

65864-6

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NO. 65864-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILLER,

Appellant.

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

MAR 06 2011

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

The Honorable Michael Heavey, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF CASE IN REPLY

Apparently unable to find legal authority to support the court's self-defense instructions, which the State proposed, the State argues the facts are different than appear on this record.

1. THERE WAS ONLY ONE ENCOUNTER BETWEEN THE TWO PEOPLE GIVING RISE TO THIS CHARGE.

The State claims Mr. Miller presented no evidence of self-defense to "the assault that was charged." Resp. Br. at 13-15. This claim is inaccurate.

Mr. Miller testified Mr. Rasar struck him with his flashlight at the top of Mr. Miller's driveway. To get Mr. Rasar off his property and avoid being hit again, Mr. Miller then bodily pushed Mr. Rasar down the driveway, his hand on the other man's shoulder. Both men accelerated down the slope of the driveway in the dark and both ran into the side of the truck. RP(7/20) 148-50.

It was the defense theory that Mr. Rasar was injured when he collided into his truck after Mr. Miller pushed him down the driveway. Contrary to the State's assertion, the defense never claimed an assault occurred on Mr. Miller's porch. Resp. Br. at 26. Mr. Miller found the flashlight Mr. Rasar

used to strike him about halfway up the driveway as he returned to the house. RP(7/20) 154.

The State claims the defense factual theory "did not involve the charged act and injury." Resp. Br. at 14. The State charged intentional assault with reckless infliction of bodily injury. Yet nothing in the State's Information specified a different contact than what occurred in Mr. Miller's driveway. CP 1. Nothing in the jury instructions, proposed by the State, specified a contact different from Mr. Miller's pushing Mr. Rasar's shoulder. CP 5-27, 90-109. The question of where on the driveway Mr. Miller began pushing Mr. Rasar -- the alleged assault -- does not divide a single continuing act into multiple separate acts.

2. THE STATE PROPOSED AND DID NOT EXCEPT TO THE COURT'S INSTRUCTIONS ON SELF-DEFENSE.

The trial court explicitly stated in court:

If the jury were to believe the defendant and not believe the State, there would be evidence of self-defense. So ... I'm going to need self-defense instructions.

RP(7/21) 5.

The State did not object to this finding at trial. In fact, it provided the court with

proposed instructions on self-defense. RP(7/21) 8 (court requests prosecutor to "help me out in making sure I've got good instructions on self-defense;" prosecutor agrees); RP(7/21) 48 (court announces it will "essentially give the instructions as proposed by the State").

The court announced it would instruct on self-defense. When specifically asked if he had any objections, the prosecutor responded, "No, Your Honor. That's fine." RP(7/21) 49.

In fact, when the court asked whether the self-defense instructions should go before or after the instructions on the lesser included offense, the prosecutor responded with his preference. RP(7/21) 50-51.

The State did not take exception to the court instructing the jury on self-defense. The State prepared the self-defense instructions the court gave. The State did not cross-appeal on this finding.

3. THE DEFENSE PROPOSED A NO DUTY TO RETREAT INSTRUCTION.

The State argues: "Post-trial, the defendant **claimed** he proposed" an instruction on no duty to retreat. Resp. Br. at 23. The record of

defendant's proposed jury instructions is uncontradicted.

Post-trial, new defense counsel explicitly informed the court she was attempting to recreate the instructions trial counsel had proposed, since he had not filed them. She invited the court and the State to assist. RP(8/12) at 5-6. The State offered no evidence contradicting or even questioning defense counsel's Declaration. The court similarly did not find any of defense counsel's declared facts to be inaccurate. It summarily denied the motions for new trial and reconsideration. RP(8/13) at 2-3.

The record is quite clear that the defense proposed the instruction on no duty to retreat. The court refused, on the record, to give it unless both parties agreed to it. The prosecutor asked the court not to give this instruction, and it did not. RP(7/21) 56-57; App. Br. at 17.

4. THE RECORD IS CLEAR THAT THE DEFENSE ASSERTED DEFENSE OF PROPERTY.

The State baldly asserts: "At no time during the course of trial did the defendant make a claim of defense of property." Resp. Br. at 18. Yet two

pages later, it concedes the defendant "referred to protecting his 'castle.'" Resp. Br. at 20.

Mr. Miller testified he pushed Mr. Rasar down his driveway to get him off his property. RP(7/20) 149-50. Mr. Miller didn't want to enter the street, to leave his property, because he should be safe on his property. RP(7/20) 153. He testified he was protecting himself, his home, and his wife that night. RP(7/20) 203-04.

The State utterly ignores defense counsel's closing argument. He began with this theory.

