No. 69841-9-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

State of Washington,

Respondent,

V.

MICHAEL K. JUSTICE,

APPELLANT.

PRO SE STATEMENT OF ADDITIONAL GROUNDS
RAP 10.10

On appeal from the Honorable Judge Barbara Linde
SUPERIOR COURT OF KING COUNTY
CASE# 12-1-04487-9

Michael K. Justice
Pro Se Litigant,
Doc# 820387 H4-A-75L
SCCC
191 Constantine Way
Aberdeen, Wa 98520

TABLE OF CONTENTS

1. OPENING STATEMENT

Mr. Justice is making both State & Federal Constitutional challenges in this Statement of Additional Grounds (SAG). Mr. Justice has filed a "Motion to Accept additional Evidence; RAP 9.11," with this Most Honorable Court. Mr. Justice asks that the material exculpatory ballistic results are added to the appeal record. Mr. Justice is making a series of claims based on the State's failure to produce this evidence in trial, please reference the "9.11" motion for a summary of those claims. If this court does grant the "9.11" Motion Mr. Justice asks that he is allowed to amend this SAG to incorporate the arguments made in the "9.11" motion.

Next, Mr. Justice makes a series of challenges to the aggressor instruction. Mr. Justice asserts that defense counsel was correct when taking the position that the Honorable Barbara Linde used the wrong standard to determine if the aggressor instruction should be given, and if so, in determining what language to use. Judge Linde made erroneous evidentiary rulings based on the incorrect homicide aggressor standard. The jury was prevented from using all the relevant facts to determine who the aggressor was, and ultimately prohibited from considering Mr. Justice's defense.

Mr. Justice asserts that the open question in State v. Donald, 178 Wn.App. 250, 316 P.3d 1081 (Wash.App.Div.1 2013), applies under the facts of his case because the Judge made many errors in ruling what evidence was admissible. Mr. Justice is entitled to De Novo review of the evidentiary challenges because the trial court's rulings denied Justice his Constitutional right to present a defense.

Mr. Justice raises a plethora of prosecutorial misconduct issue's, most were objected to by defense counsel, some were not. This naturally leads to the many Ineffective assistance of counsel claims, the biggest being in counsel's opening statement where contrary to the video evidence, counsel claimed Mr. Justice "brandished" his gun at Ed Roy. RP 387. Also, in closing arguments counsel told the jury Mr. Justice had been convicted of a firearm charge for a violent offense. RP 2102. This is not correct. Counsel did not request a lesser included, nor argue about the aggressor instruction in closing. Defense counsel failed to call a self-defense expert; enhance the quality of the video; motion to continue trial until ballistic results were finished; nor object to the prosecutor's misstatements of the law & record.

Mr. Justice will incorporate the relevant facts into the applicable arguments below. Mr. Justice asks that this court does not hold him to the same standards as a lawyer. Mr. Justice is uneducated & untrained in the law. Please give these pleadings liberal interpretations. Maleng v. Cook, 490 U.S. 488, 493, 109 S.Ct. 1923, 1926-27 (1989).

2. ARGUMENTS & GROUNDS FOR RELIEF

A. THE TRIAL COURT USED THE WRONG STANDARD FOR DETERMINING IF THE AGGRESSOR INSTRUCTION WAS APPROPRIATE & WHAT LANGUAGE TO USE IN THE INSTRUCTION THIS ERROR VIOLATED MR. JUSTICE'S FAIR TRIAL RIGHTS, SUBSTANTIVE & PROCEDURAL DUE PROCESS RIGHTS UNDER BOTH THE STATE & FEDERAL CONSTITUTION

Mr. Justice asserts that the trial court confused the homicide aggressor standard for the Assault aggressor standard. State v. Heath, 35 Wn.App. 209, 666 P.2d 922 (1983); State v. Hawkins, 89 Wash. 449, 455, 154 P. 827, 829 (1916). Mr. Justice will prove this position, but first Mr. Justice must point out this Courts decision in State v. Kidd, 57 Wn.App. 95, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990).

In Kidd this Court "upheld an aggressor instruction based on acts against a third party that were likely to provoke a belligerent response from the victim .... This ... holding seems more consistent with Supreme Court precedent. State v. Lance, 94 Wash. 484, 162 P. 574 (1917)." Washington Practice Series TM, Vol. 13B. Criminal Law Part II Defenses, Chapter 33 Use of force § 3304. Judicial Interpretation -- Self-Defense.

This is very important to the instant case because the alleged victim Ed Roy is a very Rich, violent Gang Member (RED ROY), who provoked the July 14th incident. Mr. Roy made numerous death threats against Mr. Justice's life to Doug Wren. RP 1449-50, 1453-55, 1501-03, 1506, 1734, 1851-52. In the Black community gang threats have serious consequences. Especially, when made by a gang boss like "Red Roy." The Roy threats are likely to provoke Mr. Justice to act belligerently. As Mr. Wren confirmed "I think that's [Death threats] something likely anybody would do." RP 1502. Mr. Wren took the initial threats to Mr. Justice very seriously. RP 1501. "Yes, it made me angry Roy saying that." RP 1503. These threats created the need for the telephone calls between Mr. Justice & Mr. Roy. After, the first phone call, Mr. Wren suggested that Mr. Justice leave Seattle and go to Arizona. RP 1455. Mr. Justice was supposed to stay in Seattle for another week, however, he took Mr. Wren's advice because he was scared for his life and his Wife's life. RP 1730-31.

The next wave of threats came to Mr. Justice when he was in Arizona. RP 1731-32. Mr. Roy corroborated that threats were being communicated to Mr. Justice and Justice's brother; and that Mr. Justice tried a second time to squash whatever beef Mr. Roy had with the Justice family. RP 1179. These threats now implicated Mr. Justice and his Brother Charles Justice. Private investigator Shannon Kelley confirmed that Mr. Roy corroborated Mr. Justice's version of the second phone call made from Arizona. RP 1752-53.

ShaQuina Justice (Wife), stated that Mr. Justice was getting information of the death threats from people in Seattle, and she suggested that Mr. Justice call to resolve the beef. RP 1629-30. This is because Ms. Justice found Mr. Justice a good job with the City of Tacoma, and needed to know if it was safe to return to Seattle. RP 1719, 1852. Mr. Justice begged for his and his brother's life, and at the end of the phone call with Mr. Roy believed the beef was over. RP 1732-34.

