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August 16, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73945-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUTTON,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. The Court should accept the State’s concession that the convictions for second-degree assault and felony violation of a no-contact order violate double jeopardy.**

The State concedes that Kevin Hutton’s conviction for felony violation of a no-contact order (count one) must be vacated. Resp. Br. at 8-10. This Court should accept the State’s concession because the conviction on count one violates double jeopardy as it is premised on the same conduct—a single touching—that forms the basis of the second-degree assault conviction at count two. Op. Br. at 7-11 (citing authority). As the State argues, because the jury was instructed on the lesser-included offense of misdemeanor violation of a no-contact order, that conviction can be entered on remand.

The parties also agree that vacating count one necessitates the recalculation of Mr. Hutton’s offender score. Op. Br. at 24-26; Resp. Br. at 10 n.5.

**2. The trial court erred and denied Mr. Hutton his constitutional right to present a defense by refusing to instruct the jury on self-defense for counts one and two.**

A “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." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). The long-recognized "right of the defendant" to act in defense of himself or others exists when a person has a good faith belief there is apparent danger to himself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896); accord *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010).

Mr. Hutton was entitled to a jury instruction on self-defense if there is any evidence of self-defense. *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). "The jury are [sic] entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act." *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902). Because the record shows some evidence that an intoxicated Mr. Hutton could have perceived a need to act in self-defense when Shamica Jones got angry and said something to Mr. Hutton, the trial court erred in denying the instruction.

This argument is true to the record. *See* Resp. Br. at 14 (asserting "defendant's argument is troubling because it asserts facts that are not in the record"). Ms. Jones testified she "got angry" and she "said something about it" before she was hit. RP 424. In so doing, she

“pissed him [Mr. Hutton] off even more.” RP 425. Her testimony as to her anger, her words, and his reaction shows she (at least verbally) approached Mr. Hutton with anger immediately before she was hit. These facts, particularly, when combined with Mr. Hutton’s intoxication, demonstrate there was “some evidence” Mr. Hutton subjectively believed he was in danger of imminent harm. Therefore the trial court abused its discretion when it found no evidence supported the requested instruction. RP 477-78, 494-95.

To overcome this evidence, the State draws on other evidence in the record. Resp. Br. at 15-16 (citing testimony from Patricia King). This evidence is irrelevant in evaluating the court’s denial of the self-defense instructions. The decision to provide a self-defense instruction does not look at the evidence as a whole; it looks for any evidence to support the defendant’s claim. The court should have provided the instruction because there was the “some evidence” of self-defense as set forth above. If the instruction had been provided, the jury could have weighed all the evidence and determined whether the State had disproved the defense.

Because there was at least some evidence upon which to base a claim of self-defense, the court erred in denying Mr. Hutton’s requested

instructions. *See State v. Adams*, 31 Wn. App. 393, 395-96, 641 P.2d 1207 (1982).

**3. The trial court abused its discretion in admitting irrelevant evidence about children’s emotional response to the charged conduct and propensity evidence of prior acts of abuse.**

The trial court abused its discretion when it allowed evidence about Shamicia Jones’s young children being present for and highly upset by the fight. The State claims the evidence was relevant because the children were witnesses. Resp. Br. at 23-24. But the State did not call the children as witnesses, and their presence did not contribute to any of the elements of the charged crimes.

Next, the State argues the evidence was relevant because it supported the admission of subsequent irrelevant and highly prejudicial evidence. Resp. Br. at 23. Specifically, the State claims the testimony of Patricia King and Shamicia Jones that the children saw the fight, went and hid, and were scared and crying was relevant to the part of Mr. Hutton’s phone call to Ms. Jones where she tells him the kids were “having nightmares . . . you fucked them up.” *Id.*; RP 365-67, 470, 512-13. But Mr. Hutton argues this portion of the phone call also should not have been admitted. Op. Br. at 16-17; *see* RP 470 (same argument made below).

Next, the State argues the evidence of the children’s presence and emotional scarring was relevant as context for the assault. Resp. Br. at 23. However, Mr. Hutton and Ms. Jones’s disagreement over the children (what Ms. Jones called Mr. Hutton’s “nitpicking”) could have occurred outside the presence of the children themselves. In other words, the context could have been admitted without admitting the unduly prejudicial and irrelevant evidence.

