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No. 64364-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE WALTERS, Jr.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WALTERS COMMITTED ASSAULT IN THE FIRST DEGREE

When Deche Washington advanced rapidly towards Charles Chappell with a shotgun and fired, Johnnie Lee Walters Jr. came to Chappelle's aid with a firearm, leading to a conviction for first degree assault with a firearm and a firearm enhancement. On appeal Walters argues the State did not prove beyond a reasonable doubt that he did not act in self-defense or that he intended to inflict great bodily. This Court should dismiss the first degree assault conviction because Walters acted in self-defense.

To convict a defendant, the State must prove the elements of the crime beyond a reasonable court. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The elements of first degree assault as charged in this case are (1) an assault (2) on another person (3) with a firearm (4) done with the intent to inflict great bodily harm. RCW 9A.36.011; CP 31 (Instruction 5); State v. Elmi, 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009). In addition, when the defendant claims he acted in defense of himself or others, the State must prove the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d

612, 619, 683 P.2d 1069 (1984). Self-defense is examined from the point of view of a reasonable person in the defendant's shoes. State v. Janes, 121 Wn.2d 220, 128, 850 P.2d 495 (1993); State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984); State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977); CP 36-38.

Looking at the evidence from a reasonable person in Walters' position, this Court must conclude Walters was acting to defend himself and Chappell from Washington. As soon as Washington arrived at the gas station, Washington and Chappell adopted fighting stances and circled each other. Ex. 105 #2 at 10:19:00-10:21:00; 1RP 123. Washington broke off, went to his car, retrieved a shotgun, and walked purposefully towards Chappelle and Walters. Ex. 105 #1 at 10:21:08-10:21:20; #3 at 10:20:47, 10:20:53-10:21:05. As Chappelle tried to escape, Washington fired his imposing weapon. Ex. 105, #1 at 10:21:19-10:21:22. After Washington fired the shotgun, Walters then fired a smaller weapon to protect both himself and Chappell. Ex. 105 at #1, 10:21:28 – 10:21:33; Ex. 105 #2 at 10:21:27-10:21:30; Ex. 130 at 3-4; 1RP 132; 2RP 63-63. The incident lasted only seconds.

The State argues it there was substantial evidence in the record to prove Walters did not act in self-defense and his

argument should be rejected because defense counsel made similar arguments at trial. Brief of Respondent at 12-16. The State's argument relies heavily on the testimony of Washington's friend Detra Harris even though her testimony is in conflict with the gas station surveillance tapes that caught much of the incident.¹

The State conceded at trial that Mr. Walters acted in self-defense when he shot Washington, but charged Mr. Walters with assault on the theory that he later used more force. 1RP 11-12, 15; 2RP 29-30, 68-69, 122-23. Now, however, the State cites Harris's testimony that Walters fired at Washington's head as Washington lay on the ground. Brief of Respondent at 4 (citing 1RP 137). The security footage shows that Washington never fell to the ground, but simply stumbled for one to two seconds and then kept moving. Ex. 105 at #1, 10:21:220-10:21:26, # 2 at 10:21:23-10:21:25. Additionally, Harris testified she had no idea Washington was injured. Walters, who was in the Washington's line of fire, had even less ability than Harris to determine if Washington was injured or if Washington was therefore no longer dangerous. Similarly, Walters would not necessarily be aware of whether Washington was

¹ Harris's testimony also differed from her statement to the police, as she claimed Walters shot first and did not even mention Washington's shotgun. 1RP 146-50, 157-59.

separated from his weapon and if that rendered him less of a threat.

Psychologically, Walters could not be expected to perceive within seconds that he and Chappelle were no longer in danger. Extreme physiological changes occur in a person's body when confronted with danger. In addition, the person acting in self-defense acts until he knows he is safe, not until a disinterested third person viewing a surveillance tape determines he is. Reports of recent police shootings of suspects, for example, show that police officers do not just fire one shot when in danger. Instead, officers fire multiple shots when faced with a suspect the officer believed was armed.² Similarly, Walters was entitled to fire his weapon until he knew he and Chappelle were safe.

Despite its trial theory that Walters was not the first aggressor, the State's argument in this case implies he was.³ The State claims that Harris saw Walter's "flash" his gun before

² See, www.pnwlocalnews/south_king/fwm/news/108981219./html (armed man shot "multiple times" by police); www.nwcn.com/news/Washington/Police-shoot-suspect-in-Puyallup.1042957.89.html: (suspect shot one to two times); www.seattlepi.com/local/426053.williams021.html (officer fired four rounds, killing suspect); www.cbc.ca/world/story/2009/12/01/washington-shooting-suspect-dead/html (officer fired "several rounds" because suspect would not stop) (last viewed 12/6/01).

