5-24-2016

State v. Trenkle Appellant's Reply Brief Dckt. 43219

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43219**
	)	
v.	)	**ADA COUNTY NO. CR 2014-4088**
	)	
ERIK SHERMAN TRENKLE,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

_____

HONORABLE MELISSA MOODY
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Erik Sherman Trenkle and his significant other, Misty Bacus, were involved in a physical altercation that took place in the presence of their minor son, K.T. After a mistrial in his first trial and a hung jury in his second trial, the jury in his third trial found Mr. Trenkle guilty of felony domestic violence in the presence of a child. Mr. Trenkle appealed, asserting the district court erred when it denied his request for a defense of property jury instruction.

In its Respondent's Brief, the State argued the district court correctly determined the evidence did not support a defense of property instruction, and any error in not giving a defense of property instruction was harmless. (Resp. Br., pp.3-10.) This Reply Brief is necessary to address the State's arguments, which are unavailing.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Trenkle's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied Mr. Trenkle's request for an I.C.J.I. 1522 defense of property jury instruction?

ARGUMENT

The District Court Erred When It Denied Mr. Trenkle's Request For An I.C.J.I. 1522 Defense Of Property Jury Instruction

A. Introduction

Idaho law recognizes that, to prevent an illegal attempt by force to take or injure property, the person who lawfully possesses the property may use resistance sufficient to prevent the offense from occurring. *See State v. Walsh*, 141 Idaho 870, 877 (Ct. App. 2005) (citing I.C. § 19-202). Mr. Trenkle asserts a reasonable jury could conclude from the evidence presented that Ms. Bacus was attempting to injure his cell phone, and that he made contact with Ms. Bacus' forehead while using resistance sufficient to prevent that injury to his property from occurring. *Cf. Walsh*, 141 Idaho at 877. Thus, contrary to the State's argument, the district court erred when it denied Mr. Trenkle's request for an I.C.J.I. 1522 defense of property jury instruction. Further, the State has failed to prove the error is harmless beyond a reasonable doubt.

B. The District Court Erred When It Denied Mr. Trenkle's Request For An I.C.J.I. 1522 Defense Of Property Jury Instruction

Mr. Trenkle asserts the district court erred when it denied his request for a defense of property jury instruction. The requested instruction was a correct statement of the law and was not adequately covered by other instructions. Further, the evidence presented supported the requested instruction. Thus, the district court should have honored Mr. Trenkle's request for a defense of property jury instruction. *See State v. Severson*, 147 Idaho 694, 710-11 (2009).

In the Respondent's Brief, the State has only offered argument disputing whether the evidence presented supported the requested instruction. (*See* Resp. Br., pp.3-9.) As a preliminary matter, the State appears to be confused about the scope of Mr. Trenkle's assertions regarding the evidence in support of the defense of property jury instruction. Mr. Trenkle has asserted the evidence presented supported a conclusion by the jury that Ms. Bacus was making an illegal attempt by force to *injure* Mr. Trenkle's property, and in response Mr. Trenkle used reasonable resistance sufficient to prevent the offense that was about to occur. (*See* App. Br., pp.13-14; Trial Tr., p.268, L.22 – p.269, L.3 (trial counsel asserting Ms. Bacus testified that Mr. Trenkle grabbed her "to get the cellphone.").) Thus, to the extent the State's arguments concern whether the evidence supported a conclusion that Mr. Trenkle used reasonable resistance to prevent Ms. Bacus' illegal attempt by force to take, as opposed to injure, Mr. Trenkle's property (*see* Resp. Br., pp.6, 8), those arguments may be disregarded by the Court.

