

IN THE SUPREME COURT OF IOWA

STATE OF IOWA

Plaintiff-Appellee,

v.

DEONTE WB ELLISON,

Defendant-Appellant

Supreme Court No. 21-0657

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HONORABLE MICHAEL J. SHUBATT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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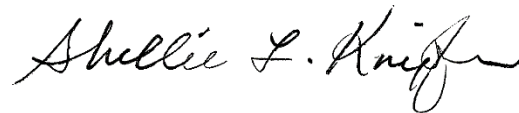
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CERTIFICATE OF SERVICE

On the 1st day of April, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Deonte Ellison, No. 6371636, Ft. Dodge Correctional Facility, 1550 L Street, Ft. Dodge, IA 50501-5767.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err by instructing the jury on “stand your ground” law in instructions 29 and 29A because Ellison was not asserting a “stand your ground” defense? Instruction 29 barring a justification defense if defendant was engaged in “illegal activity” should not have been included and, in addition, was vague.

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B. Error was not harmless beyond a reasonable doubt.

State v. Simmons, 714 N.W.2d 264, 275 (Iowa 2006)

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court so this court can clarify the justification defense as it relates to the 2017 “stand your ground” amendments. Ellison did not raise a stand your ground defense and objected to those instructions that were added in 2017 such as requiring defendant not to conceal a weapon used in the assault.

This court should also retain this case because it involves a matter of first impression. Ellison submits that Iowa Code section 704.2B(2) providing that a defendant has a duty not to destroy, alter, concealing, or disguise evidence violates an accused’s right against self-incrimination under the federal and state constitutions. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Deonte WB Ellison, from the judgment and sentence following appellant’s conviction for the offense

voluntary manslaughter in violation of Iowa Code section 707.4 (2020) (Count 1) and for his plea of guilty to the offense felon in possession of a firearm in violation of section 724.26(1) (2020) (Count 2). The Honorable Michael J. Shubatt presided in Dubuque County District Court.

Course of Proceedings in the District Court: On July 27, 2020, Ellison was charged by trial information with the offenses murder in the first degree in violation of Iowa Code section 707.2(1)(a) (2020) (Count 1) and felon in possession of a firearm in violation of 724.26(1) (Count 2). (Trial Information, 7/27/20)(App. pp. 4-5). Ellison filed a notice of self-defense. (Notice of Defense, 8/27/20)(App. p. 6).

On March 18, 2021, Ellison filed a written plea of guilty to the offense felon in possession of a firearm. (Written Guilty Plea & Waiver of Rights, 3/18/21)(App. pp. 9-16). The district court accepted the guilty plea. (Order following Guilty Plea, 3/24/21)(App. pp. 20-21). The district court ruled that the State was prohibited from introducing evidence or argument

that Ellison possessed a gun legally or illegally, had a prior felony conviction, and pled guilty to possession of a firearm as a felon. (Supplemental Motion in Limine, 3/16/21; Ruling on Motions in Limine, 3/22/21)(App. pp. 7-8, 17-19).

A jury trial commenced on March 23, 2021. The jury found Ellison guilty of the lesser included offense voluntary manslaughter. (Entry of Jury Verdict, ¶ 1, 4/29/21)(App. p. 27).

No posttrial motions were filed.

On May 3, 2021, Ellison appeared in open court, with counsel, and was adjudged guilty of voluntary manslaughter in violation of Iowa Code section 707.4 (Count 1) and felon in possession of a firearm in violation of section 724.26(1) (Count 2). (Judgment and Sentence, ¶ 1, 5/3/21)(App. p. 29). For the offense voluntary manslaughter, Ellison was sentenced to an indeterminate term of ten years and fined \$1,000 plus the surcharge. (Id. ¶2)(App. pp. 29-30). For the offense felon in possession of a firearm, Ellison was sentenced to an

indeterminate term of five years and fined \$750 with the surcharge. (Id. ¶ 2)(App. pp. 29-30). The district court ordered the sentences be served consecutively. (Id. ¶ 4)(App. p. 30). The district found no mandatory minimum sentence was applicable. (Id. ¶ 5)(App. p. 30).

Notice of appeal was timely filed on May 7, 2021. (Notice, 5/7/21)(App. p. 34).

Facts: On July 2, 2020, Curtis Smothers, the ex-boyfriend of Vanessa Ellison [hereinafter “Vanessa”], suddenly appeared as Vanessa and her family were getting out of their car. (Vol.5 p.130 L.2-5; Def. Ex.1 (video 5:57:18)). Vanessa and her husband, Ellison, were visiting his sister, Daisy Ellison [hereinafter “Daisy”], at her boyfriend’s, Cordaro Moon, apartment. (Vol.5 p.95 L.7-8, p.104 L.17-23, p.130 L.2-9). Vanessa had not seen or heard from Smothers for a year. (Vol.5 p.123 L.16-20, p.144 L.14-17). And there was a no-contact order against Smothers to have no contact with Vanessa’s family. (Vol.5 p.179 L.24-p.181 L.6). Smothers

and Vanessa share a daughter, Ceriaha. (Vol.5 p.105 L.1-6).

