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

STATE OF WASHINGTON,	)	No. 67446-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
TYSON SCOTT WHITFORD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 17, 2012
	)	

Verellen, J. — Tyson Whitford appeals his conviction for assault with a deadly weapon. He contends the court erred by refusing to instruct the jury on self-defense and by excluding certain reputation and impeachment evidence. He also argues the prosecutor committed reversible misconduct and cumulative error deprived him of a fair trial. We disagree and affirm.

FACTS

Kerry Mason and his wife, Deborah Porter, owned a car dolly and temporarily stored it at the home Tyson Whitford shared with Perry McElroy. Mason agreed to sell it to Whitford, provided he paid within a week. The week passed with no payment, so, Mason and Porter went to retrieve the dolly.

When Mason and Porter arrived at McElroy's house, they found the dolly had been locked up. Whitford was not at home, but McElroy called him. Mason sawed the

locks off the dolly, and he and Porter took it back to their nearby condominium.

Mason solicited the help of a neighbor, Mark Denton, to move the dolly into a parking spot. Another neighbor, Bruce Wade, stopped to watch and chat with Denton.

While Mason and Denton were unloading the dolly, Whitford and his girlfriend, Nicole Broughton, sped into the parking lot and stopped close to the dolly. Whitford got out of the van and he and Mason began angrily yelling at each other. Porter and Broughton yelled at each other too. Mason repeatedly told Whitford to leave.

Wade, Denton, Porter and Mason all testified that Whitford suddenly took out a baton or club and struck Mason repeatedly in the head and arm. None of the witnesses testified that Mason struck or pushed Whitford first. Broughton testified that she thought Mason was "going to try to hit" Whitford, but did not know whether he did.[1]

Whitford and Broughton got back into the van and quickly drove away. Denton called the police and later took Mason to the hospital. Mason's head wound required several staples.

The police eventually arrested Whitford, and the State charged him with assault in the second degree with a deadly weapon enhancement.

Whitford alleged he acted in self-defense. To support the claim, Whitford moved in limine to introduce testimony about Mason's reputation for aggression and untruthfulness and about specific instances of these traits. After considerable briefing and several hearings, the court decided that much of the proffered testimony was inadmissible as substantive evidence. The court later excluded the evidence for

[1] Report of Proceedings (RP) (June 9, 2011) at 124.

impeachment purposes as well, concluding the probative value of the evidence was

substantially outweighed by the danger of misleading the jury and unnecessarily prolonging the trial. The court also decided that there was no evidence to support self-defense and declined to instruct the jury on that theory.

The jury found Whitford guilty as charged. By special verdict, the jury also found that Whitford was armed with a deadly weapon during the assault. The court sentenced Whitford to a standard range sentence of 25 months. He appeals.

ANALYSIS

Self-Defense Instruction

If a criminal defendant offers credible evidence tending to prove self-defense, he is entitled to an instruction on his theory of the case.[2] Self-defense requires evidence that the defendant subjectively feared that he was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor.[3] To determine whether the evidence at trial was sufficient to support a self-defense instruction, we view the evidence in the light most favorable to the defendant.[4] When a court declines to instruct on self-defense based on a factual determination that the evidence does not support the theory, we review for abuse of discretion.[5]

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[2] State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010); State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997).

[3] State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

[4] State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) ("When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.").

[5] State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Whitford contends he produced sufficient evidence to warrant an instruction on self-defense. He relies on McElroy's testimony that Mason was enraged when he found his car dolly locked up; Broughton's testimony that Mason was angry, confrontational, flailed his arms, and ran toward Whitford; and Mason's testimony that he followed Whitford to his van while yelling at Whitford to leave.[6]

But Whitford presented evidence that he did not intentionally use force against Mason. Broughton emphatically denied that Whitford could have had a weapon and she couldn't imagine that he had hit Mason. She explained that Mason charged Whitford and "all [Whitford] did was get in the van to get away."[7] She also speculated that Mason was accidentally injured when he hit his head on the van's side mirror as he charged at Whitford. As the court noted, that "testimony is basically entirely consistent with the defense of denial, not self-defense, and as part of the denial, she is speculating that may have been an accidental injury."[8]

