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JANUARY 29, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32548-2

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

GEORGE LEWIS, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY  
THE HONORABLE JOHN ANTOSZ

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BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The Trial Court Violated the Sixth Amendment When It Refused To Allow Testimony About Prior Acts Of The Alleged Victim.

B. Counsel Was Ineffective For Failing To Request A Jury Instruction On The Defense Of Defense of Another.

Issue Pertaining to Assignment of Error

1. Mr. Lewis was charged and found guilty of first-degree burglary for entry into his ex-girlfriend's apartment and fourth degree assault for a confrontation with alleged victim, Mr. Harwood. To support the defense of defense of another, he sought to admit evidence that he and his ex-girlfriend had been physically attacked by the alleged victim approximately 10 weeks previous and Mr. Lewis had been threatened with a knife by the same alleged victim two weeks previous to that. The court excluded evidence of the prior assaultive conduct by the alleged victim. Did the court's exclusion of relevant evidence to support defense of another constitute a violation of Mr. Lewis' Sixth amendment right to present a defense?

2. Did Mr. Lewis receive ineffective assistance of counsel where counsel did not request a jury instruction on the defense of defense of another?

## II. STATEMENT OF FACTS

Grant County prosecutors charged George Lewis with first-degree burglary, domestic violence, armed with a firearm, second-degree assault, armed with a firearm, possession of methamphetamine, and malicious mischief in the third degree. CP 33-34. The matter proceeded to a jury trial.

Some time in mid-July 2013, George Lewis knocked on the apartment door of his previous girlfriend, Kari Chapman. Brent Harwood, her current companion, told Mr. Lewis he was not welcome, drew a knife, and said, "Step the f—k away from me or I'll F-ing stab you. RP 27; 192; CP 103-104.

A few weeks later, on August 4, 2013, Lewis and Ms. Chapman sat in his truck, preparing to go to the bank. RP 192. Harwood saw them and enraged, told Ms. Chapman to either get out of the truck or he was going to smash it. RP 190. Ms. Chapman did not get out and Mr. Harwood proceeded to smash all the truck windows with his crowbar. RP 190; CP 90; 21. He also struck Ms. Chapman, requiring her to receive 7 stitches in her leg.

RP 191; CP 90;103-104. Mr. Harwood was arrested and later pleaded guilty to malicious mischief and second -degree assault. CP 90.

Prior to trial, the State sought to exclude evidence of those two events, citing remoteness in time, irrelevance, and that such evidence would only inflame the jury. RP 32-33; CP 90-91. By contrast, the defense contended the evidence was relevant. It provided the context for Mr. Lewis's mental state and his defense that he was coming to the defense of another; negating the intent element in first degree burglary, and as a defense to the assault charge, and explaining why two acquaintances followed him into the apartment. RP 24-27;176; 333.

The court made a preliminary ruling that the events were not too remote in time, but initially required the defense to establish that Ms. Chapman's safety was at issue. RP 35. The court stated, "And my whole ruling turns upon that. Again, not whether Mr. Lewis is concerned for his own safety that he needs to break in to protect himself, but rather this would have to relate to the defense of Ms. Chapman." RP 42.

Over defense objection, the trial court later granted the State's motion in limine, ruling that allowing Mr. Lewis to testify

about the specific actions of the alleged victim would violate Evidence Rule 404(a). RP 177;180;196.

Prior to dating Harwood, Ms. Chapman maintained an intimate relationship with Mr. Lewis for approximately twelve years. RP 121;285. A few days before October 19, 2013, she and Mr. Lewis went out for dinner and spent the evening at his motel together. RP 286. They discussed becoming a couple again and going out of town together. RP 200. She told Mr. Lewis that she and Harwood had been arguing, and Harwood had pushed her around. He had also harassed her by showing up uninvited at her home and sending thousands of text messages to her phone, making it impossible for her to make outgoing calls<sup>1</sup>. RP 123-24; 201;289.

On the morning of October 18th, she spoke with and texted Mr. Lewis about going to Spokane together that day. RP 159;289. However, instead of going out of town Mr. Lewis ran a local pool tournament that evening. RP 289. When the tournament was over, he continued to play pool with two new acquaintances. RP 292. He tried to again contact Ms. Chapman between 11 p.m. and

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<sup>1</sup> The term used was “blowing up” the phone.

midnight. Unbeknownst to him, she was annoyed about his change of plans, so did not respond. RP 201; 210;289.