A dispute ensued between Ellison and Smothers which became physical with some shoving and some punches thrown. (Vol.2 p.96 L.5-9, p.97 L.17-21, p.197 L.3-17, p.137 L.106; Def. Ex.1 (video 5:57:36-:58:05)). As Ellison backed away from the fight, Smothers continued to come after him. (Def. Ex.1 (video 5:58:09)). Ellison responded by fatally shooting Smothers. (Vol.2 p.129 L.1-22, p.137 L.20-22; Vol.5 p.147 L.2-18; Def. Ex.1 (video 5:58:13)).

Background.

A. Rogers' and Vurciaga's testimony.

Wendell Rogers lives at 1460 Melrose Terrance, Dubuque with Latrice Davis. (Vol.2 p.80 L.18-p.81 L.6). Smothers and his girlfriend TJ lived next door to Rogers. (Vol.2 p.82 L.2-11). Smothers was not working at the time. (Vol.2 p.82 L.12-14).

On July 2, 2020, Smothers appeared at Roger's door saying he thought he was having heat stroke from being

outside working on his car. (Vol.2 p.83 L.8-p.85 L.2). Rogers had him come inside and tried to cool him down. (Vol.2 p.85 L.3-5). Rogers testified that while Smothers sat on the coach trying to cool off he talked about missing his daughter. (Vol.86 L.1-10). Rogers testified that Smothers said he had not seen his daughter for a year. (Vol.2 p.86 L.17-23).

Seventeen-year-old Jamison Vurciaga, who was staying temporarily at Rogers' residence, showed up around noon. (Vol.2 p.89 L.2-p.90 L.21, p.122 L.14-15, p.133 L.9-10). Vurciaga worked at KFC on Central Avenue. (Vol.2 p.90 L.8-9). He was working at KFC that morning but left early because he felt sick. (Vol.2 p.123 L.17-p.124 L.6). Vurciaga and Smothers smoked marijuana that afternoon. (Vol.2 p.135 L.7-22).

Rogers testified he asked Smothers to go along to buy alcohol at the gas station on 14th and Central. (Vol.2 p.87 L.9-23). Vurciaga claimed he asked to come also to get stomach medication. (Vol.2 p.126 L.7-10).

Rogers drove his white Chevy Equinox. (Vol.2 p.91 L.1-3). Smothers was in the front passenger seat and Vurciaga was in the backseat behind Smothers. (Vol.2 p.91 L.14-22). Rogers said he drove down Montrose Terrace to 14th, and then turned left onto Loras Boulevard. (Vol.2 p.92 L.13-22). Rogers claimed that after he turned onto Loras Boulevard, Smothers said, “I think I see my daughter” and told him to slow down. (Vol.2 p.93 L.7-11). Rogers testified Smothers then said that it was his daughter, so he pulled over and Smothers jumped out of the SUV and greeted his daughter. (Vol.2 p.93 L.11-14). Vurciaga gave similar testimony that Smothers said something like “I think that’s my daughter” and “yeah” and then they pulled over. (Vol.2 p.128 L.4-9). Rogers and Vurciaga stayed in the SUV. (Vol.2 p.95 L.4-6). Vurciaga was not paying much attention as he was playing on his phone. (Vol.2 p.128 L.6-12)

Rogers testified that he was sitting in the SUV looking at his phone when he looked up to see Smothers and Ellison

arguing. (Vol.2 p.96 L.5-9). Rogers claimed he told Vurciaga that they needed to go help Smother because there were 30 people about to “jump” him. (Vol.2 p.97 L.2-16). Rogers testified Smothers and Ellison were swinging at each other and “then all of a sudden I seen the guy pull out -- ... a pistol.” (Vol.2 p.97 L.17-21). He did not see who threw the first punch. (Vol.2 p.98 L.1-4). Rogers claimed after the first shot he turned around and yelled for Smothers to come with them. (Vol.2 p.99 L.8-13). Rogers testified he heard Smothers say, “Are you going to shoot me in front of my daughter?” (Vol.2 p.99 L.15-21). Then he saw Smothers get shot. (Vol.2 p.99 L.13-14). Rogers went to his car and called 9-1-1. (Vol.2 p.100 L.3-5).

Rogers admitted that Smothers walked with a “threatening posture.” (Vol.2 p.117 L.8-13, p.118 L.3-7). He also admitted that Smothers was “kind of aggressive.” (Vol.2 p.117 L.14-21, p.118 L.3-7, p.120 L.5-8, p.120 L.19-22).

Vurciaga said he got out of the car when Rogers parked.

But when he saw Smothers arguing he turned around and started walking back to the car. (Vol.2 129 L.3-17).

Vurciaga could hear Smothers yelling, but had no recall of hearing Ellison yelling. (Vol.2 p.137 L.106). He heard two gunshots, turned, and saw Smothers fall to the ground.

(Vol.2 p.129 L.18-22, p.137 L.20-22). There was a pause between shots. (Vol.2 p.137 L.23-p.138 L.3). Rogers and Vurciaga ran to Smothers' side. (Vol.2 p.132 L.3-5).

Vurciaga did not know any of the people besides Smothers and Rogers. (Vol.2 p.131 L.1-23).

