NO. 44887-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEFFAN GALE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy

No. 12-1-01909-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in instructing the jury on the lesser degree of assault in the third degree?

2. Whether the trial court abused its discretion where it declined to instruct on "act on appearances", where the instruction was not supported by the evidence and the defendant could argue his theory of the case under the self-defense instruction given?

B. STATEMENT OF THE CASE.

1. Procedure

On May 24, 2012, the Pierce County Prosecuting Attorney (State) charged the defendant, Steffan Gale, with one count of assault in the first degree. CP 1. The State also alleged that the defendant was armed with a deadly weapon. *Id.*

The case was assigned to the Hon. John McCarthy for trial. 1 RP 3. Trial began on March 25, 2013. *Id.* After hearing all the evidence, the jury found the defendant guilty of the lesser crime of assault in the third degree. CP 95. The jury did not reach a unanimous verdict regarding the deadly weapon. CP 96.

After the trial, the defendant filed a motion to arrest judgment or for a new trial. CP 97-264. The court denied his motion and proceeded to

sentencing. 5/17/2013 RP 12. The court sentenced the defendant to 57 months in prison. CP 293. The defendant filed a timely notice of appeal immediately after he was sentenced. CP 265.

2. Facts

On May 16, 2012, the defendant telephoned the victim, Timothy Andrews, to try to find a contact to purchase methamphetamine. 3 RP 117. The victim at times sold drugs (3 RP 112), but not methamphetamine. 3 RP 118.

Shortly after the defendant called, a mutual acquaintance of the defendant and the victim's, known as "Louisiana" called the victim. 3 RP 121. Louisiana wanted to buy crack cocaine, but the victim did not have any. 3 RP 122. Louisiana then asked to borrow $50 from the victim. 3 RP 123. They arranged to meet at a gas station in Fife. 3 RP 123.

When the victim and Louisiana met at the gas station, the victim took the money from his pocket. 3 RP 124. Louisiana saw the victim's large wad of cash and took it. 3 RP 125. Louisiana also took a ring of keys to several cars from the victim. 3 RP 125.

Because of the proximity of the calls, and the connection between the defendant and Louisiana, the victim suspected that the two were working in concert to steal from the victim. 3 RP 127. The victim called the defendant and asked to meet with him. 3 RP 128. The victim wanted to learn where to find Louisiana's residence. The victim wished to go there to get his car keys back.

The defendant and victim met at a nearby Safeway store in the Hilltop neighborhood of Tacoma. 3 RP 129. The victim asked the defendant to take him to Louisiana's residence to get the keys back. 3 RP 131, 133. The defendant said that the defendant was just there to buy some groceries. 3 RP 133. The victim pressed him regarding the car keys and Louisiana's whereabouts. 3 RP 135. The defendant entered the store and the victim followed him. 3 RP 133.

As the defendant stood by the milk case, the victim perceived him as swinging his arms toward the victim, as if to strike him. 3 RP 136. The victim struck the defendant in the face. 3 RP 137. The defendant struck back with a knife, slashing deeply into the victim's bicep. 3 RP 137, 4 RP 300. The defendant accused the victim of being a "snitch" and stabbed the victim in the abdomen. 3 RP 140. The abdominal stab cut the victim's spleen and perforated the diaphram. 4 RP 304.

The victim drove to Tacoma General hospital, where the wounds and his condition was stabilized. 3 RP 156. He was transferred to St. Joseph's hospital for evaluation and surgery. 4 RP 298.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN INCLUDING A JURY INSTRUCTION REGARDING THE INFERIOR DEGREE OF ASSAULT IN THE THIIRD DEGREE.

RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

The Court of Appeals reviews de novo a trial court's decision to give an instruction based on a ruling of law. ***State v. Brightman***, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the court's decision is based on a factual dispute, the appellate court reviews it for an abuse of discretion. ***Brightman***, at 519. The appellate court reviews the evidence in the light most favorable to the instruction's proponent. ***State v. Fernandez-Medina***, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). ***State v. Wright***, 152 Wn. App. 64, 214 P.3d 968 (2009).

The trial court may properly instruct on an inferior degree when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Fernandez-Medina, 141 Wn. 2d at 454 (internal cites omitted). In other words, the evidence must permit a rational juror to find the defendant guilty of the lesser offense and acquit him or her of the greater. *Id.*, at 456.

There is no question that assault in the third degree (RCW 9A.36.031) is an inferior degree of assault in the first degree, as charged (RCW 9A.36.011). *See*, ***Fernandez-Medina***, 141 Wn. 2d at 454. As in ***Fernandez-Medina***, and other cases, the question in the present case is not the legal prong, but the factual determination. *Id.*, at 455-456. When a trial court's decision to give an instruction rests on a factual determination, the decision is reviewed for abuse of discretion. ***State v. Walker***, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Self defense is an intentional act. One acting in self-defense is not committing a crime; he is acting lawfully. RCW 9A.16.050. Because self-defense is explicitly made a "lawful" act, it negates the element of "unlawfulness" contained within the statutory definition of criminal intent. ***State v. McCullum***, 98 Wn. 2d 484, 495, 656 P.2d 1064 (1983).

In murder cases, the Supreme Court has considered a similar issue in the context of "imperfect self-defense". Washington law does not recognize "imperfect self -defense". ***State v. Hughes***, 106 Wn. 2d 176, 188, 721 P.2d 902 (1986). However, where a defendant recklessly or negligently uses more force than necessary in self-defense, the court may instruct on a lesser degree or included crime. *See*, ***State v. Schaffer***, 135 Wn. 2d 355, 358, 957 P. 2d 214 (1998).