The State illogically argues the evidence of the children’s presence and emotional repercussions was relevant due to the missing witness instruction rule. Resp. Br. at 23. But, again, the State did not call the children at trial and Mr. Hutton did not seek a missing witness instruction. Mr. Hutton’s argument on appeal does not concern whether and to what extent the children could have appeared as witnesses at trial. The relevant question is whether the trial court properly overruled Mr. Hutton’s objections to testimony and evidence that the children saw the fight, went and hid, were scared and crying, and now have “nightmares and shit.” RP 365-67, 470, 512-13.

Yet, while calling the children “certainly relevant” the State also argues the evidence was “inconsequential.” *Compare* Resp. Br. at 23 *with* Resp. Br. at 22 n.6. The State’s argument on appeal is

contradicted by its argument at trial. If the evidence about the children's adverse reactions to the charged acts was truly "inconsequential," the prosecutor would not have drawn on it in summation. Instead, the prosecutor made clear the prejudicial value of this evidence by reciting it in closing. At closing, the prosecutor argued Mr. Hutton's actions harmed "three generations of this family. Ms. King, the grandma; Ms. Jones, the daughter; and then there's three boys. All of them are affected by his actions." RP 580. The trial prosecutor apparently did not think this evidence was inconsequential.

The trial court also abused its discretion in overruling objections to ER 404(b) evidence and admitting colorful testimony about the couple's past. Pretrial, the trial court excluded evidence of uncharged crimes, wrongs or acts. RP 48-50. At trial, however, the court admitted the ER 404(b) evidence. For example, Patricia King testified, "I'm just fed up with him getting away with doing what he's doing. I'm just tired of it. I'm just tired of it." RP 368. She continued, "I'm just . . . fed up with the fighting and stuff. I'm just tired of it." RP 376. Defense counsel objected, but the court simply told the prosecutor, "Let's ask another question." *Id.* A recording of Mr. Hutton's apology to Ms. Jones was also admitted: "I'm sorry babe of all the things I've

done to you.” Exhibit 17 (track 1 at 3:52 to 3:57); RP 472-73. Defense counsel objected because this apology “implies a domestic violence history.”<sup>1</sup> RP 472. The court simply stated, “Overruled.” *Id.*

In addition to this evidence, the jury also received testimony connecting the children to the couple’s history. Ms. King testified, “Because when [Ms. Jones and Mr. Hutton] fight. They [the children] hide. They like get out the way.” RP 366. This evidence informed the jury not only that the couple had a history of domestic violence, but also that the children were accustomed to it. Mr. Hutton was prejudiced by both aspects.

Mr. Hutton stipulated to the existence of no-contact orders to sanitize the evidence presented to the jury. He was assured pretrial that this ER 404(b) evidence would not be admitted. Yet, during trial, these several colorful statements about the couple’s history were presented to the jury. The admission of this evidence was an abuse of discretion

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<sup>1</sup> The State argues Mr. Hutton’s objection was based on hearsay only. Resp. Br. at 21-22 (citing RP 470). This is incorrect. As stated above, defense counsel objected to this portion of the tape because it implied “a domestic violence history.” RP 472. The State’s citation is to an earlier objection to another portion of the recorded call. RP 470 (where defense counsel argues “And my face is fucked up. I’m objecting as that is hearsay.”). In the same discussion, defense counsel also objected to testimony that the children are “fucked up” or “messed up” and having “nightmares” under ER 403. RP 470. This is the evidence at issue here.

where the court did not even put the State to its burden to produce a non-propensity purpose and the court did not balance the ER 403 factors. *E.g.*, *State v. Gunderson*, 181 Wn.2d 916, 922-23, 337 P.3d 1090 (2014) (trial court must conduct inquiry on the record).

Because there is at least a reasonable probability the jury used the evidence regarding the children's presence and scarred emotional state and Mr. Hutton's history of domestic violence against Ms. Jones, the errors are not harmless. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *see* Op. Br. at 22-23.

**4. Cumulative trial errors denied Mr. Hutton his constitutional right to a fair trial.**

Even if not standing alone, the aggregate effect of the above trial court errors denied Mr. Hutton a fundamentally fair trial. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d

772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Viewed together, the cumulative evidence that the children witnessed the fight, went and hid, and were scared and crying in addition to the cumulative evidence of the children's nightmares and being "messed up" all in addition to the cumulative evidence of Mr. Hutton's prior domestic violence materially affected the jury's verdict. In addition to the improper evidentiary rulings, the trial court erred when it denied Mr. Hutton instructions on self-defense. Cumulatively these errors prejudiced the outcome, particularly where the jury acquitted on one count nonetheless and posed several questions to the court during deliberations. The jury's careful consideration of the evidence included much evidence that should have been excluded and, due to instructional error, did not hold the State to its burden to disprove self-defense.

