

No. 44887-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

STEFFAN GALE,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

**1. The court applied a legally erroneous standard when agreeing to give the lesser offense instructions requested by the prosecution**

As a matter of law, the third degree assault instruction sought by the prosecution is unavailable without affirmative evidence proving that *only* this offense was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). Additionally, “[o]ur case law is clear” that “the evidence must affirmatively establish” that the requested inferior offense was committed, “it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Id.* The court “may not” give an inferior degree instruction when the factual basis for the instruction is merely that the jury disbelieves what witnesses said. *State v. Wright*, 152 Wn.App. 64, 71-72, 214 P.3d 968 (2009) (holding court erred by instructing on inferior degree offense of third degree rape due to lack of affirmative theory supporting this offense).

The prosecution dilutes this legal threshold in its Response Brief by framing the issue as a factual question reviewed under an abuse of discretion standard. Even factual questions must be assessed by the correct legal test. A trial court necessarily abuses its discretion when it “applies the wrong legal standard or bases its ruling on an erroneous

view of the law.” *State v. Lamb*, 163 Wn.App. 614, 625, 262 P.3d 89 (2011).

The factual prong of *Workman* is based on a controlling legal threshold that the State never met and the court never acknowledged. See *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *Wright*, 152 Wn.App. at 71-72. The prosecution never articulated a theory under which affirmative evidence showed Mr. Gale committed only negligent assault when he stabbed Timothy Andrews two separate times.

For the first time on appeal, the State raises a new theory to support the third degree assault instruction. Because the prosecution never offered this theory to the court, and the court never considered it, it cannot pretend on appeal that this Court should defer to the trial court’s discretion when reviewing this claim.

This new theory is that the jury could have believed Mr. Gale’s testimony that he acted in self-defense but disbelieved that he used a reasonable amount of force in defending himself. But in the case on which the State relies, *State v. Schaffer*, 135 Wn.2d 355, 358, 957 P.2d 214 (1998), the defense was the party seeking the lesser degree instructions. In *Schaffer*, looking at the evidence in the light most

favorable to the defense, the complainant threatened to kill the defendant and reached as if grabbing a gun, then the defendant pulled out his gun and shot the complainant. *Id.* at 357. The court held there was a sufficient factual basis for manslaughter instructions because the jury could have found the defendant reasonably acted in self-defense but used more force than necessary. *Id.* at 358.

Unlike *Schaffer*, Mr. Gale did not think Mr. Andrews was going to attack him with a weapon, but that he would “beat me up.” RP 490. Mr. Gale responded by stabbing Mr. Andrews two times, both wounds penetrated deeply. RP 306, 309, 322. According to Mr. Andrews, the second stabbing occurred after some time had passed and Mr. Andrews begged for help; Mr. Gale did not recall walking away and returning to stab Mr. Andrews a second time, but he also did not recall how the stabbing occurred so his testimony provides no affirmative evidence as to its manner of infliction. RP 137-40, 521.

Mr. Gale did not remember how he stabbed Mr. Andrews, so his testimony does not affirmatively establish that he was negligent as required for third degree assault. RCW 9A.36.031. Moreover, he knew he held a knife in his hand when he hit Mr. Andrews and he saw that he stabbed Mr. Andrews. 5RP 491, 538. Although he claimed he did not

realize he was swinging the knife, he admitted he knew it was in his hand and knowledge is defined as when a person “has information which would lead a reasonable person in the same situation to believe that facts exist.” RCW 9A.08.010(1)(b)(ii). Since Mr. Gale knew he held a knife, the evidence does not affirmatively establish negligence. To be negligent, he would need to “fail to be aware” of a substantial risk. RCW 9A.08.010(1)(d).

The court did not mention or acknowledge the requirement that the prosecution was required to affirmatively show that the evidence would show that Mr. Gale was guilty of only the lesser offense. RP 590-91. The prosecution made no argument on how it met the necessary legal threshold. *Id.*

The prosecution never presented a factual basis to convict Mr. Gale solely of the lesser third degree assault, and not the greater offenses of first or second degree assault. The court overlooked this requirement and improperly offered the jury the compromise verdict of third degree assault over defense objection. It was error for the court to give the third degree assault instruction without finding affirmative evidence supported a conviction on only that offense.

**2. The Response Brief ignores the prosecutor and court's misrepresentation of the law of self-defense, exacerbating the error caused by the court's refusing to fully explain the law of self-defense to the jury**

The trial court refused to correctly and completely instruct the jury on the law of self-defense, as explained in Appellant's Opening Brief. The court refused to give the requested instruction explaining that the jury view the incident from Mr. Gale's perspective, based on his good faith belief in what harm he faced even if he was mistaken about the extent of the danger. CP 50; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed 2008).

On appeal, the prosecution claims Mr. Gale had no mistaken belief in the degree of danger he faced, so this instruction was not necessary. Response Brief at 9. However, in addition to the reasons favoring this instruction as explained in Appellant's Opening Brief, the prosecution used this gap in the jury instructions to its advantage during closing arguments.

In his closing argument, the prosecutor emphasized that the court's the instructions did not let Mr. Gale use whatever was in his hand. RP 690-91. Defense counsel objected when the State claimed he had misrepresented the law by saying Mr. Gale had the "right to fight



back,” but the court overruled the objection and, in its ruling, told the jury that the prosecutor’s argument was correct. RP 690. The prosecutor then emphasized that once they read the self-defense instruction, they would see that, “You don’t get to stab an unarmed man,” and the jury should not “let him get away with it.” RP 691.

The State fails to respond to the argument raised in the Opening Brief that its closing argument exacerbated the error in failing to give the act on appearances instruction because the prosecutor and court both told the jury that the instructions told them that the law did not allow a person to use a weapon against someone who was unarmed. Contrary to the prosecution’s argument and the court’s endorsement of the argument to the jury, it is well-settled that even a person who only fears “the ‘simple’ use of bare hands by an assailant” may fear great bodily harm and act in lawful self-defense by using a weapon. *State v. Walker*, 136 Wn.2d 767, 775-76, 966 P.2d 883 (1998) (citing *State v. Painter*, 27 Wn.App. 708, 620 P.2d 1001 (1980) and *State v. Wanrow*, 88 Wn.2d 221, 238, 559 P.2d 548 (1977)).

The law of self-defense does not bar a person from using a weapon, instead, it rests on whether the degree of force was necessary and reasonable, based on how the defendant perceived the threat he

faced. *State v. Walden*, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

Here, the prosecutor incorrectly told the jury that Mr. Gale was legally prohibited from defending himself by using a knife when the complainant was not armed, and argued that the jury instructions supported this claim. The court refused to correct the prosecution's argument and, by failing to give the act on appearances instruction requested by the defense, the jury was never accurately informed of the controlling legal standard.

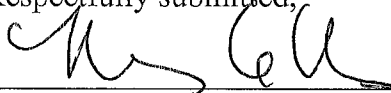
The importance of this instruction to the outcome of the case is demonstrated by the State's rebuttal argument and the jury's verdict of not guilty on all charges but the inferior degree offense of third degree assault, as well as its failure to find Mr. Gale possessed a deadly weapon. CP 93-96. The insufficient self-defense instructions, coupled with the objected-to misrepresentation of the law by the prosecution in closing argument, requires reversal.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Gale respectfully requests this Court vacate his conviction and remand his case for further proceedings.

DATED this 7<sup>th</sup> day of February 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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| STATE OF WASHINGTON, | ) |                |
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| STEFFAN GALE,        | ) |                |
|                      | ) |                |
| Appellant.           | ) |                |


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APPELLANT'S REPLY BRIEF

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