Although claims of accident and self-defense are not mutually exclusive, there must be sufficient evidence of both to warrant a self-defense instruction.[9] For example, where a defendant displays a gun to scare off an assailant and the weapon fires accidentally, the evidence supports both accident and self-defense and the defendant is entitled to a self-defense instruction.[10] But when the defense is that "a victim's

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[6] Whitford also asserts that witness Bruce Wade testified that Mason may have pushed Whitford first, but that is inaccurate. Wade repeatedly testified that he did not recall whether Mason ever touched Whitford.

[7] RP (June 9, 2011) at 131.

[8] RP (June 13, 2011) at 31.

[9] Werner, 170 Wn.2d at 337.

[10] See id. at 336; Callahan, 87 Wn. App. at 931-33.

injuries were the result of accident rather than caused by the defendant's acts, the defendant cannot claim self-defense."[11] Thus, in State v. Gogolin, a defendant who denied pushing the victim and claimed that she simply fell backward down the stairs was not entitled to an instruction on self-defense.[12]

The same is true here. Whitford presented Broughton's testimony refuting self-defense and supporting only the defense of denial or accident. The court did not err by refusing to instruct the jury on self-defense.

Reputation Evidence

A criminal defendant may introduce evidence of a "pertinent trait of character of the victim."[13] Such proof may be made by testimony of the person's reputation.[14] Where a defendant claims self-defense, evidence of the complaining witness's reputation for aggressiveness is admissible to establish the victim was the first aggressor.[15]

Whitford sought to introduce evidence of Mason's reputation for aggressiveness and dishonesty within X Marks the Scot, an on-line community of kilt wearers. Whitford asserted that Brian Neilson, a member of that group, would testify that Mason had been a member of X Marks the Scot for at least two years and had been seen at 12 of the

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[11] Dyson, 90 Wn. App. at 439; see also 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."); State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) ("One cannot deny that he struck someone and then claim that he struck them in self-defense.").

[12] 45 Wn. App. 640, 643, 727 P.2d 683 (1986).

[13] ER 404(a)(2)

[14] ER 405(a).

[15] State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998).

organization's events during that time. Nielson had met at least 100 members, and had discussed Mason's reputation for being quarrelsome, aggressive, and dishonest with 15 to 25 of them. Nielson could also testify to specific instances of Mason's dishonesty that occurred during a road trip the two had taken together with their wives. During that vacation, Mason used the car dolly to tow his car behind Neilson's recreational vehicle. Neilson would testify that Mason repeatedly shirked his obligation to pay for his share of the gas, claiming he had no money for gas even though he bought other things. The two couples parted ways, and Mason abandoned the car dolly. Mason later sued for its return, alleging it was worth $800 when he had paid only $300 for it.

The court concluded Whitford had not established a sufficient foundation for this testimony. We review the decision for abuse of discretion,[16] and find no error.

A witness offering reputation testimony must lay a foundation establishing that the subject's reputation is based on perceptions in the relevant community; personal opinion is not sufficient.[17] Further, the proponent must establish the reputation exists within a neutral and generalized community.[18] Some factors relevant to establish a relevant community include "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community."[19]

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[16] Callahan, 87 Wn. App. at 935.

[17] Id.

[18] Id. at 934; see also 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 405.2, at 4 & n.8 (5th ed. 2007) (cases concerning reputation evidence under ER 608 instructive under ER 404 and 405; Callahan properly understood to interpret ER 405 rather than ER 608).

[19] State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

In State v. Land, reputation evidence was properly admitted when its proponent established that the "wood shook" manufacturing community was close-knit, the defendant had acted as a salesman in the community for several years, had had numerous personal contacts with various members of the community, and through these contacts, had developed a well-known bad reputation for veracity.[20] And in State v. Callahan, the defendant established sufficient foundation to admit evidence of his own peaceful reputation by showing he "worked the night shift, sometimes seven days a week, at a plant that employed over 1,100 people."[21] In both cases, the proponent of the character evidence demonstrated that the subject had significant involvement within the relevant community. Whitford's offer of proof fell short of this standard.