Sometime after Mr. Justice returned to Seattle for the job interview and before the July 14th shooting, Deshawn Milikin (Mr. Justice's cousin), told Mr. Justice that Mr. Roy is still making death threats toward Mr. Justice. RP 1761-62. This is a very important fact because this caused Mr. Justice to approach Mr. Roy in the parking lot, the day of the shooting. Mr. Justice tried to squash the beef, for a third time.

The Judge did not consider these facts when deciding who was the aggressor; whether to give the aggressor instruction; or what language to use in the aggressor instruction. It is an abuse of discretion when the Judge uses the wrong standard. State v. Finch, 137 Wash.2d 792, 810, 975 P.2d 967 (1999). Ultimately the jury was prevented from using these facts in deciding if Mr. Justice was the aggressor due to the trial Judge's erroneous application of the homicide aggressor standard & failing to apply the Kidd Standard. This violates Mr. Justice's Fair Trial Rights.

The record clearly proves Judge Linde used the wrong aggressor standard even when making evidentiary rulings. RP 1401-02, 1414. Defense Counsel Hancock argued that certain evidence about Mr. Roy was admissible because it is direct evidence indicating "that the alleged victim was in fact the aggressor." RP 1401.

Judge Linde, referred "back to the Cloud and the Adoumo cases which does allow specific acts of the deceased .... I don't think it's limited to that." RP 1402. This proves that Judge Linde was using Homicide cases as the basis for her aggressor standard, and that is why she excluded the Mr. Milkin evidence RP 1412-13, and instructed the jury on not only the aggressor Doctrine, but the wrong Aggressor standard.

The Judge erroneously believed that "even if Mr. Roy responded angrily and made threats, the court's view is that it does -- it makes no showing, doesn't tent to make anything more or less likely as to who did what and why on the 14th. Because at that point, things have changed dramatically in that shot have been fired." RP 1414. This comment was made towards an erroneous evidentiary decision, however, it does shed light on what standard the judge used in her aggressor instruction decisions. Judge Linde erroneously believed that the only time frame, and set of facts, relevant to determine who the aggressor was, is the first shot that Mr. Justice fired in reaction to Mr. Roy drawing his weapon to kill Mr. Justice.

Defense Counsel Hancock pointed this error out to Judge Linde "If your Honor notices, that's again, from Title 16 of the WPIC, which is not an it's not a standard assault instruction. It's an instruction taken from -- I'm sure madame prosecutor knows, but it's from a homicide." RP 1646-47. The Judge stated "I've certainly seen it used in assault cases." RP 1647. Mr. Hancock objected to this instruction again in RP 1918-19. The Judge approved this erroneous instruction.

i. ONLY THE HOMICIDE AGGRESSOR STANDARD LIMITS THE ACT OF PROVOCATION

The self-defense case law in Washington State has repeatedly conflated the standard for Homicide with assault. This has bled into the aggressor law. The Law is clear, the person who throws the first strike is not the aggressor in all circumstances. Hawkins at 449; Heath at 269. The question in Heath was whether Heath's words or actions precipitated the situation, not whether the first strike did.

In a Homicide case "The act of provocation must have been committed at the time of the homicide and the relevant assault" that lead to the killing. Hawkins Id. This is the standard that Judge Linde used, limiting her aggressor determination to the first shot fired on the 14th, and ignoring all the evidence that proved Mr. Roy provoked the parking lot confrontation and the first shot. Mr. Roy placed himself in these situations, and therefore is the aggressor. The evidence is insufficient to support the aggressor instruction in this case. Under the proper standard this court can see Ed Roy provoked Mr. Justice through Mr. Wren & Mr. Milikin, and then directly through the phone conversations. This provoked Mr. Justice to approach Mr. Roy in the parking lot to try to squash the beef again. Mr. Roy is the aggressor, not Mr. Justice.

The fact that Mr. Roy made third-party threats to kill Mr. Justice & Charles Justice, to Doug Wren & Deshawn Milikin is undisputed credible evidence. Mr. Roy never disputed this fact. Under the facts of this case, Mr. Justice is entitled to "Third-Party" threat language from Kidd to be used in the aggressor instruction. Also, the trial Judge must use the Kidd & Heath standards to determine whether to give the aggressor instruction & in determining what evidence is admissible to prove or disprove who was the aggressor.

Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law. State v. Janes, 121 Wn.2d 220, 228, 850 P.2d 495 (Wash.1993). In a criminal trial, the state must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. Sandstrom v. Montana, 442 U.S. 510, 520-21, 99 S.Ct. 2450, 61 L.ed.2d 39 (1979). The Aggressor Instruction in this case read:

20: No person may by any intentional act reasonably likely to provoke a belligerent response create a necessity for actin in self-defense or defense of another and thereupon use, offer or attempt to use force upon or toward another person.

Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor and that defendant's acts conduct provoked or commenced the fight, then self-defense or a defense of another is not available as a defense.

As appellate counsel raised in the opening brief, the trial court did not instruct the jury that "mere words alone are not sufficient to render someone an 'aggressor.'" State v. Riley, 137 Wn.2d 904, 910-13, 976 P.2d 624, 628-29 (1999). On top of that error the jury was also prohibited from considering the entire transaction, the third-party threats & phone calls that provoked Mr. Justice to approach Mr. Roy in the parking lot, then Mr. Roy's death threats combined with being armed with a firearm, that provoked Mr. Justice to walk backwards to the car and arm himself, so that he could be safe when he tried to resolve the beef. RP 1526-27, 1579-81, 1163-64, 1183, 1770-71,1764-65.

The Jury was not allowed to assess who the aggressor was from the entire transaction. The Jury was misled into believing that when Justice signaled Mr. Roy to come back and talk, that Mr. Justice was then the aggressor. Mr. Roy did not know Mr. Justice had a gun, until he pulled it and shot. RP 1113, 1168-69. In fact Mr. Roy did not even hear anything Mr. Justice was saying when standing on So. Ferdinand. RP 1112. Even if he did, it does not matter because Mr. Justice did not threaten to shoot Mr. Roy, or kill him.

