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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KISHA LASHAWN FISHER,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER (CORRECTED)
KISHA LASHAWN FISHER

Court of Appeals No. 43870-4-II (Consolidated Case)
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 11-1-01011-4
The Honorable Vicki Hogan, Judge

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 ORIGINAL

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I. ISSUES PRESENTED FOR REVIEW

1. Did the trial court's refusal to include Kisha Fisher's affirmative defense jury instruction deny her constitutional right to present a defense, and to have the jury fully informed of the applicable law?
2. Did the Court of Appeals ignore well settled law that evidence supporting an affirmative defense instruction may come from any source, and did it incorrectly affirm the trial court's refusal to include Kisha Fisher's affirmative defense jury instruction on the grounds that the evidence supporting the instruction came from State's witnesses and not defense witnesses or from Fisher herself?
3. Is a defendant entitled to a multiple participant statutory defense to felony murder and second degree murder charges, when she claims she had no reasonable grounds to believe that any other participant in the underlying felonies intended to engage in conduct likely to result in death or serious physical injury, but also does not acknowledge aiding in or having knowledge of a plan to commit the underlying felonies?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Kisha Lashawn Fisher as an accomplice to one count of first degree felony murder (RCW 9A.32.030) and as an accomplice to one count of second degree murder (RCW 9A.32.050), in connection with the death of Lenard Masten, and alleged that Fisher or an accomplice was armed with a firearm at the time of the offense (RCW 9.94A.530, .533). (CP 25-26) Mario Steele and Corey Trosclair were charged as co-defendants for the murder

of Masten. (CP 25-26)

Fisher and Trosclair were subsequently tried together after the State agreed with Fisher's request to sever her trial from Steele's. (CP 8-23; 04/05/12 RP 3)¹ The trial court refused to give Fisher's proposed affirmative defense jury instruction, and the jury found Fisher guilty of both murder charges and the firearm allegation. (CP 5, 198-200; RP14 1684-1704; RP15 1829; RP16 1867, 1986-88)

The trial court entered an order dismissing the second degree murder conviction in order to avoid violating Fisher's double jeopardy protections. (CP 213-15; RP17 2006, 2011) Because of a 2009 conviction for taking a motor vehicle without permission, Fisher's offender score was one. (CP 216-17, 221) The trial court imposed a standard range sentence of 290 months plus a 60-month firearm enhancement, for a term of confinement totaling 350 months. (RP17 2009; CP 217, 224)

In a part-published opinion filed December 2, 2014, the Court of Appeals affirmed Fisher's convictions and sentence, finding that the evidence was sufficient to establish the charged crimes and that Fisher was not entitled to her requested affirmative defense jury

¹ The trial transcripts, labeled Volumes I through XVII, will be referred to by volume number. The remaining transcripts will be referred to by the date of the proceeding contained therein.

instruction. Fisher's Motion for Reconsideration was denied by order dated January 8, 2015. This Court accepted review of Fisher's affirmative defense claim by order dated September 4, 2015.

B. SUBSTANTIVE FACTS

In January of 2011, Lenard Masten lived with his girlfriend, Michelle Davis, in an apartment in Lakewood, and made his living by selling drugs. (RP5 381-82; RP6 559) He had two cell phones, one that he used for "work" calls and one that he used for personal calls. (RP5 380-81, 392-93) Masten once dated Kisha Fisher, but Fisher now lived with her current boyfriend, Mario Steele. (RP7 746, RP8 794; RP14 1609) Masten and Fisher had recently reconnected after they encountered each other at a local bar. (RP8 794)

Sometime around 8:30 PM on January 16, 2011, Masten was shot in the parking lot of his apartment complex. (RP5 400, 409) Neighbors Shannon Henderson, Nadise Davis, and Denise Davis² heard the gunshot and saw a man leaning over Masten, apparently searching Masten's pockets. (RP5 433, 434, 435, 479, 480, 510; RP10 1045) Henderson observed a second man walking up a stairway towards Masten's apartment. (RP5 434) Nadise saw the

² Nadise and Denise are Michelle Davis' sisters. Michelle Davis died before trial due to circumstances unrelated to this case. (RP5 475, 506) In the interest of clarity, the Davis sisters will be referred to by their first names in this brief.

man come back down the stairs, and noticed he was holding a gun. (RP5 480) The two men ran past Nadise, and left together in a black SUV. (RP5 435, 436, 481, 510; RP10 1048-49) Neighbor Aaron Howell also saw a man standing at the bottom of Masten's stairway, and saw the man get into a dark SUV and drive away. (RP10 1048-49) Masten died at the hospital later that night, as a result of the gunshot wound. (RP9 1016, 1030)

