

30094-3-III
COURT OF APPEALS

FILED
May 14, 2012
Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TRACY L. JOHNSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A.	ASSIGNMENT OF ERROR	1
B.	ISSUE	1
C.	STATEMENT OF THE CASE.....	1
D.	ARGUMENT	5
	1. EXCLUDING EVIDENCE RELEVANT TO SELF-DEFENSE VIOLATED THE RIGHT OF THE ACCUSED TO PRESENT A DEFENSE	5
E.	CONCLUSION.....	9

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. ADAMO, 120 Wash. 268, 207 P. 7 (1922).....	6
STATE V. CLOUD, 7 Wn. App. 211, 498 P.2d 907 (1972).....	6
STATE V. DARDEN, 145 Wn.2d 612, 41 P.3d 1189 (2002).....	5, 6
STATE V. HUDLOW, 99 Wn.2d 1, 659 P.2d 514 (1983).....	5, 6
STATE V. JANES, 121 Wn.2d 220, 850 P.2d 495 (1993).....	8
STATE V. JONES, 168 Wn.2d 713, 230 P.3d 576 (2010).....	5, 6
STATE V. LeFABER, 128 Wn.2d 896, 913 P.2d 369 (1996), <i>abrogated on other grounds by</i> <i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	7
STATE V. WALDEN, 131 Wn.2d 469, 932 P.2d 1237 (1997).....	8
STATE V. WALKER, 13 Wn. App. 545, 536 P.2d 657 (1975).....	6
STATE V. WOODARD, 26 Wn. App. 735, 617 P.2d 1039 (1980).....	6
STATE V. YOUNG, 48 Wn. App. 406, 739 P.2d 1170 (1987).....	6

CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT..... 6
U.S. CONST. Amend. VI 5
WASH. CONST. Art. I, § 22 5

COURT RULES

ER 401 5
ER 402 5
ER 403 6

A. ASSIGNMENT OF ERROR

1. The court erred in excluding evidence that was essential to prove the defendant acted in self-defense.

B. ISSUE

1. When the alleged victim discovered his wife had become romantically involved with the accused, he confronted the couple late at night and physically assaulted his wife. In a later confrontation, the accused struck the alleged victim with a T-ball bat, and asserted self-defense as justification. The court excluded as irrelevant testimony that the alleged victim assaulted his wife in the presence of the accused, apparently because the alleged victim had not assaulted the accused. Did the exclusion of this evidence violate the constitutional right of the accused to present a defense?

C. STATEMENT OF THE CASE

In 2008, Michelle Mulhair friended Tracy Johnson on Facebook. (RP 170) He wasn't sure who she was, but they got together at a mall and he realized she was a girl he had dated in high school 20 years earlier.

(RP 170) After graduation they had gone their separate ways, and he hadn't seen her since. (RP 170)

They renewed their friendship and in time their relationship became more serious. (RP 170) He was in the process of getting a divorce and she told him that she had been unhappy in her marriage for several years. (RP 170)

In the ensuing months several unpleasant encounters occurred in which Mr. Johnson felt threatened by Mr. Mulhair. (RP 171-73, 181-89)

Mr. Johnson and Ms. Mulhair had planned to move into an apartment together and Mr. Johnson had household goods from his storage unit in the back of his truck. (RP 161, 165) His father had been following him and Mr. Johnson pulled off the road to wait for him. (RP 162) When he saw Mr. Mulhair drive past and make a rude gesture from his truck, he became frightened. (RP 165)

Mr. Mulhair then turned and drove up behind Mr. Johnson's parked truck. (RP 165) He got out of the truck and began walking towards Mr. Johnson's truck. (RP 166-67) Mr. Johnson got out of his truck as Mr. Mulhair approached the driver's side of the truck. (RP 167) When Mr. Mulhair raised his hand, Mr. Johnson took his son's T-ball bat from the front of his truck and hit him with it three times in rapid

succession. (RP 159, 167) Then he got back in his truck and called 911. (RP 168)

Dr. Robert Padilla treated Mr. Mulhair's injuries at Yakima Valley Hospital Emergency Room. (RP 137-38) Mr. Mulhair told the physician he had been the victim of an assault with a blunt instrument, a baseball bat. (RP 139) Dr. Padilla found simple abrasions and contusions on Mr. Mulhair's elbow. (RP 142) Mr. Mulhair complained of pain with breathing because of a rib injury. (RP 140) X-rays disclosed an old fracture of a front rib. (RP 142) Dr. Padilla recommended pain medication as treatment. (RP 142-43)

The State charged Mr. Johnson with second degree assault. (CP 1) At the beginning of trial, the State objected to the relevance of the confrontations between Mr. Mulhair and Mr. Johnson that had taken place in the months preceding the alleged assault. (RP 44-45) The court noted these incidents were relevant to Mr. Johnson's claim of self-defense. (RP 44) The court asked counsel for more information about one of the incidents. (RP 45) Counsel explained:

Mr. Mulhair contacted -- he followed my client and his wife to the Golden Wheel Restaurant. He contacted them in the parking lot. He asked them what was going on. They indicated they were just friends, and he finished the conversation by assaulting her.

