Supreme Court No. 102600-5
Court of Appeals No. 84177-7-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TONY MILLER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Tony Miller, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. Mr. Miller's motion to reconsider was denied on November 3, 2023. The opinion and order denying reconsideration are attached in the appendix

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Defense of property permits necessary force to be used to try to stop a malicious trespass. The prosecution bears the burden to disprove defense of property where some evidence supports the defense. Mr. Miller, while at the entry of his home, used force to try to stop a malicious trespasser who refused to leave. Was the prosecution relieved of its burden because the court failed to provide the jury a defense-of-property instruction?

2. Defense counsel failed to obtain a defense-of-property instruction. Counsel tried to argue defense of property, but did

not have a proper instruction in support. Based on the instructions, the prosecution told the jury defense of property was not a defense. Unlike defense of self, defense of property does not require fear of injury to one's person. Was Mr. Miller deprived of his right to effective assistance of counsel by counsel's failure to obtain a defense-of-property instruction?

C. STATEMENT OF THE CASE

Tony Miller, a man in his mid-30s, was at home with his family in Granite Falls on the evening of July 3, 2019. RP 328, 332. His son was born five days earlier, and he and his partner—the baby's mother—were caring for the newborn. RP 332.

Nichole Potebyna lived across the street in the neighborhood. RP 221-24. She often had her boyfriend, Jared Simicich, over. RP 127, 222.

Late that evening, Mr. Miller heard loud fireworks. RP 335. He saw that Ms. Potebyna and Mr. Simicich were setting fireworks off nearby in the street. RP 195-96, 335. Mr. Miller

opened his door and asked them to stop so the noise would not disturb his baby's sleep, but they refused. RP 335.

The fireworks continued past midnight. RP 335-36. After Mr. Miller heard a very loud explosion close to his house, he opened his upstairs window and, using vulgar language, yelled at Ms. Potebyna and Mr. Simicich to stop. RP 137-38, 176, 229, 339. They swore back at him and continued to light off fireworks in the street outside Mr. Miller's house. RP 177, 195-96, 339. They justified their conduct because it was the Fourth of July. RP 229.

Mr. Miller left his house, a duplex, and confronted Ms. Potebyna and Mr. Simicich in the street. RP 130, 339. He told them to stop. RP 229. Repeating that it was the Fourth of July, and not caring if the noise disturbed Mr. Miller's newborn, they refused and hurled obscenities back at Mr. Miller. RP 135, 151, 260, 340, 369. They insisted on lighting their fireworks next to Mr. Miller's home, rather than down the street or in a nearby

vacant field that people in the neighborhood used when setting off fireworks. RP 195, 340.

Mr. Simicich aggressively got in Mr. Miller's face. RP 341. Mr. Simicich stood 6'3" and weighed around 220 lbs., while Mr. Miller was 5'10" and weighed around 230 lbs. RP 155, 340. Mr. Simicich appeared to be angry and intoxicated. RP 341. By their admissions, Mr. Simicich and Ms. Potebyna had been drinking alcohol throughout that day and evening. RP 133, 147, 149, 161, 226, 243-44, 253. Mr. Miller drank a small glass of whiskey earlier that evening, but did not continue drinking in case there was an emergency involving his baby. RP 334.

During the confrontation in the street, Aimee Kleidosty, who lived in the neighboring unit of the duplex, came outside. RP 166, 182. Ms. Potebyna is Ms. Kleidosty's best friend. RP 193. She intervened by telling everyone to cool off and physically put herself in between the three. RP 177, 341. Mr. Simicich pushed Ms. Kleidosty, and Ms. Kleidosty pushed him

back. RP 209, 342. Ms. Kleidosty told everyone to go home. RP 216.

Mr. Miller went back to his front door and shut it. RP 342. Outside the front door was a stoop. Ex. 10. The stairs leading to the stoop started from the driveway and it took three steps to get to get to the top. RP 343; Ex. 10. The stairs were off to the side from the front door. RP 343; Ex. 10. Standing on his stoop, Mr. Miller watched Mr. Simicich and Ms. Kleidosty push one another. RP 342.

Mr. Miller continued to express his displeasure at Mr. Simicich and Ms. Potebyna. Mr. Simicich recalled being upset that Mr. Miller was using offensive language about his girlfriend and wanted Mr. Miller to stop. RP 141, 162-63. Ms. Potebyna told Mr. Simicich to "leave it be," but Mr. Simicich did not listen. RP 250. Escalating the situation, Mr. Simicich began walking towards Mr. Miller, telling Mr. Miller to "Watch your fucking mouth." RP 212-13. Mr. Simicich was angry and wanted to defend his girlfriend's "honor." RP 190. As Mr.