Detectives investigating the shooting reviewed Masten's cellular phone records and noticed several incoming calls from one particular phone number in the minutes before Masten was shot. (RP6 687; RP8 774-77, 786-87) This same phone number had also placed a number of calls to one of Masten's cellular phones earlier in the afternoon of January 16, 2011. (RP8 784-88) The Detectives traced those calls and determined that two of the phone numbers were registered to Mario Steele, and one was registered to Cory Trosclair. (RP8 784, 785, 786-87, 791)

There were three calls placed after 8:00 PM from Steele's cellular phone to Masten's cellular phone. (RP8 786-87, 788) The last call received on Masten's cellular phone was placed at 8:24 PM, and was a three way call initiated by Trosclair's cellular phone, then connected to Masten's phone through Steele's cellular phone. (RP8

789-90)

Subsequently obtained cellular phone tower data indicated that the calls made in the afternoon connected through towers near Masten's apartment. (RP8 826, 827-28; RP10 1117, 1123, 1147-48; Exhs. 90-107) This same data indicated that, for the 8:24 PM call, Trosclair's cellular phone connected through a tower near Masten's apartment, and Steele's cellular phone connected through a tower near Steel's apartment. (RP8 813, 829-30; RP10 1132-33, 1148) Masten received all of these calls through a connection from a tower located near his apartment. (RP8 827-28; RP10 1117, 1157) Generally, when a cellular phone initiates or receives a call, it will connect through the nearest cellular phone tower. (RP7 702-04)

Detectives interviewed Steele, Trosclair and Fisher. In her first interview, Fisher said she called Masten on the afternoon of January 16, 2011, because Steele wanted to purchase drugs. (RP8 794-95) Fisher placed a call to Masten, and then Steele and another man went to Lakewood to meet Masten and purchase drugs. (RP8 795) Fisher also initially told the Detectives that Steele went out again that evening, but that he did not tell her what he did. (RP8 797-98, 816-17; RP13 1570)

Witness Aaron Howell identified Trosclair from a photo

montage. (RP8 855-56; RP10 1059) Trosclair was arrested and booked into the Pierce County Jail. (RP8 832; RP11 1235; RP13 1581) While he was there, he was confronted by Joseph Adams, who was a close friend of Masten. (RP12 1314, 1334) In fact, Adams lived with Masten a few months before the shooting, was his drug dealing partner and, in the hours after the shooting, drove to Lakewood and picked up Michelle Davis and two backpacks containing Masten's gun, money, and drug supply. (RP12 1317, 1322-23, 1327-28; RP13 1427, 1462) Adams testified that Trosclair admitted to him that he shot Masten. (RP13 1338)

According to Adams, Trosclair said it was an accident, and that he did not mean to shoot Masten. (RP13 1338) Trosclair told him that he and Steele decided to rob Masten because they felt the drugs he sold them earlier in the day were of poor quality. (RP13 1338)

In his interview with the Detectives, Steele indicated to investigators that Fisher knew more than she had initially indicated, so the Detectives eventually arrested and re-interviewed Fisher. (RP8 817; RP13 1585, 1587) In her second interview, Fisher acknowledged that she overheard Steele and another man discussing the idea of robbing Masten, but that the discussion did not

take place directly in front of her and she did not participate. (RP14 1628, 1638, 1644, 1646; CP 134, 135, 137) When the men left the apartment on the night of January 16th, she assumed they might rob Masten. (RP14 1629, 1638, 1641, 1643; CP 137) She told Steele not to get involved, but Steele said he was only going to show the men where to go so she did not think Steele was going to rob Masten. (RP14 1642, 1643, 1646; RP15 1796; CP 137, 151-52, 155)

Steele left his cellular phone at the apartment he shared with Fisher, and when he called her on Trosclair's phone and asked her to pass his call through to Masten, she complied thinking that Steele was only trying to set up another drug purchase. (RP14 1645; CP 131, 144) She assumed Masten would not answer his phone if he saw an unfamiliar number, so she connected Steele's call to Masten's phone. (RP14 1617) She told the Detectives that she did not speak directly with Masten, and only overheard Steele tell Masten that he was "about to be there." (RP14 1617; CP 125) When Steele came home, he told her that Masten had been shot. (RP14 1617; CP123) Fisher repeatedly denied any involvement in the planning of the robbery or shooting. (RP14 1609; CP 116)

III. ARGUMENT & AUTHORITIES

The Sixth Amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution grant criminal defendants the right to present a defense. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). A defendant is also entitled to have the jury instructed on her theory of the case if there is evidence that supports the theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). And the defendant must prove an affirmative defense by a preponderance of the evidence. See State v. Riker, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994); State v. Rice, 102 Wn.2d 120, 125-26, 683 P.2d 199 (1984). It is reversible error to refuse to instruct the jury on an affirmative defense where a defendant has met this burden. Williams, 132 Wn.2d at 260 (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