"A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." State v. Adamo, 128 Wash. 419, 426, P.9 (1924). It was Mr. Roy who threatened Mr. Justice through Wren & Milikin, and then directly through phone conversations and in the parking lot, and that provoked Mr. Justice. The jury was misled into believing that because Mr. Justice fired first, he is the aggressor. This is because the jury & trial judge used the erroneous Homicide Hawkins standard to determine who the aggressor was from the limited time frame starting when Mr. Justice signaled Mr. Roy to come back while screaming bad words at him. This is not proper and relieved the state of disproving self-defense and proving the elements of assault in the first degree. The State bypassed Mr. Justice's entire defense with a misstatement of the law through the aggressor instruction. In this case it is really important that the jury is allowed to look at the subjective nature of the self-defense in order to asses who the aggressor is, and to determine if Mr. Justice acted in self-defense.

ii. THE BLACK COMMUNITY IS OUTSIDE THE COMMON EXPERIENCE OF THE WHITE JURY

Mr. Roy is a rich gang boss named "Red Roy," the common experience of the white jury does not encompass the significance of this fact in the black community. For example, the consequences that would ensue from Mr. Justice, Mr. Milikin, or Mr. Wren involving the police; and being labeled a snitch, makes a Black man a target. Nor how serious the death threats are made from a overly capable "Red Roy." There are many gang members who want to please "Red Roy," and will do anything to advance their position in the gang, or amongst the black community. This makes the "Third-Party" threat evidence and phone call evidence critical for the jury to apply subjectively in determining not only who the aggressor was, but also if Mr. Justice acted in self-defense.

The Jury was unable to apply this subjective evidence due to the faulty aggressor instruction & the aggressor instruction being given, when it should not have been. The jury assessed the evidence in an objective vacuum. The State Supreme Court has ruled this to be an error, in State v. Jane, 121 Wn.2d 220, 850 P.2d 495 (Wash.1993).

In Jane the court reasoned that the jury is to inquire whether the defendant acted reasonably, given the defendants experience of abuse. Expert testimony on the battered person syndrome is critical because it informs the jury on matters outside common experience once the jury has placed itself in the defendants position it can then properly assess the reasonableness of the defendant's perception of imminence and danger." Id at 505. This subjective standard is critical in the instant case to determine who the aggressor was also, however, the aggressor instruction prevented the jury from using the experience of Mr. Justice and Mr. Wren once they found Mr. Justice to be the aggressor under the wrong standard.

The Jane court stated that the subjective & objective approach to self-defense provides balance to our jurisprudence. "The subjective aspect ensure that the jury fully understands the totality of the defendant's actions from the defendants own perspective such a consideration is especially important in a battered persons cases." Id. 505. This standard is equally important under the facts of this case. The Kidd & Heath standard are the functional equivalent of a subjective standard that allows the jury to assess evidence of facts outside of their common experience to determine whether Mr. Justice was the aggressor or not.

"The objective portion of the inquiry serves the crucial function of providing an external standard. without it, a jury would be forced to evaulate the defendants actions in the vacuum of the defendants own subjective perception." Id. 505. The reverse effect is true in this case, the jury was forced to determine who the aggressor was in the vacuum of their objective experience, excluding, the common experience of being a black man in the black community. "In order to establish self-defense actual danger is not necessary. The Jury instead must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. Lefaber, 128 Wash.2d 896, 899, 913 P.2d 369 (1996)." Jane at 228.

The Concept of imminence has symmetry with the aggressor Doctrine: "The evidence must establish a confrontation or conflict, not instigated or provoked by the defendant, which would induce a reasonable person considering all the facts and circumstances known to the defendant, to believe that there was imminent danger of great bodily harm about to be inflicted." Jane, at 505. Imminence does not require an actual physical assault. Mr. Roy's death threats are sufficient. "A Threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." Id at 505.

This standard is critical to determine who the aggressor was, in order to decide if the aggressor instruction should be given, and if so, what language to use in the instruction because it makes very clear that Mr. Roy provoked Mr. Justice to lawfully act in self-defense, and therefore Mr. Roy was not responding to unlawful force. Riley, at 909. Without the proper standard the Judge & Jury are unable to determine who the aggressor is, and who was acting in self-defense.

iii. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE AGGRESSOR INSTRUCTION

To determine if there was a basis for giving an instruction, an appellate court must view the evidence in the light most favorable to the party who received the instruction. Fernandez-Medina, 141 Wash.2d 448, 455-56, 6 P.3d 1150 (2000). The aggressor instruction is only proper when (1) The jury can reasonably determine from the evidence that the defendant provoked the fight; (2) The evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) The evidence shows that the defendant made the first move by drawing a weapon. State v. Anderson, 144 Wash.App. 85, 89, 180 P.3d 885 (2008)(Citing Riley, 137 Wash.2d at 909-10).

Whether the State produced sufficient evidence to justify the aggressor instruction is a question of law and the courts "review is De Novo. J-R Distribs., Inc, 82 Wash.2d 584, 590 (1973). The State need only produce some evidence to meet its burden of production." Anderson at 886. A court errs when it submits an aggressor instruction and the evidence shows that the defendant used words alone to provoke the fight. Riley at 910-11. Mr. Justice asks that the Kidd & Heath standard argued above is used in this analysis. Self defense finds its basis in necessity and generally ends with the cessation of the exigent circumstance which gave rise to the defensive act. U.S. v. Peterson, 483 F.2d 1222, 1229 (D.C.Cir.1973). A self- defense claim is "predicated upon the right of every citizen to reasonably defend himself against unwarranted attack." Jane, 504.

Mr. Roy corroborated Mr. Justice in that Mr. Justice approached Mr. Roy in the parking lot trying to clarify whether the beef was squashed. RP 1163, 1764-75. Mr. Roy told the defense that Justice did not want to do anything in the parking lot because Mr. Justice knew that Mr. Roy had a gun on his hip. RP 1183.

Defense Counsel asked Mr. Roy on cross-examination whether Mr. Justice saw his gun? Mr. Roy answered "I don't know. You have to ask him." RP 1164. Mr. Hancock did just that and asked Mr. Justice. Mr. Justice stated that he approached Mr. Roy in the parking lot and asked a rhetorical question, "I though we squashed this." In response Mr. Roy, "immediately pulled out a gun and said 'fuck you, boy. I'll kill you." RP 1764-65.

Mr. Roy told Detective Waters that Mr. Justice knew that he had a gun. RP 1164-65. ShaQuina Justice testified that Mr. Roy aggressively asked "What the fuck you wanna do," RP 1581, and after Mr. Roy chest-to-chest bumped Mr. Justice, RP 1526-27, Mr. Justice walked backwards, facing Roy, to the Justice's red charger. RP 1579. Mr. Roy repeatedly stated that he did not remember anything that happened that day. RP 1167, 1168-69.

