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FILED
TIME 2:08 AM / PM
DEC 28 2012
MARTHA M. COOK
CIRCUIT COURT CLERK

**CRIMINAL COURT FOR THE STATE OF TENNESSEE
IN THE COUNTY OF MONROE**

STATE OF TENNESSEE

CASE NO: 12108CRM

v.

WALTER FRANCIS FITZPATRICK, III
Defendant

DEFENDANT'S MOTION FOR A NEW TRIAL

Pursuant to Tennessee Rule of Criminal Procedure 33, the Defendant hereby moves this Court for a new trial.

Grounds for this motion are that this Court erred during the trial of this matter by refusing to allow the defendant to testify before the jury regarding facts in support of the defense of necessity; and that this Court erred during the trial of this matter by refusing to include jury instructions regarding the defense of necessity. Specifically, that this Court erred by refusing to allow the defendant to testify in support of the fact that the defendant reasonably believed that his conduct was immediately necessary to avoid imminent harm, and that he reasonably believed that the urgency of avoiding the harm clearly outweighed the harm sought to be prevented by the law proscribing the conduct of which the defendant was accused. Also, that this Court refused to instruct the jury on the rules of law governing the defense of necessity as established in Tennessee Code §39-11-609, and as set forth in Tennessee Criminal Pattern Jury Instruction 40.05.

MEMORANDUM OF LAW AND FACTS IN SUPPORT OF NEW TRIAL

I. Jury Instructions

A. Applicable Standards

On appeal a trial court's instructions to the jury are reviewed *de novo*, with no presumption of correctness. *State v. David Wayne Smart*, 2003 WL 21077997 (Tenn.Crim.App.2003).

The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn.1986); *State v. Locke*, 771 S.W.2d 132, 138-9 (Tenn.Crim.App.1988); *see also* Tenn. R.Crim. P. 30. "[A] defendant has a constitutional right to a correct and complete charge of the law." *State v. Teel*, 793 S.W.2d 236, 249 (Tenn.1990). A charge is prejudicial error "if it fails to fairly submit the legal issues." *State v. Polston*, 2004 WL 1869984 (Tenn.Crim.App.2004); quoting *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn.1997).

An accused's right to a full exposition of the law applicable to the facts extends to the accused's theory of defense. *Poe v. State*, 212 Tenn. 413, 414-20 (1963); *Davis v. State*, 64 Tenn.612 (1875).

1. Necessity Defense Standards

Conduct is justified, and therefore not criminal, if: 1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and 2) The desirability and urgency of avoiding the harm clearly outweigh the harm sought to be prevented by the law proscribing the conduct, according to ordinary standards of reasonableness. T.C.A. § 39-11-609; *State v. Watson*, 1 S.W.3d 676 (Tenn.Crim.App.1999).

Because necessity is a general defense, rather than an affirmative defense, the defendant need not prove the elements of necessity by a preponderance of the evidence. Tenn.Code Ann. § 39-11-203(c) (1997); *State v. Davenport*, , 973 S.W.2d 283 (Tenn.Crim.App.1998); *State v. Culp*, 900 S.W.2d 707, 710 (Tenn.Crim.App.1994) (citing *State v. Hood*, 868 S.W.2d 744, 748 (Tenn.Crim.App.1993)). Instead, if the evidence fairly raises this defense, the trial court must submit the issue to the jury. *Id.* Where proof fairly raises the defense of necessity, the prosecution must prove beyond a reasonable doubt that the necessity defense does not apply to the facts at hand. *State v. Davenport*, 973 S.W.2d 283 (Tenn.Crim.App.1998); *State v. Culp*, 900 S.W.2d 707 (Tenn.Crim.App.1994).

When considering whether evidence has fairly raised a statutory defense such as necessity, “a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence,” because the trial courts and appellate courts must avoid judging the credibility of the witnesses when making this determination. *State v. Polston*, 2004 WL 1869984 (Tenn.Crim.App.2004); quoting *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn.Crim.App.1994).

B. The Instant Case Fairly Raised the Defense of Necessity

a. First Element of Necessity Defense: Testimony Fairly Raised Defendant’s Reasonable Belief that Immediate Conduct was Necessary to Avoid Imminent Harm

In the instant case, during an offer of proof, the defendant testified that the government documents he was accused of unlawfully removing were evidence that would prove the existence of wide scale jury tampering by government employees in Monroe County. The defendant testified that his conclusion was based upon a discussion he had had with an FBI agent. The defendant testified that the FBI agent had advised the defendant that the defendant would have to

obtain specific evidence before the FBI would begin an investigation. The defendant testified that the conversation with the FBI agent had occurred just one day before the date of the incident giving rise to the charges against the defendant. The defendant testified that the documents he is accused of removing were exactly the kind of evidence that the FBI agent told the defendant he needed to obtain.

The defendant also testified, outside of the jury's hearing, that he believed that the documents he is accused of removing would have been destroyed if he had not secured said documents. The defendant testified that this belief was based upon past experience and discussions with court personnel. Testimony from court personnel confirmed that the documents at issue would not normally be retained after information on said documents was input into a computer.

