NO. 89644-5

IN THE SUPREME COURT
OFTHE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

ROBIN LEE DAVIS,

Appellant

ANSWER TO PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that the Court deny review.

II. STATEMENT OF THE CASE

The facts of this case have been adequately outlined in the Brief of Respondent filed in the Court of Appeals, and in the Court of Appeals decision. The State relies on those two sources for the statement of the case.

III. ARGUMENT

A. THE DEFENDANT FAILED TO PRESERVE THE ISSUE HE RAISES FOR THE FIRST TIME IN HIS PETITION FOR REVIEW.

The defendant defended his actions on the basis of self-defense or defense of others. Accordingly the court gave a lawful use of force instruction. 1 CP 82. The court also gave a first aggressor instruction. 1 CP 84. The defendant objected to that instruction on the basis that there was no evidence to support it. 3 RP 646-47.

On appeal the defendant renewed his argument that there was insufficient evidence to support the initial aggressor instruction. Opening Brief of Appellant at 9-12. The Court of Appeals rejected that argument in the unpublished portion of the opinion. Slip Op. at 12-14.

The defendant seeks review of the trial court's decision to give the initial aggressor instruction. The defendant argues that the standard WPIC instruction given by the trial court was a misstatement of the law because it allowed the jury to reject his self- defense or defense of others claim based on intentional and lawful acts by the defendant. He argues that the instruction should not preclude the defendant's use of force if the provoking action was not unlawful. Petition at 14, 17. The defendant did not raise the argument in the trial court. Nor did he assign error to the initial aggressor instruction on this basis or brief this issue in the Court of Appeals.

Whether the instruction was a correct statement of the law and whether there was sufficient evidence presented to support giving the instruction are two different issues. This Court has refused to consider issues not raised or briefed in the Court of Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993), In re Lord, 152 Wn.2d 182, 188 n. 5, 94 P.3d 952 (2004). The Court of Appeals did not have the opportunity to consider whether the first aggressor instruction was a correct statement of the law because the defendant did not raise that issue or brief it there. As this Court has done in the past, it should refuse to review

whether the instruction was a correct statement of the law because it is raised for the first time in the defendant's petition for review.

B. WHETHER THE INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE CONSIDERED BY THIS COURT.

The defendant argues that review is appropriate pursuant to RAP 13.4(b)(4); that his petition involves an issue of substantial public interest that should be determined by the Supreme Court. If this Court decides that review is not precluded because the defendant did not raise or brief the issue in the Court of Appeals that he now raises in his petition for review, review should nonetheless be denied because this standard is not met.

The crux of the defendant's argument is that the instruction did not limit the "intentional act" which is reasonably likely to provoke a belligerent response to acts which are illegal. His position is that a correct initial aggressor instruction should not preclude the use of force if the provoking action was not unlawful. Petition at 14. He argues that under the specific facts of this case the defense was precluded from "effectively arguing its theory of the case, that the defendant's use of force was not unlawful." Petition at 10.

Jury instructions are proper when they do not mislead the jury, correctly inform the jury of the applicable law, and allow the parties to argue their theories of the case. State v. Barnes, 153 Wn.2d 382, 103 P.3d 1219 (2005). The defendant cites no authority for the proposition that an initial aggressor instruction is appropriate only if the provoking act is illegal. This Court has stated that an initial aggressor instruction is appropriate if the defendant first satisfies his burden to produce some evidence that his actions occurred in the circumstances amounting to self-defense, and if there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). The instruction is appropriate even if the evidence conflicts as to whether the defendant's conduct precipitated the fight. Id.

The court has upheld giving a first aggressor instruction under circumstances where the defendant's intentional act reasonably likely to provoke a belligerent response was also unlawful. See Riley (the defendant pointed a gun at the victim), However, no case has held that the provocative act must be an unlawful act.