Simicich was crossing over Mr. Miller's driveway, Mr. Miller told Mr. Simicich to leave and to get off his property. RP 216, 346, 369. Mr. Simicich continued aggressively toward Mr. Miller, making fists and pumping his chest. RP 345-47, 369.

Fearing injury from Simicich, who had raised his right hand in a fist, and wanting Mr. Simicich to leave his property, Mr. Miller used force. RP 348, 351. From atop the stoop, Mr. Miller head-butted the taller Mr. Simicich, who was at about eye level because he was at the bottom or on a lower step of the stairs. RP 347-48. Mr. Simicich grabbed Mr. Miller and fell backward, taking both men to the ground. RP 347-49.

Unfortunately, the back of Mr. Simicich's head hit a large barbecue that was in the middle of the driveway of the duplex. RP 307, 349; Ex. 7-10. Mr. Miller did not realize Mr. Simicich hit his head on the barbecue. RP 362. Because Mr. Simicich did not let go, Mr. Miller hit Mr. Simicich three times in the face using his elbow to secure his release and protect himself. RP 365, 368.

Mr. Simicich was injured and taken to the hospital for treatment. Mr. Miller cooperated with the investigation and explained he acted in self-defense. RP 302, 316, 351. The investigating officer who spoke with Mr. Miller at the scene did not perceive Mr. Miller to be intoxicated. RP 317. Months elapsed without any charges, and the matter appeared closed.

Over two years after the incident, however, the prosecution charged Mr. Miller with third-degree assault. CP 155. Shortly before trial in 2022, the prosecution amended this charge to second-degree assault. CP 93.

Mr. Miller testified. RP 327-369. Based on this and other testimony, the trial court instructed the jury on self-defense, but omitted any instruction on defense of property. CP 73-92. Although Mr. Miller's counsel argued Mr. Miller had the right to defend not only his person, but also his property, he failed to request a defense-of-property instruction. RP 400-403, 405-06, 411-13, 419; CP 93-94, 100-126. The jury found Mr. Miller guilty of second-degree assault.

On appeal, Mr. Miller argued that the jury instructions relieved the prosecution of its constitutional burden to prove every element of the offense. Specifically, the State had the burden to disprove defense of property because there was some evidence in support. In the alternative, Mr. Miller argued defense counsel was constitutionally ineffective because he failed to secure jury instructions that would have required the jury to find the State disproved defense of property beyond a reasonable doubt.

The Court of Appeals held the jury instructional issue was not properly before Court for the first time on appeal as manifest error affecting a constitutional right under RAP 2.5(a)(3). The appellate court further held that counsel was not ineffective by failing to propose a defense of property instruction.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide whether it is manifest constitutional error to not instruct the jury that the prosecution must disprove defense of property when there is "some evidence" in support and due process requires the State to disprove defense of property when there is some evidence in support.

Instructions must make the law manifestly apparent to the average juror. State v. Ackerman, 11 Wn. App. 2d 304, 312, 453 P.3d 749 (2019). Instructions fail to make the law manifestly apparent by misstating the law or by diluting the prosecution's burden to disprove self-defense. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997); Ackerman, 11 Wn. App. 2d at 313-15.

The law recognizes not only a right to defend oneself, but also a right to defend one's property. A person may use necessary force to prevent or attempt to prevent "a malicious trespass, or other malicious interference with real or personal property in his or her possession." RCW 9A.16.020(3). Fear of

injury to oneself is not a requirement. State v. Bland, 128 Wn. App. 511, 513 & n.1, 116 P.3d 428 (2005).

While standing on the stoop of his home, Mr. Miller used force against Mr. Simicich. Mr. Miller testified that Mr. Simicich walked in an aggressive and hurried stride toward him through Mr. Miller's driveway. RP 345-46. While approaching Mr. Miller, Mr. Simicich hurled insults, telling Mr. Miller "to shut the fuck up," made fists with his hands, and pumped his chest. RP 345-47, 369. Mr. Miller told Mr. Simicich to leave and get off his property, but Mr. Simicich did not turn around. RP 216, 346. Instead, Mr. Simicich continued toward Mr. Miller and the entryway of Mr. Miller's home. RP 345-47, 369. To prevent Mr. Simicich, a malicious trespasser, from continuing to invade his property and to defend himself and his property, Mr. Miller used force.

Notwithstanding the evidence, the court failed to provide the jury an instruction outlining the law of defense of property. Pattern language exists for defense of property:

> It is a defense to a charge of (fill in crime) that the force [used] [attempted] [offered to be used] was lawful as defined in this instruction.
>
> . . .
>
> [The [use of] [attempt to use] [offer to use] force upon or toward the person of another is lawful when [used] [attempted] [offered] in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]
>
> The person [using] [or] [offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of [and prior to] the incident.
>
> The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

WPIC 17.02 Lawful Force—Defense of Self, Others, Property,

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (5th Ed).

