

No. 45965-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent and Cross-Appellant

V.

ERIC MORRISSEY,

Appellant and Cross-Respondent

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 13-1-00383-0

REPLY BRIEF OF RESPONDENT AND CROSS-APPELLANT

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A. STATE'S ARGUMENT IN REPLY TO MORRISSEY'S
RESPONSE TO STATE'S CROSS APPEAL

1. The trial court erred by modifying the standard WPIC jury instructions and by giving an instruction that defined the defense of excusable homicide in terms of criminal negligence even though proof of the charged offense required the State to prove beyond a reasonable doubt that the defendant acted recklessly

The State respectfully stands by its initial argument (in its opening brief) in reply to Morrissey's response brief on this topic.

2. There was insufficient evidence to support Morrissey's request for a self-defense instruction because there was no evidence of his good faith. Therefore, the trial court erred by giving excusable homicide instructions in this case because the defense of excusable homicide was premised upon Morrissey's claim that Talon Newman's death was the result of an accident that occurred when Morrissey was engaged in a lawful act of self-defense.

Morrissey argues that the "the State concedes that the evidence was sufficient to demonstrate that bystanders reasonably believed that Mr. Morrissey was about to be injured." Morrissey's Brief at 6. But the State does not concede that the bystanders reasonably believed anything at all. All that the State acknowledges is that there was evidence presented that would allow the parties to argue the beliefs of bystanders. Thus, if a

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bystander were charged with assaulting Talon Newman, and if the bystander were to assert self-defense, then maybe there would be evidence to support the bystander's assertion of self-defense. But here, Morrissey is the one charged, and here, there is no evidence to support any finding in regard to Morrissey's good faith belief in the necessity of acting in self-defense. One may speculate that Morrissey's beliefs would mirror the bystanders' beliefs, but if speculation is a substitute for evidence, then it is equally logical to speculate that the bystanders were weak-spirited, easily frightened persons who perceived a threat from Talon Newman, while speculating that Morrissey was a skilled fighter who perceived Talon Newman to be a weakling who was incapable of inflicting harm. The point is that speculation is a not a substitute for evidence, and there simply is no evidence in this case to establish what Morrissey believed in good faith.

Morrissey argues that the State is suggesting that in order to present some evidence of his good faith he is required to testify. Morrissey's Brief at 7-8. But in its arguments so far the State has carefully avoided saying that Morrissey, or any defendant, should be required to testify. One can easily surmise that personal testimony could

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be an efficient means of presenting evidence of one's own good faith, but the source of the evidence is not for the State to decide. Nevertheless, to present the defense of self-defense Morrissey was required to present at least some evidence of his own good faith. *State v. Graves*, 97 Wn. App. 55, 62, 982 P.2d 627 (1999) (quoting *State v. Dyson*, 90 Wn. App. 433, 438–39, 952 P.2d 1097 (1997)). In the instant case there was no evidence at all from which a fact-finder could conclude that Morrissey acted on a good faith belief in the necessity of the use of force against Talon Newman.

3. The trial court erred by not giving the State's proposed initial aggressor jury instruction.

Morrissey argues that “[t]here was no evidence that Mr. Morrissey drew a weapon, raised his fists, or lunged toward Newman.” Morrissey's Brief at 9. But the initial aggressor instruction does not require that the defendant draw a weapon, raise his fists, or lunge toward the victim.

Instead, “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137

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Wn.2d 904, 909-10, 976 P.2d 624 (1999). Furthermore, “[a]n aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight.” *Id.* at 910.

There is credible evidence in this case that Morrissey, together with a group of other men, went out looking for Talon Newman and that when they found him they ran toward him in a hostile manner and then swarmed around him. RP 244, 246-47, 248, 250, 254-55, 368-69, 372, 374-79, 382-84, 386, 442-43, 499-504, 588, 591. Morrissey and his group also made verbal threats as they charged toward Talon Newman, but this fact does not constitute “words alone” because this fact does not negate the fact that Morrissey engaged in hostile, threatening conduct when he tracked Talon Newman down and participated in charging toward him and encircling him. *Id.*

Thus, the State contends that it was entitled to an initial aggressor instruction and that the trial court erred by refusing to give one. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

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B. CONCLUSION

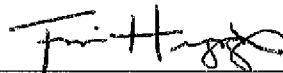
The trial court erred by modifying the standard WPIC jury instructions and by instructing the jury on absence of criminal negligence as a defense to manslaughter in the first degree even though the State was already required to prove the element of recklessness beyond a reasonable doubt. And, the trial court erred in giving this instruction because there was no evidence from which a fact-finder could find that Morrissey had a good faith belief in the necessity of acting in self-defense when he inflicted the blow that accidentally caused Talon Newman's death (if we assume for the sake of argument that Talon Newman's death was an accident).

Additionally, for the same reason as stated above, the trial court erred in giving the remainder of Morrissey's proposed self-defense jury instructions and the connected excusable homicide instructions. The trial court erred in giving these instructions because there was no evidence from which a fact-finder could find that Morrissey had a good faith belief in the necessity of acting in self-defense.

Finally, once the trial court decided to give the self-defense and excusable homicide instructions over the State's objections, the trial court erred by not giving the State's proposed initial aggressor instructions. There was evidence that Morrissey together with his group of supporters tracked Talon Newman down and charged toward him in a threatening manner and then encircled him before engaging in the assault that ultimately resulted in killing him. An initial aggressor instruction was appropriate on these facts.

DATED: February 4, 2015.

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