Mr. Justice testified that he pleaded for his life when Mr. Roy pulled the gun on him in the parking lot and threatened to kill him. RP 1770-71. Mr. Justice placed himself between Mr. Roy's gun and Ms. Justice who was in the car, and then backed away because he did not want anything to happen to his wife. RP 1770-71. Mr. Justice was scared to turn around. This can be seen on the video at 10:37.

Mr. Roy threatened Mr. Justice that money was already on his head before he started walking down the street. RP 1769-70. Even with the Kidd & Heath standard being used, the state could argue that Mr. Roy was not the aggressor once he walked away from the parking lot confrontation. However, this argument fails because Mr. Roy did not withdraw from the combat in good faith, at such a time and in such a manner as to clearly aprise Mr. Justice that Mr. Roy intended to desist from further aggressive action. State v. Craig, 82 Wn.2d 777, 787, 514 P.2d 151, 155 (1973).

Mr. Roy walked away only after chest bumping Mr. Justice while holding a gun behind his back and making death threats. Mr. Roy testified that he, not Mr. Justice, but Mr. Roy got out of the car only to see what Mr. Justice wanted to do. "I said, oh, you don't want nothing." RP 1100, 1104. This is gangster talk, that means Mr. Roy challenged Mr. Justice right then and there, and Mr. Justice did not want to fight, or have a shoot out. Mr. Roy testified to this fact. This fact alone means that Mr. Roy did not walk away in good faith with an intent to desist from further aggressive action, rather, he taunted Mr. Justice and promised that he would get Mr. Justice in the streets, on the block in the hood. This places Mr. Justice and his family in danger, and Mr. Roy told Mr. Justice that money was on Justice's head. This provoked Mr. Justice to grab the gun and try to squash the beef in the daylight where it is most safe, in the public. Calling the police would be suicide.

The evidence is overwhelming to support that Mr. Roy provoked the July 14th parking lot confrontation and shortly after, the So. Ferdinand shooting.

Mr. Justice has a reasonable belief in real danger of imminent harm. Mr. Roy created the necessity for Mr. Justice to arm himself so that he could resolve the danger to him and his family. Mr. Justice did not brandish the gun at Mr. Roy. If Mr. Justice wanted to shoot Mr. Roy, if that was Mr. Justice's intent when grabbing the gun, he would not have signaled Mr. Roy to come back and talk, he would have just started shooting at him.

An aggressor, or a person who provokes the conflict, forfeits the right of self-defense. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151, 155 (1973). Mr. Roy provoked the conflict, yet, the jury was prevented from considering whether Mr. Justice acted in self-defense because of the erroneous Aggressor instruction. Mr. Roy is the aggressor who provoked the conflict without striking the first blow. Heath & Hawkins Supra.

When the entire transaction is taken into account the jury, nor trial Judge can reasonably determine that Mr. Justice provoked the fight. The evidence is overwhelming for the jury & Judge to reasonably assume that Mr. Roy provoked a belligerent response from Mr. Justice, and therefore Mr. Roy is the aggressor, and the instruction must not be given. State v. Arthur, 42 Wn.App. 120, 124, 708 P.2d 1230, 1232 (1985). Do not forget that the third party threat evidence is not contradicted by anything. There is no evidence that Mr. Justice was involved in any wrongful conduct, that may have precipitated the conflict. Mr. Justice did everything within his power to squash this conflict. State v. Bea, 162 Wash.App. 570, 575-78 (Wash.App.Div.3 2011). This leaves us with the first shot fired. The third prong in the Anderson standard.

IS THERE EVIDENCE THAT MR. JUSTICE MADE THE FIRST MOVE BY DRAWING A WEAPON?

This question cannot be resolved in isolation, the entire transaction must be viewed to place the actions of Mr. Justice walking backwards from Mr. Roy who had a gun out threatening Mr. Justices life. Mr. Justice did arm himself, but he did not pull the gun until Mr. Roy was patting his hip while telling Mr. Justice to get in the car, and in response Mr. Justice stated "Don't go there." Mr. Roy said "Too late" and then reached for his gun, and only then did Mr. Justice pull out his gun and fire a defensive shot, a single defensive shot, while running away. Only to be hunted down by Mr. Roy who fired multiple shots at Mr. & Mrs. Justice. Mr. Justice made no threats to Mr. Roy when he was armed, so there is no nexus between Mr. Justice's words and the firearm. This cannot be said for Mr. Roy's actions & Words.

The evidence is credible that Mr. Roy twice made the first move by drawing a weapon in conjunction with death threats. First, in the parking lot. Second, when walking back to confront Mr. Justice on So. Ferdinand. The evidence does not support giving the aggressor instruction based on Mr. Justice arming himself and drawing his gun in response to Mr. Roy pulling his gun. State v. Thompson, 119 Wash.2d 657, 666 (1992). A victim faced with words alone is not entitled to respond with force. Riley at 976 P.2d 629. Mr. Roy was only faced with non-threatening words. Mr. Justice was faced with death threats in conjunction with Mr. Roy going for his gun after saying "Too Late."

In trial the video & testimony evidence depicts Mr. Justice standing to the east on So. Ferdinand & Mr. Roy to the west. RP 1263-64. The video shows a flask of color near Mr. Roy's waistband right before Mr. Justice fired. RP 1371. Please remember that Mr. Roy had on baggy sweat pants & a baggy shirt. He pulled his baggy shirt up with his left hand, and reached for the pistol with his right hand. "And he was having a problem getting the gun out, that's what seemed unusual to me, or just he kind of fumbling a lot, and then he pulled out a gun." RP 569. Shelly Tonge-Seymour was the closest to Mr. Roy and she said that when the first shot was fired, immediately she turned around and saw Mr. Roy with his gun. RP 538-39, 555-56.

Mr. Roy was yelling "Better get in that car, boy" while simultaneously patting his gun. RP 1794-96. Mr. Justice responded "Don't pull that out on me again" & "Don't go there." RP 1795-96. Witness Leslie Garza testified that she heard "Don't go in there," however, it is clear she was referring to Mr. Justice saying "Don't go there." RP 930-31. Ms. Garza heard Mr. Justice twice say "Don't go there," and Mr. Roy respond "Too, Late." RP 930-31.