When there is some evidence of lawful force, the defendant is entitled to appropriate instructions. Walden, 131 Wn.2d at 473. Once this burden is met, due process requires the State to prove the absence of lawful force beyond a reasonable doubt and the jury must be properly instructed. Id. at 469; State v. Vander Houwen, 163 Wn.2d 25, 35-36, 177 P.3d 93 (2008). Without a defense-of-property instruction, the prosecution's burden was diluted and the law was not manifestly apparent to the jury. See Walden, 131 Wn.2d at 477-78; Ackerman, 11 Wn. App. 2d at 314-15; State v. Espinosa, 8 Wn. App. 2d 353, 364, 438 P.3d 582 (2019).

Alleged errors in jury instructions may be raised for the first time on appeal as manifest error affecting a constitutional right. RAP 2.5(a)(3); Ackerman, 11 Wn. App. 2d at 309-10. If there is a plausible showing that the claimed constitutional error had practical and identifiable consequences at the trial, the

appellate court will review the claimed error. Ackerman, 11 Wn. App. 2d at 310.

The lack of a defense-of-property instruction in this case is manifest constitutional error. RAP 2.5(a)(3).

Because the prosecution bears the burden to disprove lawful force beyond a reasonable doubt when there is some evidence of lawful force, this is an error affecting a constitutional right. Vander Houwen, 163 Wn.2d at 35-36 (prosecution bears burden to disprove defense of property once sufficient evidence supports defense); Ackerman, 11 Wn. App. 2d at 310.

The error is also manifest because there are practical and identifiable consequences from the error. Id. The error diluted the prosecution's burden of proof. This error was compounded by the prosecution's closing argument. The prosecution exploited the lack of a defense-of-property instruction, telling the jury that no instruction says one can use force to compel a person to leave their property:

> The other testimony is clear is that although this was one assault, there were steps to it. Is it reasonable to use force if someone is on your property and you don't want them there? Not according to this instruction. The instruction -- if you remember you can -- the example I gave you, the analogy of the red light, what the law says only a tornado behind you is a defense. It is not the law, but it is an example if you recall that. It might be nice if the law in this case said someone comes on your property, you do what you want to assault him to get him off your property. That's not the case here. The case here says he has to be in reasonable fear that he is going to be injured."

RP 392-93 (emphasis added).. Rather, the instructions required reasonable fear of injury. RP 393. In short, the prosecution told the jury that force used in defense of property was unlawful. Of course, this is not true.

In contrast, defense counsel repeatedly emphasized that Mr. Simicich went onto Mr. Miller's property and that Mr. Miller's use of force was reasonable under the circumstances. RP 123, 400-403, 405-06, 411-13, 419. But this argument was undermined by the lack of a defense-of-property instruction. For example, defense counsel argued a person could use force

to defend property, but erroneously tied this to reasonable fear of being personally injured: "And contrary to my colleague's assertion that you can't use force to defend property, absolutely you can if you reasonably believe you are about to be injured on your property." RP 405-06 (emphasis added). But defense of property is broader and does not require any belief or fear of injury to the person. Bland, 128 Wn. App. 511, 513 & n.1.

Mr. Miller argued in this case that the trial court erred by not instructing the jury that the State had the burden to prove the absence of defense of property beyond a reasonable doubt. Br. of App. at 12-20. He explained why the error qualified as manifest constitutional error. Br. of App. at 12-13, 16-18.

In response, the State did *not* argue the claimed error did not qualify as manifest constitutional error. Br. of Resp't at 25-35 (not citing RAP 2.5(a)(3) or using the word "manifest"). In other words, the State conceded review was proper and the issue was teed up for the Court of Appeals on the merits. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983)

("Indeed, by failing to argue this point, respondents appear to concede it."); RAP 12.1(a) ("the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs").

Still, the Court of Appeals held any error in not instructing the jury on the State's burden to disprove defense of property is not "manifest" under RAP 2.5(a)(3). The Court overlooked or misapprehended precedent on what makes an error "manifest" under RAP 2.5(a)(3)—a point not argued by the State.

RAP 2.5(a)(3) requires only that the defendant make a *plausible showing* that the error resulted in actual prejudice, meaning there were practical and identifiable consequences at trial. State v. A.M., 194 Wn.2d 33, 39, 448 P.3d 35 (2019). This requirement is often mistakenly read to mean that an appellant must prove prejudice to obtain review. This is incorrect:

> The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for

> establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.

State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Here, the jury was not instructed that the State had the burden to disprove defense of property beyond a reasonable doubt. As explained, this was required by due process because there was "some evidence" of defense of property, making it an "element" that the State must disprove. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983); Vander Houwen, 163 Wn.2d at 35-36. The omission of an essential element is constitutional error that qualifies as manifest under RAP 2.5(a)(3). State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (""[f]ailure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal."). Thus, because there was

"some evidence" of defense of property, the error is properly presented for the first time on appeal. See also Ackerman, 11 Wn. App. 2d at 309 (instructions that diluted State's burden to disprove self-defense qualified as manifest constitutional error).