The State argues Mr. Trenkle's "use of force was also not 'reasonably necessary to prevent the threatened injury' to his cellphone." (Resp. Br., p.7.) According to the State, Mr. Trenkle could have simply left to prevent Ms. Bacus from throwing the phone, and it was not reasonably necessary for him to grab Ms. Bacus around the neck or knock her out. (Resp. Br., p.7.) This argument by the State improperly invites the Court to decide the legal issue on appeal based on questions of fact and thus invade the province of the jury. Whether Mr. Trenkle's use of force when Ms. Bacus attempted to throw the phone was unreasonable, and whether his use of force when she no longer had the phone was unreasonable, "are questions of fact which, in a jury trial, are within

the province of the jury." *See State v. Garner*, 159 Idaho 896, ___, 367 P.3d 720, 724 (Ct. App. 2016) (holding, on whether the evidence supported an I.C.J.I. 1263 jury instruction on self-defense with respect to officers, that "[w]hether the officers' use of force was excessive and whether [the defendant's] responding force was unreasonable are questions of fact which, in a jury trial, are within the province of the jury."). Like the Idaho Court of Appeals did in *Garner*, this Court should reject the State's invitation to "weigh the evidence." *See id.*, 367 P.3d at 724.

Contrary to the State's argument, the "primary issue here is whether there was some evidence to support" Mr. Trenkle's requested defense of property jury instruction. *See id.*, 367 P.3d at 724. Based on Ms. Bacus' testimony (*see* Trial Tr., p.147, L.8 – p.148, L.9, p.197, L.25 – p.198, L.7, p.204, L.10 – p.206, L.1), a reasonable jury could have concluded that Ms. Bacus was threatening to injure Mr. Trenkle's cell phone by throwing it out the door, and that Mr. Trenkle's actions were a reasonable response to that potential imminent injury. Because of the lack of testimony on how much time elapsed between Ms. Bacus dropping the phone and Mr. Trenkle making contact with Ms. Bacus' forehead (*see* Trial Tr., p.148, Ls.10-18, p.150, L.15 – p.152, L.6, p.207, L.21 – p.210, L.20), the jury could have concluded Mr. Trenkle contacted Ms. Bacus' forehead immediately after she dropped the phone and did not hear her announce she dropped the phone. Thus, the evidence presented supported Mr. Trenkle's requested defense of property jury instruction, and Mr. Trenkle was entitled to such an instruction.

The State attempts to argue its conclusion that Mr. Trenkle was not entitled to a defense of property instruction "is consistent with the Court of Appeals' opinion in *State v. Walsh*, [141 Idaho 870] (Ct. App. 2005)" (Resp. Br., p.7), but the facts in *Walsh*

are readily distinguishable from those in this case. In *Walsh*, the victim hid a box of documents from the defendant, and the defendant contended he pushed the victim to remove her from his path so he could look for the documents. *Walsh*, 141 Idaho at 877. On appeal, the defendant asserted the magistrate erred by refusing his requested defense of property instruction, and the Idaho Court of Appeals held the evidence did not support the legal theory of defense of property. *Id.* at 876-77. The *Walsh* Court observed "no evidence suggests that there was an imminent threat that the victim would destroy the documents, which could justify resistance to prevent such injury." *Id.* at 877.

Conversely, as the State acknowledges (*see* Resp. Br., pp.5-6), in the instant case Ms. Bacus testified that she told Mr. Trenkle she would grab his cell phone and throw it out the door if he did not leave, and she then grabbed the phone, ran to the front door, and tried to throw the phone out the door. (*See* Trial Tr., p.147, L.14 – p.148, L.1.) Thus, unlike the evidence in *Walsh*, the evidence in this case suggested there was an imminent threat that Ms. Bacus would injure the phone, which could justify Mr. Trenkle's resistance to prevent such injury. *Cf. Walsh*, 141 Idaho at 877. *Walsh* does not support the State's argument, because the facts in that case are readily distinguishable from the facts here.

The evidence presented supported Mr. Trenkle's requested I.C.J.I. 1522 defense of property jury instruction. The district court erred when it denied his request for a defense of property instruction. As shown above, the State's arguments to the contrary are unavailing.

C. The State Has Failed To Prove That The District Court's Failure To Give Mr. Trenkle's Requested Defense Of Property Jury Instruction Is Harmless Beyond A Reasonable Doubt

Mr. Trenkle asserts the State has failed to prove that the district court's failure to give his requested instruction is harmless beyond a reasonable doubt. *See State v. Perry*, 150 Idaho 209, 227 (2010).

