

FILED

MAR 19, 2012

Court of Appeals
Division III
State of Washington

No. 30233-4-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

RICHARD SOLIZ,
Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Michael McCarthy, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The evidence was insufficient to sustain a conviction for manslaughter in the second degree.

Issues Related to Assignments of Error

II. Was the evidence sufficient to sustain a conviction for manslaughter in the second degree beyond a reasonable doubt where the defendant raised the issue of self-defense?

III. STATEMENT OF FACTS

Richard Soliz was charged by information with murder in the second degree. (CP 4). The matter proceeded to a jury trial in which Mr. Soliz raised the affirmative defense of self-defense.

In the evening on Valentine's Day 2010, Richard Soliz and a friend, Oscar Flores Jr., went out together to drink beer and play pool. (4RP 549, 552-53¹). Mr. Soliz drove. (4RP 550). Mr. Soliz sat on a barstool, and Mr. Vargas took the stool next to him. (4RP 554). Although they did not know one another, Mr. Vargas asked Mr. Soliz to "watch his back" because he was going to talk to several African-American men that were sitting at a table. (4RP

¹ For purposes of this brief, the hearing date of 8/16/11 will be referenced as RP; the hearing dates of 8/17-18/2011 will be referenced as 1RP; the hearing date of 8/19/11 as 2RP; the hearing date of 8/22/11 as 3RP; hearing date 8/23/11 as 4RP; hearing date 8/24/11 as 4RP; 8/25/11 as 5RP; 8/26/11 as 6RP; 8/29/11 as 7RP; and 9/12/11 as Sentencing RP.

554-55). Mr. Soliz agreed. Later, as thanks, Mr. Vargus ordered and paid for three or four Tequila shots for himself, Mr. Soliz, and Mr. Flores. (4RP 559).

When the bar announced “last call” Mr. Soliz called for a taxi, as he believed he was too inebriated to drive. (1RP 40; 4RP 561). Mr. Vargus offered to drive Mr. Soliz and Mr. Flores to Mr. Flores’ home, about ten minutes away. They accepted. (4RP 562). Mr. Flores got into the backseat, Mr. Soliz in the front passenger seat, and Mr. Vargus in the driver’s seat. (4RP 563). As they drove, Mr. Soliz asked Mr. Vargus what he was talking about to the people at the bar. (4RP 564). Mr. Vargus became very upset, raised his voice, and told Mr. Soliz it was none of his concern. (4RP 567). Mr. Soliz became frightened by Mr. Vargus’s behavior and asked Mr. Vargus to let him out of the car. Mr. Vargus refused to let him out, he said, “...he wasn’t going to let me out unless he wanted to let me out.” (4RP 568). Mr. Soliz became frightened. (4RP 569). (4RP 568). When Mr. Vargus stopped the car at a stop sign Mr. Flores got out of the car through the back passenger door. (1RP 41). He later reported he wanted to get out of the car because he violated his probation conditions by being intoxicated and feared the police might stop the vehicle. (1RP 44).

Mr. Soliz tried to get out of the passenger side door, but the handle latch was broken, preventing his escape. (4RP 568). He reached across Mr. Vargas to grab the handle to the driver's side door in an effort to flee the car. Mr. Vargas pushed him and struck him in the side of the head. (4RP 570-71). As Mr. Soliz tried to hit him back and force his way out of the car, he felt a hot, burning sensation in his abdomen. (4RP 572-73). He heard Mr. Vargas say he was "going to fuck me up." (RP 573).

Mr. Soliz saw Mr. Vargas had a knife and tried to get it away from him. (4RP 574). He believed that Mr. Vargas was going to kill him. (4RP 573-74). Mr. Soliz suffered bruises on the back of his head and shoulders, a cut to his leg, an abdominal stab wound, and bruises to his face and left hand. (4RP 578-81). The tendons in both hands were severed and were characterized by the forensic pathologist as "defensive wounds." (4RP 578-81; 6RP 760;764). Mr. Soliz had no immediate or later recollection of getting the knife away from Mr. Vargas or of harming him. (4RP 575). Mr. Soliz has never carried a knife. (4RP 575).