Here, the defendant testified that he feared an assault by fists. 5 RP 490. Although he remembered that the victim struck him, the defendant did not remember stabbing the victim, or much of his participation in the fight, because it happened so fast. 5 RP 491. The defendant could not remember how or when he stabbed the victim. 5 RP 494. The trial court considered the evidence and determined that it was sufficient to support the instruction:

> THE COURT: I think with regard to the lessers, of course, the Assault in the First Degree requires -- or second degree is intentionally assault and recklessly inflicts substantial bodily harm. Assault in the First Degree with intent to inflict great bodily harm. Assault in the Second Degree is intentionally assault and thereby recklessly inflicts substantial bodily harm, particularly in light of the testimony of your client in which he asserted that on different occasions he -- things were a blur, if you will. And although acknowledging a stabbing, did not acknowledge some or all of the intent of Assault in the First Degree. Assault in the Second Degree is an appropriate instruction. The different level of bodily harm is one that I know the defense referred to in the testimony.
> Assault in the Third Degree is causing bodily harm, caused by a weapon or other instrument likely to produce bodily injury, and that it was done with criminal negligence. Based on the defendant's testimony, the jury could conclude that that occurred. So there is a factual basis for the lesser instructions.

5 RP 590-591. Where the evidence could support the conclusion that the assaultive act was unintentional, unknowing, and negligent, the instruction on assault in the third degree was appropriate.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO INSTRUCT THE JURY REGARDING "ACT ON APPEARANCES" IN SELF-DEFENSE.

Jury instructions are proper when they permit the parties to argue their theory of the case, do not mislead the jury, and correctly inform the jury of the applicable law. ***State v. Willis***, 153 Wn.2d 366, 103 P.3d 1213, 1215 (2005). To be given, the proposed instruction must be supported by sufficient evidence. *See, e.g.*, ***State v. Workman***, 80 Wn.2d 443, 448, 584 P. 2d 382 (1978). When determining whether the evidence was sufficient to support giving an instruction, the Court views the evidence in the light most favorable to the party requesting the instruction. ***Fernandez–Medina***, 141 Wn.2d at 455–56.

Where a trial court declines to give a proposed instruction on evidentiary grounds, an appellate court reviews the decision for abuse of discretion. *See*, ***State v. Read***, 147 Wn. 2d 238, 243, 53 P. 3d 26 (2002). A trial court abuses its discretion only when its decision is "manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (quoting ***State v. Powell,*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Here, the court properly instructed the jury on self-defense.

Instruction 23 stated:

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
> The use of force upon or toward the person of another is lawful when used by a person *who reasonably believes that he is about to be injured*, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
> The person using 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 has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 85 (emphasis added).

As part of the self-defense instructions, the defendant also proposed an instruction regarding "act on appearance", WPIC 17.04:

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 50.

It is not error to reject a requested instruction when its subject matter is adequately covered in other instructions. In a self-defense case, it is not reversible error to refuse a WPIC 17.04 instruction, when under the

self-defense instruction given, counsel is free to argue that the defendant's belief was reasonable, but ultimately mistaken. ***State v. Kidd***, 57 Wn. App. 95, 99, 786 P.2d 847 (1990). Here, an "act on appearances" instruction was not supported by the evidence, and was unnecessary because the self-defense instruction given stated that in order for the defendant to have acted lawfully, he must have reasonably believed that he was in danger. *See*, Instr. 23, CP 85; ***Kidd***, at 99.

In the present case, the defendant was not "acting on appearance", perhaps mistakenly. According to the defendant, he reacted when the victim struck him in the face with his fist. 5 RP 491. Therefore, the question for the jury was not a "mistaken belief as to the extent of danger", but whether the amount of force used in response was appropriate. *See* Instruction 23, CP 85.

Although the defendant testified that he feared an assault with fists, he did not intentionally use his knife to defend himself. 5 RP 488. The defendant testified that he was shopping for milk and only had the knife out to clean his nails when the victim struck him. 5 RP 491, 492. The defendant could not remember exactly what happened; that he just struck out at the victim. 5 RP 491. There was no intent to stab the victim. *Cf.* ***State v. Walker***, 136 Wn.2d 767, 966 P.2d 883 (1998)(defendant asserted self-defense where he stabbed victim in a fistfight).

The trial court considered whether the evidence supported the proposed instruction:

> And 17.04, the WPIC discussion of that is, that is generally not given unless it's a situation where someone thinks they are gonna suffer injury from someone else; although, it's later shown to have been an erroneous belief. That's not really what we have here. Because we have here, your theory of the case is that Andrews swung and hit your client, and your client responded. So it's not really he thought there was an appearance that he was going to be injured.

5 RP 567-568. After the trial, the defendant moved for a new trial, in part because of the instructions that he had objected to. The court considered his arguments again and declined to change its rulings. 5/17/2013 RP 12.

As in ***Kidd***, the defendant here was able to argue, from the self-defense instruction and the instructions as a whole, his theory that he reasonably believed that he was about to be injured. Also, the evidence failed to support an "act on appearance" instruction. The court did not err in declining to give the "act on appearance" instruction.

D. CONCLUSION.

The defendant received a fair trial where the court properly instructed the jury and the defendant was able to argue his theory of the

case. For the reasons argued above, the State respectfully requests that the conviction be affirmed.

DATED: January 8, 2014.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.8.14
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