The above facts are important because Ms. Garza testified "then I heard, Too Late. And then I heard a gun shot." RP 930-31. Corroborating Ms. Garza is the testimony of Robert Aguirre, who heard "Too Late" and then "it all happened." RP 90607. This testimony corroborates Mr. Justice's testimony.

Mr. Justice testified that Mr. Roy took his left hand & lifted up his shirt to get his gun, after Mr. Roy said "Too late now." RP 1796. Mr. Justice purposely fired one shot in the grass as a distraction before attempting to run to safety. RP 1797. Ed Roy did not flinch, instead he hunted down the retreating Mr. Justice while rapidly firing to kill Mr. Justice. RP 539, 555, 1264, 1286-87, 1796-99.

Mr. Roy testified that Mr. Justice merely signaled for Mr. Roy to come back. Mr. Roy could not hear anything Mr. Justice was saying. RP 1106, 1112. Mr. Roy did not know Mr. Justice had a gun. RP 1113. This means that it does not matter what Mr. Justice said, nor that he had a gun in the waistband of his pants because Mr. Roy did not know this before he decided to pull his gun and shoot Mr. Justice.

In fact Mr. Roy did not know what Mr. Justice was saying, nor that he had a gun, even before, he decided to threaten Mr. Justice by patting his gun. This is expressed communication that if Justice does not get into the car, Mr. Roy would shoot him. Mr. Roy said "Too Late Now," and made a move to grab his gun. The only fact that saved Mr. Justice from getting shot, is that Mr. Roy's baggy gangster uniform, prevented him from pulling his gun out fast enough to shoot Mr. Justice before Mr. Justice could defend himself. The wardrobe malfunction, gave Mr. Justice enough time to fire a distraction round and run, before Mr. Roy could carry out his original intent, which is to gun down Mr. & Mrs. Justice.

That was Mr. Roy's intent even before he knew Mr. Justice had a gun, even without hearing anything Mr. Justice had allegedly said; While standing east of So. Ferdinand. Mr. Roy was merely outraged by, what in his eyes is viewed: as a "Soldier" (Disrespectful Slang for a Peasant), having the audacity to call back a rich Gang boss.

What aggravated this initial disrespect, is that the call was made by Mr. Justice (peasant), after being informed by Mr. Roy, that a Boss placed a money bounty on Mr. Justice's head. Mr. Roy intended to kill Mr. Justice for no reason, other than, this disrespect to a high ranking gang boss. Mr. Justice had to try to resolve this beef for safety purposes, and attempted to call Mr. Roy over to resolve the beef. Mr. Justice was armed, unknown to Mr. Roy. If Mr. Roy had not patted his gun while screaming the threat saturated ultimatum, that Mr. Justice had "Better get in that car, boy," RP 1794-96, then Mr. Justice would have never been forced to brandish his gun to fire a single defense round.

Logically, Mr. Roy, therefore provoked Mr. Justice to fire the shot, when going for his weapon after delivering the threatening ultimatum to Mr. Justice. It is obvious that Mr. Justice choose to get in the car because many witnesses testified that Mr. Roy said "Too Late" as he went for his gun. The Video corroborates that Mr. Roy went for his gun before Mr. Justice fired a single shot. Mr. Roy's provoking act was "Intentional." Arthur, 42 Wash.App. at 124.

The two cases that are most important to this claim are Kidd & Riley, both support Mr. Justice's claim. A critical fact that separates Mr. Justice's case from both Riley & Kidd, is that Mr. Justice and the alleged victim have a series of past events that caused the shooting.

In Both Kidd & Riley the shooting occurred unprovoked and absent any past events. Rather, the shootings were both merely, unreasonable reactions, that occurred spontaneously in the moment. In Mr. Jutice's case a thick history of death threats bolstered the threatening ultimatum of Mr. Roy combined with the words "Too Late" as Mr. Roy reached for his gun.

Unlike the victim in Kidd & Riley, the alleged victim in the instant case, Mr. Roy, reached for his gun, and then proceeded to hunt Mr. & Mrs. Jutice down. Mr. Roy fired so many shots, that Mr. Roy was even "trying to figure out ... Did somebody get hit?" RP 1123.

"Aggressor intructions are not favored." State v. Wasson, 54 Wash. App. 156, 161, 772 P.2d 1039, Review denied, 113 Wash.2d 1014, 779 P.2d 731 (1989). It is error to give the aggressor instruction because under the proper legal standards, there is no credible evidence from which the jury could have concluded that it was Mr. Justice that provoked the need to act in Self-defense. State v. Hughes, 106 Wash.2d 176, 192, 721 P.2d 902 (1986); Heath at 35 Wah.App. 269, 271-72.

In Riley the victim did not ever threaten Mr. Riley with a gun. In fact the victim told Riley that the gun was in a bush across the street. The victim was laying down, with his fingers interlocked behind his neck and posed no threat to Riley.

In Kidd two fellow bus passengers, J. & K., were shot. Undercover police responded in an unmarked car, Kidd shot at the police. Kidd believed that J & K changed seats to follow him & J. placed a hand in his coat, maybe Kidd thought to draw a gun. Then Kidd shot J, and when K Jumped the gun fire, Kidd shot her. Kidd at 840. Kidd believed drug dealers were trying to kill him for being a snitch. Id at 849-50.

This court upheld the instruction on count 3, for the assault on the police officers because the bus shooting provoked the police to act. The aggressor instruction in Count 3, was given under the third-party-aggressor theory. In the instant case the same rule must be applied in determining that Mr. Roy is the aggressor. Mr. Roy threatened Mr. Jutice's and his brother's life, through many people, including Mr. Wren & Mr. Milikin. These threats are likely to produce a belligerent response from anybody. Mr. Roy is the aggressor under the third-party-aggressor standard, and it is error to instruct the jury on the aggressor doctrine. When Mr. Justice tried to squash the beef, Mr. Roy stated "Why is a soldier calling a Boss." RP 1487.

This Court in Kidd found that it was error to give the aggressor instruction on counts 1 & 2, for J & K. The reason was because no evidence existed to indicate that Kidd somehow provoked J & K, into creating a need for him to act in self-defense. However, the error was harmless because this court was persuaded beyond a reasonable doubt, that no reasonable jury could have found that the bus shooting were acts of lawful self-defense. This Court can not say the same about the evidence in Mr. Justice's case, especially, in light of the ballistics evidence in the pending "9.11" motion, that the State never disclosed.