**5. The same criminal conduct issue is resolved by the State's double jeopardy concession.**

If the Court accepts the State's concession that the convictions for felony violation of a no-contact order and assault violate double jeopardy, the Court need not decide Mr. Hutton's argument that the two convictions constitute same criminal conduct. *See* Resp. Br. at 10 n.5.

**6. The Court should strike the legal financial obligations because Mr. Hutton lacks the ability to pay.**

As set forth in the opening brief, this Court should strike the \$600 in LFOs imposed against Mr. Hutton without consideration of his ability to pay and contemporaneous with a finding as to his indigence. Op. Br. at 26-38.

The Court should review the issue for the first time on appeal just as this Court acted on the issue of costs in *State v. Sinclair*,<sup>2</sup> and our Supreme Court reviewed almost the identical issue in *State v. Blazina*.<sup>3</sup> In *Blazina*, the Supreme Court specifically rejected the ripeness challenge the State raises again here. 182 Wn.2d at 832 n.1; see Resp. Br. at 31-32. Our courts have also correctly elected to review the important issue of costs for the first time on appeal in accordance with the discretion provided to the appellate courts. *E.g.*, *Blazina*, 182 Wn.2d at 834-35 (citing RAP 2.5(a)); *Sinclair*, 192 Wn. App. at 388 (exercising discretion to consider appellate costs provided by statute and RAP 14.2). This Court should do the same.

The trial court “must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required

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<sup>2</sup> *State v. Sinclair*, 192 Wn. App. 380, 385-90, 367 P.3d 612, review denied by 185 Wn.2d 1034 (2016).

<sup>3</sup> *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

inquiry.” *Blazina*, 182 Wn.2d at 838. Because that is all the lower court did here, the award of LFOs should be stricken.

**7. No costs should be imposed on appeal.**

In an abundance of caution, Mr. Hutton argued in the opening brief that even if the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. Op. Br. at 38. The State’s position on appeal should result in Mr. Hutton prevailing on three of the substantive issues raised in his opening brief. Resp. Br. at 8-10 (conceding double jeopardy violation and that correction of that error requires correction of offender score ), 42 (conceding clerical error in judgment and sentence). Mr. Hutton therefore agrees the State cannot be the substantially prevailing party on review. *See* Resp. Br. at 41. No costs should be awarded to the State for this appeal. RAP 14.2.

Moreover, this Court should so hold in this opinion. *State v. Sinclair*, 192 Wn. App. 380, 385-90, 367 P.3d 612, *review denied by* 185 Wn.2d 1034 (2016).

**8. The State concedes the court improperly marked the sentencing aggravator for counts one and two.**

The State concedes this Court should remand to correct a clerical error in the judgment and sentence. Resp. Br. at 42-43. At

sentencing, the State withdrew the charged aggravating circumstance due to intervening case law and asked only for a sentence at the high end of the range. RP 681; *see* RP 672-77 (sentencing continued for State to determine how to proceed); *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015) (holding jury instruction defining “prolonged period of time” for domestic violence aggravator is unconstitutional comment on the evidence). Because the judgment and sentence nonetheless refers to the charged aggravating circumstance, it should be corrected on remand. *See* CP 128.

#### B. CONCLUSION

The convictions for second-degree assault and violation of a no-contact order are premised on the same conduct in violation of double jeopardy. As the State concedes, the lesser offense must be vacated. A new trial should be held on the remaining convictions because the court failed to instruct the jury on self-defense, irrelevant and unduly prejudicial evidence was admitted, and prior misconduct evidence should have been excluded.

Alternatively, several sentencing errors should be corrected: the assault and violation of a no-contact order convictions constitute the same criminal conduct, the legal financial obligations should be

stricken and, as the State concedes, the improperly marked aggravator should be corrected on remand.

DATED this 16th day of August, 2016.

Respectfully submitted,

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73945-0-I
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	)	
KEVIN HUTTON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF AUGUST, 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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