B. Vanessa and the Loras Boulevard Incident.

Vanessa has four children. (Vol.5 p.104 L.24-25). The oldest, Ceriaha, is the daughter of Smothers. (Vol.5 p.105 L.1-6). Ellison is the father of her two youngest children, Deonte, Jr. and Keaontae. (Vol.5 p.105 L.17-19).

Vanessa and Smothers had a tumultuous relationship with a history of abusive behavior by Smothers. When Ceriaha was six months old, they separated because he came

home one day and abused her. (Vol.5 p.107 L.9-11, p.107 L.1-p.108 L.16). Vanessa was holding the baby Ceriaha as they were walking up the steps to their apartment when Smothers tried to pull her down and she pushed him. (Vol.5 p.108 L.1-8). They went into the apartment and the fight escalated until he struck Vanessa. (Vol.5 p.108 L.8-16). Ellison knew about this incident prior to July 2, 2020. (Vol.5 p.108 L.17-23).

After Vanessa and Smothers separated, he never filed for custody or visitation. (Vol.5 p.109 L.2-5).

Vanessa only saw Smothers two times after they separated and both ended in abusive behavior. In May 2019, Vanessa was at Smothers' aunt's house when Smothers walked in. The two began to verbally argue about an incident where Smothers took off to Chicago with Ceriaha without telling anyone and not answering his phone. (Vol.5 p.109 L.19-p.110 L.15). Vanessa never told Ellison about this incident. (Vol.5 p.111 L.8-9).

In an earlier incident in 2017, Vanessa was at Smothers' aunt. She was pregnant with Deonte, Jr. (Vol.5 p.111 L.20-25). She was there to pick up Ceriaha but Smothers blocked the door and pushed her and she pushed back. Then Smothers grabbed her by the neck and threw her to the ground. (Vol.5 p.112 L.7-21). She told Ellison about this incident prior to July 2, 2020. (Vo.5 p.112 L.1-6).

A no-contact order was entered on November 19, 2015 and extended through November 19, 2020. (Vol.5 p.178 L.15-25). It stated Smothers could not have contact with Vanessa or her family. (Vol.5 p.179 L.24-p.181 L.6).

After Ellison and Vanessa were married, Ellison moved to Michigan for work. (Vol.5 p.117 L.15-24). Vanessa later moved to Michigan after her second child's father, Norris Culver, shot at the residence of Ellison's mother when kids were there. (Vol.5 p.118 L.4-25). There were bad feelings between Smothers and Culver. (Vol.5 p.119 L.1-3). Vanessa returned in 2020 to have her fourth baby in Iowa. (Vol.5

p.119 L.13-22).

By May 2020, Vanessa had had no-contact against Smothers and no idea where he was located. (Vol.5 p.119 L.1-p.120 L.8). Ellison was in Kalamazoo with Vanessa's three-year-old son. (Vol.5 p.120 L.13-23).

In July Ellison came back to Iowa to visit. (Vol.5 p.120 L.18-25). On July 2nd Vanessa went to KFC. (Vol.5 p.121 L.19-24). Vanessa was driving a red 2009 Dodge Avenger. (Vol.5 L.10-21). Later when she was running errands she had car trouble. (Vol.5 p.121 L.1-12). She had Ellison, Delano, and Moon come get her and the kids. (Vol.5 p.121 L.8-17). Moon drove a gray Kia. (Vol.5 p.122 L.10-16).

Daisy, three of her kids, Ellison, and Moon arrived at Moon's Loras Boulevard apartment shortly before 6:00 p.m. (Vol.5 p.97 L.2-13, p.130 L.2-5; Def. Ex.1 (video 5:55:18)). Immediately after they pulled up in the Dodge and Kia, an SUV pulled up and over, and Smothers got out of the car. (Id. 5:57). Smothers jumps out of the SUV and heads towards his

daughter Ceriaha who upon seeing him ran down the side walk. (Vol.5 p.143 L.11-14; Def. Ex.1 (video 5:56:15)). After a long hug, Ceriaha took Smothers to meet her baby brother. (Vol.5 p.143 L.25-p.144 L.4, p.145 L.5-19; Def. Ex.2 (video 5:57:03)). Smothers then greeted her brother Deonte, Jr. (Vol.5 p.145 p.20-24; Def. Ex.1 (video 5:57:07)). Smothers said nothing to Vanessa the entire time. (Vol.5 p.1-4).

Even though Smothers was jovial with the kids, he looked at Vanessa with disgust and anger. (Vol.5 p.133 L.20-p.134 L.5). Ellison went to his family's side. (Def. Ex.1 (video 5:57:21)). Vanessa said Ellison said to Smothers, "You funny. What's up? What you been on?" (Vol.5 p.142 L.20-23). Vanessa said that Smothers was "so angry" and he and Ellison started yelling at each other. (Vol.5 p.134 L.6-15). Smothers stepped very close to Ellison, who in turn put his hand on Smothers' chest and pushed him back. (Def. Ex.1 (video 5:57:36)). But Smothers came towards Ellison again. (Def. Ex.1 (video 5:57:39)). Ellison was holding a lemonade he

bought at some kids' lemonade stand. (Vol.5 p.132 L.25-p.133 L.5). He placed the lemonade and cell phone on the car. (Def. Ex.1 (video 5:57:40)). Vanessa grabbed the cell phone. (Vol.5 p.134 L.24-p.135 L.6). Smothers came in close to Ellison and then took a step back. (Def. Ex.1(video 5:57:47)). Ellison hit him with a right punch. (Id.).

