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NO. 34731-~~9~~-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RAMEL HAWKINS,

Appellant.

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

The Honorable Brian Tollefson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective representation and a fair trial when his trial attorney requested language used in instruction 18,<sup>1</sup> which misstates the law and eased the State's burden to disprove appellant's self-defense claims.

2. Appellant was denied his constitutional right to effective representation and a fair trial when his trial attorney failed to object to the first aggressor instruction.<sup>2</sup>

Issues Pertaining to Assignments of Error

1. At trial appellant's attorney requested a jury instruction that eased the State's burden to prove that he did not act in lawful self-defense. Was appellant denied his right to effective representation and a fair trial?

2. "First aggressor" instructions are disfavored in Washington and should only be used where there is evidence that the defendant intentionally provoked the victim into the fray. There was no such evidence in appellant's case. Where counsel failed to object to the aggressor instruction was appellant denied his right to effective assistance of counsel and a fair trial?

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<sup>1</sup> The instruction is attached as appendix A.

<sup>2</sup> The instruction is attached as appendix B.

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant Ramel Hawkins with first degree assault with a firearm (Count I), drive-by shooting (Count II), and second degree unlawful possession of a firearm (Count III). CP 6-7. A jury found Hawkins guilty as charged. CP 46, 48, 49. The jury also found that Hawkins was armed with a firearm. CP 47.

Hawkins was sentenced to a 151-month standard range sentence on Count I with an additional consecutive 60-month firearm enhancement. CP 50-62. Hawkins was also sentenced to 48 months on Count II and 41 months on Count III. Id. All the sentences were ordered to run concurrent with each other. Id.

2. Substantive Facts

Hawkins came to Washington in 1996 while in the military. RP 328. He owns a concrete business and has two children who lived with their mother. RP 329. Jabbarr Thomas, whose nickname name is Crime, lived with the mother of his child in the same apartment building where the mother of Hawkins' children lived with Hawkins' children. RP 53, 77, 82, 330. On the weekends Hawkins would go the apartment building to pick up and drop off his children. RP 330.

A few weeks before June 22, 2004, Thomas and Hawkins was engaged in a verbal altercation. RP 52, 331-333. Hawkins was sitting outside the apartment building waiting for his children when Thomas walked by. RP 51, 332. According to Thomas, Hawkins called him by his nickname, Crime, and told Thomas he would shoot him if he did not leave. RP 52. Thomas, in turn, told Hawkins to leave. Id.

Hawkins, however, testified that Thomas walked up to him and asked Hawkins what he was doing and asked him if he smoked dope. RP 332-333. Hawkins said he told Thomas to get away from him and they started to argue about Thomas selling drugs around Hawkins' children. RP 333, 352-53. Thomas then asked Hawkins if he was "ready for 40 shells", which Hawkins said meant bullets from a 40-caliber gun. RP 333. Hawkins saw a gun sticking out of Thomas' jacket. RP 334. At that point, Hawkins' children arrived and he took them into their apartment and then left. RP 335-336.

Thomas admitted that at the time he had a drug habit, was unemployed and carried a gun. RP 54, 75. Thomas also admitted that at the time of the altercation with Hawkins he was carrying his gun, that he has shown his gun to a number of people and has threatened others with his gun. RP 54, 98-100. Thomas, however, denied he showed his gun

to Hawkins or that he was selling drugs in the apartment building's parking lot. RP 100-101.

Thomas said that a short time after the altercation the mother of Hawkins' children came to Thomas' apartment to apologize for Hawkins' behavior. RP 82. When Thomas answered the door, he had his gun in his hand. RP 94.

In addition to the altercation with Thomas, Hawkins knew Thomas pulled a gun on the mother of his children. RP 374. He also knew that Thomas had a reputation as a "hot head." Id. Hawkins became scared of Thomas. RP 339. Hawkins decided to arm himself to protect himself from Thomas. Id.

A few weeks later, on June 22, 2004, Thomas and Hawkins saw each other in the apartment building's parking lot. RP 55, 340. Thomas said they looked at each other then he left to go to the public utility building to pay his utility bill. RP 55-56. Hawkins, who was dropping off his children, said Thomas looked at him, rapped a song, and then left. RP 337.

According to Thomas, Hawkins followed him. RP 56. When Thomas got to the utility building, he stopped and Hawkins pulled in behind him. RP 57. Thomas, who said he was not going to let Hawkins

intimidate him, walked over to the passenger side of Hawkins' car and told Hawkins to get out of the car and "let's deal with it." RP 58, 66. Thomas, who denied he had a gun with him, said that after he challenged Hawkins to a fight, Hawkins pulled out a gun and started firing at him out of the passenger side window. RP 63, 66.