Sometime between midnight and 2 a.m., Ms. Chapman's neighbor, Ms. Spencer, telephoned Mr. Lewis to tell him she found his lost coat at her apartment. RP 107;291. On his way home, he drove to the apartment with his acquaintances. Ms. Spencer met him on the outside stairwell with his coat. RP 295. Mr. Lewis testified that Ms. Spencer told him that she overheard Ms. Chapman and Harwood arguing in the apartment. RP 297. At trial Ms. Spencer testified that she could not remember if they were fighting that evening, but stated that Mr. Lewis "was always worried about Kari, because of all the fights." RP 118-119.

Based on his conversation with Spencer, the earlier conversations with Ms. Chapman about her troubles with Harwood, and the fact that she had not answered her telephone that evening, and knowing his previous behaviors, Mr. Lewis became concerned for her. He went to Ms. Chapman's apartment door and knocked. RP 304. Harwood opened the door a crack, saw Mr. Lewis, and quickly shut and dead bolted the door. RP 297. Mr. Lewis walked away but remained concerned about Ms. Chapman's safety. RP 298.

He walked back to his truck, but decided to return to Ms. Chapman's apartment to check on her. Although he testified he did not ask his two acquaintances to accompany him, they followed him up the stairs<sup>2</sup>. RP 298-300. He knocked twice on the door when Dustin, one of his acquaintances, came up behind him and kicked in the door. RP 300. Dustin carried a baseball bat and an Airsoft gun, he found in Mr. Lewis's truck- toys he used to play with children at the motel where he lived. RP 314

Mr. Lewis testified that he stepped into the bedroom and Harwood was hiding in there with a knife in his hand. Harwood closed the door, trapping Mr. Lewis inside the room. RP 305. Mr. Lewis yelled, "he's got a knife" and Dustin tried to push the door open to assist him. RP 305.

By contrast, Mr. Harwood testified he heard the front door open and Mr. Lewis came into the bedroom. Harwood leaned on the door to keep Dustin from entering the room. RP 247. He took out his knife to protect himself and used a curtain rod to keep the men away from him. RP 251. He reported that Mr. Lewis threatened to beat him up and eventually, struck him in the head,

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<sup>2</sup> Neither of the acquaintances testified at trial.

although not with either the bat or the Airsoft gun. RP 251. He later refused medical attention. RP 252.

When Mr. Lewis became aware that Ms. Chapman was upset with him, not Harwood, he realized he needed to leave, testifying, “Basically, I felt like I had been kind of duped into thinking that she was in harm, and I was upset with her...that I felt that we didn’t have any business being there...” RP 307. As he left the apartment, he told her this was all her fault and pushed her. She fell backward into the bathtub, but reported she was not hurt. RP 141;313.

The court gave a self-defense instruction and a “first aggressor” instruction. Defense counsel did not request and the court did not give a defense of another instruction. CP 136,138.

Mr. Lewis was convicted of first-degree burglary, domestic violence; fourth degree assault; possession of methamphetamine; and malicious mischief in the third degree. CP 158-163. He makes this timely appeal. CP 186-87.

### III. ARGUMENT

- A. The Trial Court Violated the Sixth Amendment When It Refused To Allow Mr. Lewis To Testify About Earlier Violent Encounters He Had With Harwood.

## 1. Standard of Review

A defendant's right to present evidence is guaranteed by the federal and state constitutions. U.S. Const. Amend.VI; Const. Art. 1, §22. "The right of an accused in a criminal trial to due process is, in essence, the right to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). An appellate court reviews evidentiary issues de novo when raised under the framework of a denial of a defendant's Sixth Amendment right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

## 2. The Proffered Evidence Was Relevant And Highly Probative

Evidence a party offers must be of at least minimal relevance, as there is no constitutional right to present irrelevant evidence. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The threshold for the relevance of evidence is low: "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.

In circumstances where the State opposes admitting the evidence, its interest “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. Under ER 403, the probative value of the evidence is weighed against the danger of prejudice, and *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).

Mr. Lewis sought admission of evidence that undergirded his defense that he entered Chapman’s apartment to come to her aid. RP 25. The jury knew that Harwood had previously shown up uninvited and unwelcome at Ms. Chapman’s apartment, pushed her around, fought with her, and jammed her phone with text messages. However, the jury was not told that because he wanted her to get out of Lewis’s truck, Harwood had recently used a crowbar to smash out the truck windows and injure Ms. Chapman. Nor was the jury informed that Mr. Harwood had threatened Mr. Lewis with a knife on another occasion. If the jury had been aware of this information, it might have concluded that Mr. Lewis reasonably believed Ms. Chapman was in danger of harm from Mr.

Harwood. This is especially so because only the day before, Ms. Chapman had expressed interest in leaving Harwood for Lewis, made plans to go out of town with Lewis, and then she did not answer her phone that evening.