Smothers came after Ellison throwing two punches as Ellison was stepping back. (Id. (5:57:50)). Parties intervened and Ellison moved back to the steps of the apartment building. (Id. (5:58:00)). Smothers continued to bounce around like he was going to box Ellison. Ellison then threw another punch. (Id. (5:58:05)). Ellison started to walk away, but Smothers came at him again in an aggressive pose. (Id. (5:58:09)).

Ellison continues to back away and held his arm out to hold Smothers at bay. (Id. (5:58:10)). Ellison backed between the cars and Smothers continued to pursue him. (Id. (5:58:12)).

It is while he was between the cars that Ellison pulled out his gun and fired two shots at Smothers. (Vol.5 p.147 L.2-18;

Def. Ex.1 (video 5:58:13)).

Daisy said that Smothers was aggressive towards Ellison. (Vol.5 p.98 L.2-19). Daisy testified that “Smothers got behind [Ellison] ... talking crazy, and I knew it was going to be something because he was aggressive....” (Vol.5 p.98 L.16-19). She heard Ellison repeatedly telling Smothers to get back. (Vol.5 p.98 L.22-23). Daisy heard Smothers tell Ellison, "Nigga, I kill you," and “then after that everything just got crazy.” (Vol.5 p.98 L.24-p.99 L.1).

Ellison fled the scene and returned to Michigan. (Vol.2 p.154 L.18-21). When Vanessa spoke with law enforcement that night she did not know where he was. (Vol.5 p.148 L.15-23). At the time of the shooting Ellison had long dreads, but at his arrest he had shaved his head. (Vol.3 p.48 L.3-20).

There was no evidence of “bad blood” between Smother and Ellison. (Vol.5 p.151 L.17-19, p.204 L.8-11).

The medical examiner determined Smothers died from a gunshot wound to the chest. (Report of Autopsy, pp.1, 6,

3/24/21)(Conf. App. pp. 4, 9).

C. Miscellaneous.

By the time Smother's girlfriend handed over his cellphone just before trial, there were two calls made in April 2020 and no text messages between December 2019 through March 2020. (Vol.5 p.190 L.24-p.191 L.7, p.195 L.21-p.196 L.3). Whereas in 2019 Smother made over 4,000 of text messages and over 1,500 calls. (Vol.5 p.190 L.11-23). No one investigated this anomaly but just assumed the phone was not functioning properly or Smothers was not using it. (Vol.5 p.191 L.8-19). Nor did anyone check on whether there was a no-contact order. (Vol.5 p.192 L.9-11).

Any further facts relevant to the appeal will be discussed in the argument below.

ARGUMENT

I. The district court erred by instructing the jury on “stand your ground” law in instructions 29 and 29A because Ellison was not asserting a “stand your ground” defense. Instruction 29 barring a justification defense if defendant was engaged in “illegal activity” should not have been included and, in addition, was vague.

Preservation of Error: Error was preserved by Ellison’s objection to the jury instructions and the trial court’s denial of his objections. (Vol.6 p.7 L.1-p.23 L.25).

Scope of Review: This court reviews challenges to jury instructions for errors at law. State v. Bensen, 919 N.W.2d 237, 241 (Iowa 2016). The vagueness claim is reviewed de novo. State v. Newton, 929 N.W.2d 250, 254 (Iowa 2019).

Merits: The issue here is whether the trial court should have used newly added “stand your ground” jury instructions when Ellison was not raising a stand your ground defense. Ellison argued that the 2020 revisions to the justification defense instructions were incorrect given that he was not raising a stand your ground defense. (Vol.6 p.7 L.1-p.8 L.18). Ellison also argued that the instruction regarding “illegal

activity” was unconstitutionally vague. (Vol.6 p.11 L.9-19).

The district court rejected Ellison’s argument used the 2020 revisions. (Vol.6 p.23 L.4-25).

A. Entitled to non-stand your ground instructions.

Ellison’s sole defense was that he acted with justification because Smothers was the aggressor. (Vol.6 p.98 L,10-18).

Smothers knew that Ellison, Vanessa, and Ceriaha were in town because his friend, Rogers, was working at KFC that morning and Vanessa and her children had been to KFC that morning. (Vol.6 p.106 L.7-13). Ellison argued that

Smothers’ contact with Ceriaha and Ellison was not a coincidence, but that Rogers came home early and told

Smothers Vanessa was in town. And that Smothers decided to contact Ceriaha, Vanessa, and Ellison despite there being a no-contact order. (Vol.6 p.16 L.3-25). During this contact

Smothers became aggressive towards Ellison and continued to pursue Ellison despite Ellison’s attempts to back away. (Def.

Ex.1 (video 5:57-58)). Daisy testified Smothers told Ellison,

“Nigga, I kill you.” (Vol.5 p.98 L.24-p.99 L.1).

