2-29-2012

State v. Curry Appellant's Reply Brief Dckt. 38127

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Respondent,	)	
	)	S.Ct. No. 38127
vs.	)	
	)	
DAVID LOREN CURRY,	)	
	)	
Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE LANSING HAYNES
District Judge

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A. Response to State's Statement of Facts

In its Statement of Facts and Course of Proceedings, the State writes that Mr. Curry made a gesture with his hand and Mr. Escudero saw a "black piece of something" prior to Mr. Escudero grabbing the large metal pipe. Respondent's Brief p. 2, first full paragraph. However, Mr. Escudero's testimony was that he grabbed the pipe and then Mr. Curry made the gesture and Mr. Escudero saw "a black piece of something." Tr. p. 42, ln. 11 - p. 43, ln. 6.

Mr. Escudero testified:

> . . . after the coffee table was kicked over, I was kind of worried that the situation was escalating. I have children there. So I stood up, and I grabbed a pole because I didn't want anything else to happen. And, when I grabbed the pole, Mr. Curry had his hand in this pocket the whole time since I was there. He didn't brandish a weapon to me. He just made a gesture. And I saw a black piece of something, which at the time I thought it was a pistol. Brandished that. Didn't show me the whole weapon or anything if there was even one.
>
> , , ,
>
> Yeah. When he came in he was yelling all kinds of things to us, threw the clothes. And then when I got that pole it was right by my couch. I picked up the pole. He kind of lunged up, just pulled his hand out and said: "Do you want to go?" And that's why I took it as a threat of a pistol is because if you have a hand in your pocket, just from what I've been trained and stuff, I observe people's hands. And there was a gesture of, you know, of what could you have in your pocket that would stop a pole?

Tr. p. 42, ln. 19 - p. 43, ln. 13.

In fact, the prosecutor clarified the order of the events in the following exchange with Mr. Escudero:

> Q: You made a reference to his hand had been in the pocket the whole time of this encounter?

A: Yes. When he walked in. That's one of the things they teach you to do in the military is to watch peoples' hands. Observe them. When he walked in, I could see that his hand was in his pocket. And I didn't see his hand leave his pocket at all the whole time. He threw the bag of clothes with his other hand and then proceeded to yell and kick the table. And then after he had made that gesture, we started to go inside the house, and he had left.

Q: And when he made the gesture and said: "Do you want to go?" was that immediately after you had pulled up the pole?

A: Well, I had just stood up and picked it up, yeah. At that point when the table got kicked at me and my fiancee I wasn't really worried about anything else at that point but us and the children.

Tr. p. 44, ln. 3-19. See also Supp. Tr. p. 6, ln. 19 - p. 7, ln. 25, where, in the State's Opening Statement, it is said the evidence will show that Mr. Escudero grabbed the pipe before Mr. Curry made the hand gesture which led Mr. Escudero to believe that he had a gun and was threatening him. Further see, Supp. Tr. p. 47, ln. 10 - p. 48, ln. 17, p. 50, ln.1-4, p. 53, ln. 15-20, where in Closing Argument the State repeatedly argues the hand gesture was not made until after Mr. Escudero grabbed the pipe.

Contrary to the State's statement of facts and later argument in its brief on appeal, Mr. Escudero grabbed the pole before, not after, Mr. Curry made a hand gesture and Mr. Escudero thought he saw some black piece of something.

The State also asserts in its statement of facts that Mr. Curry's brother heard Mr. Curry say the word "gun" on the telephone on the same evening he went into Mr. Escudero's garage. Respondent's Brief p. 2. However, Mr. Curry went into the garage on February 20, 2010. Tr. p. 36, ln. 20 - p. 37, ln. 4; p. 60, ln. 19-23. Mr. Curry's brother overheard him say the word "gun" on the telephone two days later on February 22, 2010. Tr. p. 135, ln. 20 - p. 137, ln. 6. There was no testimony that anyone heard Mr. Curry using the word "gun" on February 20, 2010.

B. The Evidence Was Not Sufficient to Prove the Elements of the Offenses Beyond a Reasonable Doubt

To sustain the burglary charge, the State was required to prove that Mr. Curry entered the garage with the intent to commit witness intimidation and/or aggravated assault. I.C. § 18-1401, R 111.

