No. **68679-8-I**

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

The Honorable Judge McKeeman

APPELLANT'S REPLY BRIEF

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I. THE INITIAL AGGRESSOR INSTRUCTION

The uncontroverted evidence is that the Davis party drove to Mt. Vernon to repossess the Valdez vehicles. Valdez testified that when Saunders approached his car, while he was in the drive thru lane of the KFC, he did not understand that Saunders was attempting to repossess the vehicle. Regardless, the State offered no testimony that Saunders did more than knock on the window of the car and point for Valdez to pull over. Valdez decided to flee. Mr. Saunders had the right to approach the vehicle. His actions did not justify the giving of an initial aggressor instruction.

When Valdez next saw the Davis party he had pulled into the Burger King parking lot, far from the entrance to the restaurant. Davis and Saunders testified that no weapons were displayed until Valdez attempted to drive away and at that point Davis obtained his shotgun from his vehicle and pointed it at the Valdez vehicle to stop it before it hit his son, Chet.

The conflicting testimony is that Valdez never attempted to drive away and that he did not come close to striking Chet. The independent witnesses, Ms. Spady and Ms. Rhodes, gave conflicting testimony. Ms. Spady testified that the Davis vehicle came speeding into the parking lot and forced the Explorer to stop with the vehicles ending up facing each other. Only after the vehicle stopped did the driver get out and point a gun at the Explorer (RP 67).

Ms. Rhodes testified that the Davis truck followed the Valdez Explorer into the parking lot and that they came to rest one in front of the other, pointed in the same direction. It was only after both vehicles stopped that the occupants of the Davis truck got out with weapons. (RP 195). Neither of these witnesses testified that Davis provoked Valdez thus making it necessary for Davis to use force in response.

In order to invoke self-defense, the force defended against must be unlawful force. State v. Riley, 137 Wash.2d 904, 911, 976 P.2d 624 (1999). A first-aggressor instruction is

proper when the record shows that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred. State v. Brower, 43 Wash.App. 893, 901, 721 P.2d 12 (1986). Even if Saunders frightened Valdez when he approached his vehicle in the KFC drive thru, his actions were not unlawful. Nor did Saunders actions entitle Valdez to use his car as a weapon, almost striking Saunders as he attempted to avoid the repossession.

Davis pulled into the Burger King parking lot to again try to repossess the Explorer. The testimony offered by the defense was that Valdez again attempted to flee to avoid the repossession. On this occasion he was about to drive into Chet Davis. Robin Davis displayed his unloaded shotgun, hoping Valdez would stop. He did stop. Saunders decided to arrest Valdez.

The State did not carry its burden of showing that the force used by the defendants to make a citizen's arrest justified the giving of an initial aggressor instruction. Saunders's

decision to order Valdez out of the Explorer so that he could arrest him was based on Valdez's attempt to assault Chet Davis with his car when Valdez attempted to flee from the Burger King parking lot. Under the common law an individual can make a citizen's arrest when a felony or a misdemeanor that constitutes a breach of the peace is committed in that individual's presence. See State v. Miller, 103 Wash.2d 792, 698 P.2d 554 (1985); State v. Gonzales, 24 Wash.App. 437, 604 P.2d 168 (1979).

The Court found that there was sufficient evidence to justify defining lawful force to include the force used in making a citizen's arrest. See Instruction 31. The State did not assign error to that instruction. Based on the testimony offered by the defense, Davis and Saunders had probable cause to believe the driver of the Explorer committed a felony, either assault in the second degree or attempted vehicular assault. See instruction 35. Similar to that of a police officer, they were entitled to use force to make the arrest. No one would dispute that ordering

someone out of a car is a provocative act. However, if the Davis party had probable cause on which to make a citizen's arrest, they were justified to use force to effectuate it. Their actions were lawful. The act of using reasonable force to make a valid citizen's arrest should never justify the giving of an initial aggressor instruction. A citizen who uses force while attempting to make a citizen's arrest stands in the shoes of a police officer. See State v. Clarke, 61 Wash.2d 138, 144, 377 P.2d 449, 453 (1962)(We conclude, after careful consideration of the conflicting arguments, that the best rule, and the rule which we adopt in this case, is that it is lawful for a private citizen to use deadly force in attempting to apprehend a fleeing felon in any situation where it would be lawful for a peace officer to do so.). Just as a suspect who is being arrested by a police officer cannot use force to prevent the arrest, See State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000) (the "arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be

protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom."), the Court should not allow Valdez to claim the force used to arrest him makes Davis's actions unlawful.