The 2020 Iowa Criminal Jury Instructions implemented the stand your ground 2017 amendments. Ellison argued that the 2017 amendments have not eliminated the traditional justification defense. See State v. Baltazar, 935 N.W.2d 862 (Iowa 2019)(counsel did not breach a duty by not objecting to the “outdated” jury instructions). The stand your ground amendments are merely an enhanced justification defense for those that assert the stand your ground defense.

Ellison was not asserting a stand your ground defense. Instead, he was simply asserting a justification defense as existed prior to the 2017 amendments to Iowa Chapter 704. The district court found that the 2020 amended jury instructions were appropriate.

Instruction No. 29

If any of the following is true, the defendant’s use of force was not justified:

1. The defendant did not have a reasonable belief that it was necessary to use force to prevent an injury or loss.

2. The defendant used unreasonable force under the circumstances.

3. *The defendant was engaged in illegal activity in the place where he used force, he made no effort to retreat, and retreat was a reasonable alternative to using force.*

If the State has proved any of these beyond a reasonable doubt, the defendant's use of force was not justified.

(Instr. No.29 (justification)(emphasis added))(App. p. 24). The third paragraph supposedly reflects the 2017 amendment to section 704.1.

Ellison argues that because he did not assert a stand your ground defense, the pre-amendment jury instructions should have been used. The instruction barring a justification defense from the pre-stand your ground was:

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force.

If the State has proved any one of the following elements, the defendant was not justified:

1. The defendant started or continued the incident which resulted in death.

2. An alternative course of action was available to the defendant.

3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.

4. The defendant did not have reasonable grounds for the belief.

5. The force used by the defendant was unreasonable.

2018 Iowa Criminal Jury Instr. 400.2 (modified for the present case). The uniform jury instruction for self-defense prior to 2020 did not include that a defendant is barred from self-defense if he was engaged in an “illegal activity”. Under the old jury instructions “illegal activity” was irrelevant unless the accused was provoking another with his or her unlawful acts. That was not the case for Ellison.

Smothers approached Ellison. Witnesses said that Smothers was being aggressive and was “so angry.” (Vol.5 p.134 L.6-15). Smothers’ own friend, Rogers, said Smothers walked with a “threatening posture” and was an “aggressive

person.” (Vol.2 p.117 L.8-21, p.118 L.3-7, p.120 L.5-8, p.120 L.19-22). Vurciaga could hear Smothers yelling, but did not remember Ellison yelling. (Vol.2 p.137 L.106).

Smothers approached Ellison, even though there was a no contact order, and Ellison put his hand on Smothers’ chest to push him back. (Def. Ex.1 (video 5:57:36)). Throughout the encounter Smothers continued to aggressive approach Ellison. Ellison would step back, Smothers would continue to approach, and Ellison would throw a punch. But nothing would deter Smothers. (Def. Ex.1 (video 5:57:47-5:58:09)). Smothers threatened to kill Ellison. (Vol.5 p.98 L.24-p.99 L.1). Ultimately Ellison backed between two cars and Smothers continued to aggressively approach him. And that is where Ellison fired two shots. (Def. Ex.1 (video 5:58:13)). So Ellison was not the provoker. Throughout it was Smothers.

Because Ellison was not asserting a stand your ground defense, the pre-stand your ground instructions should have

been use. Under the pre-stand your ground instruction, Ellison would have been found to be justified. Therefore, Ellison’s conviction should be reversed and remanded for a new trial.

B. “Illegal activity” is unconstitutionally vague.

“The Due Process Clauses of the United States and the Iowa Constitutions prohibit vague statutes” State v. Newton, 929 N.W.2d 250, 255 (Iowa 2019). Ellison did not specify whether he was raising his claim under the federal or state constitutions, so this court may address both. “Where there are parallel provisions in the Federal and State Constitutions and a party does not indicate the specific constitutional basis under which the party is proceeding, we regard both federal and state constitutional claims as preserved.” State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

Due process has three requirements. “First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited.

Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.” State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007). “No law can become a trap for the innocent.” Newton, 929 N.W.2d at 255. “[D]ue process requires a reasonable fit between the purpose of the law and the means used under the law to advance that purpose.” Id. at 256.

“A defendant charged with the violation of a statute has standing to claim the statute is unconstitutionally vague as applied to him or her.” State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) overruled on other grounds by State v. Robinson, 618 N.W.2d 306 (Iowa 2000). With a vague-as-applied challenge, the question is “whether the defendant’s conduct clearly falls within the proscription of the statute under any

construction.” State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006) (quoting State v. Hunter, 550 N.W.2d 460, 465 (Iowa 1996) (citation omitted), overruled on other grounds by State v. Robinson, 618 N.W.2d 306, 312 (Iowa 2000)) (internal quotation marks omitted).

A criminal statute may be facially vague “...because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77–78 (1999) (citations omitted). “In Hunter, we recognized that ‘a facial challenge is permitted if a statute reaches a ‘substantial amount’ of protected conduct’ under the First Amendment.” State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000)(citing State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996). To meet constitutional requirements, the statute must “provide sufficiently specific limits on the enforcement discretion of the police.” City of Chicago v. Morales, 527 U.S.

