16.020(3), even if he could not argue that an accidental killing was a justifiable homicide under RCW 9A.16.050. This resolution is in accord with Callahan, where the Court of Appeals held that an act of self-defense could reasonably precipitate an accidental shooting. 87 Wn.App. at 982-33.

Appellant, in his opening brief, relied on State v. Hendrickson, 81 Wn. App. 397, 399, 914 P. 2d 1194 (1996) which also recognized the defense of accident in assault cases. Brief of Appellant at p.8.

Respondent, in its brief, criticized Hendrickson because it relied on State v. Kerr, 14 Wn. App. 584, 587, 544 P. 2d 38 (1976) for an "established rule" that an unintentional assault or killing can be excused by the defense of accident. Respondent argues that Kerr was a homicide case and did not

stand for the rule that an unintentional assault can be excused by the defense of accident. Brief of Respondent at 23-24. However, this court's opinion in Callahan supra, removes all doubt that an assault can be excused by the defense of accident. Secondly, while Kerr does not directly mention assault, it does discuss the fact that Kerr repeatedly insisted that he did not intend to shoot (much less kill Davidson). Respondents claim that only homicide can be excused by accident leads to illogical and absurd results. For example, if the defendant accidentally shoots a person and the person dies, the defendant, charged with murder can claim that the killing is excused by the defense of accident as incorporated in excusable homicide. See RCW 9A.16.030 and WPIC 15.01. However, in the same shooting, if the person does not die, and the defendant is only charged with assault, the defendant gets absolutely nothing, no defense of accident, no instruction on accident or the state's burden to disprove it beyond a reasonable doubt, nothing. Doesn't this mean that if you are a person who is going to be charged in a shooting incident and you claim the shooting was accidental, that the victim had better die? Otherwise, if the victim lives, you cannot claim the defense of accident or receive instructions as you would in a murder charge.

- b. The defense of accident negates the element of intent in the crime of first degree assault and the jury should have been instructed that the State has the burden to disprove accident beyond a reasonable doubt.

The State claimed at trial and Respondent now argues that by proving beyond a reasonable doubt that the assault was intentional, it necessarily proves that the defendant's conduct was not accidental. This argument sounds eerily similar to the arguments made at the time the Washington Supreme Court decided State v. McCullum, 98 Wn. 2d 484, 656 p. 2d 1064 (1983) and State v. Acosta, 101 Wn. 2d 612, 638 P. 2d 1069 (1984). The argument then was that there was no need for an instruction that the State must disprove self defense beyond a reasonable doubt because by proving that the assault or murder was intentional, the State necessarily proved that the defendant did not act in self defense. The holdings in McCullum and Acosta firmly established that the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, require the State to prove the absence of a defense beyond a reasonable doubt if that defense negates one or more elements of the defense. Acosta and McCullum established the rule that self defense is one such defense that negates an element of the charged crime and that the State must disprove it beyond a reasonable doubt. McCullum, 98 Wn. 2d

at 490, Acosta, 101 Wn. 2d at 615.

Respondent's claim that the Washington Supreme Court has serious doubt about the correctness of the "negates" analysis is totally meritless. Respondent is correct that in State v. Camera, 113 Wn. 2d 631, 639, 781 P. 2d 483 (1989) the then Court, in light of the United States Supreme Court opinion in Martin v. Ohio, 480 U.S. 228, 107 S. ct 1098 (1987), expressed substantial doubt about the "negates" analysis. However, that is no longer the position of the Court. In State v. Walden, 131 Wn. 2d 469, 473-74, 932 P. 2d 1237 (1997) the court, citing Acosta firmly held that the State bears the burden of proving beyond a reasonable doubt the absence of self-defense. In State v. Lively, 130 Wn. 2d 1, 10-11, 921 P. 2d 1035 (1996) the court reaffirmed the McCullum/Acosta "negates" analysis

McCullum and Acosta provide a two-tiered test to evaluate whether the State or a defendant has the ultimate burden of persuasion. First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime. Under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the

defense beyond a reasonable doubt. McCullum, 98 Wn. 2d at 490; Acosta, 101 Wn. 2d at 615; also Patterson v. New York, 432 U.S. 197, 214-15, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

The McCullum/Acosta "negates" analysis has been applied to other defenses. State v. R.H., 86 Wn. App 807, 939 P. 2d 217 (1997). (Public premissis defense to criminal trespassing). The McCullum/Acosta "negates" analysis is presently the law in Washington and whatever concerns the Camera court had, no longer exist in light of Lively and Walden. Appellant therefore reaffirms his argument in his opening brief that he was entitled to have the jury instructed on the defense of accident and because accident negates the element of intent in first degree assault, the jury should have been further instructed that the State bears the burden of disproving accident beyond a reasonable doubt.

