

68605-4

68605-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 JAN 28 PM 1:25

NO. 68605-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. KELLY,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

 A. THE TRIAL COURT’S JURY INSTRUCTIONS WERE PROPER.
 4

 1. A Defendant Who Never Requests A Self-Defense Instruction Is
 Not Entitled To One..... 4

 2. A Defendant Who Denies Inflicting The Victim’s Injuries Is Not
 Entitled To An Instruction On Self-Defense..... 6

 B. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT
 SHOWED THE PROGRESS OF THE POLICE INVESTIGATION,
 SINCE THAT EVIDENCE DID NOT CONTAIN ANY COMMENT
 ON THE DEFENDANT’S EXERCISE OF HIS RIGHTS..... 9

IV. CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) 5

State v. Adams, 31 Wn. App. 393, 641 P.2d 1207 (1982)..... 7

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1987)..... 7, 8

State v. Dyson, 90 Wn. App. 433, 952 P.2d 1097 (1997)..... 6

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 10

State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004) 9

State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005) 5

State v. O'Hara, 141 Wn. App. 900, 174 P.3d 114 (2007), rev'd on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009) 10

State v. Scott, 93 Wn.2d 7, 604 P.2d 943, cert. denied, 446 U.S. 920 (1980)..... 4

COURT RULES

ER 404(b)..... 9

I. ISSUES

(1) If evidence supports an instruction on self-defense, but the defense never requests such an instruction, is the court constitutionally required to give one?

(2) If so, did the evidence support an instruction on self-defense, where the State's evidence indicated that the defendant inflicted the victim's injuries in a manner inconsistent with self-defense, and the defendant testified that he did not inflict the injuries at all?

(3) Two police officers testified that they attempted to contact the defendant by knocking on his door, but no one answered. The defendant testified that he was not home at the time. Was this evidence properly admitted to explain the progress of the police investigation?

II. STATEMENT OF THE CASE

On April 11, 2008, there was a family gathering at the home of Sheryl Hinds. One of the guests was Ms. Hinds's boyfriend, Randy Beckett. She also invited her former boyfriend, the defendant, Michael Kelly. The defendant, however, said that he was too tired to attend. 1 RP 39-40, 74-75.

Towards the end of the day, Mr. Beckett seemed intoxicated and asked to lay down. He undressed and went to sleep in Ms. Hinds's bed. She later undressed and went to bed also. 1 RP 41-42, 77.

Mr. Beckett testified that he woke up to the defendant standing over him. Mr. Beckett believed that the defendant had just hit him, because his "face hurt real bad." The defendant swung at him again. Mr. Beckett did not remember anything more until he came to some time later. 1 RP 42.

Ms. Hinds testified that she was woken up around midnight by a loud yelling. She saw the defendant standing beside the bed next to her. Both he and Mr. Beckett were yelling. Ms. Hinds asked the defendant what the hell he was doing there. "He said something about his ex-wife and he needed to talk to me right then and there..." The defendant's hands were up. "He had one hand kind of balled up and one hand just out, but they weren't, like, clenched." Ms. Hinds told the defendant to go home, and he left. 1 RP 78-80.

Later that morning, Ms. Hinds saw that on the left side of Mr. Beckett's face, his cheek and his eye were swollen and red. Mr. Beckett called 911. 1 RP 81-82. Police responded to the call around 1 a.m. After questioning Mr. Beckett, they went to the

defendant's house to question him. They knocked on the door, but no one answered. They therefore obtained a search warrant. 1 RP 93-94. At around 3:30, they returned to the house with the warrant. After announcing themselves, they entered the house and arrested the defendant. 1 RP 93-98, 102-06. When questioned, the defendant said that he had assaulted Mr. Beckett because Ms. Hinds was cheating on the defendant with Mr. Beckett. 1 RP 107-08.

By around 4 a.m., Mr. Beckett's pain was worse. He went to the hospital and discovered that his face was fractured. 1 RP 45-48.

