

FILED
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No. 40837-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Freya Marconette,

Appellant.

Lewis County Superior Court Cause No. 10-1-00094-6

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

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PM 5-18-11

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ARGUMENT

I. MS. MARCONNETTE WAS ENTITLED TO AN INSTRUCTION ON THE LAWFUL USE OF FORCE BECAUSE THERE WAS AT LEAST SOME EVIDENCE THAT SHE WAS IN ACTUAL AND IMMINENT DANGER OF SERIOUS INJURY FROM THE OFFICERS' USE OF EXCESSIVE FORCE.

A court must instruct on the lawful use of force whenever there is some evidence to support the defense. *State v. George*, ___ Wash. App. ___, ___, 249 P.3d 202 (2011). If properly raised, the absence of the defense is an element which the prosecution must disprove beyond a reasonable doubt. *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009).

In this case, when evaluated in a light most favorable to the defense, there was at least some evidence that Ms. Marconnette used lawful force under the standards set forth in *State v. Valentine*, 132 Wash.2d 1, 21, 935 P.2d 1294 (1997) and WPIC 17.02.01. Specifically, the evidence suggested that she was in actual and imminent danger of serious injury from the officers' use of excessive force when the officers unlawfully crossed the threshold, grabbed her by the hair, dragged her from the apartment, and suspended her head-first over a staircase, ultimately causing injuries that were shown to the jury. RP (5/24/10) 29-30, 59-60, 67-71, 75, 79, 108, 109-113; Exhibits 1-5.

The trial court's failure to instruct the jury on the lawful use of force relieved the prosecution of its burden of proof and violated Ms. Marconnette's right to due process. *George*, at ___; *Kyllo*, at 862. Respondent erroneously argues that Ms. Marconnette was not entitled to the instruction "because she claimed that she struck the officers by accident, because she created the danger of physical harm, and because there was no evidence of excessive force." Brief of Respondent, p. 7. These arguments are without merit.¹

First, a criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own testimony. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). The evidence as a whole is to be taken in a light most favorable to the defendant's position as the proponent of the instruction, regardless of what the defendant says on the witness stand. *Id.*

Respondent's argument is erroneously based on a narrow reading of the facts, drawn solely from Ms. Marconnette's testimony.² See Brief of Respondent, pp. 9 ("[she] said she was flailing..."), 10 ("[s]elf-defense

¹ Without citation to the record or to authority, Respondent argues for review under an abuse of discretion standard. Brief of Respondent, pp. 14-15. Given the absence of any record establishing the basis for the trial court's ruling, this argument is without merit.

² Ironically, Respondent also points to defense counsel's failure to argue self-defense in closing. Brief of Respondent, p. 11. Given the absence of a self-defense instruction, this failure is neither surprising nor helpful to the analysis.

is inconsistent with [her] claim that...” “she did not claim...” “in [her] version of events...”), and 11 (“[she] did not claim...”). Respondent’s argument that Ms. Marconnette was not entitled to the instruction because she did not intend to resist arrest or use force against the officers is contradicted by at least some of the evidence—and by Respondent’s own Statement of the Case. As Respondent notes, after being told she was under arrest,

Marconnette actively resisted, flailing her arms, kicking, and cursing at the officers. She was close enough to hit the officers and they believed she was aiming at them...

Brief of Respondent, p. 4.

When taken in a light most favorable to her position as the instruction’s proponent, the evidence suggests that she intentionally used force in resisting the arrest. Accordingly, Ms. Marconnette was entitled to the instruction. *Fernandez-Medina*, at 456.

Second, when viewed in a light most favorable to Ms.

Marconnette, the evidence suggests that the officers created an actual and imminent danger of serious injury—when they dragged her out of the apartment by her hair and suspended her over the staircase. Ms.

Marconnette did not create this danger. Ms. Marconnette was under no obligation to allow the officers to enter without a warrant. *See, e.g., State v. Schultz*, 170 Wash.2d 746, 248 P.3d 484 (2011).

Even if (as Respondent suggests) Ms. Marconnette could have avoided the confrontation (by submitting to the officers' illegal demands), her insistence on her constitutional rights does not strip her of her ability to use lawful force. Furthermore, *the officers* should have avoided the confrontation (1) by accepting her lawful request that they obtain a warrant, (2) by not attempting an illegal arrest, and (3) by refraining from unlawfully crossing the threshold to seize her by the hair.

