STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 2

Case No. 2015AP000922

State of WISCONSIN,
Plaintiff-Respondent,
v.

TERRY SHANNON,
Defendant-Appellant.

No. 2006-CF 594.

On Appeal from the Judgment of Conviction, the Hon. Faye M. Flancher, Presiding, and the Decision and Order Denying Shannon's Motion for Post Conviction Relief pursuant to 974.06, the Hon. Faye M. Flancher Presiding, Entered in the Racine County Circuit Court.

Reply Brief of Defendant-Appellant

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ARGUMENT

A. The Respondent has completely side-stepped Shannon's argument.

Whereas, the Respondent attempts to paint the controversy as being whether or not it was reasonable trial strategy to not seek a lesser included offense (P7); that has virtually nothing to do with Shannon's actual argument, which is plainly that he was convicted of First Degree Intentional Homicide, where a plethora of self-defense was put in evidence, but the jury was never asked if the State had satisfied the Third Element of the Crime: "The defendant did not **actually** believe that the force used was necessary to prevent imminent death or great bodily harm to himself" (Instruction 1014) In fact, Shannon would be perfectly content with waiving all lesser included offenses again, providing the jury was properly instructed and charged with deciding all three elements on First Degree Intentional Homicide, where self defense is in issue. That is the true controversy, and apparently the State still has no answer, as it has effectively waived argument to same by ignoring it.

There is nothing in the statutes, jury instructions, nor any case law anywhere to support the State's contention that the State's burden of proof for first degree turns on whether or not instructions on second degree are requested or granted, as opposed to whether or not "self defense is put in issue by the trial evidence", which all sources seem to confirm.

The case law is clear:

Once self-defense is raised, "the only issue at trial [is] the defendant's state of mind." ***State v. Daniels***, 160 Wis.2d 85, 92 (1991). In a prosecution for 940.01, and despite its label as an affirmative defense, once self defense is raised by the evidence, "the lack of the defense becomes an element of the crime." ***State v. Schmidt***, 2012 WI App 113, ¶ 8, 344 Wis. 2d 336, 343, 824 N.W.2d 839, 843 (citing ***State v.Head***, 2002 WI 99, ¶¶ 106–07, 255 Wis.2d 194, 648 N.W.2d 413;) The trial evidence, "viewed most

favorably to the Defendant", most certainly provided reasonable doubt as to the nonexistence of this mitigating circumstance, but no jury was ever asked this pivotal question. In order to secure a lawful conviction for first degree intentional homicide, the burden was on the State to prove the Shannons had no **actual** belief in a need for self defense. This, despite the fact that no party disputes there were bullets flying in both directions. The final arbiter of this fact which must be proven was required to be the Jury in a trial for First Degree Intentional Homicide.

The appropriate jury instruction,1014, is equally clear:

"When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide."

B. Shannon did not waive his right to put the State to its full burden of proof.

Even if this court were to be persuaded that the State's statutory burden of proof for first degree intentional homicide is somehow lowered by a defendant's choice not to seek lesser included offenses, it should by now be abundantly clear that Shannon did not knowingly and intelligently waive his right to put the State to its full burden of proof. It is inconceivable that any rational defendant would agree to waive the lesser included offense of second degree, if doing so meant he would in effect lower the State's burden to that of second degree while preserving the harsher punishment range for first degree. There is no conceivable circumstance where that could be described as a knowing, intelligent choice.

C. Actual and Reasonable beliefs are not inconsistent.

Shannon would also note that the Respondent's attempt to paint actual and reasonable beliefs in a need for self defense as inconsistent is absurd: "To present imperfect self defense in the alternative would have required the

defense to take the inconsistent position that Tony's beliefs were unreasonable." (P13 Brief of the Respondent) Taking its cue from the trial court's error, the Respondent is suggesting that in order to benefit from a second degree instruction, a Defendant would have to embrace guilt of second degree intentional homicide. This is untrue, of course, and there is nothing incompatible about Shannon believing his actual beliefs in a need for self-defense constituted reasonable beliefs in a need for self-defense. Indeed, believing any other way would be inconsistent.

D. Judicial Estoppel/Escalona- Naranjo

Same goes for judicial estoppel. Whereas, the Respondent suggests "Terry should be judicially estopped from pursuing ineffective assistance of trial counsel because he is now taking a position that is completely inconsistent with his position at trial." (P6 Brief of the Respondent.) Actual and reasonable beliefs are in no way mutually exclusive, and the respondent's repeated insistence that Shannon's argument suggests "Attorney Birdsall was deficient for failing to pursue imperfect self defense and possible conviction of second-degree intentional homicide." (P6 Brief of the Respondent.) remain absurd. Shannon certainly didn't expect Attorney Birdsall to "pursue imperfect self defense"; Shannon objects to Attorney Birdsall allowing him to be convicted of First Degree Intentional homicide, with self defense, without the jury ever determining if the State had disproven his actual beliefs beyond a reasonable doubt.

Once this point is decided, Shannon's original brief demonstrates this same erroneous conclusion of law was made by trial counsel, appellate counsel, and ultimately the trial court.

Finally, the first 7 pages of the Respondent's argument, essentially that all arguments are barred via *Escalona-Naranjo*, mandatorily fail as soon as one concludes that:

1. Shannon was entitled to have a jury decide if the State had disproven his actual beliefs in a need for self defense.

2. Trial counsel Birdsall was ineffective in this case for failing to safeguard the jury instructions accordingly, due to an erroneous interpretation of law.

3. Appellate counsel was ineffective in this case for the exact same reason.

4. This issue is a great deal stronger than the issues raised on direct appeal.

5. Ultimately, the trial court should have recognized the error, and corrected same before, during, or after the trial.

6. This error is of such magnitude, that the interests of justice cannot be served by allowing a man to be imprisoned for the rest of his life, based on a decision where the third required element of the crime was never presented to the jury.

CONCLUSION

For all of the above reasons, Shannon prays this court will set aside his unlawful conviction as a matter of well settled law.

Dated this 27th day of May, 2016 in Milwaukee, Wisconsin.

Thomas W. Kurzynski
State Bar #1017095

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State v. Terry Shannon
Appeal Number 2015AP00922
Court of Appeals District 2

I, Thomas W. Kurzynski, certify that this brief is identical to the paper version submitted on May 27, 2016.

Date May 27, 2016

Signature _____
"s/" Thomas W. Kurzynski
Attorney for the Defendant-Appellant

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