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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND THOMAS SHORT, Appellant.	No. 50673-4-II UNPUBLISHED OPINION

LEE, J. — Raymond T. Short appeals his conviction for attempted first degree premeditated murder. Short argues that the trial court erred by excluding evidence relevant to his defense. Because the evidence the trial court excluded was relevant to Short's defense, the trial court erred in excluding it. Therefore, we reverse and remand for further proceedings consistent with this opinion.[1]

[1] Short has also filed a Statement of Additional Grounds (SAG) and, later, a second SAG. RAP 10.10. Short's first SAG is a recitation of facts regarding his life and association with Sears. However, the SAG does not "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Therefore, we do not consider it.

Short's second SAG takes issue with portions of the Verbatim Report of Proceedings that Short asserts are inconsistent with his memory. However, objections to the report of proceedings is governed by RAP 9.5(c) and are not properly addressed through a SAG.

FACTS

On October 31, 2016, Short shot Robert Sears in the face. The bullet passed through Sears's mouth and throat, then lodged in his vertebrae. Sears was able to drive to a local grocery store, where he got someone to call 911.

The State charged Short with attempted first degree premeditated murder and first degree assault, both with a firearm enhancement.

At trial, Sears testified that he had known Short for about 10 years. Sears had spent several months doing construction projects for Short. After Sears stopped working for Short, they saw each other intermittently at a mutual friend's house. Sears testified that, prior to the shooting, he had not seen Short in approximately two and a half years.

On the night of the shooting, Sears decided to stop at Short's house to see if Short would sell him one of the old vehicles Short kept on his property. Sears parked his truck in the driveway and walked to the back door of the house. Sears testified that he saw Short through the screen door window. Sears also testified,

> [The screen door] opened toward me.
>
> And so I backed up, said, "How are you doing, [Short]?"
>
> He says, "Oh, it's you, [Sears]."
>
> I said, "Yeah."
>
> He says, "I got something for you, you son of a bitch. You're going right straight to the devil."
>
> Boom. That was it.

Verbatim Report of Proceedings (VRP) (Jun. 8, 2017) at 232. Short shot Sears in the face.

Sears testified that he did not make any threatening gestures toward Short. He also testified that he liked Short and did not have any reason to argue with him. And Sears testified that if he had known that Short was angry at him, he would not have gone to see him.

Short asserted the lawful use of force and excusable attempted homicide based on accident. Short testified that "[t]here were words spoken to the effect that [Sears] could lay his hands on a .357 [gun] anytime he wanted." VRP (Jun. 14, 2017) at 436. And Short testified that Sears knew karate and "he could kick as high as the top of a door frame." VRP (Jun. 14, 2017) at 436.

Short also explained the ending of his friendship with Sears:

> [SHORT:] It was in 2011. It was a cold time of year. I can't remember for sure if it was January and February or November and December.
>
> Mr. Sears and I had a final conversation in which I tried to expound the values of kindness and friendship, and it—making money relatively worthless to me. It's all I care about really, compared to money.
>
> I explained to him that it doesn't—it didn't matter to me the money that I'd spent on him, and he said "F friends" at me.
>
> [DEFENSE COUNSEL:] Okay. When you said "F friends," did he—
>
> [SHORT:] Expletive.
>
> [DEFENSE COUNSEL:] Did he say "fuck friends"?
>
> [SHORT:] Yes, he did.
>
> [DEFENSE COUNSEL:] Okay. And that offended you?
>
> [SHORT:] Yes.
>
> [DEFENSE COUNSEL:] Tell me how.
>
> [SHORT:] That's all I care about, friendship.

VRP (Jun. 14, 2017) at 437.

Short then testified that, "if I thought anything of Mr. Sears in that time, it was just that I had to watch out for him, because I turned him in to the police after he tried to extort my silence." VRP (Jun. 14, 2017) at 444-45. The State objected. The trial court excused the jury and allowed Short to explain the extortion and associated threat:

> [SHORT]: Because [Sears] tried to extort my silence. I turned him in to the police. If it got back to him, he's ready to follow through with what he's threatened to do.
>
> [COURT]: What did [Sears] threaten to do?
>
> [SHORT]: Well, he made a—it was in 2004. That's why it goes to 2004.
>
> [DEFENSE COUNSEL]: Okay. He asked you a question. In 2004, what?
>
> [COURT]: What did he do?
>
> [SHORT] He did it through a third person.

> . . . .
>
> [SHORT]: It was a third person's choice to tell me that he could make me disappear by cutting me up in pieces and scattering me across Mason County.
>
> . . . .
>
> [COURT]: And this gentleman . . . said that Mr. Sears would do that?
> [SHORT]: No. He said he could do it.
> [COURT]: So [the third party] said that he could do it?
> [SHORT]: Yes. And then Mr. Sears called me, and in the conversation he brought up [third party] with me, and said, "Did [third party] talk to you?"
> I said, "Yes." I was disturbed, and I said, "[Third party] said something disturbing to me."
> Then Mr. Sears said, "It could happen. . . . Remember what I said." Then [Sears] hung up on me.

VRP (Jun. 14, 2017) at 446-47.

The trial court stated that the main consideration regarding the admissibility of Short's testimony was relevance for the purposes of establishing Short's state of mind during the shooting. Then the trial court ruled,

> I am going to sustain the State's objection on this matter. I think that it's too attenuated for information to be submitted into this case.

VRP (Jun. 14, 2017) at 451.

Although Short was not permitted to testify about the specific threat above, Short was allowed to testify, without specifics, that Sears had made a veiled threat against him.

Short also testified that he initially thought that the person who had come to his house was a neighbor girl, but Short carried a gun with him to answer the door. When Short realized that it was Sears at the door he became frightened. Short claimed that Sears pushed the door open in an uncontrolled manner. And Short testified that "Sears was in a stance which indicated he could be ready to draw a weapon at me . . . ." VRP (Jun. 14, 2017) at 423. Short then attempted to fire a

warning shot past Sears's ear to scare him into leaving. But Short explained, "when I pulled the trigger, my—the gun turned in my hand and Mr. Sears was struck, but I didn't know it at that point." VRP (Jun. 14, 2017) at 425.

The trial court instructed the jury on attempted first degree premeditated murder, first degree assault, and second degree assault as a lesser included offense of first degree assault. The trial court also instructed the jury on lawful use of force for the first degree and second degree assault charges. And the trial court instructed the jury on excusable attempted homicide based on accidental death or injury during a lawful act relating to the attempted first degree premeditated murder. Specifically, the trial court instructed the jury that an "[a]ttempted homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." Clerk's Papers at 98.

The jury found Short guilty of attempted first degree premeditated murder and first degree assault. The jury also found the firearm enhancements by special verdict. The trial court ruled that the first degree assault merged with the attempted first degree premeditated murder and entered a conviction only on the attempted first degree premeditated murder. The trial court imposed a standard range sentence.

Short appeals.

ANALYSIS

Short argues that his right to present a defense was violated because the trial court excluded evidence of the specific threat Sears made through a third party. We agree.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *State v.*

Starbuck, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). A defendant has the right to present evidence in his defense that is not otherwise inadmissible. *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), *review denied*, 159 Wn.2d 1022 (2007). However, the right to present evidence does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). We defer to the trial court's rulings unless " 'no reasonable person would take the view adopted by the trial court.' " *Id.* (internal quotation marks omitted) (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)). Alleging that a trial court's evidentiary ruling violated the right to present a defense does not change the standard of review from an abuse of discretion, but an erroneous evidentiary ruling that violates the defendant's constitutional right to present a defense is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence that is not relevant is inadmissible. ER 402.

When the defendant claims self-defense, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *State v. Wanrow*, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account "*all* the facts and circumstances known to the defendant, including those known substantially before the [incident]." *Id.* at 234. Evidence of the victim's prior acts of

violence, which are known by the defendant, is relevant to a claim of self-defense " 'because such testimony tends to show the state of mind of the defendant . . . and to indicate whether he, at the time, had reason to fear bodily harm.' " *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (quoting *State v. Adamo*, 120 Wash. 268, 269, 207 P. 7 (1922)) , *review denied*, 81 Wn.2d 1005 (1972).

And lawful use of force is relevant to Short's excusable attempted homicide defense because the injury is excusable when an accidental injury occurs during an act of self-defense. *See State v. Brightman*, 155 Wn.2d 506, 525-26, 122 P.3d 150 (2005) (holding excusable homicide is the appropriate defense when "theory of the case involved self-defense, followed by excusable homicide"); *State v. Slaughter*, 143 Wn. App. 936, 942, 186 P.3d 1084 ("In a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide."), *review denied*, 164 Wn.2d 1033 (2008).

Here, the trial court excluded Short's testimony that Sears had made a veiled threat of dismemberment against Short in 2004. This is as an act of violence known to Short at the time of the shooting. Sears's threat made it more probable that Short feared Sears the night Sears arrived at the house, and, therefore, the testimony was relevant to Short's self-defense claim. Accordingly, the trial court violated Short's right to present his defense. *See State v. Duarte Vela*, 200 Wn. App. 306, 319-27, 402 P.3d 281 (2017) (right to present a defense was violated when the trial court excluded relevant threats the victim made against the defendant), *review denied*, 190 Wn.2d 1005 (2018).

The State apparently argues that the error was harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have

reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). However, given the testimony about the circumstances of the shooting, we cannot say beyond a reasonable doubt that any reasonable jury would have reached the same result if the improperly excluded testimony had been admitted. Accordingly, the error was not harmless.

We reverse Short's conviction and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.