The defendant testified that he went to Ms. Hinds's house to talk to her about something he'd discovered concerning his ex-wife. He went into her bedroom and announced himself. Mr. Beckett sat up. He reached towards the edge of the bed and said, "you're dead." At the same moment, Ms. Hinds lunged over Mr. Beckett. She reached for Mr. Beckett's arms saying, "what are you doing." The defendant thought that Mr. Beckett was reaching for a weapon, so he reached out and slapped at Mr. Beckett's arms to stop him. The defendant was not sure if he made contact with Mr.

Beckett's arm. He was sure that he never struck Mr. Beckett in the face. 2 RP 126-31.

The defendant left Ms. Hinds's house and took a walk. He then returned to his own house. Around 10 minutes later, police arrived and arrested him. 2 RP 131-33.

The defendant was charged with second degree assault. CP 64. The defense did not request any instructions on self-defense. In closing argument, defense counsel argued that the defendant did not cause Mr. Beckett's injuries. 2 RP 175-76. The jury found the defendant guilty. CP 26.

III. ARGUMENT

A. THE TRIAL COURT'S JURY INSTRUCTIONS WERE PROPER.

1. A Defendant Who Never Requests A Self-Defense Instruction Is Not Entitled To One.

The defendant claims that the trial court was required to give an instruction on self-defense. No such instruction was requested. See CP 42-48 (Defendant's Proposed Jury Instructions). "In the absence of either a violation of a constitutional right or a request to instruct there can be no error assigned on appeal for failure to give an instruction." State v. Scott, 93 Wn.2d 7,14, 604 P.2d 943, cert. denied, 446 U.S. 920 (1980).

The defendant argues that because the State has the burden of proving absence of self-defense, the absence of an instruction on this defense is constitutional error. The true rule is that “the State ... must disprove self-defense *when the issue is properly raised.*” State v. Acosta, 101 Wn.2d 612, 617, 683 P.2d 1069 (1984) (emphasis added). Here, the defendant never raised any claim of self-defense. The State has no burden to disprove a defense that is never raised.

It is questionable whether a court is even *allowed* to instruct on a defense that is not raised. This court addressed a similar issue in State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005). The defendant there was charged with luring for allegedly attempting to lure a child into his car. He denied talking to the child. Over the defendant’s objection, the trial court instructed the jury on the defense that the defendant’s actions were reasonable under the circumstances. This court held that giving the instruction interfered with the defendant’s constitutional right to control his own defense. Id. at 604-05 ¶¶ 15-17.

Here, the defendant was charged with second degree assault for allegedly striking the victim in the face. No instruction was requested or given on any lesser offense. The defendant

denied that he had struck the victim in the face. 2 RP 130-31. A claim of self-defense would reflect the assumption that the defendant committed acts that constituted a felony assault, but did so in a manner that constituted self-defense. The defendant could properly choose to rely on a defense that assumed the truth of his testimony, rather than one that assumed his testimony was false.

Even if the defendant had a valid claim of self-defense, he was entitled to rely on some other defense. The trial court was not constitutionally required to instruct on a defense that the defendant did not choose to rely on. The absence of an instruction on this subject was not constitutional error.

2. A Defendant Who Denies Inflicting The Victim's Injuries Is Not Entitled To An Instruction On Self-Defense.

Even if the issue could be raised, the evidence was not sufficient to support an instruction on self-defense.

A defendant is entitled to a self-defense instruction only if he or she offers credible evidence tending to prove self-defense. To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable. When a defendant claims a victim's injuries were the result of accident rather than caused by the defendant's acts, the defendant cannot claim self-defense.

State v. Dyson, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997)

(citations omitted).

To support an instruction on self-defense, the defendant is not required to admit that he *intentionally* caused the victim's injuries. He must, however, admit that he committed an act that caused the injuries. This distinction is illustrated by State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1987). That case arose out of a "road rage" incident. The State contended that the defendant shot a driver who had cut in front of him. The defendant testified that he was confronted by a hostile motorist, displayed a gun because he feared for his safety, and the gun discharged accidentally. Id. at 928-29.