Moreover, besides the dilution of the State's burden of proof, the closing argument demonstrates practical and identifiable consequences. The prosecution seized on the lack of a defense of property instruction by telling the jury that use of force to remove a person who "comes on your property" is not permitted under the law. RP 392-93. In other words, that the prosecution did not need to disprove defense of property. Thus, as a consequences of the lack of defense of property instruction, there were practical and identifiable consequences. See Bland, 128 Wn. App. at 516 (there were practical and identifiable consequences flowing the lack of a proper defense of property instruction because "[t]he parties did not make the distinction between self-defense and defense of property clear to the jury in their closing arguments").

In concluding the error was not manifest, the Court of Appeals reasoned "it was not obvious to the trial court that omission of the instruction constituted error." Slip op. at 6. It should have been. Mr. Miller stood at the entry of his home while Mr. Simicich advanced toward him through Mr. Miller's driveway. Instead of heeding Mr. Miller's demand that Mr. Simicich leave, Mr. Simicich continued to toward Mr. Miller and his home. This made Mr. Simicich a malicious trespasser. Mr. Miller was entitled to use force to try to prevent this continuing trespass. Bland, 128 Wn. App. at 517.

Moreover, the "obviousness" of the error is just a factor and not determinative. In A.M., this Court held it was manifest constitutional error to admit evidence that violated the defendant's constitutional right against self-incrimination even though the defendant had only made an ER 401 objection to the admission of the evidence. A.M., 194 Wn.2d 38-40. The Court did not analyze whether the self-incrimination violation was

obvious in holding the error qualified as manifest constitutional error.

The opinion recognizes that the jury appears to have found that the State disproved self-defense based on a determination that (1) Mr. Miller was not placed in reasonable fear by Mr. Simicich or (2) that his use of force, by use of a head-butt and subsequent elbow strikes, was greater than was justified. But reasonable fear is not required for *defense of property*. Bland, 128 Wn. App. at 513. So this could have changed the jury's analysis as to whether the State proved Mr. Miller's head-butting was unlawful. Whether Mr. Miller's use of force by a headbutt was "greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions." Bland, 128 Wn. App. at 516.

As for Mr. Miller's use of force to free himself after being entangled with Mr. Simicich when they fell to the ground, the jury could have found Mr. Miller had reasonable

fear of harm and that his elbow strikes were justified under *defense of his person*, if not also his property.

In short a defense of property instruction could have made a difference.

Whether the trial court was obliged to instruct the jury on the State's burden to disprove defense of property is an important constitutional question worthy of this Court's review. RAP 13.4(b)(3). It is a question of substantial public interest because self-defense and defense of property issues are often intertwined. RAP 13.4(b)(4). And the Court of Appeals' decision conflicts with precedent on what makes an error manifest for purposes of RAP 2.5(a)(3), further meriting review. RAP 13.4(b)(1), (2).

2. Review should be granted to decide whether defense counsel provides ineffective assistance by failing to ensure the State complies with due process to disprove defense of property where the defense would have only made it more difficult for the State to prove guilt beyond a reasonable doubt.

Criminal defendants have the right to effective assistance of counsel under our state and federal constitutions. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Const. art. I, § 22. Counsel's failure to request a necessary instruction can constitute ineffective assistance. Thomas, 109 Wn.2d at 229.

To establish ineffective assistance of counsel, there must be deficient performance and resulting prejudice. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 226.

As argued, the evidence entitled Mr. Miller to a defense-of-property instruction. Counsel's failure to obtain a defense-of-property instruction was deficient performance.

Deficient performance is performance falling below an objective standard of reasonableness. Strickland, 466 U.S. at 687. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The presumption that counsel was effective is rebutted if there is no legitimate tactical explanation for counsel's actions. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Additionally, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

There was no legitimate strategy by trial counsel in not seeking a defense-of-property instruction. Because the prosecution would have been required to prove the absence of this defense beyond a reasonable doubt, obtaining the instruction would only have made it *more* difficult for the

prosecution to convict Mr. Miller. In other words, by not obtaining the instruction, counsel lightened the prosecution's burden. Making it easier for the prosecution to convict one's client is not valid strategy. See Kyllo, 166 Wn.2d at 869 (not valid strategy to propose defective instructions that decreased prosecution's burden to disprove self-defense).