In its brief on appeal, the State argues that it presented substantial evidence upon which the jury could conclude that Mr. Curry "entered the garage on the date in question with the intent to find Ms. Ferra and confront her about informing the police of her suspicions that he had taken and wrecked her car." Respondent's Brief p. 9.

However, it should be first noted that Mr. Curry entered the garage through the open large door. See Tr. p. 41, ln. 22 - p. 42, ln. 6. (The outside entrance to the garage is only through the large door. The other door in the garage leads into the house. Mr. Curry entered directly into the garage, not through the house. Tr. p. 42, ln. 1-17.)

Ms. Ferra was obviously not in the garage. This would have been readily apparent to anyone walking up the driveway and into the garage. Therefore, the State did not present substantial evidence that Mr. Curry entered the garage with the intent to even see Ms. Ferra. Rather, he entered the garage knowing she was not there.

It should also be noted that the State does not argue that it provided substantial proof of an intent to commit witness intimidation. Rather, it argues that it provided substantial evidence that Mr. Curry had the "intent to find Ms. Ferra and confront her about informing the police of her suspicions that he had taken and wrecked the car." Respondent's Brief p. 9.

Mr. Curry disputes that the State presented any evidence of an intent on his part to find

and confront Ms. Ferra. However, even if that was his intent - to find and confront her - confrontation is not witness intimidation.

As defined by I.C. § 18-2604(3), witness intimidation requires a belief by the defendant that the victim may be called as a witness in any criminal proceeding. The State presented absolutely no proof that Mr. Curry believed that Ms. Ferra would ever be a witness in any criminal proceeding regarding the car. In fact, there were no charges ever filed against him with regard to the car.

Further, I.C. § 18-2604(3) defines the proscribed behavior as wilfully intimidates, influences, impedes, deters, threatens, harasses, obstructs, or prevents a witness, potential witness or person believed to be a potential witness from testifying freely, fully and truthfully in any criminal proceeding by means of direct or indirect force or by any threats to person or property. Confrontation is neither force nor threat. Mr. Curry maintains that the State did not even present evidence of an intent to confront Ms. Ferra. But, even if the evidence could possibly be construed to indicate an intent to confront Ms. Ferra, there was no evidence whatsoever of any intent to use direct or indirect force or threats to person or property against Ms. Ferra to stop her from testifying in a criminal proceeding that did not even exist.

The State did not present substantial proof that Mr. Curry entered the garage with the intent to commit witness intimidation against Ms. Ferra.

Likewise, the State did not present substantial proof that Mr. Curry entered the garage with the intent to commit aggravated assault. The State emphasizes that its substantial proof is the evidence it presented that Mr. Escudero "believed" that Mr. Curry had a gun and that combined with the earlier phone call, the fact that Mr. Curry's brother heard him say the word

"gun" on the night of the garage entry and the subsequent discovery of a gun in the house, that this amounted to substantial proof of entry into the garage with intent to commit aggravated assault. Respondent's Brief at pages 9-11.

However, it should first be noted that Mr. Curry's brother did not hear him use the word "gun" until two days later. It is impossible to conclude that the single utterance of the word "gun" two days after the event, goes to prove possession of a gun at the garage. And, the discovery of the gun some three days after the garage incident in the place where Mr. Curry's mother had hidden it years ago in a seemingly undisturbed state is also impossible to tie to possession of a gun at the garage. If anything, it goes to prove the opposite.

And, the earlier phone call received by Mr. Escudero does not go to show the presence of a gun. If the call referenced a gun, then the case would be different. But, the call included no statement about a gun. Even if the call is taken in the worst possible light for Mr. Curry as a threat of some sort, it is not a threat of an impending assault with a gun.

While the State says its proof was something more than a bulge in the pocket with a threatening gesture, in fact, that is all the proof of the presence of a gun that the State had.