The State charged Fisher in count one as an accomplice to first degree felony murder, pursuant to RCW 9A.32.030, alleging that: "while committing or attempting to commit the crime of Robbery in the First Degree or Second Degree, and in the course of or in furtherance of said crime or in immediate flight therefrom, the

defendant or an accomplice shot, and thereby causing the death of Lenard T. Masten[.]” (CP 25) The State charged Fisher in count two as an accomplice to second degree murder, pursuant to RCW 9A.32.050, alleging that: “While committing or attempting to commit assault in the second degree, and in the course of and in furtherance of said crime or in immediate flight therefrom, the defendant or an accomplice shot Lenard Masten, and thereby causing the death of Lenard T. Masten[.]” (CP 26)

Before trial, Fisher notified the State that she intended to argue the “multiple participant” defense. (CP 5) Fisher also requested that the court include a jury instruction explaining this defense to felony murder and second degree murder,³ which is outlined in RCW 9A.32.030(1)(c) and RCW 9A.32.050(1)(b):

[I]n any prosecution under this subdivision . . . in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

- (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
- (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon,

³ See RP14 1684-98, RP16 1867.

instrument, article, or substance; and
(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

See *also* WPIC 19.01. The trial court denied Fisher's request for the instruction, finding that she did not provide sufficient proof of the elements of this statutory defense. (RP14 1703-04; RP15 1829),

It is undisputed that Fisher did not commit the homicidal act, and the State has not claimed that Fisher in any way encouraged the commission of the homicidal act or that she was armed with a deadly weapon at any time. So the first two requirements of this defense are clearly met.⁴ But the State argued, and the Court of Appeals agreed, that Fisher did not meet the third and fourth requirements.

(Opinion at 26-27) According to the Court:

We agree with the State that Fisher had the burden to present evidence that she was entitled to the affirmative defense instruction that she requested, and that she failed to do so. . . . The defendant has the burden of proving this defense by a preponderance of the evidence. Fisher did not testify nor did she call witnesses. Our review of the record reveals no evidence that Fisher had "no reasonable grounds to believe" that another participant was armed and that no other participant intended to engage in conduct likely to result in death or serious physical injury.

(Opinion at 26)

⁴ The prosecutor at trial agreed, stating that "yes, frankly, she does satisfy the first two elements here." (RP14 1700)

What the Court of Appeals overlooked is that the proof may come from any source, not necessarily from the defendant. It is well settled that proof for the affirmative defense must be considered in light of **all the evidence presented at trial, without regard to which party presented it.** See State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997); State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005). And, although affirmative evidence of the elements of the defense “certainly is the most effective,” **a defendant may exercise his right to remain silent and rely on the State’s evidence and cross-examination of the State’s witnesses to support a defense instruction.** State v. Finley, 97 Wn. App. 129, 134-35, 982 P.2d 681 (1999). Thus, it is irrelevant that “Fisher did not testify nor did she call witnesses.”

Furthermore, contrary to the Court of Appeals’ opinion, a review of the record reveals ample evidence to support the conclusion that Fisher had no reasonable grounds to believe that another participant was armed and that no other participant intended to engage in conduct likely to result in death or serious physical injury.

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it

most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

In her statement to investigators, Fisher explained that, while she overheard the men talking about robbing Masten, she told Steele to stay out of it. (CP 128, 135, 137, 155; RP14 1620, 1638, 1649) She was under the impression that Steele was not going to be involved in any robbery, and was only going along to show the other man or men where to meet Masten. (CP 137, 151-52; RP14 1637, 1638, 1642, 1643) When Steele left his cell phone at home, then subsequently called Fisher and asked her to make contact with Masten, she assumed that there would be no robbery and that Steele was simply trying to arrange the purchase of more drugs from Masten. (CP 150, 154; RP14 1642, 1645)

Furthermore, there was absolutely no evidence that any of the participants in this incident ever discussed assaulting Masten, or that Fisher had any indication that an assault was intended, planned, or even a possibility. Fisher told investigators that Steele was "in a daze" when he came home and she was "in shock" when Steele told her they shot Masden. (RP 1619) And even State's witness Adams testified that Trosclair told him the shooting "wasn't supposed to

happen.” (RP13 1338) The evidence indicated at most that the participants discussed committing a robbery, and only a robbery. (RP14 1628, 1638, 1644, 1646; CP 134, 135, 137)

Interpreting the evidence most strongly in Fisher’s favor, Fisher’s statements, coupled with all of the other evidence, shows Fisher did not believe, when she made the call to Masten, that the other men planned to rob or assault him. Therefore, by obvious extension, Fisher had no reason to believe that either man would arm himself with a deadly weapon or that either man intended to engage in conduct likely to cause Masten’s death.