Hawkins testified that he left the apartment's parking lot a few minutes after Thomas. RP 362. He found himself waiting at the same stop light beside Thomas. RP 341. Thomas looked at him and told him to pull over. Hawkins thought Thomas wanted to settle their differences so Hawkins followed Thomas into the public utility parking lot. RP 342. Thomas then came up to Hawkins' car and yelled, "I told you last time what was up and you must be ready to feel these shells." RP 344. Thomas then reached for a gun from his pant pocket. RP 345. Hawkins was scared so he grabbed his gun from the console of his car and fired a shot through the passenger window of his car. RP 345. Thomas moved back and was still trying to get the gun out of his pocket. Hawkins thought Thomas would kill him so Hawkins fired his gun until it was empty. RP 346-47. Hawkins then drove away. RP 348.

Thomas was shot in the leg behind his knee so he ran. RP 68. Thomas said he called his child's mother and then went to a nearby veterinarian hospital. RP 71-72.

Police and paramedics were called to the veterinary hospital. Thomas was uncooperative and only told police he was shot by a black guy driving a pink Lincoln. RP 201-202. When the paramedics who were helping Thomas took off Thomas' shoes and socks they found a bag of crack cocaine. RP 75, 204, 219. Thomas was arrested and then taken to a hospital. RP 204, 221. Thomas eventually told police he knew who had shot him. RP 203.

There were other people who saw and heard the shooting. RP 125-26, 135-36, 144-45, 154. One, Mary Gipson, was leaving the public utilities' parking lot when she heard the gunshots. RP 125. When Gipson got home she found a bullet hole in her car. The bullet was lodged in her car's antenna box. RP 128-30, 227.

Defense investigator Becky Durkee testified she interviewed Thomas and Thomas told her that Hawkins knew Thomas carried a gun. RP 291. Thomas also told her that he once showed Hawkins his gun. Id. Thomas denied making those statements to Durkee. RP 106-07.

Tory Hayes testified that Thomas once pulled a gun on him. RP 317. He said that his friend got into a fight with Thomas at a club and 3 days later Thomas and another man followed Hayes until Hayes pulled over. Thomas and his friend then jumped out of their car brandishing guns and asked about Hayes' friend. RP 323-25.

Hawkins stipulated that he was previously convicted of a felony. RP 269-70.

3. Self-Defense Instructions

Hawkins' defense at trial was self-defense. Instruction 16 correctly set forth the applicable self-defense standard:

It is a defense to a charge of Assault in the First Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the

absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 33 (emphasis added).

Unfortunately, in contrast to the fear of "injury" language in instruction 16, instruction 18 provided:

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

CP 35 (emphasis added).

The jury was told "[g]reat bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 24 (Instruction 7).

The court also gave an aggressor instruction. That instruction provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense/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 the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 35 (Instruction 20).

Defense counsel proposed an instruction with the same "great bodily harm" language found in the court's instruction 18. CP 10.

C. ARGUMENTS

1. **HAWKINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY PROPOSED A FAULTY SELF-DEFENSE INSTRUCTION.**

Evidence of self-defense negates criminal intent. Accordingly, when faced with such a claim, due process requires the State to prove the absence of reasonable defensive force beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 489-96, 656 P.2d 1064 (1983).

As noted above, instruction 16 required the State to prove beyond a reasonable doubt that Hawkins did not reasonably believe Thomas intended to inflict "injury" to him. This is a correct statement of the law and formed the foundation of Hawkins defense.

Unfortunately, instruction 18 (the "act on appearances" instruction) employed a very different term -- "great bodily harm." There is a huge distinction. The definition of "injury" is common knowledge. "Great bodily harm," however, requires a much greater showing; it is "injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of

the function of any bodily part or organ." CP 24 (instruction 7); RCW 9A.04.110(4)(c); see also State v. Rodriguez, 121 Wn. App. 180, 185-186, 87 P.3d 1201 (2004); State v. Freeburg, 105 Wn. App. 492, 504, 20 P.3d 984 (2001).

In State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), the Washington Supreme Court made it clear that the "act on appearances" instruction should not use the term "great bodily harm" even though it is found in WPIC 17.04 of the pattern instructions. Walden, 131 Wn.2d at 475 n.3; see also Freeburg, 105 Wn. App. at 507 (calling it "imperative" that trial courts use the correct language).

