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No. 73928-0-I

Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RALPH SMITH,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

In this homicide case, the defense, prosecution, and trial court agreed that the jury should be instructed on self-defense (“justifiable homicide”) for both the charged crime of second-degree murder and the lesser-included offenses of first- and second-degree manslaughter. At the eleventh hour, appellate prosecutor Kimberly Thulin derailed the proceedings. She convinced the trial court, over defense counsel’s objections, that self-defense was not legally available for manslaughter.

Ms. Thulin now admits she was wrong. Yet she has the audacity to argue that the error she caused was invited by the defense. She further claims – contrary to the record and to the State’s position at trial – that no evidence was presented to support the self-defense instruction.

This Court should not tolerate such antics. Because the justification defense for manslaughter was improperly withdrawn, the conviction should be reversed and the case remanded for a new trial.

B. ARGUMENT

The trial court erred in refusing to instruct the jury that the defense of justification applied to the lesser-included offense of manslaughter and not just to the charged offense of second-degree murder.

As explained in the opening brief, a new trial is required because the State improperly convinced the trial court to remove the defense of

justifiable homicide from the instructions on manslaughter and to remove manslaughter from the instruction on justifiable homicide. Contrary to the State's argument at trial, the defense of justifiable homicide is available for manslaughter, not just for murder. RCW 9A.16.050; *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983); *State v. Hanton*, 94 Wn.2d 129, 614 P.2d 1280 (1980); WPIC 16.02. If the jury acquitted Mr. Smith of murder because it found the State failed to prove intent to kill, Mr. Smith was entitled to have the jury consider the justification defense when it evaluated the lesser-included offense of manslaughter. The instructions did not permit this to occur. Mr. Smith was convicted of first-degree manslaughter after the jury was wrongly denied the opportunity to consider the justification defense for that crime. Br. of Appellant at 9-20.

Although it now admits the justification defense is available for manslaughter, the State urges this Court to affirm on the alternative grounds that Mr. Smith invited the error and that the evidence did not support a self-defense instruction. These claims are frivolous.

1. Mr. Smith did not invite the error; to the contrary, the appellate prosecutor caused the error by convincing the judge to withdraw the instructions already agreed to by the parties and the court.

As explained in the opening brief, the prosecuting attorney, defense counsel, and court discussed jury instructions and agreed that the

jury should be instructed on self-defense (“justifiable homicide”) both for the charged crime of second-degree murder and for the lesser-included offenses of first- and second-degree manslaughter. Br. of Appellant at 11-13; CP 53-57, 59, 62, 117 (defense proposed instructions include defense of justification for manslaughter); CP 282-83, 286, 289-92 (State’s proposed instructions include defense of justification for manslaughter); RP 1698, 1702-06 (discussion and agreement).

But after a break, appellate prosecutor Ms. Thulin appeared in the trial court and claimed that the defense of justification was not available for manslaughter. RP 1714-20. Defense counsel disagreed. They pointed out that WPIC 16.02 specifically stated that the defense was available for both murder and manslaughter. RP 1725. They also explained the fallacy of the prosecutor’s claim that if the jury reached the manslaughter question it necessarily would have rejected self-defense:

MR. FOLLIS: I'm sorry. The problem I've got is that the jury could proceed to manslaughter if they aren't satisfied there is an intent to kill. Quite apart from that, they're also considering justification.

RP 1721.

The trial court nevertheless granted Ms. Thulin’s request to change the jury instructions at the last minute. RP 1717 (judge admonishes State, “This last minute stuff just isn’t going to work.”); RP 1728 (accepting

State's proposed changes); CP 145 (instruction to jury states that justification is a defense only to murder in the second degree).

Ms. Thulin now admits that the defense of justification is available for manslaughter. Br. of Respondent at 31. But she alleges the *defense* invited the error she caused. Br. of Respondent at 20-28. The Argument section of the brief does not cite the pages of the record at which Mr. Smith allegedly invited the error, but falsely claims "Smith agreed he did not want the jury to consider self-defense in the context of manslaughter in the first or second degree." Br. of Respondent at 25.

The Facts section cites the record and acknowledges that it was *the State* who requested removal of the justification defense from the manslaughter instructions and the removal of manslaughter from the justification instruction. Br. of Respondent at 2-3 (citing RP 1715, 1717-18, 1721); *see also* Br. of Respondent at 24-25 ("the state requested justification to be removed from the lesser included 'to convict' instructions and self-defense instruction modified to only reference murder in the second degree ..."). The State also acknowledges that although Mr. Smith's attorney said he "intellectually understood" the State's request, he "initially objected" to the proposed changes. Br. of Respondent at 2-3. But the State wrongly claims that "[i]n the end Smith agreed to all of the

changes,” *id.* at 3, and that he took “no ‘exceptions’” to the final instructions. Br. of Respondent at 4 (citing RP 1728).