The next thing Mr. Soliz remembered was running to get away from the car. (4RP 575). He testified that at the time he did not know Mr. Vargas had been injured. (4RP 582). He wandered,

lost, through a neighborhood and park, looking for Mr. Flores' home. (4RP 583). He eventually found the home and was allowed inside. (4RP 585). Mr. Flores, noticing Mr. Soliz was "pretty drunk and weak" led him to the shower, gave him clean clothing and showed him where he could sleep. (1RP 48; 4RP 586).

Shortly after 2 a.m., Maria Cortez drove past Mr. Vargas's car. (1RP 72). She observed the car stopped near a stop sign. The driver's door was open and Mr. Vargas was leaning out of the car. (1RP 74). Between 2:15 a.m. and 2:30 a.m., Mauricio Rodriguez and his girlfriend also saw Mr. Vargas' car parked with its lights on, the motor running. They saw Mr. Vargas, alive, on the ground in the middle of the roadway. (2RP 95, 125 -27). They called 9-1-1. (2RP 96).

Officers and an ambulance arrived at the scene. (2RP 116,119). Mr. Vargas was transported to the hospital, where he was later pronounced dead. (2RP 169, 173). The coroner's report indicated that Mr. Vargas had a blood alcohol level of .28, and there was evidence of cocaine and metabolized cocaine and alcohol in his system. (2RP 199-200).

The forensic pathologist testified that Mr. Vargas had facial injuries and bruises, some of which may have been caused by

falling on the ground. (2RP 249). He had cuts on his ankle, lip, wrist and hairline, caused by a four inch knife. (2RP 216-222; 259). He also sustained a two- inch deep stab wound into the back of his shoulder, and four stab wounds on the right side of his back. (2RP 223, 227). A weapon was never found. (4RP 492).

The officers who arrived at the scene saw blood in the car and on the ground, and noticed a blood trail leading away from the car. (2RP 112). Several officers followed the blood trail through a park. Although circuitous, the trail eventually led to Mr. Flores' home. (4RP 487). Mr. Soliz was arrested. (4RP 587).

Officers questioned Mr. Soliz both while he was at the hospital getting medical treatment for his injuries, and later at the police station. (4RP 587-89, 688-691). Mr. Soliz consistently told the officers the driver attacked him with a knife, he fought for the knife, and tried to climb over the driver to get out of the car. He did not know what happened to the knife. (5RP 689,690-91). When questioned as to why he did not call the police, Mr. Soliz said:

“ Yeah, I wanted to go to the hospital. I wanted to go and he [Mr. Flores] was like well,... I was scared. And I, I knew I was gonna have to do something with, with the, these cuts and stuff in the morning.”

(State's Exhibit 190; 5RP 625-26).

Psychiatrist, Dr. Mark McClung testified he interviewed Mr. Soliz, reviewed discovery, conducted tests, and obtained background information from family members about Mr. Soliz. (5RP 655). It was his opinion that Mr. Soliz perceived the attack by Mr. Vargas as life-threatening, and as a result suffered from acute stress disorder at the time and later, post-traumatic stress disorder. (5RP 656).

In Dr. McClung's expert opinion, Mr. Soliz's description of events matched the criteria for acute stress disorder also found in police officers, firefighters, and others who have experienced a traumatic event: that is, distortions in time, inability to lay down or retrieve memories from the event, confusion, disorientation, numbing, as well as tunnel vision- which left him unable to keep track of events as they occurred. (5RP 660). The alcohol intoxication, blood loss, and traumatic event itself, all contributed toward Mr. Soliz's inability to remember or recount an exact sequence of events. (5RP 672).

The court gave the following pertinent jury instructions:

Instruction No. 19

“A person commits the crime of Second Degree Manslaughter, when with criminal negligence, he or she causes the death of another person unless the killing is justified.”

(CP 196)

Instruction No. 20

“To convict the defendant of the crime of Second Degree Manslaughter, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 15, 2010, the defendant engaged in conduct of criminal negligence;
- (2) That Ali Lemus Vargas died as a result of the defendant’s criminal negligence; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.”

(CP 197).

Instruction No. 21

“A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.”

(CP 198).

Instruction No. 22

“It is a defense to the charges of Second Degree Murder,

Second Degree Felony Murder, First Degree Manslaughter and Second Degree Manslaughter that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) The slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;

(2) The slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to all charges.

(CP 199)

Instruction No. 23

"Great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

(CP 200).

Instruction No. 24

"A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide to be justifiable."

(CP 201).

Instruction No. 25

“It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.”

(CP 202).

