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DIVISION II

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STATE OF WASHINGTON
No. 36683-5-II *W*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicole Charles,

Appellant.

Clallam County Superior Court

Cause No. 07-1-00238-2

The Honorable Kenneth D. Williams

Appellant's Reply Brief

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ARGUMENT

I. NICCOLE CHARLES WAS FORCED TO CHOOSE BETWEEN HER CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS AND HER CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

The state interfered with Ms. Charles' constitutional right to compulsory process by refusing to produce a witness serving a sentence in custody of a state DOSA contractor. Because Ms. Kreaman was serving a Washington sentence, it was incumbent upon the state—through DOC, the Sheriff's Department, or the prosecuting attorney's office—to produce her at Ms. Charles's trial. RP (7/11/07) 15-17; RP (7/20/07) 8-9; RP (7/30/07) 5-8, 18; RP (8/10/07) 8-12; RP (8/13/07) 7, 116; RP (8/14/07) 7-9.

Respondent's assertions that the state did not "interfere, either directly or indirectly" with her testimony ignores the fact that Ms. Kreaman was under restraint imposed by state action. Brief of Respondent, pp. 5, 7. Furthermore, it is disingenuous for Respondent to suggest that the state had nothing to do with Ms. Kreaman's absence and lacked power to secure her presence: had the *prosecutor* needed her testimony, there is no doubt that Ms. Kreaman would have been brought into the courtroom.

Ms. Charles did not "elect" to proceed to trial with telephonic testimony; nor did she waive her right to have her witnesses appear at trial. Brief of Respondent, pp. 6, 8; RP (7/11/07) 15-17; RP (7/20/07) 8-9; RP

(7/30/07) 5-8, 18; RP (8/10/07) 8-12; RP (8/13/07) 7, 116; RP (8/14/07) 7-9. Instead, having started the trial with assurances that Ms. Kreaman would be in attendance, she was forced to choose between having Ms. Kreaman testify by telephone (and waiving her right to compulsory process), or requesting a mistrial (and waiving her “valued right” under the double jeopardy clause to have the trial completed by the jury she had helped select.)¹ This choice between two constitutional rights was not a free choice, and requires reversal of the conviction. *See, e.g., State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980).

II. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING IMPEACHMENT WITH EXTRINSIC EVIDENCE WITHOUT AFFORDING THE WITNESS AN OPPORTUNITY TO DENY OR EXPLAIN HER PRIOR STATEMENT.

Without citation to the record, Respondent asserts that Ms. Kreaman was offered the opportunity to explain the statement she made to law enforcement officers. Brief of Respondent, p. 10. This is incorrect; Ms. Kreaman was never confronted with her alleged statements. Respondent implicitly acknowledges this by arguing that the “interest of justice” exception of ER 613(b) applies. Brief of Respondent, p. 10.

¹ *See Arizona v. Washington*, 434 U.S. 497 at 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), quoting *Wade v. Hunter*, 336 U.S. 684 at 689, 69 S. Ct. 834, 93 L.Ed. 974 (1949).

But the trial court did not reference the “interest of justice.” RP (8/15/07) 160-163. In addition, the record does not support application of the exception: the state’s inability to confront Ms. Kreaman with her prior statement was brought about by the state’s own refusal to transport her to the courtroom. Rather than supporting admission of extrinsic evidence, the interests of justice favored exclusion.

The state does not attempt to argue that any error was harmless. Nor could it do so, given the prosecutor’s reference to the improperly admitted testimony during closing arguments. RP (8/15/07) 213. The evidence should not have been admitted. Ms. Charles’s conviction must be reversed and the case remanded for a new trial. ER 613(b).

III. THE “AGGRESSOR” INSTRUCTION WAS IMPROPER UNDER THE FACTS OF THIS CASE.

Without any citation to the record, Respondent presents a sequence of events that it claims supports the use of an “aggressor” instruction. Brief of Respondent, p. 13.² The record does not support the state’s version of events. The undisputed facts—including those presented by the state at trial—establish that the conflict began when Tvrđik insulted Ms. Charles. RP (8/14/07) 41-42, 122, 170, 172, 180-184, 192, 209, 212; RP

² Respondent apparently concedes that the aggressive act must also be unlawful, as argued in the Appellant’s Opening Brief, Section III B.