Under Washington law, a person can use force to defend a third party to the same extent he could defend himself. *State v. Penn*, 89 Wn.2d 63, 65, 568 P.2d 797 (1977). The necessity for the use of force is judged from the viewpoint of the defendant, and a jury determines what a reasonably prudent person would have done in the circumstances as they appeared to the defendant at the time of the event. *Id.* To provide context for Mr. Lewis's belief that his intervention was necessary for Ms. Chapman's protection, the evidence of Harwood's previous violent acts and the reasons for the acts against Mr. Lewis and Ms. Chapman were essential.

In *Jones*, the Court overturned a conviction because the trial court violated his right to present a defense in refusing to allow him to testify or introduce evidence as to the circumstances surrounding the alleged crime of rape.. *Jones*, 168 Wn.2d at, 720-21. Following the reasoning in *Darden and Hudlow*, the Court stated:

“After the court effectively barred Jones from presenting his defense and after all witnesses had already testified, the trial

court attempted to say that Jones had not been precluded from testifying to the issue of consent alone. The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events....These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense. The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment." *Jones*, 168 Wn.2d at 721.

Similarly, here the court effectively barred Mr. Lewis from presenting his defense. Both he and Ms. Chapman were prevented from giving an account of the window-smashing incident, and Harwood could not be questioned about his earlier violent behavior. Mr. Lewis was precluded from giving the context that explained his fearfulness for Ms. Chapman.

The exclusion of the prior aggressive acts by Harwood cannot be said to be harmless beyond a reasonable doubt. In an early Washington case, the Court upheld jury instructions which requested the jury to "take into consideration all the facts and circumstances bearing on the question and surrounding defendant, and existing at or prior to the time of the alleged shooting..." *State v. Churchill*, 52 Wash. 210, 220, 100 P.309 (1909). This was

approved of in *Warrow*, with the Court adding, the circumstances to be considered by the jury went beyond just the immediate circumstances, and should include those existing and known long before the alleged crime. *State v Warrow*, 88 Wn.2d 221, 235-46, 559 P.2d 548 (1977).

The testimony about the arguing between Harwood and Chapman, his telephone jamming, uninvited visits, and pushing were all acts that occurred shortly before the entry and confrontation. However, they paled in comparison to Harwood's physical aggression and use of weapons (crow bar and knife). The excluded acts went directly to the reasonableness of Mr. Lewis's entry into the apartment and confrontation with Harwood. Because the excluded evidence was of greater probative value than the evidence presented to the jury, the error in exclusion was not harmless.

### 3. The Evidence Was Admissible Under ER 404.

The trial court ruled that evidence about the two prior incidents ran afoul of ER 404. This was error. When a claim of self-defense, or defense of another is raised, a defendant may introduce two different kinds of evidence concerning the alleged victim's character. 13B Seth A. Fine & Douglas J. Ende,

Washington Practice: Evidence § 3310 (2013-14 ed.). A defendant may introduce evidence concerning a reputation for violence: such evidence may not, however, be introduced for the purpose of proving action in conformity therewith on a particular occasion. ER 404(a).

Evidence of a victim's violent acts or reputation may be admissible to show the state of mind of the defendant at the time of the alleged crime, and to indicate whether he had reason to fear bodily harm. *State v. Cloud*, 7 Wn.App. 211, 218, 498 P.2d 907 (1972). In *Cloud*, the Court reasoned:

“ A recently performed single act of violence by the deceased [victim ] may have been sufficient to engender fear in the mind of the defendant. If the defendant knew of such an act which was not too remote and would normally cause a person to be apprehensive, evidence of the act and the defendant's knowledge of it should be allowed.”

*Cloud*, 7 Wn.App. at 218-19.

Here, the trial court ruled the events were *not* too remote in time and initially found the evidence of the previous violent encounters could logically pertain to a defense of defense of another. Prior bad acts evidence may be introduced if the trial court finds (1) the misconduct has been proven by a

preponderance of the evidence; (2) the purpose for which the evidence is sought to be introduced is identified; (3) the evidence is relevant to prove an element of the crime charged; (4) the weight of the probative value exceeds its prejudicial effect. *State v. Thach*, 126 Wn.App. 297, 106 P.3d 782, *rev. denied*, 155 Wn.2d 1005, 120 P.3d 578 (2005). Under *Darden*, the State bears the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

Here, the prior bad acts evidence was easily proven by a preponderance of the evidence: there was a police report detailing the window smashing incident, and a record that Mr. Harwood was convicted of malicious mischief and second degree assault as a result of the incident.

