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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 21 PM 4:53

NO. 62526-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN ARTHUR JONES, III

Appellant.

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

The Honorable George N. Bowden

APPELLANT'S REPLY BRIEF

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A. ARGUMENTS IN REPLY

The State concedes Mr. Jones' case should be remanded for a comparability analysis of his prior California convictions. Brief of Respondent at 16. The State also agrees the portion of Mr. Jones' sentence ordering he have no contact with his son should be stricken because it conflicts with existing law. Id. at 24. However, the State argues Mr. Jones was not entitled to a self-defense instruction, new evidence should be allowed at his resentencing, and Mr. Jones' sentence was not excessive or based on improper evidence. Id. at 12. Mr. Jones contends his assault in the second degree conviction should be reversed and remanded because he was entitled to a self-defense instruction. In the alternative, his exceptional sentence should be reversed and remanded for resentencing with no further evidence adduced.

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A SELF-DEFENSE INSTRUCTION

In reviewing an ineffective assistance claim based on counsel's failure to ask for a jury instruction, the reviewing court engages in a three-part analysis: (1) was the defendant entitled to the instruction; (2) was counsel ineffective for not requesting the instruction; and (3) did the ineffective assistance prejudice the defense. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011

(2001). The State argues the “defendant did not produce any evidence that he acted in self defense” and thus Mr. Jones was not entitled to a self defense instruction. Brief of Respondent at 9. The State also claims Mr. Jones’ attorney was not ineffective for failing to propose the self-defense instruction because he made a tactical decision to argue that the defendant did not commit the crime. Id. at 11. The State is incorrect on both points.

a. Mr. Jones was entitled to a self-defense instruction. The use of force against another is not unlawful whenever a person about to be injured uses necessary force to prevent or attempt to prevent an offense against his person. RCW 9A.16.020. The degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). A defendant is entitled to a self-defense instruction if he produces some evidence demonstrating self-defense. Id. at 473.

The State argues Mr. Jones testified he acted “accidentally, not intentionally,” and that accidental acts cannot support a theory of self-defense. Brief of Respondent at 9. However, Mr. Jones did not testify he acted “accidentally.” Rather, Mr. Jones described Ms.

Phillips hitting him in the head while his back was turned to her.
4RP 134. Although Mr. Jones said he was responding reflexively to Ms. Phillips' assault, he also testified he raised back with his arm to try to get her away from him. 4RP 134-35; 5RP 16. Mr. Jones testified he was intentionally attempting to prevent Ms. Phillips from assaulting him further when he said, "So I try to push her off me with my other hand." 5RP 16.

The State also apparently attempts to argue that because Mr. Jones "did not testify that he believed that he was in imminent danger of death or serious bodily injury," he was not entitled to a self-defense instruction. Brief of Respondent at 9. The State does not cite legal authority to support this proposition. Mr. Jones did not need to testify in this manner to be entitled to a self-defense instruction. The evidence showed Mr. Jones was using the degree of force that a reasonably prudent person would find necessary under the conditions as they appeared to him. Mr. Jones swung back with his arm in response to an assault. He did not use a weapon or any unnecessary force in his attempt to protect himself. Viewing the evidence from the point of view of the defendant, Mr. Jones produced sufficient evidence of self-defense and was entitled to a self-defense instruction.

b. Counsel's failure to request a self-defense instruction was ineffective assistance of counsel and was not a legitimate trial strategy. The State contends Mr. Jones' counsel made a tactical decision when he argued that Mr. Jones did not hit Ms. Phillips in the face. Brief of Respondent at 12. However, there was no legitimate tactical reason not to offer the self-defense instruction in light of Mr. Jones' testimony because Mr. Jones admitted he made contact with Ms. Phillips when he was trying to get her off of him. 5RP 16. In light of Mr. Jones' testimony that described his defensive actions, counsel's failure to request the instruction was objectively unreasonable. Where failure to request an instruction does not fit strategically or tactically in the case, where the instruction goes to an element of the crime that is at issue and is a focus of the defense, and where the instruction would allow the defense theory of the case to be submitted to the jury, counsel should have asked for the instruction. State v. Kruger, 116 Wn. App. 685, 693-94, 67 P.3d 1147 (2003).

c. Counsel's ineffective assistance prejudiced Mr. Jones and requires reversal. Mr. Jones was acquitted of every charge but second degree assault, the only charge to which he testified he acted to defend himself. Because the jury did not have a

corresponding instruction advising them of the State's burden to prove beyond a reasonable doubt that Mr. Jones was not defending himself, this error cannot be said to be harmless beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). Therefore, Mr. Jones' conviction should be reversed and remanded for a new trial.

2. MR. JONES' EXCEPTIONAL SENTENCE SHOULD BE REVERSED AND REMANDED FOR RESENTENCING WITHOUT FURTHER ADDUCED EVIDENCE

The State concedes the court erred in failing to do a comparability analysis in calculating Mr. Jones' offender score. Brief of Respondent at 16. However, the State contends it should be allowed to introduce new sentencing evidence on remand. Id. This argument is based on the Washington State Legislature's 2008 amendment to RCW 9.94A.530(2): "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." This amendment does not apply to Mr. Jones' case on resentencing because it was not in effect at the time of his alleged offense. RCW 9.94A.345. Even if the

amendment did apply, it offends general notions of due process.