(8/15/07) 25, 27-28. The “aggressor” instruction was not justified by any reading of the testimony.

The function of the instruction is to legally strip an accused of the defense of justifiable use of force. This does not mean that an accused is prevented from mentioning self-defense to the jury; instead, it means that the jury is unable to consider self-defense if it believes that the accused was the aggressor. Respondent does not address this distinction. Brief of Respondent, p. 14.

Finally, although Respondent “urges” this Court to find any error harmless, it presents no argument suggesting that the error was (in fact) harmless beyond a reasonable doubt as required under *State v. Kidd*, 57 Wn. App. 95 at 101 n. 5, 786 P.2d 847 (1990). Brief of Respondent, p. 15. In fact, if the jury applied the aggressor instruction, it was required to disregard Ms. Charles’s self-defense claim. This error cannot be harmless.

Accordingly, the conviction must be reversed and the case remanded for a new trial. *Kidd, supra*.

IV. MS. CHARLES WAS ENTITLED TO A “NO DUTY TO RETREAT” INSTRUCTION.

Ms. Charles was entitled to a no-duty to retreat instruction.

Without citation to the record or authority, Respondent implies that Ms.

Charles was not lawfully in the jail cell where the altercation took place.³ Brief of Respondent, p. 16. But the record does not establish that Tvrdik had any right to exclude others from this cell. Furthermore, Respondent applies the wrong legal standard in suggesting that a “no duty to retreat” instruction was improper.

In considering whether or not the instruction was required, this Court must consider the evidence in a light most favorable to the accused. *See State v. Fernandez-Medina*, 141 Wn.2d 448 at 456, 6 P.3d 1150 (2000). Under this standard, this Court should presume that Ms. Charles was in a place where she had a right to be (since the state introduced no evidence to the contrary), that she was not the aggressor, and that Tvrdik started the fight. Accordingly, the instruction should have been given. The trial court’s failure to give a complete set of instructions explaining the law of self-defense prejudiced Ms. Charles. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007); *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003).

³ If Ms. Charles had unlawfully entered or remained, the state would undoubtedly have charged her with Burglary in the First Degree as well as assault.

V. IF THE ABSENCE OF A “NO DUTY TO RETREAT” INSTRUCTION IS NOT PRESERVED FOR REVIEW, THEN MS. CHARLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant rests on the argument set forth in the Opening Brief, and that in the preceding section.

VI. MS. CHARLES WITHDRAWS HER SEPARATION OF POWERS ARGUMENT.

In light of the Supreme Court’s decision in *State v. Chavez*, Ms. Charles withdraws her assignments of error and argument on this point. *State v. Chavez*, Slip Op. No. 79265-8; 2008 Wash. LEXIS 262 (2008).

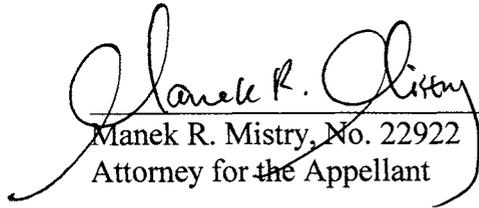
CONCLUSION

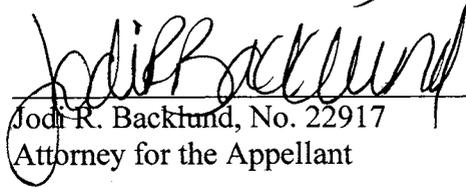
Ms. Charles’s constitutional right to compulsory process was violated when the state refused to transport a witness for trial. In addition, the trial court erred by admitting extrinsic evidence for impeachment in violation of ER 613(b), by giving an aggressor instruction, and by giving incomplete instructions on the law of self-defense. Finally, Ms. Charles was denied the effective assistance of counsel when her attorney failed to propose a “no duty to retreat” instruction.

For all these reasons, her assault conviction must be reversed. The case must be remanded to the Superior Court for a new trial.

Respectfully submitted on May 8, 2008.

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