Mr. Justice is asking for this court to make a rule that instructs the trial judge to consider the third-party-threats and more then just the time frame starting from the first strike, in the decision that determines who is the first-aggressor. If the instruction is appropriate, then the jury must be instructed that:

1.) Third-party-threat evidence if credible makes a person the aggressor;

2.) When history between the alleged victim and the defendant exist that caused the fight, the entire transaction must be taken into account to determine who is the aggressor;

3.) The person who throws the first strike is not automatically the aggressor;

4.) Mere words alone are not sufficient to make Mr. Justice the aggressor.

These combined errors deprived Mr. Justice of a fair trial. Mr. Justice asks that this Court find that the evidence was not sufficient to support the aggressor instruction. In the alternative that the trial Judge abused her discretion in determining to give the aggressor instruction by using the wrong standard. Finally, the instruction that was given did not properly instruct the jury on the proper aggressor law governing this case.

Conclusion

Please reverse and remand Mr. Justice for a new trial with instructions to the court.

B. THE TRIAL JUDGE ABUSED HER DISCRETION BY EXCLUDING SUBSTANTIVE EVIDENCE THAT PROVED MR. ROY IS A GANG BOSS NAMED "RED ROY"

In State v. Donald, 178 Wn.App. 250, 316 P.3d 1081 (Wash.App.Div.1 2013), this court declined to give Donald De Novo review of evidentiary issues because the trial judge made no error. Mr. Justice makes the same argument, that this court should review the evidentiary issues De Novo because the trial court's challenged rulings denied Mr. Justice a right to present a defense. State v. Burri, 87 Wn.2d 175, 550 P.2d 507, 513 (1976). The trial Judge in the instant case did error when excluding the "Red Roy" gang evidence from both Mr. Wren's & Mr. Justice's trial testimony. RP 1449-50, 1454, 1458-68. This prevented Mr. Justice from presenting a defense to the aggressor instruction and self-defense. Excluding this evidence from the jury removed the subjective evidence of facts from the juries fact-finding function.

Defense Counsel did move to exclude gang references about Mr. Justice because there is no evidence that Mr. Justice is in a gang. The State conceded that Mr. Justice was not in a gang. RP 116, 118. Mr. Justice went to college and played college football, he is not a gang member. Defense counsel was attempting to protect Mr. Justice, from any prejudice that would occur from DPA Kline, making comments not supported by the evidence. RULE 103(c). The defense did not motion to exclude the "gang evidence" of Mr. Roy (Red Roy) which is material & exculpatory evidence, needed to prove Mr. Justice's innocence.

In Donald this court reasoned that "the plain language of ER 404(a) prohibits the use of character evidence to show circumstantially that a person acted on a particular occasion consistently with his character, with two exceptions that apply only in criminal cases. ER 404(a)(1) & (2) address character evidence of the defendant and the victim." Id. at 1083-84.

ER 404(a) allows Mr. Justice to admit the "Red Roy" evidence. The State had agreed in Motions in limine that no gang evidence existed for Mr. Justice. RP 118. That ruling cannot act as a bar against Mr. Justice admitting material "gang evidence" against Mr. Roy. That type of bar punishes Mr. Justice for choosing to go to college and play football versus being like "Red Roy," and dropping out of school to join a gang. RP 1449-50, 1454-68.

In Donald the question before the court was "Did the court err by excluding 'other suspect' evidence?" The trial court had rejected evidence of Leon's extensive criminal history of violent crimes. Mr. Donald asserted that the jury could have concluded from Leon's propensity to commit violent crimes that he acted alone when he assaulted the victim. Mr. Donald acknowledged that ER 404(b) bans "Other Suspect" pure propensity evidence. Mr. Justice asserts that no rule bans the "Red Roy" evidence, especially, since Mr. Justice claimed self-defense.

Mr. Justice's Constitutional right to present a defense were violated by the trial judge's abused of discretion. This evidence is admissible under ER 401, 402, 403, 404, and 405. Trial Judge Linde's ruling on RP 118, that banned gang evidence for being admitted by both parties violated Mr. Justice's substantial rights.

Gang evidence is properly allowed when it proves mental state and intent to cause bodily harm, that is relevant for Mr. Justice's self-defense defense. State v. Embry, 171 Wn.App. 714, 287 P.3d 648, 660 (Wash.App.Div.2 2012). The Embry court discussed their decision in Yarbrough, 151 Wash.App. 86, 210 P.3d 1029.

In Yarbrough the court found that the perception that is associated with a gang member and the dangers of having a beef with a gang member is Material "Gang Evidence." Even evidence regarding any pervious altercation between a person and a gang member. Yarbrough at 97. This type of evidence is found to help the jury better understand Mr. Roy's mental state & intent behind the threats & assault towards Mr. Justice. Embry at 287 P.3d 660.

A sufficient nexus does exist between Mr. Roy's gang affiliation and the reason why he sent death threats to Mr. Justice; that provoked Mr. Justice to approach Mr. Roy in the parking lot. In the parking lot Mr. Roy further provoked Mr. Justice, thereby creating the necessity for Mr. Justice to arm himself; before Mr. Justice attempted to resolve the beef with Mr. Roy. The "Red Roy" evidence is probative. The trial court is obligated to "conduct the Er 404(b) Analysis on the record." State v. McCreven, 170 Wn.App. 444, 284 P.3d 793, 800 (Wash.App.Div. 2 2012).

Conclusion

Mr. Justice prays that this Most Honorable court will rule the "Red ROY" evidence admissible, and reverse and remand for a new trial.

C. THE PROSECUTION COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS WHEN MISSTATING THE LAW & FACTS AND BY NOT DISCLOSING THE BALLISTICS LAB RESULTS

The Sixth and Fourteenth amendment to the United States Constitution and Wash. Const. art. 1, § 22 guarantee a criminal defendant the right to a fair trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Devenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Statements made by a prosecutor constitute reversible misconduct if the comments were improper and the defendant was prejudiced. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is shown where there is a substantial likelihood the prosecutor's remarks affected the outcome of trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was flagrant and ill intentional. State v. Russell, 125 24, 86, 887 (1994), cert. denied, 514 U.S. 1129 (1995). Where the defendant objects or moves for mistrial on the basis of alleged prosecutorial misconduct, the appellate court reviews the trial court's ruling for abuse of discretion. State v. Borg, 145 Wn.2d 329, 334-36, 36 P,3d 546 (2001). A mistrial is proper where only a new trial can cure the prosecutor's misconduct and ensure a fair trial. State v. Henderson, 100 Wn.App. 794, 799, 998 P.2d 907 (2000).