II. THE TRIAL COURT, BY NOT INSTRUCTING THE JURY ON THE DEFENSE OF ACCIDENT AND THE STATE'S BURDEN TO DISPROVE IT BEYOND A REASONABLE DOUBT, COMMITTED REVERSIBLE ERROR.

a. The case law from other jurisdictions relied on by Appellant in his opening brief, while not binding on this court, stands for the principle that appellate courts can and have recognized the defense of accident and required trial courts to instruct on accident even if that defense is not listed in the statutory criminal code.

There are no Washington cases that address the issue of whether on

a charge of assault a defendant is entitled to an instruction on the defense of accident and whether that defense negates the element of intent requiring the state to disprove accident beyond a reasonable doubt.

Appellant relied on cases from other jurisdictions, which have addressed whether or not a court can instruct on the defense of accident even though that defense is not enumerated in the criminal code. In State v. Rosciti, 144 N. H. 198, 740 A. 623 (1999) the New Hampshire Supreme Court held that where the evidence supports a defense of accident, it is error to not give a defendant's requested instruction on the defense of accident even though not recognized in the Criminal Code. Respondent claims that this case provides no help because the defendant was convicted under an assault statute, which provides that a person is guilty of assault in the second degree if he recklessly causes bodily injury to another by means of a deadly weapon. (N.H. Rev. Stat. Ann § 631:2 1 (b)). The Court held that there was insufficient evidence to support an accident defense and upheld the trial courts decision not to instruct on accident. The New Hampshire assault second-degree statute is similar to Washington's RCW 9A.36.021 (1) (a) which requires a person to intentionally assault another and recklessly inflict substantial bodily harm. This court has held that

assault in the second degree committed by a battery under RCW 9A.36.021 (1) (a) is not a specific intent crime. This court held that it is a general intent crime because it does not require the specific intent to inflict substantial bodily harm. State v. Esters, 84 Wn. App 180, 185, 927 P. 2d 1140 (1996). Specific intent is an "intent to produce a specific result as opposed to an intent to do the physical act that produces the result Esters, supra at 184 quoting State v. Davis, 64 Wn. App 511, 515, 827 P. 2d 298 (1992) rev'd on other grounds, 121 Wn. 2d 1, 846 P. 2d 527 (1993).

In Rosciti, the New Hampshire Supreme court was willing to allow, if supported by evidence, an instruction on the defense of accident to a general intent crime. The defendant in the present case was charged with first degree assault under RCW 9A.36.011 (1) (a), "with intent to inflict great bodily harm assaults another with a firearm or any deadly weapon or means likely to produce great bodily harm of death." The present charge is a specific intent crime and makes an even stronger case than Rosciti for the defense of accident and the requirement of an instruction.

The New Hampshire Supreme Court has reversed convictions for attempted murder in one case, and second degree assault in another finding

that the court committed error by failing to give a defense instruction on the defense of accident even though it is not contained as a defense in the criminal code. State v. Gamarsh, 126 N.H. 228, 489 A. 2d 157 (1985), State v. Aubert, 120 N.H. 634, 421 H. 2d 124 (1980), both cases involved accidental shootings.

Respondent claims in its brief that the Massachusetts cases cited by Appellant do not provide this court with any guidance. Appellant believes they do provide this court with guidance. In Commonwealth v. Podkowka, 445 Mass 692, 840 N. E. 476 (2006) the court found that the defendant did not present evidence to warrant an accident instruction but did hold that when the issue of accident is fairly raised and the defendant requests an instruction, the court must instruct on accident and that the State must disprove it beyond a reasonable doubt. Podkowka, 840 N. E. 2d at 482. Podkowka, in addition to being charged first degree murder was also charged with general intent crimes of assault and battery on a child causing bodily injury and substantial bodily injury. The court held that because the assault crimes were general intent crimes, the defendant was not entitled to an accident defense. Podkowka, 840 N. E. at 483. Respondent argues in their brief that Podkowka supports the State's position that an accident

instruction is not required where the state must prove an intentional assault. Respondent is incorrect on this point. First, this court's opinion in Callahan, supra, recognized the defense of accident for the charge of assault in the second degree. Second and more importantly however, is that the defendant in this case was charged with a specific intent crime, assault in the first degree. Assault in the first degree, based on this court's opinion in Esters supra, requires a specific intent to produce a specific result, inflict great bodily harm. Podkowka, does not support the State's position in any way because we are not dealing with a general intent crime in this case. The issue of whether the defense of accident can be applied to a general intent crime is not before this court in this case.