Even if X Marks the Scot constitutes a neutral and generalized community,[22] Whitford failed to show Mason's involvement in the group beyond his appearance at 12 events over two years. Neilson's proffered testimony did not establish the number of people in the community, any details regarding the frequency of Mason's contact with

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[20] 121 Wn.2d 494, 496, 851 P.2d 678 (1993).

[21] 87 Wn. App. 925, 936, 943 P.2d 676 (1997).

[22] Whitford contends X Marks the Scot is a neutral and generalized community. He analogizes to the Boy Scouts, and asserts that Division Three of this court held the Boy Scouts qualified as a relevant community in State v. Carol M.D., 89 Wn. App. 77, 95, 948 P.2d 837 (1997). But Carol M.D. did not analyze that question. Rather, Division Three pointed out that the case upon which the trial court relied to exclude reputation evidence, State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963), had been "specifically overruled" by Land, but provided no further analysis of the issue. Carol M.D., 89 Wn. App. at 95. In Swenson, the court held that reputation evidence must come from "the community in which [the subject] resided." Swanson, 62 Wn.2d at 282-83. In any event, Whitford provides no meaningful similarity between an on-line community of kilt wearers and the large, widely known and highly organized youth organization.

members of the group, or Mason's role within the group. Thus, Whitford failed to establish that members of X Marks the Scot would be well acquainted with Mason's reputation. Additionally, the court could reasonably infer from the feud between Neilson and Mason that Neilson's testimony might reflect Neilson's personal opinion of Mason rather than Mason's reputation in the group. The court did not abuse its discretion by excluding the reputation evidence.

Impeachment

Whitford also sought to impeach Mason and Porter with specific instances of untruthfulness related to the vacation they took with the Neilsons and the small claims suit that ensued.

A court may allow a party to impeach a witness during cross-examination with specific instances of the witness's conduct if probative of truthfulness or untruthfulness.[23] We review the decision whether to admit such evidence for abuse of discretion.[24]

The court initially permitted Whitford to cross-examine Porter about specific instances of her and Mason's dishonesty during their vacation with the Neilsons. After eliciting Porter's opinion that the Nielsons "are not nice people," Whitford's counsel remarked, "Well, you may be surprised to know that they don't have too many nice things to say about you."[25] Whitford's counsel later asked, "Did your husband ever get drunk and pass out?"[26] After sustaining the State's objection, the court concluded the

[23] ER 608(b).

[24] State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001).

[25] RP (June 7, 2011) at 164.

cross-examination went "far [a]field of anything the court contemplated" and precluded further questioning about the trip.[27]

At the court's request, Whitford's counsel made a written offer of proof describing the questions he would ask Mason on cross-examination to impeach Mason's credibility with specific acts of dishonesty. The proffered questions all related to Mason's failure to pay his share of expenses during the vacation with the Nielsons and the small claims suit that followed. The court precluded the inquiry because the probative value of the evidence was outweighed by its potential to confuse the issues, mislead the jury, and unnecessarily prolong the trial. The court also concluded that the proffered evidence was not indicative of a general disposition for untruthfulness: "Really, all we ultimately have here is a dispute. . . . [I]t really comes down to that these people got into disputes as to what their agreement was, as to who was supposed to pay what on their trip, the dolly ends up getting abandoned because of their dispute, and then it all escalates, ultimately, into the small claims lawsuit, which is wholly irrelevant to this case."[28]

"Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative" and the rights of confrontation and cross-examination "are limited by general considerations of relevance."[29] Because the proposed cross-examination of Mason (and the actual cross-

[26] Id. at 167.

[27] Id. at 174.

[28] RP (June 8, 2011) at 68-69.

[29] State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

examination of Porter) was vague, argumentative, speculative and irrelevant, the court did not err by prohibiting the inquiry.