Thank you, Your Honor. He just wanted him to leave the property. That's all he wanted. You would, too, because your home is your castle. Your home is where you feel safe. Your home is where your wife should feel safe while she's doing her homework against a time line and a deadline so that she can get her much-needed computer science degree. ... So he protected her and said I want this man away. He did it with this hand. And then he started to get him off the property to avoid being struck again. He testified to that.

...  
... I just want him off my property. Or Mr. Miller wanted him off his property. He said that. That's all I wanted.

RP(7/21) 88-89. After describing how Mr. Miller saw the flashlight coming at him, he continued:

I don't want to get hit with that. And then you back up. And then it hits you.

And you do not want to get hit again. Mr. Miller didn't. He said that. And at that point all bets are off. I just want this man off my property.

RP(7/21) 94. And yet again:

All Mr. Miller testified that he wanted to do was to get him off the property.

... Mr. Miller said: I just wanted to get him away. I'm not sure what I was thinking. I don't know what I wanted. I just wanted him off my property.

RP(7/21) 95.

B. ARGUMENT IN REPLY

1. INACCURATE AND INCOMPLETE INSTRUCTIONS ON SELF-DEFENSE CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

The State's only response to the constitutional nature of inaccurate and incomplete self-defense instructions is that the trial court erred in giving any self-defense instructions because there was no evidence of self-defense. Resp. Br. at 13-15.

As shown in the Statement of the Case in Reply, above, there was ample evidence of self-defense in this case.

As noted above, the State did not oppose, except or object to instructions on self-defense at trial. Rather it proposed the instructions the court gave. "The invited error doctrine prohibits

a party from setting up an error in the trial court then complaining of it on appeal." In re Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003).

The State's cited murder cases do not support its theory. State v. Walker, 136 Wn.2d 767, 778, 966 P.2d 883 (1998) (five knife wounds to the chest and trunk area, plus five or six stab wounds to his arms); State v. Brigham, 52 Wn. App. 208, 758 P.2d 559 (1988) (stabbed in back eight times). Both murder cases were based on assault as the underlying felony, where the court found excessive force as a matter of law. Homicide requires a greater threat to justify deadly force than assault for self-defense.<sup>1</sup> In both cases, what began as a fist fight ended with the defendants repeatedly stabbing their adversaries. Both defendants acknowledged they had committed the stabbings.

The defense here did not acknowledge pounding Mr. Rasar's head into the truck or into the pavement. The State did not allege Mr. Miller used a weapon or deadly force.

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<sup>1</sup> Compare: RCW 9A.16.020(3) (Use of force--When lawful), with RCW 9A.16.050 (Homicide--By other person--When justifiable).

In State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980), the trial court instructed on self-defense and the Supreme Court affirmed the instructions were warranted and adequate. The Theroff court applied a rule that flawed self-defense instructions affect a constitutional right only if the evidence on self-defense is "close." Theroff, 95 Wn.2d at 391.

Theroff, however, was decided before the later authority that require self-defense instructions to "more than adequately convey the law of self-defense" if there is **any** evidence of self-defense. State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). See generally Appellant's Brief at 21-23.

2. THE INSTRUCTIONS AS A WHOLE DID NOT PERMIT THE DEFENSE TO ARGUE ITS THEORIES OF THE CASE.

The State repeatedly argues defense counsel was able to argue his theory of the case based on "the instructions as a whole." Resp. Br. at 16-18, 24. This argument entirely overlooks some theories of the defense.

There was no instruction on the theory of defense of property. The defense proposed it. The State's proposed instruction, which the court gave, omitted that theory. The legal principle of this defense was not presented anywhere in the instructions "as a whole." See App. Br. at 30-32.

There was no instruction that the defendant had no duty to retreat. See App. Br. at 23-26. This quintessential legal principle is nowhere in the instructions, although the defense requested it.

In contrast, the court instructed the jury that it should disregard the "lawyers' remarks, statements, and argument ... not supported by the evidence or the law in my instructions." CP 8. Thus, with no instructions on these legal principles, the jury was required to disregard any argument defense counsel may have made about them.

These instructions prohibited the defense from arguing its theories based on the instructions "as a whole" because the court did not instruct on the law of the defense theories. Thus the improper instructions denied Mr. Miller his right to due process and effective assistance of counsel. See

App. Br. at 21-23. U.S. Const., amends. 5, 6, 14; Const., art. I, §§ 3, 22.

"A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." State v. LeFaber, supra, 128 Wn.2d at 899-900. The State blithely argues the jury's verdict proves it "necessarily found that the assault occurred as Rasar described" and so self-defense was irrelevant. Resp. Br. at 26. With no instructions on the defense theory, however, the jury could not reach the issue. The prejudice is clear.

3. THE COURT'S FAILURE TO INSTRUCT ON NO DUTY TO RETREAT IS REVERSIBLE ERROR.

The State now properly acknowledges that, under both the State's and the defense version of the facts, Mr. Miller had a right to be in his driveway and had no duty to retreat if Mr. Rasar assaulted him there. Resp. Br. at 22-23.

