

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OMARI E. CLARK,)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	No. 651,2011
)	
STATE OF DELAWARE,)	COURT BELOW: In the
)	Superior Court of the State
Plaintiff-Below,)	of Delaware, In and For New
Appellee.)	Castle County, I.D
)	1006026385

APPELLANT'S REPLY BRIEF

JOSEPH A. HURLEY, ESQ.
1215 King Street
Wilmington, DE 19801
(302) 658-8980
Bar I.D. 326

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SUMMARY OF ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS REFUSAL TO PERMIT AN INSTRUCTION ON SELF-DEFENSE (11 DEL.C. §464) AS A POTENTIAL DEFENSE FOR JURY CONSIDERATION IN THE CONTEXT OF MURDER IN THE SECOND DEGREE AND/OR MANSLAUGHTER.

II. THE TRIAL COURT DIRECTLY COMMENTED ON THE EVIDENCE, HOWEVER INADVERTENTLY, THEREBY COMMITTING LEGAL ERROR.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS REFUSAL TO PERMIT AN INSTRUCTION ON SELF-DEFENSE (11 DEL.C. §464) AS A POTENTIAL DEFENSE FOR JURY CONSIDERATION IN THE CONTEXT OF MURDER IN THE SECOND DEGREE AND/OR MANSLAUGHTER.

A. Merits of the Argument.

The State undertakes to defend the action of the trial judge in refusing the defendant's request for a self-defense instruction vis-à-vis Manslaughter.

The State "kicks off" on "thin ice" in seeking to frame the question presented as:

"Whether one who twice leaves a place of safety armed with a deadly weapon for the purpose of confronting another person at that person's home may ever be entitled to a justification jury instruction?".

Au contraire that is certainly not the question presented. The question that is presented is one that needs to be decided as a matter of law. The question that the State seeks to focus the Court's attention on is whether or not there is a factual basis for giving an instruction. No one has argued, at any stage of the proceedings, that the defendant is deprived of self-defense, at a later stage, because he chose to return to the scene of an earlier confrontation. If, as a matter of fact, the victim had implemented deadly force against the defendant, and the defendant successfully retreated, then it is true he could not avail himself of the self-defense justification. That is not what happened. What happened, according to the defendant's version, is that it was only when he returned, and when Brower came at him while brandishing a bat that the defendant feared for his own

life. The fact that he earlier had been at the scene is irrelevant in determining whether or not he could utilize justification as a complete defense.

The "ice" gets even "thinner" when the State truncates the language of 11 Del.C. §470 and pronounces an errant legal proposition that self-defense can never be offered as justification for a criminal offense when an element of the underlying criminal offense is recklessness or negligence. That is not what the statute says. In fact, a cursory review of the language of 470 clearly identifies the disqualifiers contained in the statutory mandate. They are:

1. "... [T]he defendant is reckless or negligent in having such belief (referring to a belief that he is being subjected to deadly force by another), or
2. In acquiring or failing to acquire any knowledge or belief, and
3. Which is material to the justifiability of the use of force. 11 Del.C. §470(a)."

In order for the State's position to be correct, the Trial Court had to find that as a matter of law Clark was reckless or negligent in believing that Brower posed a deadly threat to Clark. Otherwise, the disqualification language of 470 has no applicability.

Clark believed that Brower had a bat in his hand. (A-35) Brower held it in a threatening position by holding it "over top of his head". (A-35) As Brower was charging down the porch

steps, he "swung the bat in a downward motion towards [Clark] and just started whaling the bat at me". (A-35) So great was the force that Brower was utilizing that the weapon was fractured as it slammed into a nearby object. (A-35) At the same time, Brower was yelling. (A-35) After Clark successfully "ducked down"¹ so as to avoid the impact, he noted that the blow would have struck him in the area of the head.² (A-35)

Indeed, several of Brower's blows impacted on Clark's body. (A-45)³

It was for the jury to decide whether or not the defendant was reckless or negligent in forming the belief that he formed, but, because of the action of the trial judge, the defendant never got that chance nor did the jury have the opportunity to do what juries are supposed to do - "decide the facts and apply the law".

Finally, the State makes a somewhat grandiose claim that there was no evidentiary basis for the jury to conclude that Clark intended to cause serious physical injury rather than intending to cause death. (St.'s.Ans.Br. at 8)

¹ Indeed, one of the Brower witnesses confirmed the evasive Clark behavior; viz., "At this time, I seen (sic) Omari duck as Mr. Brower went forward, I seen Omari duck...". (A-46)

² Of course, it is to be realized that Clark had already taken a "shot to the head" with a chair maneuvered by another apparent occupant of the Brower residence, thereby signaling, quite clearly, that they "meant business". (A-34)

³ One will never know the extent of the injuries that Clark might have sustained was it not for the fortuity of Brower slipping and losing his balance. (A-46)

In fact, that facile assertion is easily dismissed by reference to a question and answer:

"Q: Did you intend for the man to die?