This court held that the defendant was entitled to an instruction on self-defense. To obtain such an instruction, there must be evidence of an intentional act of self-defense. There need not be evidence that this act intentionally caused the victim's injury. Since the defendant admitted intentionally displaying the gun, but claimed that act was in self-defense, there was sufficient evidence to support the instruction. Id. at 930-31.

The defendant cites State v. Adams, 31 Wn. App. 393, 641 P.2d 1207 (1982). The situation in that case was similar to that in Callahan. The defendant testified that he saw the victim approaching his trailer. The defendant left the trailer carrying a rifle.

When the victim came close to him with a shotgun, the defendant was “in fear of my life” and unintentionally shot the victim. Id. at 394. As in Callahan, the victim’s fatal injury was, according to the defendant’s testimony, the unintended result of an act of self-defense.

The present case is different. Here, there is no evidence that the victim’s injuries were caused by any act done in self-defense. The defendant testified that he may have slapped the victim’s arms in self-defense. 2 RP 129-31. That act, however, did not cause the injuries to the victim’s face, which formed the basis for the charge of second-degree assault.

In short, the defendant did not claim that he caused the victim’s injuries in self-defense, whether intentionally or unintentionally. Rather, he denied causing the injuries at all. Under such circumstances, there was no evidence to support an instruction based on the theory that the injuries were caused in self-defense. If the defendant had requested such an instruction, the trial court would have properly refused it. The instructions were not erroneous.

B. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT SHOWED THE PROGRESS OF THE POLICE INVESTIGATION, SINCE THAT EVIDENCE DID NOT CONTAIN ANY COMMENT ON THE DEFENDANT'S EXERCISE OF HIS RIGHTS.

The defendant next claims that the trial court improperly admitted evidence of police efforts to contact him. The State offered this evidence for the purpose of explaining the officers' conduct. The trial court admitted this evidence for "completion of the story and for res gestae." 1 RP 24-25. This reasoning is essentially correct.

"Under the res gestae or 'same transaction' exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Here, the challenged evidence showed events close in time and place to the crime. The defendant correctly points out that these events did not constitute either crimes or bad acts. That, however, is not a proper reason for *excluding* the evidence. The lack of any "bad" aspect to the testimony makes it less prejudicial, not more so.

"An officer may appropriately describe the context and background of a criminal investigation, so long as the testimony

does not incorporate out-of-court statements.” State v. O’Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), rev’d on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009)¹; see Lillard, 122 Wn. App. at 437. The testimony here described the police investigation and included no out-of-court statements. It was therefore properly admitted.

The defendant analogizes this testimony to comments on the defendant’s exercise of his right to remain silent. Even in that context, the State may introduce evidence of the defendant’s delay in contacting police for the purpose of “explain[ing] the investigative process.” The test is “whether the prosecutor manifestly intended the remarks to be a comment on [a constitutional] right.” State v. Gregory, 158 Wn.2d 759, 839-40 ¶ 134, 147 P.3d 1201 (2006).

Here, the officers simply testified that they knocked on the defendant’s door and received no answer. 1 RP 93, 104. The prosecutor mentioned this fact in closing argument without suggesting any inferences that could be drawn from it. 2 RP 167. At no point did either the officers or the prosecutor suggest that the

¹ In O’Hara, the Court of Appeals upheld the admissibility of evidence, but it reversed the conviction because of improper jury instructions. The Supreme Court granted review only on the jury instruction issue. O’Hara, 167 Wn.2d at 97 ¶ 9.

defendant's failure to answer the door was evidence of his guilt. It was not even clear if the defendant was home at the time. He testified that he was not, and no one testified to the contrary. 2 RP 131-32.

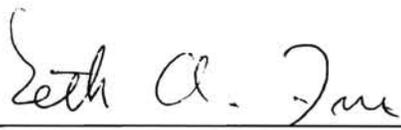
If the defendant was not home when police knocked, his failure to respond could not possibly support any adverse influences. Even if he was home, the police and prosecutor did no more than refer to the officer's attempt to contact him. No comment was made on any exercise by him of a constitutional right. The evidence was properly admitted to explain the course of the investigation.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 25, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent