IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ROBERT HENRY KOCH,<br><br>Appellant. | ) | No. 63977-3-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: June 6, 2011 |

Becker, J. — Robert Koch appeals his conviction for first degree assault. He argues the trial court should have answered "yes" to a jury inquiry regarding whether a "reasonable possibility" of self-defense could form the basis of a reasonable doubt. We conclude that the trial court acted within its discretion by directing the jury to reread its original instructions. The instruction on reasonable doubt adequately informed the jury to consider all evidence or lack thereof when deciding the issue of guilt. We affirm.

Koch, 81 years old, was tried for attempted first degree murder and first degree assault of his son Scott. The testimony and evidence presented by the State at trial established that Scott was shot twice in the head. Scott was 40 years old at the time and was living in a hotel room. He had recently been

convicted of domestic violence while living with his parents. He was required by court order not to visit his parents' home or have any contact with his father.

Scott testified his father came to the hotel on the night of the assault to bring him dinner. He said Koch also brought a gun and rubber gloves. Hotel surveillance footage showed Koch entering Scott's room before the incident and leaving the room after Scott was shot. Four shots were fired in the room—one into a window frame, one into a wall, and two into Scott's head.

Koch did not testify at trial. He did not request a jury instruction on self-defense, and he did not present a theory of self-defense at trial.

During deliberations, the jury sent a note asking, "If a juror believes that there is a reasonable possibility of the defendant acting in self-defense, can that belief form the basis for 'reasonable doubt' of guilt in this case, despite the fact that the issue of self defense was not raised in the trial." The court discussed with counsel what response should be given. The State said the court should "direct them to, as the Court has already instructed them, base their decision on the evidence and arguments admitted in Court." Defense counsel urged the court to say, "yes . . . because a juror can consider anything that they want to as a basis for their own individual reasonable doubt." He proposed a specific response:

> MR. SAVAGE: Your Honor, for the record, I would like to have the answer to read as follows.
> THE COURT: Go ahead, Mr. Savage.
> MR. SAVAGE: A juror may consider the facts as proved at trial and any reasonable inferences therefrom in reaching his or her decision.

> THE COURT: The reasonable inference part I think is already encapsulated in the instruction on direct or circumstantial evidence. So I think that's already before them.
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> MR. SAVAGE: Well, then, I would still like my answer given. But we could also say: Please refer to instruction number -- whatever the number is.

The court rejected the defendant's suggestion of referring to a specific instruction because it might be considered a comment on the evidence:

> THE COURT: . . .
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> All right. I think I've convinced myself that the answer to their questions can be derived from the first jury instruction and I think it was jury instruction four, the direct and circumstantial evidence instruction. I'm disinclined to give them any more guidance than to just indicate to them that they need to reread their jury instructions or please refer to your jury instructions. Because anything more I say, number one, could be considered a comment of some sort if I direct them to a specific instruction.
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> Frankly, Mr. Savage, there may be something in here that is a better reference than the ones I'm coming up with now that would answer their question. And I don't want them to be somehow or other misguided into believing that one or two instructions are more important than the other on this particular issue.

Defense counsel again requested that the court simply instruct that a juror could "consider the facts as proved at trial and any reasonable inferences therefrom in reaching his or his decision." The court decided against doing so because the jury already had that instruction.

> MR. SAVAGE: . . . I don't think that just telling them again that they can consider the facts and any reasonable inference therefrom is a comment. I don't think it's illegal or unethical.
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> THE COURT: I wouldn't suggest that it was unethical either, counsel. I just think it may be misleading in the sense that the instructions that they have are sufficient. Like I said before -- and I think I'm unshakeable on this -- that given the nature of the question they've asked, it's a land mine if I try to answer the question the way it's written.

> Furthermore, they're raising the question of self-defense just because they know something. They know just enough to make a question potentially dangerous. There isn't self-defense in this case. It wasn't raised as an affirmative defense. There's insufficient evidence to support an instruction on self-defense, as far as I'm concerned, which is the reason why it wasn't asserted.
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> So they've kind of gone off on their own. And I think the only way to reel them is to direct them to reread their instructions so that they know what the law is. And if they do that and they do it carefully, I think they will find the answer to their question, which is, they get to consider all the facts and the absence of facts and determine whether those facts and/or the accompanying absences are sufficient to raise a reasonable doubt. Once they get to that calculus, they have their answer. It's not a self-defense question.

After the colloquy, the court responded to the note, "please reread your instructions." The jury convicted Koch of first degree assault.

Koch assigns error to the trial court's response to the jury and the court's refusal to respond to the jury note in the manner he requested below.

"Whether to give further instruction in response to a request from a deliberating jury is within the discretion of the trial court." State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). Supplemental instructions "should not go beyond matters that either had been, or could have been, argued to the jury." State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). As the jury's question recognized, there was no issue of self-defense in the trial. The question asked whether a reasonable doubt about guilt could arise from a particular view of the facts.

Koch maintains that the jury raised an issue not covered by the previous instructions and that re-reading them would shed no light on it.

> The appellant was convicted of Assault in the First Degree. The charge alleged "intent to inflict great bodily harm." If the injuries to Scott Koch occurred in self-defense during the course of a struggle over the gun this could refute the State's theory of the appellant's intent and form the basis for a reasonable doubt. The jury question should have been answered "yes" as was done in State v. Becklin.

Appellant's Br. at 13-14. Koch argues that the court's reply to the jury "in effect, told the jury that acting in self-defense could not form the basis for reasonable doubt because there was nothing in those instructions to the contrary." Appellant's Br. at 14.

We disagree. The original instruction on reasonable doubt told the jury everything it needed to know on that topic: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." If a juror believed it was reasonably possible that Koch was acting in self-defense, and for that reason doubted that Koch intended to inflict great bodily harm, this instruction permitted the juror to vote for acquittal. Further instruction was unnecessary. And even a simple "yes" answer might have appeared to be an endorsement of the particular path of reasoning the jury was considering.

The trial court acted within its discretion by directing the jury back to the original instructions.

Affirmed.

Becker, J.

WE CONCUR:

Appelwick, J.

Grosse, J.