

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

NO. 45789-0-II

CLALLAM COUNTY CAUSE NO. 11-1-00331-0

STATE OF WASHINGTON,

Respondent,

vs.

BOBBY SMITH II,

Appellant.

BRIEF OF RESPONDENT

Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296
lschrawyer@co.clallam.wa.us
Attorney for Respondent

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I. Counterstatement of the Issues

ISSUE ONE

When Mr. Smith elects with the assistance of able counsel to rely on the defense of self-defense, when Mr. Smith is permitted to testify to the events as he saw them, and when the jury is provided an instruction that includes language that it could take into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident, can it be said that Mr. Smith was denied his right to present his own defense?

ISSUE TWO

When Mr. Smith had the opportunity to ask for redaction of Detective Spencer's interview with him but did not, but was instead permitted to cross examine Detective Spencer about the testimony he felt was inappropriate, and when the detective admits he was employing a ruse, can it said that this unchallenged admission of evidence was of any importance at all?

ISSUE THREE

When the record reflects that the Trial Court accepted and reviewed numerous documents requesting a downward exception, including the PSI, and was aware of its authority to grant a downward exception but chose to impose a low end standard sentence because (a) Mr. Smith shot a mortally wounded person in the head and (b) Mr. Smith never acknowledged that he had killed a human being, is there any question that the sentence is appropriately entered?

II. Statement of the Case

On June 20, 2011, Bobby Smith shot Robert Fowler five times (10/14/2013 RP 81-88) severely wounding Mr. Fowler with the second and third shot to Mr. Fowler's body mass and then executing Mr. Fowler as Mr. Fowler lay on the floor (10/14/2013 RP 88) because he was "still moving" (10/14/2013 RP 81-88). His explanation for the assassination was that the Marine Corps had taught him that one does not quit firing until the "deadly threat" has been eliminated (10/14/2013 RP 89). To Mr. Smith, that Mr. Fowler was still moving on the floor, severely wounded, unable to talk, was sufficiently still "a deadly threat" so that two more shots to the head were necessary because Mr. Fowler was "still attacking" while laying on the floor (10/14/2013 RP 86).

Mr. Smith testified that Mr. Fowler came into his house uninvited, demanding beer and money (10/14/2013 RP 52-3). He further alleged that Mr. Fowler was unarmed when he entered the home but then picked up a knife sheath, removed

the knife from the sheath, and made his demands (10/08/2013 RP 96). The knife was sitting on a table in the living room and had been there for some time (10/14/2013 RP 59). Mr. Smith testified he thought Mr. Fowler's alleged hold on the knife was still a deadly threat (10/14/2013 RP 95). He testified he pushed the knife out of Mr. Fowler's hand after killing him (10/14/2013 RP 59).

Bethany Smith, Mr. Smith's daughter, testified that her father slept on a mattress on the floor outside her room with a loaded gun next to him (10/10/2013 RP 40). She was awakened by the gun shots (10/10/2013 RP 49). She remembered hearing a couple gun shots, maybe some muffled voices and heard someone say "I'm sorry" and then more gunshots (10/10/2013 RP 49, 52, 63). She also told Detective Rife that Mr. Fowler was laughing and sounded happy when her father answered the door (10/10/2013 RP 67).

Kristopher Kern, WSP forensic scientist (10/09/2013 RP 34), testified about blood spatter, drip and transfer (10/09/2013

RP 50-55). The knife Mr. Fowler allegedly picked up and held in a threatening manner had no blood transfer, spatter or drip on it from Mr. Fowler (10/09/2013 RP 52).

Jim Luthy, WSP forensic scientist (10/09/2013 RP 62), testified there were no latent prints on the knife that Mr. Fowler allegedly held in his hand while threatening Mr. Smith (10/09/2013 RP 77).

Mariah Low, also a WSP forensic scientist (10/09/2013 RP 71), testified that Mr. Smith was a major contributor of DNA on the knife and Mr. Fowler was a possible minor contributor (10/09/2013 RP 88). Mr. Smith's chance of another match in the universe is 1 in 23 quadrillion. Mr. Fowler's chance, because there was not enough of his DNA to get a good match, was 1 in 72 (10/09/2013 RP 88, 97).

Doctor Daniel Selove, forensic pathologist (10/10/2013 RP 146), testified about the medical evidence gained from the autopsy. He retrieved two complete bullets and two bullets that were in pieces from the body (10/10/2013 RP 151). The cause

of death was multiple gunshot wounds to the head and the trunk (10/10/2013 RP 151). Five bullets entered Mr. Fowler's body, creating 13 bullet holes because some bullets entered, exited and then reentered (10/10/2013 RP 152). The first bullet entered just behind the top of the left shoulder (10/10/2013 RP 153).¹ At this time, the wounded person would be leaning forward a little and turned a little for the bullet to follow the path (10/10/2013 RP 154). The next two shots were fired close together point in time, while the body is still upright but leaning far forward or actually falling down at the time (10/10/2013 RP 153). The effect of one of the two bullets was to concuss the spine, making Mr. Fowler's leg muscles unusable or paralyzed (10/10/2013 RP 158). The other bullet entered the scalp and split (10/10/2013 RP 159). This bullet would have stunned Mr. Fowler, probably cause him to lose consciousness and also likely make him fall (10/10/2013 RP 159-60.) When Mr.