41 at 64, 119 S. Ct. 1849 at 1863 (1999).

This Court has held that a statute can be impermissibly vague if it fails to provide people of ordinary intelligence a what conduct it prohibits, or if it allows enforcement that is arbitrary and discriminatory. State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006).

The use of “illegal activity” fails both as applied and facial inquiries. However, Ellison appears to focus his argument on the as applied constitutional violation. (Vol.6 p.11 L.9-p.23 L.25). The jury was instructed, in part, that Ellison was not entitled to a justification defense if,

3. The defendant was engaged in illegal activity in the place where he used force, he made no effort to retreat, and retreat was a reasonable alternative to using force.

(Instr. No. 29 (justification))(App. p. 24). This instruction is based upon Iowa Code section 704.1(3) which provides that a “person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this

chapter.” The problem is how the term “illegal activity” is applied.

The justification defense is premised on the fact that the accused has engaged in an activity that would otherwise be criminal. A person that shoots another has engaged in an act of assault. But the legislature has recognized some assaultive behavior is justified. But the legislature does not want to reward illegal assaultive by allowing justification for any assaults that occur because of the illegal behavior. So the legislature intended to prohibit the person claiming the justification defenses when the person was engaging in an illegal activity separate and distinct from the claimed justified act. As the district court noted it was meant for cases such as where someone caught someone else in the act of burglary. (Vol.6 p.17 L.19-p.18 L.13). The burglar could not claim justification for any assaults that took place after being caught.

Section 704.1(3) should be thought of in a similar way as Iowa's felony murder law. In Heemstra this court held that where the felony willful injury is the same act causing death, the felony is merged into the murder and cannot serve as the predicate felony for felony-murder purposes. State v. Heemstra, 721 N.W.2d 549, 557-58 (Iowa 2006)(where the felony. The court recognized to hold otherwise would result in all felony assaults that preceded a murder "would bootstrap the killing into first-degree murder." Id. at 557.

Similarly, to make the "illegal activity" any felony assault type offense that preceded a death in a murder case would result in defendants never being able to claim justification. (Instr. No.29)(App. p. 24). This court should bar all assaults that are part of the act causing death of another from being the "illegal activity" that prohibits the justification defense. So in the present case the district decided to define the illegal activity as

going armed with intent. (Instr. No.29A (defining illegal activity))(App. p. 25). Going armed with a dangerous weapon with intent to use without justification, section 708.8, is not a lesser included offense of murder but it is an act that would proceed a murder. And in this case would have been an act that led up to the death of Smothers under the State's theory. The intent in question was the intent to commit an act of using the weapon.

Instead, the illegal activity must be a wholly separate crime from the murder. Such as would take place with a theft from person or a burglary (theft alternative) where the death was collateral to the primary illegal activity. Here the illegal activity was intertwined with the death of Smothers. But such an interpretation is not laid out such as to be understood by the public or legal authorities.

Illegal activity is also being read too broadly. It was

error to include the “illegal activity” in the jury instruction for prohibiting a justification defense. Section 704.1 states “[a] person who is not engaged in illegal activity has *no duty to retreat* from any place where the person is lawfully present before using force as specified in this chapter.” Iowa Code § 704.1(3) (2020) (2017 Acts, ch. 69, § 37)(emphasis added). So if one is engaged in illegal activity he or she has a duty to retreat. It does not say that a person engaged in illegal activity is prohibited from asserting the justification defense. It is very possible for a person to be in the act of retreating and still have to act in self-defense.

A person could be retreating from a shop lifting incident, the store clerk catches him and unreasonably beats him, and the person throws a single punch causing the death of the store clerk. This potentially would be a justified act given the shop keeper response was unreasonable. But jury instruction number 29 would bar a claim of justification under such circumstances. Another possible example is a person

manufactures controlled substances in his or her home and someone breaks into the home and assaults the person. We generally would not require a person to retreat from the person's own home. But in this example the person would not be able to assert a justification defense.

“Illegal activity” as it is used in section 704.1 fails to be reasonably clear and fails to provide sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. See State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007). Section 704.1(3), which is the basis for jury instruction 29, is unconstitutionally vague and, therefore, jury instruction 29 was in error. Ellison's conviction for voluntary manslaughter should be reversed and the matter remanded.

C. The instructional errors were not harmless.

This court reverses erroneous jury instructions when prejudice results. State v. Buman, 955 N.W.2d 215, 219 (Iowa 2021). Errors in jury instructions are

presumed prejudicial unless the record affirmatively establishes there was no prejudice. Id. (cleaned up).

The error here was not harmless. The case against Ellison was not overwhelming. Reviewing the video of the incident, Smothers was the aggressor in the incident. Ellison kept backing away. First to the steps of the building, then through the cars on the street. Yet, Smother kept pursuing him.

Smothers own friends admitted that he had an aggressive way about him. He had physically abused Vanessa in the past and Ellison knew of at least one incident. This was why there was a no-contact order prohibiting Smothers from making any contact with Vanessa or her family – which would include Ellison and Smother’s daughter.