After a jury trial, Mr. Soliz was found guilty of manslaughter in the second degree with a deadly weapon. (CP 228). This appeal follows.

IV. ARGUMENT

The Evidence Is Insufficient To Sustain A Conviction For Manslaughter In The Second Degree.

Due process rights, guaranteed under both the Washington Constitution and the United States Constitution, require the state to prove every element of a crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983).

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Sufficiency of the evidence is a question of

constitutional magnitude and can be raised initially on appeal.

Baeza, 100 Wn.2d at 488.

A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person. RCW 9A.32.070(1). Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-6, 683 P.2d 1069 (1984).

In Washington, a homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon or do some great personal injury to the slayer. RCW 9A.16.050(1),(2). Additionally, RCW 9A.16.020(3), sets the parameters of self defense in Washington: the use of force is not unlawful when used “by a party about to be injured...in preventing or attempting to prevent an offense against his person.” The State’s evidence here did not meet the basic requirements of due process by showing the necessary quantum of proof that Mr. Soliz was criminally negligent when he protected himself. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005). Moreover, the State’s evidence is insufficient to show the force Mr. Soliz used was more than the

force a reasonably prudent person would have used under the circumstances. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

A self - defense claim is “predicated upon the right of every citizen to reasonably defend himself against unwarranted attack.” *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (quoting *Whipple v. State*, 523 N.E.2nd 1363, 1366 (Ind. 1988)). Evidence of self-defense must be assessed from the viewpoint of a reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees.*” *Id.* at 238. See *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

Mr. Soliz consistently told his experience in the same manner: while in the car, he asked Mr. Vargas about the conversations that took place at the bar and Mr. Vargas got very upset and yelled. Mr. Soliz wanted to get out of the car because he was frightened. The door handle on the passenger side did not work. Mr. Soliz asked Mr. Vargas to let him out. Mr. Vargas refused, holding Mr. Soliz against his will. Mr. Soliz reached across Mr. Vargas to undo the door latch. Mr. Vargas pushed him back and hit him in the head. Mr. Vargas used a knife to stab Mr. Soliz in the abdomen. Mr. Soliz tried to defend himself from the knife

with his hands, hitting and punching. Tendons in both his hands were severed as a result. Somehow, during the fight, Mr. Soliz got the knife away from Mr. Vargas and stabbed him as he tried to crawl over him to get out. Mr. Soliz was very frightened and bleeding when he got out of the car. Mr. Vargas was alive when Mr. Soliz left the scene.

Subjectively, there can be no question, considering all the circumstances and facts known to Mr. Soliz, that his fear was reasonable. Further, under the law, he was entitled to defend himself against Mr. Vargas.

The degree of force used in self-defense is limited to what a reasonably prudent person, in the same or similar circumstances as they appeared to the defendant, would find necessary. *See State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979). Thus, a jury is to use the subjective information to determine what a reasonably prudent person would do under those conditions. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993); *See also State v. LeFaber*, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

The question here is whether a reasonably prudent person,

fighting off his attacker, would have used the same degree of force to insure his own safety. A person is considered, under the law, to act with criminal negligence when he fails to be aware that a substantial risk of a death may occur, and that failure of awareness constitutes a gross deviation from the standard of care that a reasonable person would exercise in that situation.

Mr. Soliz had every reason to subjectively and objectively fear for his life: He was trapped in a car, threatened with bodily harm, then his assailant hit him and attacked him with a knife. A finding of criminal negligence, rather than a justified homicide, in this circumstance implies that a reasonably prudent person would not have fought for his own life. This is contrary to a well-settled principle: deadly force can be used in self-defense if the defendant reasonably believed he was threatened with death or great personal injury. *Walden*, 131 Wn.2d at 474-75.

Mr. Soliz had a lawful right to use deadly force to save his own life. The evidence was insufficient to sustain a conviction for manslaughter in the second degree.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Soliz respectfully requests this Court to reverse his conviction and dismiss all charges with prejudice.

Respectfully submitted this 19th day of March, 2012.

s/Marie J. Trombley

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury that a copy of appellant's opening brief was mailed first class, postage prepaid, on March 19, 2012, to Richard Soliz, DOC # 710992, Washington Corrections Center, PO Box 900, Shelton, WA 98584; and by email per agreement between the parties to Kevin Ellmes, Prosecuting Attorney's Office, at Kevin.ellmes@co.yakima.wa.us.

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