The instruction would have been consistent with defense counsel's strategy at trial. Defense counsel repeatedly emphasized that Mr. Simicich went onto Mr. Miller's property and that Mr. Miller's use of force was reasonable under the circumstances. RP 400-403, 405-06, 411-13, 419. Obtaining a defense-of-property instruction would not have hindered the defense strategy. It would have only helped it. State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009) (deficient performance to not propose "reasonable belief" defense instruction when evidence supported it, counsel effectively argued the defense, and the defense was consistent with the defendant's theory of the case). It would have increased the

prosecution's burden and made it easier to create a reasonable doubt. See State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014) ("Creating a reasonable doubt for the defense is far easier than proving the defense by a preponderance of the evidence.").

Accordingly, because Mr. Miller was entitled to the instruction and there was no valid strategy in not seeking the instruction, the deficient performance prong is satisfied. See State v. Moore, noted at 176 Wn. App. 1008 , 2013 WL 4606541 (2013) (unpublished) (deficient performance to not propose defense-of-property instruction where defense of self and defense of property were "intertwined" and "not conflicting or otherwise inconsistent").[1]

The failure to obtain the defense-of-property instruction was prejudicial, meaning that had the instruction been obtained, there is a reasonable probability of a different result. Strickland,

[1] Unpublished decisions are cited for persuasive authority. GR 14.1(a).

466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. This is "lower than a preponderance standard." State v. Vazquez, 198 Wn.2d 239, 248, 494 P.3d 424 (2021). Thus, proof that the outcome would have been altered is not required. Thomas, 109 Wn.2d at 226.

As explained, it was reversible error for the trial court to fail to give a defense-of-property instruction. If the jury had been properly instructed, the prosecution would not have been able to mislead the jury into believing that Mr. Miller had no right to defend his property or to respond to Mr. Simicich's continuing malicious trespass. RP 392-93.

The jury could have rejected self-defense on the theory that Mr. Miller did not reasonably fear injury to himself when he headbutted Mr. Simicich. But this would not have mattered for a claim of defense of property, and the issue would have been whether there was reasonable doubt as to whether the

prosecution had proved Mr. Miller's use of force was unnecessary.

There is a reasonable probability that the jury would have found that the prosecution did not disprove defense of property beyond a reasonable doubt. See Kyllo, 166 Wn.2d at 870 (prejudice prong met where defense counsel proposed incorrect defense instruction); Powell, 150 Wn. App. at 155-58 (prejudice established for failure to propose "reasonable belief" defense instruction because jury would not have recognized legal significance of evidence and argument of counsel supporting the defense); Moore, noted at 176 Wn. App. 1008, 2013 WL 4606541 at *4-5 (unpublished) (prejudice prong established where counsel failed to obtain defense of property instruction and this would have created "legal significance" for the jury in evaluating the defendant's decision to use force).

Mr. Miller established ineffective assistance of counsel. The Court of Appeals should have reversed. Instead, the Court of Appeals reasoned it was valid strategy for defense counsel to

not require the State to meet its constitutionally mandated burden of proof. This conflicts with the precedent.

The Court also reasoned there was not prejudice. But as explained earlier, a defense of property instruction could have changed the jurors' analysis. The headbutt may have been justified as defense of property while the later use of force while Mr. Miller was on the ground being held by Mr. Simicich may have been justified as defense of self rather than defense of property. There is a reasonable probability of a different result.

This issue is of constitutional dimension, meriting review. RAP 13.4(b)(4). It is also one of substantial public interest for the reasons explained earlier. RAP 13.4(b)(3). The Court of Appeals' decision is also in conflict with precedent, meriting further review. RAP 13.4(b)(1), (2).

E. CONCLUSION

Mr. Miller asks this Court to grant his petition for review on whether it was manifest constitutional for the trial court to not instruct the jury that the State must disprove defense of

property beyond a reasonable doubt, and whether defense counsel's failure to propose this instruction constituted ineffective assistance of counsel.

This document contains 4,723 words and complies with RAP 18.17.

Respectfully submitted this 28th day of November, 2023.

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Appendix

FILED
11/2/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TONY DALE MILLER,

Appellant.

No. 84177-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Tony Miller, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Birk, J.

Judge

FILED
10/9/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TONY DALE MILLER, Appellant.	No. 84177-7-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Tony Miller appeals his conviction of second degree assault, asserting the trial court erred by refusing to give an instruction on defense of property, ineffective assistance of counsel for failing to obtain a defense of property instruction, error in requiring a substance abuse evaluation, and lack of statutory authority for four legal financial obligations. We affirm Miller's conviction and remand with instructions to limit the substance abuse evaluation to alcohol, inquire concerning Miller's ability to pay discretionary legal financial obligations, and strike unauthorized financial obligations.