Respondent argues in its brief that the Georgia cases relied on by Appellant in his brief are distinguishable because Georgia caselaw has long recognized the defense of accident and Washington law does not except in cases of excusable homicide. However, this court in Callahan recognized the defense of accident in an assault case. Hendrickson, supra, while not an assault case, did recognize that assaults can be excused by the defense of accident. In Griffin v. State, 267 Ga. 586, 481 S. E. 2d 223 (1997) the Supreme Court of Georgia held that even though the defense of

accident was not included in the list of statutory defenses in the Criminal Code, it was error to refuse to instruct on accident and to instruct the jury that the State bears the burden of disproving accident beyond a reasonable doubt. Washington courts have recognized defenses not enumerated in RCW 9A16.

Washington courts have recognized the defense of necessity even though it is not listed in the enumerated defenses in RCW 9A.16. State v. Parker 127 Wn. App. 352, 110 P. 3d 1152 (2005). State v. Stockton, 91 Wn. App. 35, 955 P. 2d 805 (1998). See also, WPIC 18.02.

The defense of accident was supported by the evidence in this case and the defendant's instructions should have been given by the trial court.

- b. Defendant's proposed instructions defined accident, stated that accident was a defense to assault in the first degree, and provided that the State had the burden to disprove accident beyond a reasonable doubt, these instruction were not improper and correctly stated the law.

Defendant's proposed instructions did not misstate the law and were not confusing. Defendant's proposed instruction No. 32 defined accident as "a sudden or unintentional happening, consequence or event from either a known or unknown cause". This instruction was culled from Washington civil case law. There is little difference between this instruction and the ordinary dictionary meaning of accident. The dictionary meaning of accident is stated in the American Heritage College

Dictionary, 2004, p. 8 as (a) "an unexpected undesirable event, (b) an unforeseen incident. 2. Lack of intention." The proposed instruction is also consistent with case law from other jurisdictions which have required an accident instruction in a criminal case even though that defense does not appear in the criminal code of that state. In Commonwealth v. Russell, 439 Mass. 340, 787 N.E. 1039, 1042 (2003), the Supreme Judicial Court of Massachusetts approved of the trial court's definition of accident in a homicide case.

He instructed the jury that the evidence in the case raise the issue whether the killing was "excused as the result of an accident," and that they therefore needed to "determine whether the defendant intentionally committed the act or whether what occurred was an accident." He then defined "accident" as "an unexpected happening that occurs without intention or design on the defendant's part," "a sudden, unexpected event that takes place without the defendant's intending it," repeating that "if an act is accidental, it is not a crime." Reminding the jury of the burden of proof, the judge further explained that the defendant did not have to prove justification or excuse. "Rather, the Commonwealth must prove to you beyond a reasonable doubt that the killing was not the result of an accident. If it fails in its burden to prove that the killing was unlawful and not accidental, then you need not proceed further but must return a verdict of not guilty on the indictment for murder."

The defendant's proposed instruction was consistent with the definition of accident given in Russell and was not confusing. Appellant has

argued above that the appellate courts of this state, including this court, have recognized the defense of accident to the crime of assault.

The Respondent claims in its brief that the broad definition of accident contained in Defendant's proposed Instruction No. 32 could confuse a jury into concluding that the assault was accidental even though the jury concluded that the defendant's conduct was criminally negligent. Brief of Respondent at 20-21. However, Respondent ignores Defendant's proposed instruction No. 22, which clearly instructs the jury that an assault is excusable by accident if the act is done "without criminal negligence". The trial court gave the jury the standard instruction on criminal negligence from WPIC 10.04. The proposed instruction defining accident does not confuse the jury, especially when combined with the other proposed instructions above mentioned.

Appellant reaffirms his argument in his Brief of Appellant p. 23 that the court's failure to instruct in this case constituted reversible error and was not harmless.

CONCLUSION

The trial court committed reversible error by failing to instruct the jury as requested by defendant that accident is a defense to the crime of