Moreover, of course, burglary requires an intent to commit a crime at the time of the entry. Even if the State did not have proof problems with the very existence of a gun, it still had insurmountable proof problems in that it had no proof that even if armed, Mr. Curry's intent was to commit an aggravated assault when he entered the garage. Consider the sequence of events in the garage. Mr. Curry yelled and screamed and kicked a table. Mr. Escudero grabbed a large metal pipe. It was only then, when faced with a metal pipe, that Mr. Escudero believes that Mr. Curry made a gesture and he saw a black piece of something. Had Mr. Curry's intent been

aggravated assault, any gesture with any gun would have come before, not after, he was threatened with a pipe. And, of course, Mr. Curry would have actually displayed a weapon rather than move his hand from his pocket and then turn around and walk away.

There was not proof beyond a reasonable doubt of the elements of burglary.

Likewise, there was not proof beyond a reasonable doubt of the elements of aggravated assault, specifically that Mr. Curry committed an assault with a deadly weapon.

As the State admits, at best its proof was that Mr. Escudero believed there was a gun based upon a hand gesture and a glimpse of a piece of a black something. Respondent's Brief p. 10. As set out in *Lawless v. Commonwealth,* 323 S.W.3d 676, 679 (Ky. 2010); *Swain v. Commonwealth,* 887 S.W.2d 346 (Ky. 1994); *Williams v. Commonwealth,* 721 S.W.2d 710 (Ky. 1987); and *People v. Banks,* 563 N.W.2d 200, 201 (1997), it is not sufficient to prove just that the alleged victim thought that the defendant was armed. *See also, United States v. Huckins,* 95 F.3d 276, 279-80 (9th Cir. 1990), holding that the statement of a bank teller that she believed Huckins had a gun because he kept his hands in his pockets at all times during a robbery does not prove, even by a preponderance of the evidence, that Huckins was armed. The State was required to prove that Mr. Curry committed an assault with a deadly weapon. The State offered only Mr. Escudero's belief that Mr. Curry was armed - a belief that Mr. Escudero himself undercut by testifying that Mr. Curry could have had anything in his pocket including a water pistol. Tr. p. 51, ln. 21-23. This was not substantial proof of all the elements of aggravated assault. There must be some proof of a gun. And, in this case there simply was not that proof.

Due process requires that no person be convicted except upon proof beyond a reasonable doubt of every element of the offense. United States Const. Amend. 5 and 14, Idaho Const.

Article 1, Sec. 13. *In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970); *Jackson v. Virginia,* 443 U.S. 307, 315-6, 99 S.Ct. 2781, 2787 (1979). In this case, there was not proof beyond a reasonable doubt of either burglary or aggravated assault and therefore those convictions as well as the convictions resting upon their validity must be vacated and judgments of acquittal entered.

C. Refusal of a Self-Defense Instruction Was Reversible Error

Mr. Curry set out in the Opening Brief that the refusal to give a self-defense instruction was reversible error. In particular, there was support in the evidence for a self-defense instruction because the evidence was that Mr. Curry only made the gesture that Mr. Escudero assumed was the display of a weapon after Mr. Escudero had grabbed a metal pipe. Mr. Curry's gesture was in response to the threat posed by that pipe. Opening Brief at pages 17-21.

The State has first replied by arguing, contrary to its position at trial and contrary to the evidence, that Mr. Curry made the hand gesture that would constitute the aggravated assault prior to Mr. Escudero grabbing the pipe. The State writes, "A review of the record shows that the district court properly rejected the requested self-defense instruction because there was no evidence whatsoever that there was any threat from the victim at the time of the assault." Respondent's Brief at page 13. However, the evidence is that the hand gesture, which was taken as a threat of harm by a gun, was made only after Mr. Escudero grabbed the pipe.

The State further argues that the District Court was correct in imposing a requirement that Mr. Curry show a subjective fear of Mr. Escudero through statements to the police or testimony that he was afraid prior to this incident to be entitled to a self-defense instruction. However, the State cites no authority for this position and instead inserts a quote from the trial judge wherein

he stated that the facts would not allow the jury to infer that Mr. Curry was in fear. Respondent's Brief at page 14. Of course, the judge's opinion by itself is not authority.

Moreover, the State's quote includes only a part of the judge's comments. The judge's conclusion was:

> So this court finds that there is no evidence before this jury of subjective fear, and therefore, the jury cannot determine whether there was any reasonably objective fear and will not be given any self-defense instructions.

Supp. Tr. p. 22, ln. 12-16.