I

On the evening of July 3, 2019, Jared Simicich and his girlfriend, Nichole Potebyna, began lighting off fireworks in the middle of the street near both Potebyna's and Miller's homes. From his bedroom window, Miller yelled profanities at Simicich and Potebyna, demanding that they stop the fireworks. Miller was upset because the fireworks had woken his newborn son. Simicich and his girlfriend began yelling back, claiming they were not the only ones lighting off

fireworks. The couple continued to light fireworks. Miller went out to his front porch, and eventually the street, continually referring to Potebyna with a derogatory word. During the confrontation in the street, Aimee Kleidosty, a neighbor, came outside and tried to keep the argument from escalating. Miller went back into his house, and Simicich and Potebyna walked back to Potebyna's house. Miller soon came back outside and started yelling again. Kleidosty testified Miller continued to direct derogatory terms toward Potebyna.

Simicich walked back into the road, asking Miller to "watch his mouth." Miller continued, and Simicich started to walk towards Miller's front porch. Miller testified he yelled at Simicich to leave and to get off his property. Simicich continued to the bottom step of Miller's porch. Miller remained at the top of the stairs. Miller testified that he thought he was in danger, so he was trying to protect himself when he headbutted Simicich, causing Simicich to fall backwards. While falling, Simicich hit his head on a large smoker in Miller's front yard. Potebyna testified Simicich "just laid lifeless, motionless." Two witnesses testified Miller came over the top of Simicich, straddled him, and started to elbow him in the face multiple times. Miller testified Simicich grabbed onto him, which caused the two men to fall off the porch together. Miller further testified he delivered three elbows to Simicich's face to get Simicich to release him. The State later charged Miller with second degree assault.

Before trial, Miller filed a notice of intent to present defense of self or others. Miller cited RCW 9A.16.020(3), stating that the use of or attempt to use force upon the person of another is not unlawful where " 'used by a party about to be injured,

or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary.' " (Alteration in original.) Miller's filing used the quoted ellipsis to omit the part of RCW 9A.16.020(3) covering use of force to prevent malicious interference with property. In Miller's proposed jury instructions, he requested a self-defense jury instruction, but not one for defense of property. Following the language of RCW 9A.16.020(3), the pattern jury instruction from which Miller's self-defense instruction was drawn includes an optional paragraph that Miller omitted: "[The [use of] [attempt to use] [offer to use] force upon or toward the person of another is lawful when [used] [attempted] [offered] in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]" 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 282 (5th ed. 2021) (alterations in original). In Miller's trial brief, he again noted "[t]he defense is self-defense."

The jury convicted Miller as charged. At sentencing, the court ordered Miller to complete an anger management evaluation and a substance abuse evaluation. Regarding legal financial obligations, the trial court noted that it was imposing "the $500 victim penalty assessment, the $200 filing fee, the $100 DNA[1] fee, and I will sign a separate order to provide a DNA sample. I believe those are the only applicable fees." However, the judgement and sentence additionally included language that Miller shall "pay supervision fees as determined by [the Department

[1] Deoxyribonucleic acid.

of Corrections]." The trial court inquired into Miller's ability to pay through the following dialogue:

> THE COURT: Mr. Miller, I have not asked you what other financial obligations you have. You said you have rent, you have [a] car bill. Obviously you have family support obligations, but if there is information that you wish to provide me about your need to pay towards financial obligation, I am happy to hear what you want to offer. On the other hand, if you think that you can pay $20 a month towards this $800 legal financial obligation bill beginning three months after release from confinement, I am satisfied that I can set it at that amount.
>
> THE DEFENDANT: $20 is fine.
>
> THE COURT: I will adopt that amount.

Ten days later, the trial court granted Miller an order of indigency authorizing the expenditure of public funds to prosecute this appeal, finding Miller "lack[ed] sufficient funds to prosecute an appeal."

II

For the first time on appeal, Miller argues the trial court provided incomplete jury instructions because it omitted an instruction on defense of property. Citing State v. Vander Houwen, Miller argues his conviction violated the Fourteenth Amendment, because the State was not held to its burden to disprove defense of property despite there being some evidence that would have supported the defense of property instruction. 163 Wn.2d 25, 177 P.3d 93 (2008).

Generally, we will not entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception to that general rule is RAP 2.5(a)(3), which gives this court discretion to reach an issue not raised at trial if the party asserting it demonstrates a manifest error affecting a constitutional right. State v. Gordon, 172

Wn.2d 671, 676, 260 P.3d 884 (2011). "Stated another way, the appellant 'must identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.' " State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). To be manifest, the error must have practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court. Id. at 108.