U.S. Const. amend. XIV; Const. Art. I, § 3.

a. RCW 9.94A.345 prohibits application of the 2008 amendment to Mr. Jones' resentencing. Under RCW 9.94A.345, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Because Mr. Jones allegedly committed this offense on June 5, 2007 and the amendment to RCW 9.94A.530 occurred after this date, the new provision does not apply to Mr. Jones' resentencing. Therefore, this court should look to the law regarding evidence on remand as analyzed in Mr. Jones' opening brief. See State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009)¹; State v. Allen, 150 Wn. App. 300, 316, 207 P.3d 483 (2009) (remanding case for resentencing consistent with Mendoza even though remand occurred after 2008 amendment); State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (same).

Under this analysis, where a defendant raises a specific objection and the disputed issues have been fully argued to the

¹In Mendoza, the parties agreed the 2008 version of RCW 9.94A.530 applied to the case. 165 Wn.2d at 930, n.9. However, the Court still followed the rationale of Lopez in analyzing whether new evidence would be allowed at resentencing. Id. at 930. The Court held that because the defendants had raised no objections to their offender scores at sentencing, the State would be allowed to admit new evidence on remand. Id.

sentencing court, the reviewing court holds the State to the existing record, excises the unlawful portion of the sentence, and remands for resentencing without allowing further evidence to be adduced. Mendoza, 165 Wn.2d at 930; State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). In Lopez, the defendant objected to the court's imposition of a life sentence absent proof of a prior offense by preponderance of the evidence. 147 Wn.2d at 521. The Supreme Court remanded for sentencing without letting the State adduce more evidence because Lopez's objection was sufficient to notify the sentencing court of its obligation to demand evidence of the prior convictions alleged by the State. Id. at 521.

Here, Mr. Jones specifically objected to the lack of the State's proof regarding comparability, identity, and same criminal conduct. 7RP 5-7, 19-20. Like in Lopez, these objections notified the sentencing court of its obligation to demand more evidence from the State. Lopez, 147 Wn.2d at 521. The court did not demand such evidence, and the prosecutor did not offer any proof of comparability to demonstrate that the out-of-state convictions should have been counted in Mr. Jones' offender score. Because Mr. Jones raised specific objections, this Court must hold the State

to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced.

b. Notions of due process and fundamental fairness require the State not be allowed to adduce further evidence at resentencing. Even if the 2008 RCW 9.94A.530(2) were applicable to Mr. Jones' resentencing, this statute raises significant due process concerns. The reasoning behind allowing the State a second chance to introduce new evidence on resentencing when a defendant has not objected is that the State was not put on notice of any defects at the time of the first sentencing hearing. See State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (citing Lopez, 147 Wn.2d at 520). However, if a State is allowed to introduce new evidence on remand when a defendant has specifically objected, there is no incentive for a court or the State to follow proper sentencing procedures. The only party affected is the defendant, who has to spend months in prison appealing his case.

Punishing a defendant on remand by allowing the State to introduce more evidence is fundamentally unfair. Courts must do their duty at sentencing and cannot just leave the matter of sentencing up to the appellate court by estimating an offender

score. 7RP 22, 24; CP 8-9. In Mr. Jones' case, the defense attorney conscientiously objected several times on multiple grounds, putting the State and the court on notice of the sentencing defects. Because the prosecutor did not offer any evidence to prove the 1992 out-of-state convictions were comparable to Washington felonies and did not provide any documentation about any other convictions, the trial court erred when it found Mr. Jones had an offender score of six. The State did not meet its burden of proving by a preponderance of the evidence that Mr. Jones had prior criminal convictions that could be counted in his offender score.

Because RCW 9.94A.345 prohibits application of the 2008 version of RCW 9.94A.530 and application of the amended statute would violate due process and notions of fundamental fairness, remand and resentencing without any further adduced evidence is the proper remedy.

3. THIS COURT SHOULD REVERSE MR. JONES' EXCEPTIONAL SENTENCE BECAUSE THE STATE CANNOT PROVE MR. JONES' SENTENCE WOULD HAVE BEEN THE SAME ABSENT THE SENTENCING ERRORS.

The State does not address Mr. Jones' argument that his exceptional sentence must be reversed because of the sentencing

error. However, the State has conceded that the sentencing court erred in failing to do a comparability analysis. Brief of Respondent at 16. This implies that the offender score may be incorrect. A sentencing court must first correctly calculate the standard range before imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Resentencing is required where a trial court imposes an exceptional sentence and an incorrect offender score is used to calculate the standard range. Ford, 137 Wn.2d at 485. Remand is appropriate unless the record is expressly clear that the sentencing court would have imposed the same sentence had the standard range been properly calculated. Parker, 132 Wn.2d at 192.

Here, the record is not expressly clear that the court would have imposed the exceptional sentence if Mr. Jones' offender score were zero. Therefore, Mr. Jones' sentence should be reversed and remanded for resentencing with no further evidence adduced.

B. CONCLUSION

Mr. Jones asks this Court to find his counsel was ineffective for failing to request a self-defense instruction. This requires reversal of his conviction. In the alternative, Mr. Jones urges this Court to find the sentencing court erred in computing Mr. Jones'

score and to reverse his exceptional sentence without allowing any further evidence to be adduced at resentencing. Mr. Jones further asks this Court to reverse his exceptional sentence because the judge relied on improper information in imposing it and it was clearly excessive. The State concedes this Court should strike the order prohibiting Mr. Jones from contacting his son.

DATED this 21 day of October, 2009.

Respectfully submitted,


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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 62526-8-I
)	
)	
JOHN JONES III,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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		()	_____

SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF OCTOBER, 2009.

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