The State may argue, as it did below:

That Fisher was unaware that Steele and Troclair intended to rob Mr. Masten at that particular time, if the jury believed her, would negate an element of the crime the State was required to prove. To use [the] proposed instruction, Fisher would have had to testify or present other evidence that she intended the robbery to take place, but she had no reasonable grounds to believe any participant was armed and that no participant intended to engage in dangerous conduct.

(Brief of Respondent at 46; see also RP14 1694-95) This argument should be soundly rejected.

Evidence to support an affirmative defense may come from any source, even the prosecution’s witnesses. See Finley, 97 Wn. App. at 134-35; Callahan, 87 Wn. App. at 933; Olinger, 130 Wn. App.

at 26. And in this case, the State presented evidence, which the jury apparently believed, indicating that Fisher knew the men planned to rob Masten. Fisher was not required to testify or present evidence of her own to show this knowledge.

Regardless, the State is also incorrect to assert that Fisher was required to admit she was an accomplice to the robbery plan in order to be entitled to her requested instruction. That is because the multiple participant defense is distinguishable from other affirmative defenses, such as self-defense, in several critical ways. First, self-defense negates an element of the crimes of assault and homicide.⁵ But the multiple participant defense “negates none of the elements the State [is] required to prove The defense merely permits an accused to disprove his participation in the homicidal act, not in the underlying felony, and to establish that he was not armed and was ignorant of his coparticipant’s being armed and of the likelihood of death or serious physical injury.” State v. Gamboa, 38 Wn. App. 409, 413, 685 P.2d 643 (1984). The multiple participant defense thus does not impact the proof, or lack of proof, for the underlying felony.

Second, it is correct that a defendant generally must admit the

⁵ See e.g., State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984); State v. Hanton, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980); State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983).

criminal act in order to be entitled to an affirmative defense excusing or justifying the act. For example, a defendant cannot deny committing a homicidal act and at the same time claim he committed the homicidal act in self-defense.⁶ A defendant may not make these inconsistent, contradictory claims.

But it is not inconsistent for a defendant to deny aiding in or knowing of a plan to commit both the underlying felony and the resulting homicide. Fisher can, without contradiction, claim that she did not aid or know about a plan to rob or assault Masten, and also claim that she did not know or believe anyone was going to be armed or might commit an act that could result in Masten's death. There is no inconsistency or contradiction. And the jury, also without contradiction, could reject Fisher's claim that she had no reason to believe the men would commit a robbery, but still find that she no reason to believe that the men were armed and might commit a homicidal act.

The failure to include this instruction was highly prejudicial. To convict Fisher as an accomplice to felony murder, the State had

⁶ See e.g., State v. Gogolin, 45 Wn. App. 640, 642-43, 727 P.2d 683 (1986), where the defendant did not receive a self-defense instruction because he denied pushing the victim, and claimed that she simply fell backward down the stairs, hitting her head.

to prove only that she was an accomplice to a plan to rob Masten. To convict Fisher of second degree murder, the State had to prove only that she was an accomplice to a plan to assault Masten.⁷ The State was not required to prove that she was an accomplice, or had any knowledge of a plan, to bring a firearm and engage in conduct that could result in Masten's death. And the jury was not told that this fact, if true, meant that it could acquit Fisher of the murder charges. The jury was told that it must convict Fisher of murder, even if the jury believed she did not know that Trosclair might be armed with a firearm or that he might shoot Masten. And, as noted above, there was ample evidence to support a conclusion that Fisher had no such knowledge.

Fisher met her burden of presenting evidence sufficient to warrant the affirmative defense, and she should have been allowed to have the jury consider this defense. The trial court's refusal to include this instruction denied Fisher her constitutional right to present a defense, and to have the jury fully informed on the

⁷ To convict Fisher as an accomplice to felony murder, the State had to prove that she was an accomplice to a plan to rob Masten, and that Trosclair committed a homicide in the course of committing the robbery. State v. Carter, 154 Wn.2d 71, 80-81, 109 P.3d 823 (2005). To convict Fisher of second degree murder, the State had to prove that she was an accomplice to a plan to assault Masten, and that Trosclair shot and killed Masten in the course of committing the assault. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

applicable law. Therefore, Fisher's first degree and second degree murder convictions should both be reversed.

IV. CONCLUSION

Based on the above-stated authority and argument, Fisher respectfully requests that this Court reverse the Court of Appeals, hold that Fisher was entitled to an affirmative defense jury instruction, and remand Fisher's case for a new trial.

DATED: November 13, 2015



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CERTIFICATE OF MAILING

I certify that on 11/13/15, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kisha L. Fisher DOC# 360378, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, WA 98332-8300.



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Attached for filing is a corrected Supplemental Brief of Petitioner Kisha Lashawn Fisher. In the last paragraph of page 12, two references to Trosclair have been corrected to refer to Steele. Thank you.

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