The purpose of introducing the evidence was to present evidence that Mr. Lewis reasonably believed that Ms. Chapman might very well be trapped and in danger from a man who two months earlier had harmed her, requiring seven stitches in her leg .

Third, the evidence was relevant to negate the mens rea of the crimes. And lastly, the probative value of the evidence outweighed any prejudicial effect: it went directly to Mr. Lewis's state of mind at the time and showed he had reason to fear bodily

harm to Ms. Chapman. Introduction of the evidence would not have disrupted the fairness of the fact-finding process at trial. The trial court erred when it excluded the evidence under ER 404.

B. Mr. Lewis Received Ineffective Assistance of Counsel Where Counsel Did Not Propose A Jury Instruction on Defense of Another.

1. Standard of Review

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Art 1 §22. A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

2. Mr. Lewis Was Entitled To A Jury Instruction On Defense of Another.

A defendant has a right to present his theory of the case to the jury. *State v. Walker*, 164 Wn.App. 724, 734, 265 P.3d 191 (2011). “This right can include the right to jury instructions on an affirmative defense after offering sufficient admissible evidence to justify giving the instruction.” *Id.* As in a self-defense instruction, the threshold burden of production is low. *State v. Janes*, 121

Wn.2d 220, 237, 850 P.2d 495 (1993). A defendant's testimony alone can raise the issue sufficiently to require an instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). Only where the record contains no credible evidence will a trial court be justified in denying a request for an instruction. *Id.* Mr. Lewis argues on appeal that he received ineffective assistance of counsel, in violation of his constitutional rights where counsel did not propose a jury instruction on the affirmative defense of "defense of other."

Even with the court's ruling excluding the evidence of earlier acts of violence by Harwood, Mr. Lewis nevertheless presented a sufficient quantum of credible evidence to support a 'defense of other' instruction. Lewis's explanation for and defense of his entry into the apartment was based on his fear for Ms. Chapman's safety. He did not enter with an intent to commit a crime. Testimony established that Lewis was aware that on previous occasions Harwood had shown up uninvited to Chapman's apartment and pushed her around. Testimony established that only a few days earlier Ms. Chapman had discussed leaving Harwood for Mr. Lewis. Despite texting and talking earlier in the day and making plans for a trip together, Ms. Chapman stopped responding to his texts.

Ms. Spencer testified that Lewis was always worried about Ms. Chapman because he was aware of the fighting between Harwood and Chapman: and based on his conversation with Ms. Spencer, he reasonably believed that Harwood and Chapman had been arguing that evening. Further, when he knocked on the door, Harwood saw him and quickly dead bolted the door.

Early on, the trial court concluded that Mr. Lewis's defense was not self-defense, but rather defense of another. If requested by the defense, a "defense of other" instruction must be given whenever there is evidence from which the jury could conclude that, under the circumstances, the actor's apprehension of danger and use of force were reasonable. *State v. Bernardy*, 25 Wn.App. 146, 148, 605 P.2d 791 (1980); *Penn*, 89 Wn.2d at 66. Here, the testimonial evidence (cited above) was sufficient for the court to give a defense of another instruction. Instead, defense counsel agreed to an instruction on self-defense, and did not request a jury instruction on defense of another.

A strategic or tactical decision is not a basis for finding error. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). While there is a strong presumption that defense counsel's performance is not deficient, where there is no conceivable legitimate tactic

explaining counsel's performance, there is a sufficient basis to rebut such a presumption. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Here, there is no conceivable legitimate strategy or tactic for not requesting the instruction.

Prejudice occurs where, but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

"Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." *In re Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007). Here, Mr. Lewis's defense was that he reasonably believed Ms. Chapman to be in danger. Without the instruction on the affirmative defense, the jury had no way to understand and weigh the legal significance of Lewis's reasonable belief and explanation that he entered for her sake. As in *Hubert*, the absence of the instruction essentially nullified Mr. Lewis's defense to the charges. Without the instruction, it cannot be said that the trial outcome would have been

the same had the jury been provided with the defense of other instruction. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Mr. Lewis received ineffective assistance of counsel, in violation of his Sixth Amendment. Mr. Lewis must be granted a new trial.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lewis respectfully asks this Court to reverse his convictions and remand the matter for a new trial at which his proposed relevant evidence is presented to the jury.

Dated this 29<sup>th</sup> day of January, 2015.

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## CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant George Lewis, do hereby certify under penalty of perjury under the laws of the State of Washington, that on January 29, 2015, a true and correct copy of the Appellant's Brief was sent by USPS first class mail, postage prepaid, or served electronically by prior agreement between the parties to the following :

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