¹ Dr. Selove then testified that this bullet exited out of the back of Mr. Fowler and flew through a door (10/10/2013 RP 153). It is not clear why he said the bullet entered "just behind the top of the left shoulder" from this record.

Fowler was already prone on the floor, two more bullets entered his head (10/10/2013 RP 170). One bullet entered slightly downward in the body from near the sideburn to beneath the angle of the jaw on the other side and from the left to the right in the body and a little bit from the front to the back within the head. Another bullet entered just behind the left ear, passing through the back part of the skull and brain through a vital area called the brain stem which would cause instant death (10/10/2013 RP 170-71).

The jury convicted Mr. Smith of second degree murder (CP 21). Mr. Smith was sentenced to 123-220 months in prison (CP 9). This appeal followed.

III. Summary of Argument

None of the errors cited to by Mr. Smith occurred. First, the State never stopped Mr. Smith from presenting any defense he wished. He chose to present his defense of self-defense with PTSD. Mr. Smith never sought to present a diminished capacity defense, instead choosing a straight justifiable homicide defense. Further, he asked for and received a justifiable homicide instruction which told the jury to look at the facts from his perspective.

Second, the tape of the interview between Detective Spencer was reviewed by Mr. Smith and edits were made, but Mr. Smith accepted the CD for presentation to the jury (Exhibit 100). There was no challenge to the CD before it was admitted and played to the jury. After the CD was played, Mr. Smith challenged a portion of the interview. The Court permitted Mr. Smith to examine Detective Spencer who admitted that some of what he said about blood was “a ruse.” There is no error.

Third, sentencing is a matter of trial court discretion.

The Trial Court was under no obligation to accept anyone's request for a downward exceptional sentence. The record shows the Court listened to all the reasons supporting a downward exceptional sentence but determined, along with the jury, that the cold-blooded shots to the head – along with Mr. Smith's failure to ever admit he killed a human being --justified a regular sentence at the low end. There is no error.

IV. Argument

ISSUE ONE

When Mr. Smith elects with the assistance of able counsel to rely on the defense of self-defense, when Mr. Smith is permitted to testify to the events as he saw them, and when the jury is provided an instruction that includes language that it could take into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident, can it be said that Mr. Smith was denied his right to present his own defense?

Standard of Review: Issues raised for the first time on appeal are generally not reviewed by the appellate court. RAP 2.5 (a); *State v. Gray*, 134 Wn.App. 547, 557, 138 P.3d 1123 (2006), *review denied*, 160 Wn.2d 1008 (2007).

Analysis: Prior to presentation of evidence, the State asked Mr. Smith whether he was bringing an expert witness (9/19/2011 RP 57). Mr. Smith answered that he was not, so long as the State did not challenge that he had been diagnosed with PTSD (9/19/2011 RP 58). The State agreed it would not challenge his PTSD but then reminded Mr. Smith that the defense of self-defense was based on a “reasonable person” standard (9/19/2011 RP 59). Mr. Smith agreed, and stated that he would be relying on self-defense, stating “[h]e suffers from it, that’s who he is and that’s for the jury to determine whether it’s relevant or not and who he is, what he saw” (9/19/2011 RP 59).

At the conclusion of the trial, Mr. Smith asked for and received a jury instruction on justifiable homicide (Instruction 13, CP 38).

In short, Mr. Smith was permitted to try the case as he wanted, presenting his PTSD as part of how he viewed Mr. Fowler’s alleged behavior, “taking into consideration all the

facts and circumstances as they appeared to him, at the time of and prior to the incident.” (Instruction 13, CP 38). No one attempted to tell Mr. Smith how to present his defense. He chose his own defense as required in *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013).

ISSUE TWO

When Mr. Smith had the opportunity to ask for redaction of Detective Spencer’s interview with him but did not, but was instead permitted to cross examine Detective Spencer about the testimony he felt was inappropriate, and when the detective admits he was employing a ruse, can it said that this unchallenged admission of evidence was of any importance at all?

Standard of Review: An issue not raised below is generally waived on appeal. RAP 2.5 (a); *State v. Gray, supra*.

Analysis: This evidentiary issue was not raised until after the redacted CD was played for the jury. Detective Spencer’s interview, on CD and transcribed (listening aid that did not go to the jury room) was admitted as exhibit 99 and 100 with no objection from Mr. Smith (Ex. 99, 10/9/2011 RP 102).