This testimony fairly raises the first element of the necessity defense. The evidence presented provides a basis for a reasonable juror to conclude that the documents at issue were evidence of jury tampering, and that the defendant reasonably believed that the documents would be destroyed if they had not been secured. The fact that the defendant was acting based upon information received from an FBI agent fairly raises the issue that the defendants' actions were objectively reasonable.

b. Second Element of Necessity Defense: Undisputed Evidence of Minor Inconvenience to Government, Compared to Preventing Systematic Jury Tampering by Government Employees

The Monroe County Court Clerk, testifying on behalf of the prosecution, explained that the loss of the government documents that defendant is accused of removing resulted in court personnel having to listen to a court reporter's recording of the day's jury selection proceedings

in order to recover names and addresses of selected jurors. The Clerk also testified that the loss of documents caused the Clerk's office to have to send letters to said jurors.

Undisputed evidence from prosecution witnesses also established that all information on the documents at issue was public information. Therefore, no sensitive or otherwise private information was lost.

This evidence, all presented by the prosecution, fairly raises the second element of the necessity defense. Tenn.Code Ann. § 39-11-203(c) (1997); *State v. Davenport*, , 973 S.W.2d 283 (Tenn.Crim.App.1998); *State v. Culp*, 900 S.W.2d 707, 710 (Tenn.Crim.App.1994) (citing *State v. Hood*, 868 S.W.2d 744, 748 (Tenn.Crim.App.1993))(the defendant need not prove the elements of necessity by a preponderance of the evidence, but must simply fairly raise the issue.) This undisputed evidence provides a basis for a reasonable juror to conclude that the loss of the documents at issue resulted in little more than a minor inconvenience to the government. The undisputed evidence fairly raises the issue that the "desirability and urgency of avoiding" widespread and systemic jury tampering by government employees, clearly outweighs a minor inconvenience to court staff.

The fact that the defendant was acting based upon information received from an FBI agent fairly raises the issue that the defendants' actions were objectively reasonable.

Because the evidence fairly raises the elements of a necessity defense, this Court's refusal to instruct the jury on said defense constitutes reversible error. *State v. Polston*, 2004 WL 1869984 (Tenn.Crim.App.2004); quoting *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn.Crim.App.1994)(a court must consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence).

Therefore, the defendant respectfully requests that this Court grant this motion for a new trial.

II. Defendant's Right to Testify

A. Applicable Standards

"It is now a well established principle in both state and federal law that a criminal defendant has a constitutional right to testify at trial." *Mormon v. State*, 18 S.W.3d 152, 159 (Tenn.1999); citing *State v. Burkhardt*, 541 S.W.2d 365, 371 (Tenn.1976); *Campbell v. State*, 4 Tenn.Crim.App. 100, 469 S.W.2d 506, 509 (1971); *Rock v. Arkansas*, 483 U.S. 44, 49–52 (1987); *Harris v. New York*, 401 U.S. 222, 225 (1971).

A criminal defendant's right to testify is not an unqualified right, and "may bow to accommodate other legitimate interests in the criminal trial process," including most applications of the rules of evidence and procedure. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). However, the Supreme Court has found the exclusion of evidence based upon a rule of evidence to be unconstitutionally disproportionate to the purpose of the rules of evidence where the exclusion infringed upon a weighty interest of the accused. *Rock v. Arkansas*, 483 U.S. 44, 58 (1987). Specifically, the Supreme Court has found normally acceptable rules of evidence to be unconstitutional under circumstances where excluded testimony was critical to the accused's defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

B. Defendant's Excluded Testimony was Critical to the Defense of Necessity

In the instant case the defendant was prohibited from testifying to the jury that an FBI agent had instructed the defendant to obtain evidence exactly like the documents that the defendant was accused of unlawfully removing. The defendant was also prohibited from

testifying to the jury that the documents at issue were evidence of jury tampering by court employees. The defendant was also prohibited from testifying to the jury as to why he believed that the documents at issue would have been destroyed if he had not secured them. The defendant was also prohibited from discussing any other aspect of his defense of necessity.

Because this Court prohibited the defendant from testifying regarding facts supporting the defendant's defense of necessity, and prohibited the defendant from arguing the necessity defense to the jury, this Court has violated the defendant's constitutionally protected rights. *Mormon v. State*, 18 S.W.3d 152, 159 (Tenn.1999); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

III. Conclusion

For the reasons set forth herein, the defendant respectfully requests that this Court grant this motion for a new trial.

Respectfully submitted this 14th day of Tevet, in the year of our Lord 2012 (a.k.a. December 28, 2012),



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CERTIFICATE OF SERVICE

It is hereby certified that on the 14th day of Tevet in the year of our Lord 2012 (a.k.a. December 28, 2012), a copy of "Defendant's Motion Motion for a New Trial" was mailed via deposit with the U.S. Post Office to Assistant District Attorney Paul Rush at his office in Athens Tennessee.



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