A: No, sir, not at all." (A-39)

That "trigger event" put into issue what his intention was. It is clear that he intended the mechanical act of extending his knife-laden hand into the midsection of another person. That, however, does not necessarily shed light on his ultimate goal. Furthermore, he said nothing before or after the event which would, circumstantially, provide disclosure. Although the State contents itself with ignoring the testimony, and relies entirely on circumstantial evidence as to the location of what became the ultimate death blow, the Court's review must go beyond that.

One of the factual predicates supporting Manslaughter is found in the language:

"With intent to cause serious physical injury to another person, the person causes the death of such person, employing means which to a reasonable person in the defendant's situation knowing the facts known to the defendant seem likely to cause death."

In addition to the direct evidence noted above, the circumstantial evidence also could have been, and should have been, considered by the jury in determining whether or not there was an intention to inflict serious physical injury. The location and extent of a wound is relevant in a murder case.

Young v. State, 407 A.2d 517 (Del.1971). The entrance of a wound is probative of intent. Diaz v. State, 508 A.2d 861 (1980). The nature of a victim's wounds can shed light on the perpetrator's state of mind. Casalvera v. State, 410 A.2d 1369 (Del.1980).

The entry wound was located on the right side of the abdomen. (C-1) The penetration of the knife was almost six inches. (C-1) The wound was approximately one inch to the right of the central midline of the body and approximately 25 inches from the top of the head.

Using the familiar "totality of circumstances" protocol, the depth of the knife wound, the location of the knife wound in an area where vital organs are known to be located, the single thrust, the absence of any verbal material that would evidence intention combined with the direct evidence that Clark offered that he did not intend to kill clearly demonstrates there was a factual basis to permit the jury to determine whether or not Clark intended to cause serious physical injury while employing means that a reasonable person would recognize as being likely to cause death. That is the test that had to be met, and that is the test that was met.

The defendant was entitled to a lesser included offense for either of two reasons or both. Firstly, unless specifically prohibited, 11 Del.C. §461 entitles the defendant to the instruction. There was no basis to conclude, as a matter of law, that the defendant was reckless or negligent in believing his life was in danger or that he was at risk of sustaining serious

physical injury on account of the actions of Brower on account of the actions of Brower. Likewise, there was a solid factual basis to conclude that Clark intended to stab Brower yet did not intend to kill him, but simply wound him under circumstances which made it likely that Brower could die.

II. THE TRIAL COURT DIRECTLY COMMENTED ON THE EVIDENCE, HOWEVER INADVERTENTLY, THEREBY COMMITTING LEGAL ERROR.

A. Merits of the Argument.

The State throws up the penultimate "Hail Mary pass" in its, factually vacant, interpretation of the judge's charge. Magically, the Prosecution divines that the Court Reporter "dropped the ball". One can only marvel at the avatar prosecutor who can assuredly certify to the Court that the Court Reporter recorded the judge's remarks incorrectly as opposed to the judge misspeaking and in doing so, misinforming the jury.⁴

Notwithstanding the authoritative oracle presented by the State's explanation, the defendant would ask that the Court indulge the alternative explanation; i.e. judicially misspoken instruction.

Could there be any clearer circumstance where there is a weakening of confidence than a circumstance where when the issue is whether or not the defendant held a reckless state of mind, the Trial Court says, in no uncertain terms, "The defendant acted recklessly and it's not justified in terms of Murder Second Degree and Manslaughter."

WOW!

Jurors are presumed to follow the instructions of the Court. Guy v. State, 913 A.2d 558, 565-566 (Del.2006); Michaels v. State, 970 A.2d 223 (Del.2009).

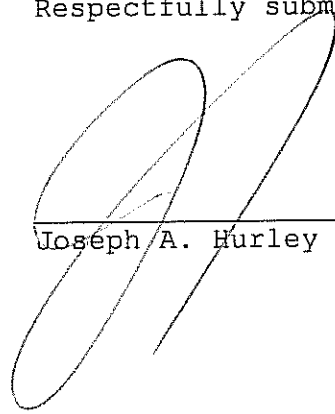
⁴ We, Delawareans, are in a unique position to recognize, but not necessarily appreciate, the dangers of what is said rather than what was intended to be said as we observe the national political stage.

It is not necessary that the Court find, as a matter of presumption, that the jurors followed the Court's directive indicating the defendant "ACTED RECKLESSLY". (Emphasis supplied) It is only necessary that the Court recognize the obvious; i.e. that direction certainly "casts a cloud" on the integrity of the process.

CONCLUSION

The appellant maintains that reversal is mandated.

Respectfully submitted,



Joseph A. Hurley