Yet it claims there was no prejudice from the court refusing to give a "no duty to retreat" instruction. Resp. Br. at 23. It bases this conclusion on a convoluted argument that the "assault" was "the shattering of Rasar's nose" which could not have occurred on Mr. Miller's porch

-- "the only location where any assault occurred that could be characterized as self-defense." Resp. Br. at 26.

This argument is ridiculous. As shown above, if the assault was the pushing of Mr. Rasar down the driveway, it was an ongoing assault. The injury occurred on impact with the truck as a result of the pushing, which occurred in the driveway. Mr. Miller had a right to be in his driveway, and no duty to retreat.

The State itself provided the prejudice of this failure to instruct at trial. The prosecutor asked Mr. Miller: "Why didn't you just run away?" "Why didn't you just push him and run into the house?" RP(7/20) 182. See App. Br. at 25-26. Under State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003), this questioning established prejudice. The trial court was required to give a no duty to retreat instruction. It was reversible error not to.

4. FAILURE TO INSTRUCT ON DEFENSE OF PROPERTY REQUIRES REVERSAL.

This case is distinct from State v. Prado, 144 Wn. App. 227, 181 P.3d 901 (2008). There the trial court gave an instruction on defense of property

that contained the same error as caused reversal in State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005). Nonetheless, the Court of Appeals held Mr. Prado had not presented evidence of defense of property at his trial.

The opening statement and closing argument of Mr. Prado's defense counsel made no mention of a defense of property claim. Mr. Prado's testimony was about self-defense, not defense of his car or other property.

Prado, 144 Wn. App. at 245. The Prado court also noted that defense of property would not support the use of a deadly weapon in a deadly manner.

As shown above, here there was ample evidence and argument by counsel that Mr. Miller acted in defense of his property. There was no suggestion of deadly force. It was reversible error not to instruct on this theory.

5. THE STATE DOES NOT CONTEST TRIAL COUNSEL'S DEFICIENT PERFORMANCE.

The State does not appear to contest that trial counsel's performance regarding jury instructions was deficient. App. Br. at 35-42; Resp. Br. at 23-25.

The prejudice of counsel's deficient performance is shown by the constitutional errors

in the instructions, discussed above and below, which prohibited counsel from arguing, and the jury from considering, the theories of the defense.

6. THE STATE MUST PROVE A CRIMINAL ASSAULT WAS DONE WITH UNLAWFUL FORCE IN A SELF-DEFENSE CASE.

a. In a Self-Defense Case, Defining Assault as an Act "with Unlawful Force" is Not Optional.

The State characterizes WPIC 35.50 as its legal authority for defining the crime of assault. It then concludes because some phrases are bracketed, they are "optional." In this context, "optional" does not mean at the discretion of the prosecutor or the court. It means it must be used in those assault cases in which self-defense is at issue, although without that issue it may not be essential.

Although the Pattern Instruction Comment explicitly directs the court to "include the phrase 'with unlawful force' if there is a claim of self defense or other lawful use of force," see App. Br. at 26-27, the State reduces this directive to a "recommendation." Resp. Br. at 16. Again, without authority, it seems to argue the trial court has

unlimited discretion to properly instruct the jury or not.

It is notable that the two primary cases the State cites to support its argument were not self-defense cases. Resp. Br. at 16. State v. Holt, 56 Wn. App. 99, 783 P.2d 87 (1989), review denied, 114 Wn.2d 1022 (1990), was a conviction for promoting pornography. State v. Miller,<sup>2</sup> 60 Wn. App. 767, 807 P.2d 893 (1991), was vehicular homicide.

Furthermore, in Miller the defense challenged the instruction that defined the crime. He conceded the "to convict" instruction was accurate. 60 Wn. App. at 775.

In Holt, the Court of Appeals agreed with the defense that the "to-convict" instruction must contain a complete statement of all the elements of the offense charged, and that an incorrect statement of the law is presumed prejudicial. The Court further agreed the instructions were in error because the jury could have understood them as the court's comment or direction that the material at issue was lewd -- an issue of fact for the jury.

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<sup>2</sup> The cited case is no relation to the appellant.

The Court proceeded to conclude the error was harmless beyond a reasonable doubt: the jury's inquiry demonstrated that the jury struggled with and considered the factual issue of whether the material was lewd. Holt, 56 Wn. App. at 104-06.

The Holt Court made a further observation useful in this case. The prosecutor had admitted she was concerned about the correctness of the instructions at trial, but when the defense did not object to them, she made a "tactical decision" not to amend the instruction since she "had already, in effect, won." The Court soundly condemned this behavior.

Her actions demonstrated a shocking lack of respect for constitutional protections. We are distressed to see the judicial system turned into a game to be won at the expense of a defendant's right to a fair trial.