The Court had earlier noted that subjective fear could have been shown if Mr. Curry had run away upon seeing Mr. Escudero grab the pipe, but the fact that he did not run away but rather that he made the hand gesture showed he was not afraid. Supp. Tr. p. 21, ln. 22 - p. 22, ln. 11.[1]

The State is incorrect in two ways. First, it is incorrect in its assertions that Mr. Escudero grabbed the pipe after the hand gesture and that there was no threat to Mr. Curry at the time the hand gesture was made. Second, it is incorrect in arguing that a demonstration of a subjective fear (for example, by running away) is required before a self-defense instruction may be given.

Indeed, if the State's argument is correct - that one must demonstrate a subjective fear prior to being entitled to a self-defense instruction - the only way to get a self-defense instruction would be to either waive the state and federal constitutional rights to remain silent and testify at trial or to run away from the aggression of the "victim," which, of course, would completely eliminate the right to self-defense as the only way to claim the right would be to abandon the

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[1] The Court was wrong that Mr. Curry needed to demonstrate a subjective fear to obtain a self-defense instruction, and the Court's evaluation of the facts is also wrong - while Mr. Curry did not "run" away, after Mr. Escudero grabbed the pipe, Mr. Curry did walk away. If leaving is a sign of subjective fear, then Mr. Curry displayed subjective fear.

right. It would also make ICJI 1519 regarding no duty to retreat an absurdity. That instruction states that "one may stand one's ground and defend" and that "a person may pursue the attacker" until he has been secured from danger. And, lastly, the State's position conflicts with Idaho Constitution, Article 1, Section 1, which makes defense of life and protection of property inalienable rights.

As set out in Mr. Curry's Opening Brief, the District Court erred in failing to give a self-defense instruction.

D. A New Trial Should Have Been Granted

Mr. Curry set out in his Opening Brief that the District Court erred in denying the new trial motion insofar as the Court abused its discretion in not understanding the scope of its discretion to determine whether the presumption that the jury could follow its limiting instruction was overcome. Appellant's Opening Brief at page 21-24.

The State has responded by first arguing this theory was not presented to the trial court in support of the motion for a new trial. Respondent's Brief at pages 15-16. However, this is precisely the theory that trial counsel argued to the District Court. Tr. p. 243, ln. 24 - p. 245, ln. 7. And this is precisely the theory the District Court ruled upon. Tr. p. 252, ln.12 - p. 256, ln. 14. And, it was in ruling upon this theory that the Court stated, "And I have to make the presumption the appellate courts have told we trial judges to make sure that jurors follow the limiting instructions of the Court." Tr. p. 256, ln. 11-13.

It was in making this presumption without recognizing that the presumption can be overcome that the District Court abused its discretion. *State v. White,* 97 Idaho 708, 551 P.2d 1344 (1976); *State v. Wrenn,* 99 Idaho 506, 584 P.2d 1232 (1978); *State v. Simonsen,* 112 Idaho

451, 732 P.2d 689 (1987).

The State's only response to this is a single statement that there is nothing in the record to indicate the jury could not follow the Court's instructions. Respondent's Brief at page 16. But, there is ample record that the jury could not follow the Court's instructions. There was so much inadmissible evidence (evidence that Ms. Ferra told the police she was afraid of Mr. Curry) and evidence that was subject to limitation (evidence that Ms. Ferra told the police she had previously seen Mr. Curry with a gun) that it overwhelmed the rest of the trial and resulted in Mr. Curry being convicted on proof that did not meet the constitutional standard of proof beyond a reasonable doubt.

As set out in the Opening Brief and above, the District Court erred in not granting the new trial motion.

III. CONCLUSION

Mr. Curry asks this Court to reverse his convictions and enter judgments of acquittal because the evidence was not constitutionally sufficient. In the first alternative, he asks that the convictions be reversed and the case remanded for a new trial because the denial of a self-defense instruction was erroneous. In the second alternative, he asks that the order denying a new trial be reversed.

Respectfully submitted this 29th day of February, 2012.

Deborah Whipple
Attorney for David Curry

CERTIFICATE OF SERVICE

I CERTIFY that on February 29, 2012, I caused two true and correct copies of the foregoing document to be:

✓ mailed

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