

May 2, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MORRIS RICHARD KEITH, JR.,

Appellant.

No. 48609-1-II

UNPUBLISHED OPINION

WORSWICK, J. — Morris Keith appeals from his second degree assault conviction and sentence, asserting that the trial court (1) violated his right to present a defense by failing to instruct the jury on self-defense, (2) violated his right to present a defense by excluding evidence of the victim’s prior assault conviction, and (3) erred by imposing a community custody condition requiring him to undergo a drug and alcohol evaluation. The State concedes that the trial court erred by refusing to instruct the jury on self-defense and that the error was not harmless beyond a reasonable doubt.<sup>1</sup> We accept the State’s concession, reverse Keith’s conviction, and remand for a new trial. Because we reverse Keith’s conviction based on the trial court’s error in failing to instruct the jury on self-defense, we do not address his remaining issues.<sup>2</sup>

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<sup>1</sup> The State also concedes that the trial court erred by excluding evidence of the victim’s prior assault.

<sup>2</sup> Keith has also requested that we waive the imposition of appellate costs should the State prevail in this appeal. Because the State has not prevailed in this appeal, we need not address Keith’s request. RAP 14.2.

## FACTS

Justin Moon lived with Kimberly Ann Brooks in Centralia. Moon often listened to loud music in the residence's detached garage. Neighbors repeatedly complained and called the police about the volume of music coming from the garage.

On the evening of May 31, 2015, Brooks and Moon were barbecuing and listening to loud music from the stereo in their garage. Their neighbor, Morris Keith, came to the couple's garage, approached Moon while carrying a small sledgehammer, and complained about the music. Although Moon and Keith disagree about the details of their encounter, it is undisputed that the two exchanged words and that Moon was struck in the face by the hammer. After Moon was struck by the hammer, Keith left the garage. As a result of being struck, Moon blacked out. When he regained consciousness, Moon noticed blood all over his face, and he started screaming for someone to call the police and an ambulance. Brooks called the police.

Centralia police officer Mary Humphrey responded to the call. Humphrey saw that Moon's "nose was pretty much flat to his face and he had blood all over." Report of Proceedings (RP) at 130. Humphrey arrested Keith and transported him to jail. Keith provided Humphrey with a taped statement in which he stated, "[Moon] swung at me, I blocked him, and I turned around and hit him with it." RP at 293. Police officers located the hammer on the roof of a shed on Keith's property.

The State charged Keith with second degree assault while armed with a deadly weapon, first degree burglary, and felony harassment. Before the start of trial, the State moved to exclude evidence of Moon's prior conviction for third degree assault. Keith opposed the motion, noting that Moon's prior assault conviction was relevant to his claim of self-defense because Keith was

aware of the prior conviction on the date of the incident. The trial court reserved ruling on the State's motion in limine to exclude evidence of Moon's prior assault conviction, and it directed Keith to inform it prior to introducing evidence of the conviction so the matter could be addressed outside the presence of the jury. Keith did not seek to admit evidence of Moon's prior conviction during trial.

At trial, Humphrey testified consistently with the facts stated above. Moon testified that he was playing loud music in his garage when Keith approached him while carrying a hammer. He further testified that Keith appeared angry and was uttering profanities at him while telling him to turn the music off. Moon stated that, after he told Keith not to tell him what to do, Keith swung the hammer and hit Moon's groin. Moon said that he hunched over from the pain of being hit in the groin, and Keith again swung the hammer and hit his nose, after which he blacked out. Moon stated that he had not seen the hammer before this incident. Brook's testimony largely substantiated Moon's account of what had transpired.<sup>3</sup>

Keith testified that he went to the garage to return a hammer he had borrowed from Moon and to ask him to turn his music down. Keith further testified that, while he and Moon were discussing the music situation, he tossed the hammer onto a bench in the back of the garage. Keith stated that as he and Moon were arguing, Moon swung the hammer and hit him on his prosthetic leg. Keith said he stepped back and bumped into Brooks. Keith stated that Moon again swung the hammer at him, at which point he "was able to block it and get a hold of it. That's when we went back and forth. That's when [Moon] was hit with the hammer." RP at

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<sup>3</sup> Brooks also testified about facts relevant to Keith's first degree burglary and felony harassment charges, which we do not discuss here because they are not pertinent to the issues raised on appeal.

251. Keith also stated that, as he was leaving the garage, the hammer flew past him. Keith said that he picked up the hammer, handed it to his wife, and told her “to go put it some place where [Moon] can’t get a hold of it again.” RP at 255. Keith denied intentionally swinging the hammer at Moon, but stated that he may have slapped him.

Keith requested the trial court to instruct the jury on self-defense. During argument on the issue of a self-defense instruction, the trial court noted that Keith’s taped statement to police contained evidence that he had intentionally swung the hammer at Moon. The trial court, however, noted its reluctance to instruct on self-defense because Keith had denied intentionally swinging the hammer at Moon during his testimony, stating:

It seems to me he has to intentionally say that he hit him, because assault requires an intentional act. Otherwise, I don’t see—again, the argument is it never happened because I never intentionally hit him. All I did was block it and somehow he ended up getting his nose smashed by some interaction between the two. But there is no testimony that he intentionally struck him.

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Again, the problem that I see here is that if Mr. Keith had said, “He swung a hammer at me, I got the hammer away, I hit him with the hammer,” then I would see a basis for a claim of self-defense. But he didn’t say that. His direct testimony was . . . that he was denying that he ever struck the defendant. And as long as he is denying that he ever struck [Moon], I don’t see a basis for self-defense. Self-defense requires that there has to be an intentional act on the part of the defendant. You can’t get to self-defense through accident. You can’t get to self-defense by, in essence, retreating solely. You’ve got to basically step up and say, “Yeah. I did this, but I did it because I was defending myself.” That isn’t what Mr. Keith said.