What defense counsel *actually said* at RP 1728 is the following:

MR. FOLLIS: Well, I agree that's *what the Court is ruling*, that issue, that instruction. *I'm still hung up on the fact that that's not what the WPIC says.*

RP 1728 (emphases added). Because defense counsel repeatedly protested that the WPICs permit the justification defense for manslaughter, the State’s claim of invited error is without merit. *See generally State v. Hood*, ___ Wn. App. ___, ___ P.3d ___ (No. 73401-6-I, filed 9/26/16) at ¶¶ 4-17.¹

The State also argues that Mr. Smith somehow invited the error by stating the following in closing argument: “If the state hasn’t disproved self-defense, you’re done, it’s not guilty and you don’t consider manslaughter, you’re done.” Br. of Respondent at 23 (citing RP 1810). This does not make sense. A defendant is entitled to argue alternative theories to the jury. *State v. Fernandez-Medina*, 141 Wn.2d 448, 459, 6 P.3d 1150 (2000). If the jury had been instructed on self-defense for manslaughter, Mr. Smith would have been able to tell them that even if

¹ *After* the court overruled Mr. Smith’s objections to the removal of manslaughter from the justification instruction, Mr. Smith did not take exception to the final wording of the instructions. RP 1729. This acknowledgement of the court’s ruling and acquiescence to the language does not constitute invited error. *See Hood*.

they did not reach the self-defense question for murder (because they found no intent to kill), they should find justification when considering the lesser-included offenses. *See* RP 1636-37, 1721. But because the State wrongly convinced the court to remove manslaughter from the justification instruction, Mr. Smith was unable to ask the jury to consider the defense when evaluating the lesser crime.

After the jury found him guilty of manslaughter, Mr. Smith gave the trial court an opportunity to correct the error by moving for a new trial, but the State again misled the court. CP 183-94. It acknowledged it was wrong about the availability of the justification defense for manslaughter, CP 192, but incorrectly claimed that (1) a jury need not be instructed on self-defense even when the defense is legally and factually supported; and (2) the jury was required to have reached and rejected the justification defense in order to move on to the lesser-included offenses. *See* Br. of Appellant at 15-17; CP 192-94; RP (7/14/15) 5-23. Thus, the State is the party that caused the error during trial and the State is the party that exacerbated the error after trial.

2. The withdrawal of instructions on the justification defense was error.

Although the State admits it was wrong when it told the trial court the justification defense was not legally available for manslaughter, it

urges this court to affirm on the alternative basis that no evidence was presented to support the defense. Br. of Respondent at 28-40. This Court should reject the invitation. The trial court properly ruled that there was evidence supporting the defense, RP 1654, and the prosecutor at trial properly agreed that there was evidence supporting the defense. RP 1715.

The State appears to begin by arguing Mr. Smith was not entitled to the instructions on the lesser-included offenses of manslaughter in the first and second degree. Br. of Respondent at 29-30. This is not an issue on appeal. *See* CP 283-88 (State's proposed instructions include manslaughter); CP 137-42 (court instructed jury on manslaughter); CP 158-59 (Mr. Smith was found guilty of manslaughter). Furthermore, in discussing the issue the State recites the wrong definition of the mens rea for the crime. *See* Br. of Respondent at 29 (claiming State must prove only that the defendant disregarded a substantial risk that *a wrongful act* may occur); *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (manslaughter requires proof the defendant disregarded a substantial risk that a *death* may occur); CP 138 (providing correct definition).

The State then moves on to addressing self-defense. Br. of Respondent at 31. It concedes not only that the justification defense is legally available for manslaughter, but also that in determining whether any evidence has been presented to support the instruction, “[r]eview is

conducted in the light most favorable to the party who requested the instruction at trial.” Br. of Respondent at 31-32 (citing *Fernandez-Medina*, 141 Wn.2d 448). “The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense.” *McCullum*, 98 Wn. 2d at 488.

Under this standard, the trial court was correct in concluding that Mr. Smith was entitled to the justification instruction. RP 1654. Evidence was presented showing that the decedent, Mr. McClellan, was high on methamphetamines, which increase aggressiveness, and that he was angry on the night in question. RP 577, 580-84, 957, 1019, 1128. He was a large man who was much younger than Mr. Smith. RP 316; ex. 184. Mr. McClellan went to Mr. Smith’s trailer three different times during the night, banged on the side of the trailer, and yelled at Mr. Smith to come out. RP 537-40, 897, 1218-30; ex. 184.