Although Miller is correct that failing to instruct on defense of property could raise a constitutional issue, any error was not manifest. Miller argues that the State unfairly capitalized on the absence of a defense of property instruction during closing argument. The State argued, "It might be nice if the law in this case said someone comes on your property, you do what you want to assault him to get him off your property. That's not the case here. The case here says he has to be in reasonable fear that he is going to be injured." Contrary to Miller's argument, the State did not argue that the use of force is never allowed to defend property, but only that it is not the case that a person acting in defense of property can "do what [they] want" to an intruder. In context, the State was speaking to Miller's stated defense at trial, for which Miller never gave testimony supporting defense of property as a factual matter, but instead relied on Simicich's intrusion only to the extent it was evidence he posed a threat of injury to Miller. As the defense closing emphasized: "And contrary to my colleague's assertion that you can't use force to defend property, absolutely you can if you reasonably believe you are about to be injured on your property. What is the significance of the property? The property—

the significance of [Simicich] going on the property is that it strengthens [Miller's] claim that he acted reasonably, *that he believed he was about to be injured*." (Emphasis added.)

Miller did not raise defense of property, the record suggests Miller intentionally chose not to raise defense of property, and Miller did not testify or argue that he was acting in defense of property. It was not obvious to the trial court that omission of the instruction constituted error. The trial court's failure to sua sponte instruct the jury on defense of property was not manifest error. We therefore decline to reach this issue under RAP 2.5(a)(3).

III

Miller next argues his trial counsel provided ineffective assistance by failing to obtain a defense of property instruction. We disagree.

Our federal and state constitutions guarantee an accused person the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. We apply the two pronged test from Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for evaluating whether a defendant had constitutionally sufficient representation. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To demonstrate ineffective assistance of counsel, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694.

A

Washington courts begin with a strong presumption that counsel's representation was reasonable. Estes, 188 Wn.2d at 458. This court presumes adequate representation if there is any " 'conceivable legitimate tactic' " that explains counsel's performance. In re Det. of Hatfield, 191 Wn. App. 378, 402, 362 P.3d 997 (2015) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The reasonableness of counsel's performance is evaluated from " 'counsel's perspective at the time of the alleged error and in light of all the circumstances.' " In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). To rebut the presumption of reasonableness, a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance. In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017).

Miller's counsel's failure to request the defense of property instruction was a legitimate trial tactic. Defense of property is absent from Miller's notice of intent to present defense of self, Miller's proposed instructions, and Miller's trial brief. Miller did not mention defense of property at any point during his opening statement, his trial testimony, or his closing argument. These apparently intentional omissions of defense of property can be characterized as a conceivable legitimate tactic consistent with the starting presumption of reasonable representation. Defense counsel may reasonably decline to pursue avenues that are potentially counterproductive. State v. Wood, 19 Wn. App. 2d 743, 780-81, 498 P.3d 968 (2021) (not deficient performance to decline to divert efforts to

locating a witness), review denied, 199 Wn.2d 1007, 506 P.3d 647 (2022); State v. Hassan, 151 Wn. App. 209, 220, 211 P.3d 441 (2009) (not deficient performance to not request a lesser included offense instruction that might weaken a claim of innocence); State v. Johnston, 143 Wn. App. 1, 17, 177 P.3d 1127 (2007) (not deficient performance to opt against voir dire that might antagonize jurors). As discussed further below, it was reasonable for defense counsel to conclude a jury would think poorly of a claim that a violent assault, disconnected from any fear of bodily injury, was reasonable merely to stop a property trespass. Because it was a stronger defense to argue that Miller feared for his own safety, Miller has not demonstrated deficient performance.

B

Miller also cannot establish prejudice. Prejudice exists if there is a reasonable probability that "but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Reasonable probability" in this context means a probability sufficient to undermine confidence in the outcome. Estes, 188 Wn.2d at 458. A defendant must affirmatively prove prejudice, not simply show that " 'the errors had some conceivable effect on the outcome.' " State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 693).

To show deficient conduct based on failure to request a jury instruction, the defendant must establish that he would have been entitled to the instruction. See State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Because we conclude there was neither deficient performance nor prejudice in this case, we do

not decide whether a defense of property instruction would have been available if Miller had asked for one. While generally the reasonableness of the amount of force used is a question for the jury, Washington decisions nevertheless observe that there are limits on the amount of force that may be used to protect a mere property interest. In State v. Murphy, a property owner brandished a gun at environmental control agents who were inspecting the premises of his construction business. 7 Wn. App. 505, 506-07, 500 P.2d 1276 (1972). We held,

> Under the statute [RCW 9.11.040] or under the common law, the use of a deadly weapon by a private party to eject a mere nonviolent, nonboisterous trespasser, who, at most can be understood to be interfering with a private party's intangible proprietorial interest, is, as a matter of law, not a justifiable use of force.

Id. at 514. In State v. Madry, we held that the use of deadly force to recover a small amount of money, stolen from the defendant by someone he knows, is unreasonable as a matter of law. 12 Wn. App. 178, 180-81, 529 P.2d 463 (1974).