56 Wn. App. at 104-05 & n.8.

Here, the defense counsel was obviously floundering with proposed instructions. The court turned to the prosecutor to assure "proper" instructions. The prosecutor then proposed instructions that omitted constitutional defense theories and an essential fact: that the force used must be "unlawful."

Due process requires that the State prove beyond a reasonable doubt **every fact** necessary to constitute the crime charged. State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). To prove a criminal assault against a theory of self defense, the State must prove that the act was done "with unlawful force." Removing this fact from the instructions relieved the State of this burden.

It is not a sufficient answer to this assignment of error to say that the jury could have supplied the omission of this element ... by reference to the other instructions. Concededly, as a general legal principle all the pertinent law need not be incorporated in one instruction. However, the trial court undertook to specifically tell the jury in instruction No. 5 that they could convict appellant if they found that four certain elements of the crime had been proven beyond a reasonable doubt. In effect, the judge furnished a yardstick by which the jury were to measure the evidence in determining the appellant's guilt or innocence of the crime charged. The jury had the right to regard instruction No. 5 as being **a complete statement of the elements** of the crime charged. This instruction purported to contain **all essential elements**, and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in instruction No. 5.

State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953) (emphases added).

The court here further instructed the jury that the State "has the burden of proving **each element** of the crime beyond a reasonable doubt." CP 11. By defining the "elements" as only those matters included in the "to convict" instruction, the court excused the State from having to prove the force used was unlawful.

"Unlawful force" was not included in Instruction 6, defining assault; Instruction 7, defining assault in the second degree; or 11, the to-convict instruction for second degree assault. CP 14, 15, 19.

To the extent the self-defense instruction conflicted with the to-convict instruction, the court gave the jury no means to resolve that conflict.

- b. The State's Closing Arguments and the Court's Instruction that the Jury has a Duty to Convict Without Regard to Self-Defense Establish Prejudice.

As demonstrated in Appellant's Brief at 26-30, there was no word or phrase in the to-convict instruction that referred the jury to the concept of or instruction on self-defense.

Without this reference, the instructions required the jury to "return a verdict of guilty" if it found the elements of this instruction proven, even if it didn't consider self-defense.

Unlike Holt, supra, in which the jury's inquiry persuaded the appellate court the instructional error was harmless, here there was no jury inquiry showing it had deliberated on self-defense. Instead, there is the prosecutor's closing argument using a projected image of the to-convict instruction. As did the instruction, he omitted any mention of self-defense. Rather than accept its burden to prove there was no "unlawful force," that there was no self-defense beyond a reasonable doubt, the State argued the jury could rely on this single instruction and nothing more to decide the case. RP(7/21) 64-68.

The emphasis of this incomplete instruction, omitting an essential fact the State bore the burden of proving, demonstrates prejudice.

c. State v. Prado Does Not Control This Case.

In State v. Prado, supra, the Court of Appeals agreed the instruction defining "assault"

erroneously omitted the phrase "with unlawful force" from one paragraph.

This was a self-defense case and instruction 25 contained an incomplete definition of "assault" because the first paragraph defining "assault" omitted the phrase "with unlawful force" as recommended by the current pattern instructions and case law.

Prado, 144 Wn. App. at 247. Yet the second paragraph of that instruction included the phrase "with unlawful force." Id. at 236.

Unlike Prado, here there was no definition of assault that contained "unlawful force." CP 14.

C. STATEMENT OF ADDITIONAL AUTHORITY

Appellant cited State v. Stark, 158 Wn. App. 952, 244 P.3d 433 (2010), in App. Br. at 32, 34, 35, and 40. On April 26, 2011, the Supreme Court denied review of that opinion. Supreme Court No. 85543-9.

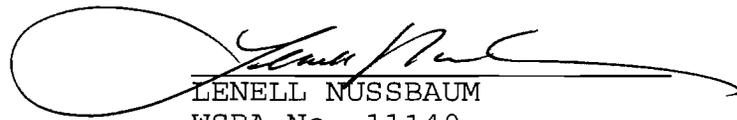
D. CONCLUSION

For the remaining issues, appellant relies on the Brief of Appellant and authorities there cited.

For these reasons, and the reasons stated in the Brief of Appellant, this Court should reverse Mr. Miller's conviction.

DATED this 6<sup>th</sup> day of May, 2011.

Respectfully submitted,



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**DECLARATION OF SERVICE**

On May 5th, 2011, I caused the Reply Brief of Appellant to be filed in the Court of Appeals of the State of Washington Division One, as well as caused a copy of this document to be sent by United States Mail Service, postage prepaid to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

May 6<sup>TH</sup>, 2011, Seattle  
Date and Place

Alexandra Fast  
ALEXANDRA FAST