Mr. Trenkle would first note the State urges the Court to use the wrong harmless error standard in this case. The State contends "[a]n instructional error is harmless where it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (Resp. Br., p.9 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). But the Idaho Supreme Court has explained that "[w]here the jury reached its verdict based upon erroneous instruction an appellate court shall generally vacate and remand the decision of the lower court." *Perry*, 150 Idaho at 228. The *Perry* Court continued: "However, in the limited instance where the jury received proper instruction on all but one element of an offense, and '[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.'" *Id.* (quoting *State v. Lovelace*, 140 Idaho 73, 79 (2004)).

Mr. Trenkle's case does not involve the "limited instance" from *Perry*. In the present case, the jury instructions did not omit an element of an offense, but rather the jury did not receive proper instruction on a defense. (*See, e.g.*, App. Br., pp.10-14.) Thus, the harmless error standard invoked by the State is not applicable here. *See Perry*, 150 Idaho at 228. The State in this case "has the burden of demonstrating to the

appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict." *See id.* at 227-28. Put otherwise, the issue "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The State argues the Court "can easily conclude beyond a reasonable doubt that, had the jury been given the defense of property instruction, it still would have found" Mr. Trenkle guilty because his acts "were not reasonably necessary to prevent the threatened harm to his cellphone." (Resp. Br., p.9.) This argument by the State is unavailing because it uses the wrong harmless error standard and, for the reasons set forth in Part B. above, improperly invites the Court to invade the province of the jury.

The State additionally argues it is clear beyond a reasonable doubt that the jury would have found Mr. Trenkle guilty absent the error because Mr. Trenkle's conduct after the incident "revealed that his violent acts were not to protect his phone, but were the result of rage." (*See* Resp. Br., p.9.) This argument also fails because it uses the wrong harmless error standard.

Further, the defense of property jury instruction provides, as the State recognizes (*see* Resp. Br., p.4), that "[r]easonableness is to be judged from the viewpoint of a reasonable person placed in the same position and seeing and knowing what the defendant then saw and knew." I.C.J.I. 1522; *cf. State v. Mason*, 111 Idaho 660, 670 (Ct. App. 1986) ("We conclude that any threat to Mason had subsided when Stapleton left his presence. Thus, Mason was not 'about to be injured' and lawful resistance was unnecessary."). The jury therefore could have found that any battery committed by

Mr. Trenkle was, at the time, "reasonably necessary to prevent the threatened injury" based on "the viewpoint of a reasonable person placed in the same position and seeing and knowing what [Mr. Trenkle] then saw and knew," irrespective of Mr. Trenkle's future conduct.[1] *See* I.C.J.I. 1522.

The State has failed to prove that the district court's failure to give his requested instruction is harmless beyond a reasonable doubt. *See Perry*, 150 Idaho at 227. Thus, Mr. Trenkle's conviction should be vacated and the case should be remanded for a new trial. *See State v. Adamcik*, 152 Idaho 445, 472 (2012).

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Trenkle respectfully requests this Court vacate his conviction and remand his case to the district court for a new trial.

DATED this 24th day of May, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

[1] For example, the court minutes for Day 3 of Mr. Trenkle's second trial state the jury was given the full I.C.J.I. 1522 defense of property jury instruction in response to a jury question. (R., p.199.) After the jury received the defense of property instruction, it was unable to reach a verdict. (R., p.199.)

Mr. Trenkle asserts the result of the second trial indicates at least one juror in that trial was concerned whether Mr. Trenkle's actions were justifiable as defense of property. *Cf. State v. Thomas*, 157 Idaho 916, ___, 342 P.3d 628, 631-32 (2015) (holding the State failed to demonstrate beyond a reasonable doubt that the constitutional error in excluding proffered evidence that would have corroborated the defendant's testimony did not affect the jury's verdict, where a jury question "indicates that at least one juror was concerned whether there was any evidence to corroborate Defendant's testimony.")

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of May, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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