DPA Kline made insinuations throughout the trial that Mr. & Mrs. Justice tailored & fabricated their stories after having watched the video. RP 1850-1851, 1857-1858. Then DPA Kline made that argument in closing: "Keep in mind that ShaQuina Justice and Michael Justice are the only witnesses who watched the video before testifying. Michael Justice had to come up with a pretty big tale to explain away what everyone can see on the video. RP 2045.

"His testimony was unreasonable, considering the other evidence. Ed Roy hiring a hit man? He had to come up with something that would be so scary a threatening to explain away his actions on that day. Okay? The tailored and manipulated testimony, having seen the video, trying to talk to you about miscarriages and all sorts of things life that, crying on the stand and the fact that he was caught in lie during his testimony." RP 2047.

The Prosecutor prejudicially argued that Mr. Justice & Mrs. Justice are liars and jointly fabricated their story because they watched the video before testifying. This is extremely prejudicial and no objection, nor curative instruction can cure this prejudice.

Prosecutors are prohibited from stating their personal beliefs about the defendant's guilt or innocence or the credibility of witnesses. State v. Dhaliwal, 150 Wn.2d 559, 577-578, 79 P.3d 432 (2003). Whether expressed directly or through inference, an opinion on guilt is equally improper and equally inadmissible because it invades the province of the jury. State v. Haga, 8 Wn.App. 481, 491-492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973)(Witness may not offer opinion as to accused's guilt). DPA Kline used the "based on the testimony you have heard" style of language to further call Mr. Justice a liar, and in a credibility contest, make Mr. Justice not credible. This ill tactic was rejected in State v. Martin, 41 Wn.App. 133, 140, n.3, 703 P.2d 309, review denied, 104 Wn.2d 1016 (1985).

DPA Kline made huge mistakes when contrary to the evidence DPA Kline argued "it's undisputed that he fired on Ed Roy while Ed Roy's gum was still holstered or in his pocket. Regardless, it wasn't in his hand .... Nothing corroborates these three things, and those three things are key his self defense claim." RP 2046-2047.

"He was the aggressor. There's no evidence that Ed Roy posed a threat, let alone an imminent threat, which again, is required. There is no one else for Michael Justice to blame for his decision to raise the gun to Ed Roy and pull the trigger..." RP 2050. This is contrary to the evidence and without the ballistic results that prove Mr. Justice fired one defensive shot into the grass and ran.

DPA Kline flat out called Mr. Justice a liar, and erroneously told the jury that Mr. Justice lied on the stand. This is not true. RP 1829-1839. "Why do we care if Ms. Justice was pregnant or she wasn't pregnant? We care because it gives us a little insight into Mr. justice and Ms. Justice's mind and them trying to manipulate you. And if they're willing to tell a lie about this on the stand, what else is he lying about that we can't disprove with a simple jail call or simple internet search." RP 2048-2049.

Mr. Hancock objected to this foul argument. The Court sustained the objection. This however did not cure the prejudice from the improper argument. This type of character assassination invades the credibility province of the jury. "Crediblility determinations lie thin the sole province of the fact finder." State v. O'Neal, 126 Wn.App. 395, 409, 109 P.3d 429 (2005).

DPA Kline improperly invaded that province here. Mr. Justice & Mrs. Justice's credibility was critical to the self-defense & aggressor defense. Therefore the prosecutor's remarks were particularly prejudicial. State v. Jungers, 125 Wn.App. 895, 901-902, 106 P.3d 827 (2005)(Prosecutor's comments disparaging defendant's credibility, in trial were credibility was central issue, required mistrial). The same result should be obtained here.

DPA Kline misstated the trial evidence by saying that Ed Roy did not say anything back to Mr. Justice when they stood on So. Ferdinand. RP 2035. DPA Kline ignores all the people that heard Mr. Roy say "Better get back in that car, boy" & "too late." Even Ms. Rosenberg heard Mr. Roy saying things to Mr. Justice. RP 1021, 1028-1029.

DPA Kline argued contrary to the evidence when telling the jury that Mr. Justice fired two shots. The first at 10:41:34 & the second at 10:41:36. The ballistic results prove that Mr. Justice only fired one shot before running to safety. The prosecutor committed a violation of CrR 8.3(b) & RPC 8.4, when failing to disclose this evidence. Also, by arguing contrary to the video evidence. The video quality was horrible, and instead of the prosecution making the quality better, they made prejudical arguments based on the poor quality. Mr. Justice fired one shot. DPA Kline lied claiming "He fired the first shots at Ed Roy. He admitted that to you." RP 2017. That is not true.

The prosecutor's statements to the jury about the law must be confined to the law as set forth in the court's instructions to the jury. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Appellate courts will reverse a conviction for improper argument of law where the error prejudices the accused. Estill, 80 Wn.2d at 200.

DPA Kline contrary to the law of self-defense argued, "And if you find that Mr. Justice wasn't scared, that he was acting out of angry -- anger, then it's not self-defense." RP 2110. That is a prejudicial misstatement of the law. Anger and fear are not determinative to whether somebody acted in self-defense.

The Prosecutor worked the anger theory into her aggressor theory, DPA Kline erroneously argued to the jury, "it is so obvious from this video that the defendant was the aggressor and that the defendant started shooting first and that the defendant was the one who was angry. Yeah, Detective Waters did know from the beginning who he was going to focus on and he already had that person's name." RP 2111. That is contrary to the law, and what a dirty trick, to tell the jury Mr. Justice is guilty because detective Waters picked to charge him versus Mr. Roy.

Defense counsel Mr. Hancock motioned for mistrial after the state's opening argument in closing. RP 2058-2059. Mr. Hancock argued that the state violated Mr. Justice's fair trial rights when referencing Jail phone call of Mr. & Mrs. Justice. Thejury understood that Mr. Justice was incarcerated. RP 2054, 2061.

DPA Kline improperly argued, "Mr. Hancock told a nice story that's not supported by anything, including his clients' testimony, when it comes to speculating that Mr. Roy at some point removed his gun, fired a shot, and then kept walking up the street.