In attempting to articulate prejudice, Miller emphasizes that, in general, defense of property does not depend on the defendant having any fear of bodily injury. See State v. Bland, 128 Wn. App. 511, 513 n.1, 116 P.3d 428 (2005). Here, by finding Miller guilty, the jury necessarily found he either did not fear bodily injury or used force disproportionate to that necessary in light of any fear he may have had, or both. This was a violent assault. Simicich had a total of five fractures in his face, had staples in his head, and had a plate placed in the back of his eye to hold it in the socket. His vision was impaired after the assault, and he has both short and long term memory loss. There is no reasonable probability a jury would

view this violent assault as a reasonable use of force to stop a mere property trespass. Miller's ineffective assistance of counsel argument fails.

IV

Miller next challenges the requirement of a substance abuse evaluation, arguing the trial court never found that chemical dependency contributed to the offense. This court reviews a trial court's statutory authority to impose a particular community custody condition de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a trial court does have statutory authority, the imposition of conditions is reviewed for abuse of discretion. Id.

RCW 9.94A.607(1) allows a court to order chemical dependency treatment if it finds that the defendant has any chemical dependency that has contributed to their offense. "If the court fails to make the required finding, it lacks statutory authority to impose the condition." State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). However, a court may impose a chemical dependency evaluation if the "record amply supports its decision," "[e]ven [when] the trial court failed to check the box indicating that [the defendant] had a chemical dependency." State v. Powell, 139 Wn. App. 808, 820, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009).

In Powell, Powell attempted to break into his ex-girlfriend's house. Id. at 811. At trial, the State presented testimony that Powell took methamphetamine before the incident. Id. at 813. Powell and the State requested the trial court impose a chemical dependency evaluation. Id. at 820. The trial court did not check the box on the judgment and sentence indicating that a chemical dependency

contributed to Powell's offense, and Powell challenged the chemical dependency treatment condition on that basis. Id. at 819-20. We affirmed, concluding that "[e]ven though the trial court failed to check the box indicating that Powell had a chemical dependency, the record amply supports its decision." Id. at 820.

The trial court in this case did not check the box in the judgment and sentence indicating that Miller had a chemical dependency that contributed to the offense. However, unlike Powell, the record does not support a conclusion that chemical dependency contributed to the offense. Miller testified he consumed "one glass of whiskey, three fingers deep" on the night in question and the whiskey had no effect on him. Furthermore, a sheriff's deputy who responded to the incident testified he did not document that Miller exhibited signs of intoxication. Because there was no evidence Miller had a chemical dependency and therefore no evidence that one contributed to the offense, RCW 9.94A.607 did not provide authority to order a substance abuse evaluation.

Under RCW 9.94A.703(3)(c) and (d), a court may order a defendant to engage in substance abuse treatment if the substance abuse was either "crime related" or "reasonably related to the circumstances of the offense." However, where there is no evidence that substances other than alcohol contributed to a crime, substance abuse evaluation and treatment must be restricted to alcohol. State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015). In Munoz-Rivera, Munoz-Rivera was charged with second degree assault of his live-in girlfriend and aggravated second degree assault of her daughter. 190 Wn. App. at 876, 878. At trial, the State presented evidence that Munoz-Rivera had been

drinking before the incident. Id. at 877. Munoz-Rivera challenged the chemical dependency treatment condition on the basis that it required him to undergo treatment for substances other than alcohol. Id. at 893. This court reversed, concluding that "because there is no evidence that substances other than alcohol contributed to Mr. Munoz-Rivera's crimes, substance abuse evaluation and treatment must be restricted to alcohol." Id.

The evidence indicated that Miller had consumed alcohol the evening of the assault. It was not an abuse of discretion for the trial court to conclude alcohol use was reasonably related to the circumstances of the offense under RCW 9.94A.703(3)(d). But like Munoz-Rivera, there is no evidence that substances other than alcohol contributed to Miller's crimes. RCW 9.94A.703(3)(d) provides authority supporting a substance abuse evaluation, but it must be limited to alcohol. We remand for the trial court to limit that condition accordingly.

V

Miller argues the trial court erroneously imposed four legal financial obligations: the criminal filing fee, the victim penalty assessment, the community custody supervision fees, and the DNA fee. The State concedes remand is appropriate to determine whether Miller was indigent for the purposes of the criminal filing fee and the victim penalty assessment and to strike the imposition of the supervision fee and DNA fee. Wash. Court of Appeals oral argument, State v. Miller, No. 84177-7-I (September 15, 2023), at 18 min., 44 sec. to 19 min., 17 sec., https://tvw.org/video/division-1-court-of-appeals-2023091189/?eventID=202309. We accept the State's concession, and remand accordingly.

We affirm Miller's conviction and remand for proceedings consistent with this opinion.

Birk, J.

WE CONCUR:

Feldman, J.

Chung, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84177-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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