A reasonable jury could have found under the pre-stand your ground jury instructions that Ellison was entitled to the justification defense. Smothers

aggressively approached Ellison. Ellison may have thrown the first punch, but Smothers continue to aggressively pursue him and threatened to kill him. A jury could have found that Ellison did not believe an alternative course of action was available. Ellison clearly believed he was in imminent danger of death or injury. Ellison had reasonable grounds for the belief given Smothers history of abusive behavior. And, finally, a jury could have found the force used by Ellison was reasonable under the circumstances.

Clearly, the jury had some sympathy for Ellison. They acquitted him of the greater charges and found him only guilty of voluntary manslaughter. Had Ellison been given the pre-stand your ground jury instruction, a reasonable jury could have acquitted Ellison.

II. Instruction 32 prohibiting a defendant from intentionally destroying or concealing evidence should not have been included as it violates the federal and state constitutions right against self-incrimination.

Preservation of Error: Error was preserved by Ellison's objection to the jury instruction and the trial court's denial of his objections. (Vol.6 p.7 L.19-p.8 L.22, p.20 L.18, .23 L.22-p.24 L.16, p.25 L.14-p.26 L.8).

Scope of Review: The court reviews challenges to jury instructions for errors at law. State v. Bensen, 919 N.W.2d 237, 241 (Iowa 241).

Merits: The issue here is whether Iowa Code section 704.2B(2), prohibiting the destruction, alteration, concealment, or disguising of physical evidence in order claim a justification defense violates defendants' right against self-incrimination. Ellison submits section 704.2B should be held unconstitutional on its fact under the federal and state constitutions. Ellison did not specify a specific constitution in his argument. "Where there are parallel provisions in the Federal and State Constitutions and a party does not indicate

the specific constitutional basis under which the party is proceeding, we regard both federal and state constitutional claims as preserved.” State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

A. Analysis.

A defendant is protected from being required to testify against himself or herself by the Fifth Amendment. U.S. Const. amend. V. This amendment is applied to the states via the Fourteenth Amendment. U.S. Const. amend. XIV; State v. Gibbs, 941 N.W.2d 888, 894 (Iowa 2020). “Although the Iowa Constitution does not have a parallel textual provision, this court has held the right to be free from compulsory self-incrimination is protected by the due process clause of the Iowa Constitution.” Gibbs, 941 N.W.2d at 888; see Iowa Const. art. I, § 9.

“[T]he Fifth Amendment can be violated even when the government does not directly coerce testimony from the defendant.” Such as the “use of a penalty that might compel

the defendant into offering testimony against himself or herself.” Gibbs, 941 N.W.2d at 888 (citing Spevack v. Klein, 385 U.S. 511, 514-15 (1967)). The State cannot comment on a defendant’s refusal to testify. Id. (citing Griffin v. California, 380 U.S. 609, 615 (1965)). However, the requirement to stay and identify oneself after an accident was upheld because disclosure of automobile accidents simply does not entail a substantial risk of self-incrimination. Id. (citing California v. Byers, 402 U.S. 424, 425 (1971)(cleaned up)). The courts also look to whether the statute had a noncriminal purpose. See id.

In State v. Gibbs, this court found that Iowa Code section 704.2B(1) requirement that a person who uses deadly force notify law enforcement about the use of deadly force within a reasonable time violated the Fifth Amendment.¹ A jury instruction using 704.2B(1) “puts someone who has used

¹ Gibbs did not address section 704.2B(2). Gibbs, 941 N.W.2d at 897.

deadly force in a dilemma. Either the person gives up his or her right to remain silent, or in later prosecution, the person faces a jury told that he or she violated the law in not doing so.” Id. at 897. This court found that section 704.2B(1) extracted a significant penalty on the part of the defendant to remain silent. Id. Failure to comply resulted in a denial of the justification defense and potential criminal liability. This court also found there was no regulatory purpose justifying section 704.2B(1). Id. at 899. As a result, this court concluded the instruction paraphrasing section 704.2B(1) violated Gibb’s Fifth Amendments rights. Id.

Looking at section 704.2B(2), a similar conclusion must be reached. Section 704.2B(2) provides:

The person using deadly force shall not intentionally destroy, alter, conceal, or disguise physical evidence relating to the person’s use of deadly force, and the person shall not intentionally intimidate witnesses into refusing to cooperate with any investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.

The failure to comply with section 704.2B(2) can be used by

the jury to consider whether Ellison was justified in his use of deadly force. (Instr. No.32 (duty))(App. p. 26). This is a substantial criminal penalty. First, a defendant is left with the quandary of whether to assert the right against self-incrimination but have the jury weigh against him or her the refusal to reveal incriminating evidence. Second, homicide offenses carry substantial penalties. See Iowa Code §§ 707.2(2)(class “A” felony), 707.3(2)(not to exceed 50 years), 707.4(2)(class “C” felony), 707.5(1)(a)(class “D” felony), 707.5(1)(b)(aggravated misdemeanor).