(RP 45) The court promptly ruled the evidence irrelevant. (RP 45)

Mr. Mulhair told the jury that on the day of the incident he drove past Mr. Johnson's truck, Mr. Johnson made a rude gesture, and he turned around because it looked like Mr. Johnson had one of Mr. Mulhair's toolboxes in his truck. (RP 50-52) The toolbox was red and Mr. Mulhair testified that he owned about nine toolboxes, and they were all red. (RP 52-53) He later acknowledged that his toolbox had not been in Mr. Johnson's truck. (RP 80)

Mr. Mulhair testified that he turned around and drove up behind Mr. Johnson's truck. (RP 54) He got out and as he was approaching the truck, Mr. Johnson got out and hit him with his baseball bat. (RP 56) He was struck in the elbow, the ribs, and his knee. (RP 59-60) He got back in his truck and called 911. (RP 63)

Dr. Padilla opined that a baseball bat is readily capable of impairing an organ or body part of a human being. (RP 148)

According to Mr. Johnson, Mr. Mulhair did not offer to help him, nor did he stop to look at the toolbox. (RP 166-67, 190) Mr. Johnson told the jury that as Mr. Mulhair approached his parked truck he was scared and believed he was going to be harmed. (RP 190) The jury, however, found Mr. Johnson guilty of second degree assault. (RP 323)

D. ARGUMENT

1. EXCLUDING EVIDENCE RELEVANT TO SELF-DEFENSE VIOLATED THE RIGHT OF THE ACCUSED TO PRESENT A DEFENSE.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). A claimed denial of the right to present a defense is reviewed *de novo*. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Accordingly, the threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Under ER 402, "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

The State's interest in excusing prejudicial evidence "must be balanced against the defendant's need for the information sought, and only

if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Darden*, 145 Wn.2d at 622. No state interest can be compelling enough to preclude the introduction of highly probative evidence. *Hudlow*, 99 Wn.2d at 16. Evidence Rule 403, which requires balancing the probative value of evidence against the danger of prejudice, cannot be used to exclude "crucial evidence relevant to the central contention of a valid defense." *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

Evidence of a victim's prior acts of violence, which are known by the defendant, is relevant to a claim of self-defense "because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at that time, had reason to fear bodily harm." *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting *State v. Adamo*, 120 Wash. 268, 269, 207 P. 7 (1922)). Accordingly, such evidence is admissible to show the defendant's reason for apprehension and the basis for acting in self-defense. See *State v. Woodard*, 26 Wn. App. 735, 737, 617 P.2d 1039 (1980); *State v. Walker*, 13 Wn. App. 545, 549-50, 536 P.2d 657 (1975); *Cloud*, 7 Wn. App. at 217.

The Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence.

State v. Jones, supra. In *Jones*, the court reversed a rape conviction because the defendant was precluded from testifying as to his version of the incident. 168 Wn.2d at 720-21. The court held that evidence that constitutes a defendant's entire defense is so highly probative that no State interest is compelling enough to preclude its introduction. *Jones*, 168 Wn.2d at 721.

Mr. Johnson was permitted to relate to the jury several incidents in which Mr. Mulhair appeared angry or confrontational. But he was precluded from telling the jury that in their very first confrontation, in the parking lot of a restaurant, Mr. Mulhair assaulted Ms. Mulhair in Mr. Johnson's presence. In the course of Mr. Johnson's testimony, the judge further explained her reasoning: "One of the reasons I'm indicating that I don't believe it is relevant that Mr. Mulhair came up and slapped or cold-cocked or whatever we're indicating Michelle Mulhair is because that is not specifically directed at [Mr. Johnson]. It is highly prejudicial." (RP 175)

The court suggested that, unless a prior act of violence has been directed at the accused, it is not relevant even if the violent act occurred in the presence of the accused. A defendant may lawfully use force in self-defense if he reasonably believed he would be imminently harmed by the victim. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996),

abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

The jury knew that Mr. Mulhair had confronted Mr. Johnson and Ms. Mulhair in a parking lot and evidenced anger at their relationship, and that the confrontation in the parking lot was the last time Mr. Johnson had been confronted by Mr. Mulhair without any witnesses. Since then Ms. Mulhair had decided to leave her husband and move in with Mr. Johnson. What Mr. Johnson knew, and the jury did not know, was that on that evening in the parking lot, Mr. Mulhair had physically assaulted Ms. Mulhair because of her relationship with Mr. Johnson. Knowing what Mr. Johnson knew, a jury might more readily conclude that Mr. Johnson reasonably believed he was in imminent danger of harm from Mr. Mulhair.

Evidence that Mr. Johnson had seen Mr. Mulhair physically assault Ms. Mulhair because of her relationship with Mr. Johnson was not merely relevant but highly probative of Mr. Johnson’s claim that he acted in self-

defense. By excluding this evidence the court violated Mr. Johnson's right to present a defense.

E. CONCLUSION

The conviction should be reversed and the matter remanded for a new trial at which defendant's proposed relevant evidence is presented to the jury.

Dated this 1st day of May, 2012.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30094-3-III
)	
vs.)	CERTIFICATE
)	OF MAILING
TRACY L. JOHNSON,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Tracy L. Johnson
200 Bridleway, #109
Yakima, WA 98901

Signed at Spokane, Washington on May 14, 2012.


Janet G. Gemberling
Attorney at Law