Rodriguez is similar to Hawkins' case. There the defendant was convicted of first degree assault with a deadly weapon. Rodriguez, 121 Wn. App. at 183. Counsel likewise proposed the same faulty "act on appearances" instruction, and the trial court defined "great bodily harm" using the same language as that used here. Rodriguez, 121 Wn. App. at 185-86. The Rodriguez court identified the precise problem present in this case:

Based on the definition of 'great bodily harm,' the jury could easily (indeed may have been required to) find that in order to act in self-defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or func-

tion." And this is precisely the problem the Supreme Court warned against in State v. Walden.

Rodriguez, 121 Wn. App. at 186.

Given Walden, Rodriguez, and Freeburg, it is difficult to fathom how the court, the prosecution, and defense counsel failed to recognize the error in instruction 18. By requesting, rather than objecting to, instruction 18, defense counsel denied Hawkins his constitutional right to effective representation and a fair trial.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney 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 Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance

of counsel. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

There is simply no excuse for counsel's failure to object to use of "great bodily harm" in light of Walden, Rodriguez, and Freeburg. His failure to investigate the law falls below what can be considered reasonable and competent. Additionally, there can be no tactical reason to propose the instruction, since "the net effect was to decrease the State's burden to disprove self-defense." Rodriguez, 121 Wn. App. at 187.

Further, Hawkins was prejudiced because there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

"Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

Hawkins was legally entitled to defend himself based merely on his reasonable fear of "injury." But under instruction 18, jurors could not find for Hawkins on this claim unless it concluded that he reasonably feared "great bodily harm," meaning "injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of the function of any bodily part or organ." CP 24. This is an inaccurate statement of the law that improperly raised the bar for lawful self-defense -- Hawkins' only defense at trial.

The faulty instruction "struck at the heart of" Hawkins' defense. Rodriguez, 121 Wn. App. at 187. In Rodriguez, the court found counsel's deficient performance prejudicial because "[a]s instructed the jury was required to find that he was scared of death or at least permanent injury. And this not the test." Rodriguez, 121 Wn. App. at 187.

By proposing, rather than objecting to, instruction 18, defense counsel deprived Hawkins of his right to effective representation, due process, and a fair trial. This Court should reverse his convictions on Count I and Count II.

2. HAWKINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO AN IMPROPER AGGRESSOR INSTRUCTION.

If the defendant provokes an attack that requires the use of force in self defense, an aggressor instruction may be appropriate. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). The Supreme Court has warned, however, that "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). The Court has noted, "[a]n aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction." State v. Riley, 137 Wn.2d at 910 n.2.

A court may properly give an aggressor instruction when there is conflicting evidence whether the defendant's conduct precipitated a fight. State v. Heath, 35 Wn. App. 269, 666 P.2d 922, rev. denied, 100 Wn.2d 1031 (1983); State v. Davis, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992). The instruction is not appropriate, however, when the defendant's provoking "act" is belligerent language. Riley, 137 Wn.2d at 911. Likewise, the instruction is not appropriate when the defendant's only threatening act towards the victim is the assault itself. State v. Brower,

43 Wn. App. 893, 902, 721 P.2d 12 (1986). In fact, it is reversible error to give such an instruction when not supported by the evidence. State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039, rev. denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. at 901-02.

Here, the evidence did not support the aggressor instruction. There was no evidence Hawkins did anything to provoke Thomas. Even if Hawkins followed Thomas, as Thomas claimed, that was not a provoking act because Hawkins did nothing belligerent. Thomas admitted that he got out of his car and challenged Hawkins to a fight. At that point, Hawkins, who had not said anything to Thomas, believed Thomas was going for a gun and so he shot at Thomas. Hawkins' only real threatening or belligerent act was shooting at Thomas, which was the assault itself. That act did not justify the aggressor instruction. State v. Brower, 43 Wn. App. at 902.

The aggressor instruction told the jury that if Hawkins was the initial aggressor he could not claim self-defense. The jury could have erroneously and impermissibly believed that Hawkins was the aggressor when he shot at Thomas. Thus, the instruction vitiated Hawkins' defense. State v. Arthur, 42 Wn. App. at 124.

Because Hawkins' sole defense was self-defense, there was no legitimate tactical or strategic reason for counsel not to object to the aggressor instruction. His failure to object deprived Hawkins of effective assistance of counsel. And, because the jury could have impermissibly believed Hawkins was the aggressor because he shot at Thomas and on that basis rejected his self-defense claim, Hawkins was prejudiced by counsel's ineffective assistance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Thus, Hawkins' convictions on Count I and Count II should be reversed.

D. CONCLUSION

Hawkins' counsel was ineffective for proposing an incorrect self-defense instruction that reduced the State's burden and by failing to object to the aggressor instruction where there was not evidence to support the

instruction. These errors, alone or together, require reversal of Hawkins' assault and drive-by shooting convictions.

DATED this 17 day of October, 2006.

Respectfully submitted,

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