"It's not supported by the video and it's not supported by the two people that were walking right behind him from the corner, Emma and Shelly Tonge-Seymour, who certainly would have noticed somebody removing a gun, wrapping something into the chamber, a bullet falling to the ground..." RP 2109.

A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges. Also, if the prosecutor stated that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory." State v. Blair, 117 Wash.2d 479, 816 P.2d 718 (1991).

The prosecutor even attempted to inflame the passion of the jury by improperly arguing, "Mr. Hancock is right about another thing as well. Four and a half minutes after the defendant picked up the gun shots rang out, shots fired by the defendant. He had a gun for four and a half minutes, and there's a shootout on the street. This is, in fact, the very reason why we have laws against individuals such as Mr. Justice possessing guns, because it only took him four minutes to commit this crime after he picked up a gun." RP 2113. This argument is very prejudicial.

Mr. Justice also asserts a Brady claim under Amado v. Gonzalez, 2014 WL 3377340. DPA Kline knew that she would make the central focus of her case in chief was that Mr. Justice fired first. DPA Kline even argued Mr. Justice would have been innocent if he fired one shot, however, he fired two shots so he is guilty. RP 2114. DPA Kline should not have proceeded to trial until the ballistic results were finished, and it is the duty of DPA Kline to put forensic expert Kathy Geil, on the stand.

The Ninth circuit in Amado held that the impeachment evidence was not in the prosecutions possession, the prosecutor should have known. Id. * 1.

Defense Counsel Hancock twice moved for disclosure of the ballistic results, but never received them. In Fact the results were released on 1/11/13, and Mr. Justice's sentencing hearing was not until 2/1/13.

Mr. Justice could have moved for a dismissal based on the ballistic results, that prove Mr. Justice was telling the truth, he fired one shot before running for safety. The ballistic results disprove the state case and prove the defense theory is true. Without this evidence Mr. justice could not effectively cross-examine any state witness. The remedy for this issue is a complete dismissal with prejudice. Please reference the pending "9.11" motion.

Conclusion

Mr. Justice prays that this court will either dismiss all charges with prejudice, or reverse and remand for a new trial.

D. DEFENSE COUNSEL IS INEFFECTIVE FOR ARGUING CONTRARY TO THE EVIDENCE THAT MR. JUSTICE BRANDISHED HIS GUN AT MR. ROY; FAILING TO CALL A SELF-DEFENSE EXPERT; FAILED TO OBJECT TO DPA KLINE'S IMPROPER CLOSING ARGUMENTS; AND FAILED TO REQUEST A LESSER INCLUDED VIOLATING Mr. JUSTICE'S RIGHTS.

Both the federal and state constitution guarantee the right to effective representation U.S.Const.Amend. IV; Wash.Const.art. 1, § 22. A defendant denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney's conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickalnd v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn.A$\frac{11}{12}$.256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91.

There is no excuse for defense counsel to argue contrary to the facts that Mr. Justice "did not fire the gun he had in his hand, he brandished it at Ed Roy, and he showed Ed Roy that, hey, you're not going to scare me by bringing a gun." RP 387. This did not happen, Mr. Roy did not see Mr. justice's gun until it was pulled and he shot in Mr. Roy's direction. This makes Mr. Justice guilty under the erroneous aggressor instruction number 20.

Mr. Hancock also prejudiced Mr. Justice when incorrectly arguing "Well, with respect to the harm the represents, you can probably consider that he has not been con - he was convicted of a serious offense when he was only 16 years old and that he had not been convicted of a firearm charge or a violent crime since." RP 2102. Mr. Justice was never convicted of a previous crime involving a gun. Why would defense counsel say this?

Mr. Hancock should have improved the quality of the video so the jury could see that Mr. Roy did pull a gun on Mr. Justice in the parking lot; that Mr. Roy did go for his gun first on So. Ferdinand; and that Mr. Justice only fired one defensive shot before running for safety.

Defense Counsel should have obtained a self-defense expert to explain why Mr. Justice shooting first is a presumptive strike that is consistent with self-defense. The Jury was able to believe Mr. Justice was the aggressor for merely shooting first. The jury did not have to weigh the evidence under the self-defense standard.

Defense counsel is also ineffective for failing to request the lseeser included of assault in the second degree. The United States Supreme Court have recognized that a Due Process Right does exist under Due Process. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

A defendant is entitled to an instruction on a lesser included offense where there is some evidence that only the lesser offense was committed. Washington Courts have repeatedly held a defendant had an "absolute right" to have the Jury consider the lesser included offense on which there is evidence to support an inference it was committed. State v. Ward, 133 Wn.2d 559, 947 P.2d 708 (1997). The Ninth circuit uphold this right as well, in u.S.v. Hernadez, 476 F.3d 791 (9th.Cir.2007), the court found the failure to instruct on the lesser is not harmless; "we cannot say that a rational jury would not have concluded that Hernandez possessed the methamphetamine for personal use. The government did not show that the jury's only option on the evidence was to find intent to distribute beyond a reasonable doubt." Id. at 800.

This is similar to the instant case where the jury only had the Great Bodily harm stnadard for assault in the first degree, and could not consider the "Substantial Bodily harm" standard for assault in the second degree.

Washington Courts presume harm from the failure to properly instruct, unless the error affirmatively appears harmless. State v. Belmarez, 101 Wn.2d 212, 216 (1984). In deciding whether a lesser included offense instruction is warranted Washington courts view the facts in the light most favorable to the defendant. State v. Smith, 154 Wn.App. 272 (2009); Lockhart v. Fretwell, 506 U.S. 364, 368 (1998)(The Sixth Amendment right to counsel exist in order to protect the defendants fundamental right to a fair trial).

This is not like State v. Grier, 171 Wash.2d 17, 30 (2011), where the reviewing court must proceed on the basis that the defendant defense counsel consulted with the defendant as to the exclusion of lesser included offense and that the defendant agreed to defense counsel's withdrawal if these instructions."

There is no mention of this on the record, and a reference hearing can be ordered to question counsel on the matter.

Conclusion

Mr. Justice prays that this Court reverse and remand for a new trial.

E. CUMULATIVE ERROR DEPRIVED JUSTICE OF A FAIR TRIAL

Justice contends that any of the trial errors set forth above require reversal and a new trial. If this court disagrees, the cumulative of errors will require a reversal where the effect deprives a party of his right to a fair trial. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 669 (1984).

Respectfully Submitted,

This 24th day of January, 2015.

X _____

Michael K. Justice