Prosecutorial Misconduct

To prevail on a claim of prosecutorial misconduct, a defendant must show the conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[30] Courts will find prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict.[31]

Whitford contends the prosecutor committed reversible conduct in her rebuttal argument when she stated, "Well, as you'll recall, Mr. Mason indicated to you that the doctor, who wasn't able to be here, based on schedules."[32] Whitford objected, and the court sustained the objection. At the conclusion of the State's rebuttal argument, Whitford moved for a mistrial or, in the alternative, five minutes for surrebuttal. The court denied the motion.

During deliberations, the jury asked to see the medical report, along with the police reports and all of the other witness statements. Shortly after being instructed to refer to its instructions, the jury returned a guilty verdict. Whitford's stand-in counsel renewed the motion for a mistrial in light of the jury's request to see the medical records, which he argued "would tend to indicate that they were focused in some measure on some unknown or unproduced hospital or medical personnel" and were "tainted by the comments that were made in closing."[33] The court denied the mistrial

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[30] State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1230 (1997).

[31] Id. at 718-19.

[32] RP (June 13, 2011) at 78.

"without prejudice to any appropriate written motion the defense might be able to make under the applicable rules."[34] Whitford made no written motion.

The State concedes that the prosecutor's remark was improper but contends no prejudice resulted. Whitford argues the prejudice is manifest in the jury's request to see the medical report: "Given that there was no medical testimony and no evidence regarding a medical report, the only source for that inquiry must be the prosecutor's reference."[35] But that is not so. Whitford's counsel referred to "the medical documents" during cross-examination of Mason to refute Mason's testimony that the attack caused an indentation in his skull.[36] During cross-examination of Denton, Whitford's counsel asserted that "the medical report only shows one injury to the head. . . . Just one. There's no lacerations anywhere else. No bumps."[37] Denton replied, "I haven't seen the medical report."[38] Thus, the jury's request to see the medical report cannot solely be attributed to the prosecutor's remark.

Whitford suggests the prosecutor's remark was prejudicial because "the prosecutor was clearly attempting to argue facts not in evidence" and "[a]rgument intended to encourage the jury to render a verdict based on facts not in evidence is improper."[39] But given that Whitford's timely objection successfully prevented that from

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[33] Id. at 98-99.

[34] Id. at 99.

[35] Appellant's Br. at 32.

[36] RP (June 8, 2011) at 138.

[37] RP (June 7, 2011) at 122.

[38] Id.

[39] Appellant's Br. at 32.

happening, he demonstrates no substantial likelihood that the remark affected the jury

or contributed to the verdict. The argument fails.

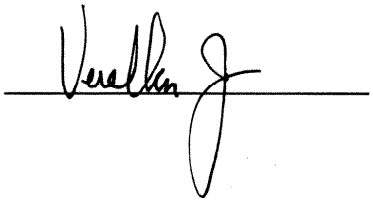
Cumulative Error

The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial."[40] However, "[a]bsent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial."[41] Because Whitford has established no prejudicial error, the doctrine does not apply.

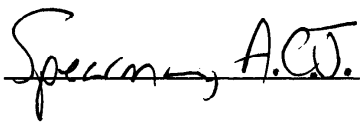
Conclusion

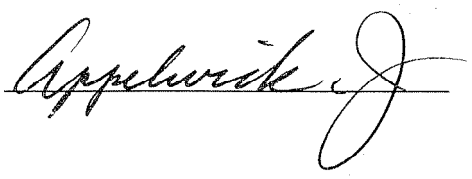
Whitford was not entitled to a jury instruction on self-defense, and fails to establish that the trial court abused its discretion in its rulings on proffered evidence of the victim's reputation or specific instances of his untruthfulness. The trial court sustained Whitford's objection to the prosecutor's closing argument, and Whitford does not establish any prejudice. Accordingly, there are no prejudicial errors, cumulative or otherwise.

Affirmed.



WE CONCUR:





[40] State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

[41] State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004).