RP at 310, 313. After recessing to consider the matter further, the trial court denied defense counsel’s request to instruct the jury on self-defense.

The jury returned verdicts finding Keith guilty of second degree assault, not guilty of first degree burglary, and not guilty of felony harassment. The jury also returned a special verdict finding that Keith was armed with a deadly weapon when committing the second degree assault.

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At sentencing, the trial court imposed a community custody condition requiring Keith undergo a drug and alcohol evaluation, despite noting that “I don’t think there was any particular evidence of it.” RP at 430. Keith appeals.

## ANALYSIS

### SELF-DEFENSE JURY INSTRUCTION

Keith first contends that the trial court violated his right to present a defense by refusing to instruct the jury on the law of self-defense. The State concedes this error. We accept the State’s concession, reverse Keith’s second degree assault conviction, and remand for a new trial.

A defendant is entitled to a self-defense jury instruction when there is “some evidence admitted in the case from whatever source which tends to prove [that an act was committed] in self-defense.” *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). When determining whether some evidence supported instructing the jury on self-defense, we review the entire record in a light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). “Because the defendant is entitled to the benefit of all the evidence,” a trial court may be required to instruct the jury on self-defense instruction even where the defendant’s own testimony is inconsistent with a self-defense claim. *Callahan*, 87 Wn. App. at 933. “The law [of self-defense] does not require an explicit statement of intent.” *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). And “[t]he defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). A trial court’s failure to give the defendant’s self-defense jury instruction where the evidence supports it is reversible error unless the State proves

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the error was harmless beyond a reasonable doubt. *State v. Arth*, 121 Wn. App. 205, 213, 87 P.3d 1206 (2004) (citing *McCullum*, 98 Wn.2d at 497.)

Our standard of review depends on the reason the trial court refused to grant Keith's requested self-defense instruction. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If the trial court declined the self-defense instruction based on a factual dispute, we review its decision for abuse of discretion. *Walker*, 136 Wn.2d at 771-72. But if the trial court declined the self-defense instruction based on a ruling of law, we review its decision de novo. *Walker*, 136 Wn.2d at 772. Here, it appears that the trial court refused Keith's proposed self-defense instruction based on the legal determination that a defendant could not assert self-defense when testifying that he had struck the victim accidentally. Accordingly, our review is de novo.

Here the trial court recognized that Keith's statement to police, wherein Keith stated that he had turned around and hit Moon with the hammer after gaining control of it, was evidence that Keith had intentionally struck Moon with the hammer. The trial court, however, refused to instruct the jury on self-defense because Keith denied intentionally striking Moon with the hammer during his testimony, claiming that any strike on Moon was accidental. This was error.

The trial court was required to consider all the evidence at trial in a light most favorable to Keith when determining whether he was entitled to a self-defense instruction. *Callahan*, 87 Wn. App. at 933. And, if some evidence supported Keith's self-defense theory, the trial court was required to instruct the jury on self-defense even where Keith's own testimony contradicted the theory. *Werner*, 170 Wn.2d at 337; *Callahan*, 87 Wn. App. at 933; *Hendrickson*, 81 Wn. App. at 401. Had the trial court properly analyzed the evidence at trial, Keith would have been entitled to the self-defense instruction.

There are three elements to a claim of self-defense: (1) the defendant subjectively feared imminent danger of bodily harm, (2) the defendant's belief was objectively reasonable, and (3) the defendant exercised no more force than reasonably necessary. *Werner*, 170 Wn.2d at 337-78. If the evidence fails to support any one of these elements, the defendant is not entitled to present a self-defense theory to the jury. *Walker*, 136 Wn.2d at 773.

Here the evidence at trial, when viewed in a light most favorable to Keith, clearly supported instructing the jury on self-defense. Keith testified that he approached Moon to discuss the volume of music being played from his garage and to return a sledgehammer that he had borrowed. Keith further testified that, during his discussion with Moon, he tossed the hammer on a bench in the garage. Keith stated that after he and Moon began arguing, Moon struck him on his prosthetic leg and then attempted to again hit him with the hammer. Keith said that he was able to block the second blow and grab hold of the hammer. Although Keith denied at trial that he had intentionally struck Moon with the hammer during the ensuing fray, the trial court was required to consider all the evidence when assessing whether Keith was entitled to a self-defense jury instruction. This evidence included Keith's statement to police that, after gaining control of the hammer, he "turned around and hit [Moon] with it." RP at 293.

A reasonable jury could find, based on this evidence above, that (1) Keith subjectively feared imminent danger of bodily harm from Moon's repeated strike of a hammer, (2) his belief was objectively reasonable, and (3) his use of force was no more than necessary under the circumstances. Because Keith would have been entitled to a self-defense jury instruction had the trial court properly analyzed all the evidence at trial in Keith's favor, and because the State concedes that the trial court's error in refusing to give the instruction was not harmless beyond a

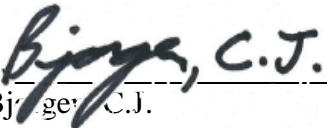
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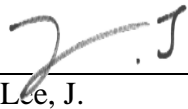
reasonable doubt, we reverse Keith's second degree assault conviction and remand for a new trial. Because we reverse Keith's conviction based on the trial court's failure to instruct the jury on self-defense, we do not address his remaining assignments of error.

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.

  
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Worswick, J.

We concur:

  
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Bjorge, C.J.

  
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Lee, J.