In one case the court found the instruction was appropriate even though the provocative act was not itself unlawful. State v. Anderson, 144 Wn. App. 85, 180 P.3d 885 (2008). In Anderson an assault victim saw the defendant yelling at her mother as he leaned over her while the mother sat in a chair. That victim confronted the defendant with an iron bar, which led to physical fight between the defendant and the victim, her mother and her boyfriend. The defendant was charged with two counts of second degree assault. In addition to a self-defense instruction the trial court gave the first aggressor instruction. The Court of Appeals held that instruction was properly given because the act of leaning over the victim's mother with his hands on the arms of the chair she was seated in while yelling at the victim's mother was an act that consisted of more than words. Id. at 89-90.

The defendant argues that the instruction should not have been given because he was acting lawfully performing a vehicle repossession and then conducting a citizen's arrest. He argues that anyone would naturally respond belligerently to these acts because people do not want their cars repossessed and do not want to be arrested. However conduct that is not punishable as a

crime may nonetheless provoke a belligerent response, as demonstrated in Anderson.

Evidence produced in this case also demonstrates that one may intentionally act in such a way to provoke a belligerent response, even though the act itself is not punishable as a crime. The defendant and accomplices first encountered Mr. Valdez, his son, his sister, and his niece, as the Valdez family was driving through a Kentucky Fried Chicken restaurant drive through. Mr. Valdez testified that one of the men approached his car yelling at him and directing him forward. Mr. Valdez did pull around the corner and encountered two more men in addition to the first man yelling at him incomprehensibly. The men had parked their truck so that it blocked the drive-through exit. The truck's lights were shining at Mr. Valdez's car. One of the men approached Mr. Valdez's car and demanding that they get out. None of the men informed Mr. Valdez that their intent was to repossess the car. Nor did they show him any paperwork indicating that they were lawfully repossessing the car, rather than attempting a car-jacking. 1 RP 110-11, 114-20, 228-31. Attempting to repossess an occupied car or to continue a repossession effort if someone resists an attempt to repossess a vehicle is not a standard practice in the vehicle

repossession industry. 3 RP 621. Under those circumstances the jury could reasonably conclude that the manner in which the defendant and Mr. Saunders chose to perform a vehicle recovery was reasonably likely to provoke a belligerent response; i.e. Mr. Valdez escaping by jumping the drive through lane curb.

Although the instruction did not limit the intentional act to unlawful acts, it did not preclude the defendant from arguing his theory of the case. The defendant's recitation of facts is based on his testimony and testimony from his co-defendant, Jeffrey Saunders. The State produced conflicting evidence regarding how Mr. Saunders approached Mr. Valdez and whether Mr. Valdez nearly hit Mr. Saunders as he escaped the drive through.1 RP 119, 227-31; 2 RP 400-01. There was also conflicting evidence regarding what happened in the Burger King parking lot in Smoky Point. Defense witnesses claimed Mr. Valdez nearly hit the defendant's son Chet as he tried to speed away. Independent witnesses testified Mr. Valdez's car did not do that, and was completely stopped when the defendant and Saunders jumped out of their truck brandishing a firearm at Mr. Valdez's car. Slip Op. at 13, n. 13; 1 RP 65-68, 194-95; 2 RP 407-10.

Pursuant to this conflicting testimony the defendant was still able to argue that the credible evidence showed that he and Mr. Saunders did nothing to provoke Mr. Valdez's actions for which they justifiably could defend themselves and the defendant's son.

IV. CONCLUSION

Because prior case authority that considered the initial aggressor instruction does not limit the intentional act justifying the instruction to only unlawful acts, and the defendant was not precluded from arguing his theory of the case he has failed to show how an initial aggressor instruction that is not limited in that manner presents an issue substantial public interest that this Court should review. For that reason the State asks the court to deny review.

Respectfully submitted on January 9, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

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Good Morning...

RE: State v. Robin Lee Davis
Supreme Court No. 89644-5

Please accept for filing the attached pleading: State's Answer to Petition for Review

Let me know if there is a problem opening the attachment.

Thanks.

Diane.

Diane K. Kremenich
Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org