Furthermore, a person may *resist* an unlawful arrest, even when the arrest threatens no more than loss of freedom. RCW 9A.76.040; *see also*, *e.g.*, *State v. Hornaday*, 105 Wash.2d 120, 131, 713 P.2d 71 (1986). Recalcitrance or failure to cooperate is not the same as using force to resist arrest. *Id.* By refusing to leave the apartment, by retreating from the officers' unlawful attack, and by attempting to shut the door, Ms. Marconnette resisted the unlawful arrest – without assaulting the officers. When taken in a light most favorable to Ms. Marconnette, the evidence suggests that the police chose to escalate in such a way as to threaten harm; only after they had done so did Ms. Marconnette use force. RP (5/24/10) 25-26. Respondent's repeated suggestion that Marconnette's resistance created the danger of physical harm is without merit. Brief of Respondent, pp. 12-13.

Third, the unlawful arrest threatened more than mere loss of freedom. When taken in a light most favorable to Ms. Marconnette, the evidence suggested that the officers illegally crossed the threshold of the apartment, seized her by the hair, dragged her out, and suspended her over the staircase, placing her in actual and imminent danger of serious injury. RP (5/24/10) 29-30, 59-60, 67-71, 75, 79, 108, 109-113; Exhibits 1-5. Whether or not their actions constituted excessive force under the circumstances was a jury question. Respondent's argument to the contrary is without merit. Brief of Respondent, p. 14.

The error here is presumed to be prejudicial. Furthermore, given Ms. Marconnette's plan to rely on a lawful-use-of-force defense, the court's refusal to give the instruction cannot be said to be harmless under the stringent test for constitutional error (which requires the prosecution to establish harmlessness beyond a reasonable doubt). *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Her conviction must be reversed and the case remanded to the trial court, with directions to instruct the jury on the lawful use of force. *Id.*

II. MS. MARCONNETTE WAS DEPRIVED OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent concedes that any instructional error is preserved for review. Accordingly, Ms. Marconnette rests on the argument set forth in her Opening Brief.

III. THE IMPROPER COMMENT ON THE EVIDENCE IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

By overruling Ms. Marconnette's objection, the trial judge implied to the jury that the officers acted properly (when they unlawfully entered the apartment without a warrant and attempted to arrest Ms. Marconnette for asserting her constitutional rights). RP (5/24/10) 126. This "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wash.2d 757, 764, 675 P.2d 1213 (1984).

Because the exchange amounted to a comment on the evidence, the error is structural, and reversal is required (notwithstanding Respondent's assertion that the court's instructions made any error harmless).³ *State v. Jackman*, 125 Wash. App. 552, 560, 104 P.3d 686 (2004).

³ Brief of Respondent, p. 21.

IV. THE PROSECUTOR'S MISCONDUCT REQUIRES REVERSAL.

The prosecutor in this case argued that the judge “makes rulings whether officers do the right thing...” RP (5/24/10) 126. In the context of this case, the statement clearly suggested that the judge had approved the officers’ actions; jurors could infer that the prosecution would have been dismissed had the judge decided otherwise.⁴

Respondent’s argument—that the prosecutor intended merely to differentiate the jury’s role from that of the judge—might carry weight if the prosecutor had stopped after saying “the judge rules on the law...” RP (5/24/10) 126. A concern about the possibility of jury nullification did not provide license to mislead the jury into thinking the judge approved the officers’ actions. Because there is a substantial likelihood that the misconduct affected the verdict, the conviction must be reversed and the case remanded for a new trial. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

CONCLUSION

Ms. Marconnette’s conviction must be reversed and the case remanded for a new trial.

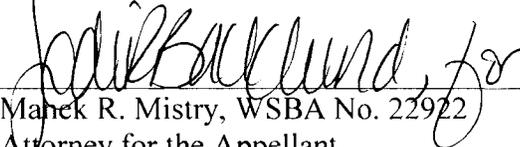
Respectfully submitted on May ¹⁸~~17~~, 2011.

⁴ This is especially true in light of the court’s decision to overrule the objection.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Freya Marconette
231 SW 11th St., #9
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and to:

Lewis County Prosecutor
360 NW North St.
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 18, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 18, 2011.



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