After the CD was played for the jury, Mr. Smith objected

to Detective Spencer's testimony about blood composition (10/9/2013 RP 104). The State pointed out that Mr. Smith had not asked that this portion of the CD be redacted (10/9/2013 RP 105). The Court refused to give Mr. Smith a limiting instruction but stated that he could properly cross exam Detective Spencer about whether he is a blood expert (10/9/2013 RP 105).

Mr. Smith argues that admission of some of Detective Spencer's testimony about blood denied him "a fair trial." Mr. Smith accused Detective Spencer of lying to Mr. Smith to obtain a confession, just like a television show entitled "The Closer" (10/10/2013 RP 16-17). Detective Spencer admitted that some of his discussion with Mr. Smith was "a ruse" (10/10/2013 RP 17). The jury was clearly advised to be wary about accepting Detective Spencer's blood analysis. In light of the admission of Mr. Smith that he fired two shots into the head of Mr. Fowler as Mr. Fowler lay mortally wounded on the floor, any error would be harmless.

ISSUE THREE

When the record reflects that the Trial Court accepted and reviewed numerous documents requesting a downward exception, including the PSI, and was aware of its authority to grant a downward exception but chose to impose a low end standard sentence because (a) Mr. Smith shot a mortally wounded person in the head and (b) Mr. Smith never acknowledged that he had killed a human being, is there any question that the sentence is appropriately entered?

Standard of Review: A sentencing court abuses its discretion when it “categorically refuses” to exercise sentencing discretion. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005).

Analysis: There is nothing wrong with sentencing a person to a standard range sentence. A standard range sentence is the law unless “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The Court would have to find extensive “substantial and compelling reasons” in this trial record to impose an exceptional sentence downward for a person who admitted he put two more .45 slugs in the victim’s head, merely because he would not quit moving.

The record shows that the Court received an exceptional outpouring of support for Mr. Smith (1/14/14/ RP 26-36), including numerous letters of support, but the Trial Court summed the sentencing issue up when it stated “he died unnecessarily at the hand of Mr. Smith and I believe this is what the jury, was behind what the jury’s verdict was all about and there certainly was evidence to support their verdict. Mr. Smith, by his own admission testified that he came up to Mr. Fowler, while Mr. Fowler was lying wounded on the ground and methodically put two bullets in his head. There was no threat at that point.” (1/14/14/ RP 36-37). The Court also took umbrage at Mr. Smith’s refusal to acknowledge that he had killed a person:

Mr. Smith, I don’t know if you understand how harsh that language sounds and I found it interesting that at trial you never referred to Mr. Fowler’s life as terminating. The only thing you said was, “My only intent was to eliminate the threat,” not a life. So regardless, the jury didn’t buy that and I think that probably alienated the jury to some degree when you use that kind of language to justify what you did, but regardless, it wasn’t up to Mr. Smith.

(1/14/14 RP 39).

This record shows the Court exercised discretion in choosing a sentence for Mr. Smith. Based on all the support Mr. Smith had and his lack of criminal history, the Court set the sentence at the low end (1/14/14 RP 40).

Mr. Smith is arguing the Court abused its discretion because it relied on the jury verdict as a basis for its decision. That is not the test. The test is whether the trial court exercised discretion. *State v. Grayson, supra*. Had the trial court categorically refused to exercise discretion, one can argue there may be error. But, when the Court listened to the requests for a lower sentence and then based its decision on the admissions of the defendant, the cold blooded manner in which Mr. Smith testified about the two shots to the head, and the jury verdict, there is no error.

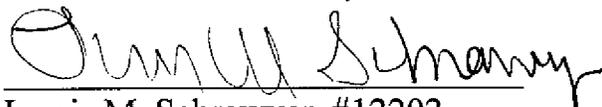
CONCLUSION

When it's all said and done, the two questions that must be addressed are whether the record contains substantial

evidence to support each element of the crime charged, *State v. Athan*, 160 Wn.2d 354, 378, n.5, 158 P.3d 27 (2007), and whether the defendant received a trial with no prejudicial errors. *See, e.g. State v. Martines*, ___ Wn.App. ___, 331 P.3d 105 (2014) (constitutional error in admission of evidence is presumed prejudicial); *but see also State v. Hudlow*, ___ Wn.App. ___, 331 P.3d 90 (2014 (even constitutional error can be harmless if the evidence is so overwhelming that it necessarily leads to a finding of guilt). In this case, the jury most likely determined that the final two shots to the victim's head were unnecessary for self defense. The jury's determination would have been made on Mr. Smith's testimony. Mr. Smith's conviction and sentence should be affirmed.

Respectfully submitted this October 29, 2014.

WILLIAM B. PAYNE, Prosecutor



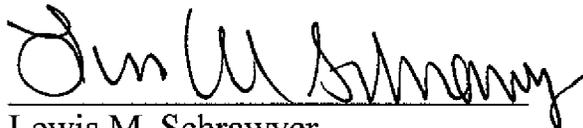
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Deputy Prosecuting Attorney

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Lewis M. Schrawyer

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