³ The State had successfully prosecuting Washington for assaulting Chappelle. 1RP 15; 2RP 29-30, 68-69.

Washington armed himself with the shotgun. Brief of Respondent at 13 (citing 1RP 132). While Harris did not explain what she meant by the word “flash,” its usage implies an extremely quick display.⁴ There is no evidence Washington saw the handgun, and this Court must reject the State’s suggestion that Walters was the first aggressor. Additionally, Walters was purchasing gasoline at the gas station and thus was lawfully there. In contrast, Washington and his companions went to the gas station only to confront Chappelle.

Finally, the State argues Walters cannot claim defense of Chappelle because Chappelle had already left the gas station when Walters fired his weapon. Brief of Respondent at 15. This argument must be rejected because there is no evidence as to how close Washington was to Chappelle when Walters fired and because Walters was also entitled to defend himself from Washington.

Walters had seconds to react when Washington displayed and fired his shotgun in the direction of Chappelle. The gas station was dark, and he could not see that he and Chappelle were out of

⁴ Webster’s Third New International Dictionary at 865 (Mass. 1993) (vt, 3b, “to expose to view suddenly and usu. briefly” (“the detective ed his badge”); <http://dictionary.com> (#32 “display suddenly or briefly”)

danger after Washington stumbled. Viewing the evidence from Walters' point of view, this Court cannot conclude the State proved beyond a reasonable doubt that the danger was over and Walters was not acting in self defense. His conviction for first degree assault must be reversed and dismissed.

2. THE TRIAL COURT'S REFUSAL TO GIVE
WALTERS' PROPOSED NECESSITY DEFENSE
INSTRUCTION VIOLATED HIS CONSTITUTIONAL
RIGHT TO PRESENT HIS DEFENSE

Walters was convicted of unlawful possession of a firearm, RCW 9.41.040(2)(a)(i). At trial he requested the jury be instructed on the defense of necessity to this charge because he was acting in self-defense when he used a firearm to protect himself and Chappelle. 2RP 110-11, 116; CP 92-93. The proposed instruction reads:

Necessity is a defense to a charge of Unlawful Possession of a Firearm in the Second Degree if

(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

(2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and

(3) the threatened harm was not brought about by the defendant; and

(4) no reasonable legal alternative existed.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge.

CP 93. On appeal Walters argues his conviction should be reversed because the trial court refused to give his proposed instruction. Brief of Appellant at 18-31.

The trial court did not give a necessity instruction because the court believed Walters must have possessed a weapon before the necessity of acting in self-defense arose. 2RP 112-13. The court opined that it did not appear Walters went to his car to get a gun after Washington strode towards Chappelle and Waters with a shotgun. 2RP 112-13. The State argues the trial court's ruling was correct and quotes the court's reasoning that "there is just no evidence that he was not in possession of the gun before the incident." Brief of Respondent at 19 (quoting 2RP 113).

The trial court's reasoning thus assumed Walters was armed before Washington's attack in light of the absence of evidence to prove the proposition. In deciding whether to instruct the jury on a

defense, however, the trial court must look at the evidence in the light favorable to the defendant. State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005) (medical marijuana defense to possession of marijuana charge), rev. denied, 157 Wn.App. 1010 (2006); State v. May, 100 Wn.App. 478, 482, 997 P.2d 956 (unwitting possession defense to unlawful possession of a firearm), rev. denied, 142 Wn.2d 1004 (2000). The trial court must remember that it is the jury's job to weigh the evidence and evaluate witness credibility, and the court may not substitute its judgment for the jury's. Id. Thus, the trial court erred in failing to give Walters's proposed instruction, thus violating his constitutional right to present his defense. His conviction for unlawful possession of a firearm must be reversed and remanded for a new trial.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Johnnie Walters' conviction for assault in the first degree must be reversed and dismissed because the State failed to prove beyond a reasonable doubt (1) that Walters did not act in defense of himself and/or another person and (2) that Walters acted with intent to inflict great bodily harm. Walters' conviction for unlawful possession of a firearm in the first degree must be reversed and

remanded for a new trial where the jury will be provided with an instruction on the defense of necessity.

DATED this 6th day of December 2010.

Respectfully submitted,



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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] JOHNNIE WALTERS, JR. 820185 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99362-0769</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF DECEMBER, 2010.

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