The Court erred in giving the initial aggressor instruction. The instruction prejudiced the defense and deprived Mr. Davis of his right to a fair trial. The Court should vacate the convictions and remand for a new trial.

II. THE REBUTTAL EVIDENCE

Saunders testified that he did what he did in attempting to repossess the Valdez vehicle based on his training and experience. The State in its response discusses 6 instances during which Saunders testified about the "standard in the industry." State's Response at pages 16-17. In the first two and fifth instances Saunders explained on cross that his use of the phrase "standard in the industry" pertained only to his company, not the entire industry. Accordingly, rebuttal testimony was not appropriate. The third instance has him

saying that "in this industry, so many things happen." The fourth instance involved whether he intended to arrest Valdez when the Davis vehicle pulled into the Burger King parking lot. The rebuttal evidence did not rebut these assertions and certainly were collateral to anything the State needed to prove.

While the legality or illegality of the defendants' actions in making the repossession may have been relevant, the standard in the industry, rather than the law applicable to repossessions, was not. What the improperly admitted rebuttal evidence did do was give support to the State's contention that the defendants, whose behavior may have been inconsistent with the "standards in the industry," though not unlawful, provoked a belligerent response and therefore they were the initial aggressors and not entitled to use force to defend themselves or others.

The State then goes on at page 21 to argue that the rebuttal evidence was relevant to assess Mr. Valdez's credibility. Although there is nothing in the record to establish

that Mr. Valdez's one time prior experience with having a car repossessed would provide him with any expertise concerning repossessions, rebuttal evidence is designed to rebut evidence offered during the defense case. As a state's witness, evidence that might bolster Mr. Valdez's credibility is not properly admitted during the State's rebuttal.

III. THE "TO CONVICT" INSTRUCTION

The defendant contends the "to convict" instruction on the kidnapping counts was deficient. He further contends that the error was not harmless.

To understand why the deficiency in the instruction prejudiced Mr. Davis the Court needs to recognize the interrelationship between the instructions defining the lawful use of force, the initial aggressor, and the elements required "to convict".

The case concerns the attempt to repossess vehicles. The defendants' use of force in approaching the car first in Mt. Vernon and then in Marysville was lawful. It did not justify the

giving of the initial aggressor instruction. The use of force to arrest Valdez was lawful; it did not justify the giving of the initial aggressor instruction. The failure of the Court to properly instruct the jury on the elements that the State needed to prove beyond a reasonable doubt to convict Davis of Kidnapping in the Second Degree prejudiced him. The State argues that "There is no evidence either the defendant or Saunders believed he had any lawful authority to effect an arrest in the manner that he did." State's Response at p. 39. Saunders testified that after observing Valdez attempt to run down Chet Davis he ordered Valdez and his son from their vehicle to arrest them. RP 494. Once again, the law allows a citizen to use the same force as a police officer when making a citizen's arrest, see supra. The State had to prove that the defendants knowingly acted without legal authority. The defendants did not have to prove that they had the legal authority to restrain Valdez. The faulty initial aggressor instruction deprived them of their theory of the case, that they used lawful force to make a lawful citizen's arrest,

when combined with the deficient to convict instruction, the prejudice is apparent.

IV. CONCLUSION

For the reasons set out in Appellant's pleadings, this Court should vacate the Judgment and Sentence and remand this matter for a new trial.

DATED this 29 day of MARCH, 2013.

Respectfully Submitted,

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V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by United States Postal Service, addressed to:

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DATED this 29 day of March, 2013.

Brandy L. Ellis

Brandy L. Ellis, Secretary