When Mr. Smith went outside the third time, Mr. McClellan was wielding an axe. RP 1231-35; exs. 137, 184. Mr. McClellan yelled at Mr. Smith and flinched toward him with the axe. RP 1235-38. He took off his watch and put it in his pocket. RP 1030-31, 1627; ex. 184. He then punched Mr. Smith, causing the “goose egg” officers later saw. RP 1414-15; ex. 184.

Mr. Smith was afraid for his life and for the life of his girlfriend, and he attacked Mr. McClellan in self-defense. Ex. 184. Although Mr. Smith told officers a broken bottle caused Mr. McClellan's injuries, one of Mr. Smith's kitchen knives also had Mr. McClellan's blood on it, and the medical examiner believed a knife had caused some of the injuries. Ex. 184; RP 930-33, 947-52, 1136, 1456. The fatal neck wound could have been caused by either a knife or broken glass. RP 930-33. In closing argument, Mr. Smith's attorney pointed out that it did not matter whether the wounds were caused by a knife or by broken glass; Mr. Smith was entitled to defend himself and his girlfriend against this axe-wielding methamphetamine-fueled first aggressor. RP 1797-1835. The court properly ruled that there was evidence supporting a self-defense instruction, and the trial prosecutor properly agreed. RP 1654, 1715.

The State claims that because Mr. Smith denied causing the neck wound on the day of the incident, he was precluded from claiming self-defense at trial. Br. of Respondent at 38-39. That is not the law. Perhaps if he testified to that effect at trial, the State would be correct. *See State v. Hendrickson*, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996) ("Self-defense is not available to a defendant who *consistently testifies* that the fatal blow was accidental") (emphasis added). But he did not do so. And in contrast to *Brightman*, Mr. Smith's primary theory of the case was justifiable

homicide, not accident. *See* RP 1798 (“The whole case has been about self-defense”); *Compare State v. Brightman*, 155 Wn.2d 506, 526, 122 P.3d 150 (2005) (defendant claimed accident and there was no evidence that defendant intentionally used deadly force against decedent or that deadly force was necessary).

In any event, in evaluating whether any evidence supports a self-defense instruction, *all* of the evidence presented must be considered, not just the defendant’s statements immediately following the incident. *See McCullum*, 98 Wn.2d at 488 (“In order to properly raise the issue of self-defense, there need only be *some evidence* admitted in the case *from whatever source* which tends to prove a killing was done in self-defense.”); *State v. Thysell*, 194 Wn. App. 422, 423, 374 P.3d 1214 (2016) (evidence from both State and defense must be considered); *State v. George*, 161 Wn. App. 86, 100, 249 P.3d 202 (2011) (“a trial court should deny a requested jury instruction that presents a defendant’s theory of self-defense only where the defense theory is *completely unsupported by evidence ...*”) (emphases added).

In sum, there was more than sufficient evidence to support a self-defense instruction, and that is why the court instructed the jury on justifiable homicide for murder. The only problem was that the court withdrew the self-defense instruction for manslaughter because the State

wrongly convinced the court it was not legally available. This was error.

Br. of Appellant at 9-20.

3. The error may not be deemed harmless.

The State finally avers that the withdrawal of the justification defense for manslaughter is harmless error. Br. of Respondent at 40-44. The State is wrong. Where a trial court improperly refuses to instruct on self-defense, prejudice is presumed, and reversal and remand for a new trial is required. *Thysell*, 194 Wn. App. at 427; *George*, 161 Wn. App. at 100-01; *State v. Callahan*, 87 Wn. App. 925, 928, 943 P.2d 676 (1997); *cf. State v. Henderson*, 182 Wn.2d 734, 737, 344 P.3d 1207 (2015) (new trial required where trial court improperly refused to instruct on lesser-included offense). The State may retry Mr. Smith for manslaughter, but may not retry him on the murder charge of which he was acquitted. U.S. Const. amend. V; *State v. Linton*, 156 Wn. 2d 777, 783, 132 P.3d 127 (2006). On remand, the recording of Chena Fisher's prior statements should be excluded unless she denies making the prior inconsistent statements. *See* Br. of Appellant at 21-25.²

² Mr. Smith relies on his opening brief for this issue and for the offender score issue.

C. CONCLUSION

Because the trial court erred in failing to instruct the jury that the justification defense also applied to manslaughter, Mr. Smith asks this Court to reverse his conviction and remand for a new trial. At the new trial, extrinsic evidence of Chena Fisher's prior statements should be excluded unless she fails to acknowledge having made the statements.

In the alternative, because the State presented insufficient evidence of Mr. Smith's 2003 prior out-of-state conviction, Mr. Smith asks this Court to reverse his sentence and remand for resentencing.

DATED this 7th day of November, 2016.

Respectfully submitted,

/s Lila J. Silverstein
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WILLIAM SMITH,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2016, 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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