The purpose of the section 704.2B(2) is to enable law enforcement to obtain evidence in support of the crime. It does not serve any significant regulatory purpose. See Gibbs, 941 N.W.2d at 899. Ellison recognizes this is the same purpose of Iowa Code section 719.3(1) which prohibits the obstruction of evidence. It states that

[a] person who, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, knowingly does any of the following

acts, commits an aggravated misdemeanor:

1. Destroys, alters, conceals or disguises physical evidence which would be admissible in the trial of another for a public offense, or makes available false evidence or furnishes false information with the intent that it be used in the trial of that case.

Iowa Code § 719.3(1). There is a very big difference, however, in that section 719.3(1) results in an aggravated misdemeanor conviction. A violation of 704.2B(2) results in the denial of the justification defense which in turn could result in the conviction for a homicide with the potential penalty of life in prison. Also, section 719.3(1) applies generally to anyone, not just criminal defendants. So section 719.3(1) does not implicate the right against self-incrimination on its face.

This court should find section 704.2B(2) violates the Iowa and federal constitutions' right against self-incrimination. In turn, instruction 32, implementing 704.2B(2), was in error. See Iowa Code § 707.2(2). "A jury instruction authorizing an inference of guilt in a murder case because the defendant

breached a legal duty” to not destroys, alters, conceals or disguises physical evidence that would be used in his or her trial “exact a significant penalty on the defendant’s right to remain silent.” Gibbs, 941 N.W.2d at 897. Ellison’s conviction for voluntary manslaughter should be reversed and the matter remanded with instruction not to instruct the jury on section 704.2B(2).

B. Error was not harmless beyond a reasonable doubt.

“In order for a constitutional error to be harmless, the court must be able to declare it harmless beyond a reasonable doubt.” Id. (quoting State v. Simmons, 714 N.W.2d 264, 275 (Iowa 2006)(quoting State v. Deases, 518 N.W.2d 784, 791 (Iowa 1994))).

This was not an overwhelming case. Smothers was the aggressor. Smothers had a history of assaultive behavior which is why there was a no contact order against him preventing him from having any contact with Vanessa Ellison

and the rest of her family – which included Ellison. (Vol.5 p.180 L.3-p.181 L.6). Ellison knew about some of the assaults.

Vurciaga and Smothers smoked marijuana that afternoon before Smothers confronted Ellison. (Vol.2 p.135 L.7-22). Rogers admitted that Smothers walked with a “threatening posture.” (Vol.2 p.117 L.8-13, p.118 L.3-7). He also admitted that Smothers was “kind of aggressive.” (Vol.2 p.117 L.14-21, p.118 L.3-7, p.120 L.5-8, p.120 L.19-22).

Vanessa testified that Smothers looked very angry. (Vol.5 p.133 L.22-p.134 L.14). Ellison kept backing away. First to the steps of the building, then through the cars on the street. Yet, Smother kept pursuing him.

Smothers’ appearance that afternoon was not a coincidence. Looking at the video closely, one can see that the SUV turns onto Loras from a side street. (Def. Ex.1 (video 5:55:44). It appears Smothers and his friends were waiting for Vanessa to arrive. Vurciaga worked at KFC on Central

Avenue that morning but left early because he was sick.

(Vol.2 p.90 L.8-9, p.123 L.17-p.124 L.6). Vanessa was also at KFC that morning and likely was seen by Vurciaga. (Vol.5 p.121 L.21-24, p.141 L.15-17).

As for his testimony about the crime, Rogers was not a credible witness. He claimed at trial he did not work, but at his deposition said he worked at 6:00 p.m.² (Vol.2 p.81 L.5-8, p.112 L.9-p.113 L.16).

Rogers also testified he saw the second shot, but at deposition he said he did not see the second shot. (Vol.2 p.114 L.15-19). He testified they went to buy liquor, but at deposition he said they were going to buy a single beer. (Vol.2 p.114 L.1-19).

Vurciaga testified that Smothers said that's my "daughter", but he told Officer Rosenthal that as they drove by Ellison's vehicle Smothers said "Oh, shit, that's it." (Vol.2

² Rogers initially testified that he had the day off. (Vol.2 p.81 L.5-8).

p.137 L.3-9). “That’s it” signifies that it was looking for where Vanessa would be. He was not looking for his daughter. Smothers was looking to confront Vanessa and her family for whatever reason. He knew he would be in violation of the no contact order.

The jury’s consideration of instruction 32 would have weighed against Ellison. While Ellison did not turn the gun over to the police, there is no evidence that he destroyed it or even concealed it. He simply did not reveal it to law enforcement and was not required to do so under his rights against self-incrimination.

Instructing the jury on Iowa Code 704.2B(2) was not harmless beyond a reasonable doubt. This court should reverse his conviction for voluntary manslaughter and remand for a new trial.

CONCLUSION

For the reasons stated Divisions I and II, above, the defendant respectfully requests this court to reverse his conviction for voluntary manslaughter and remand for a new trial.

NONORAL SUBMISSION

Counsel does not request to be heard in oral argument.

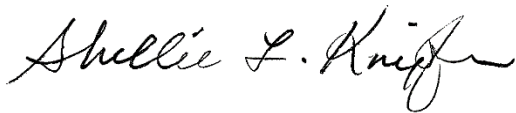
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The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$6.14, and that amount has been paid in full by the Office of the Appellate Defender.

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