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NO. 35185-4-II

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

STATE OF WASHINGTON, Respondent

v.

JUAN REYES MARQUEZ, Appellant

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00300-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the appellant. Where additional information is needed, it will be supplied in the argument section of this brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR NO. 1 & NO. 2

The first two assignments of error raised by the defendant deal with the jury instruction that was given concerning the concept of self-defense. The defendant maintains that the jury was not properly instructed on the concept of self-defense and because of this defect in the instructions he did not receive a fair trial.

The State submits that the only evidence of self-defense pled or argued was an actual danger of great bodily harm. As such, the jury was properly instructed in the law and the instructions that had been provided were done so at his request.

The entire thrust of the defense in this case was that the defendant was faced with a threat of deadly force and had to combat that deadly force by use of deadly force himself.

The defendant testified that the fear that he had was fear of death when the victim had pulled a knife on him. He was asked on direct examination by his attorney whether or not he believed that the victim was

going to stab him at which time he reported that yes he was afraid that he was going to be stabbed and that this frightened him. (RP 246-247).

When asked why he, the defendant, stabbed the victim, he replied “Well, that’s what he was trying to do to me.” (RP 252, L.23). On cross examination, the defendant indicated that this was a struggle for the knife brought by the victim and that he considered this to be a deadly struggle. (RP 260). On redirect, he indicated that when the victim pulled the knife he didn’t know what his intentions were but he did believe that he could be injured or killed. He indicated that he was afraid of being injured or killed because he knew the victim’s reputation as being a violent person. (RP 265-266).

In closing argument, the defense attorney argued that “this was a fight over life and death.” (RP 301). He further indicated that the victim was using “deadly force” and that it was this victim that had “started the deadly force.” (RP 303). He further argued to the jury that all the defendant was doing was meeting “deadly force with deadly force.” (RP 303).

There is absolutely no evidence in this case whatsoever that would establish that this was anything other than a deadly confrontation with the use of a deadly weapon. There was no fear expressed by the defendant, or argued to the jury by his attorney, that this was merely a fear of some type

of minor bodily injury. As he indicated this was deadly force being met with deadly force.

As a general rule, jury instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury, and permit each party to argue its theory of the case. State v. LaFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). For erroneous instructions to require reversal, prejudice must be shown. Brown v. Spokane County Fire Protection District No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). A party is entitled to have the jury instructed on his or her theory of the case as long as there is evidence to support the theory. Hizey v. Carpenter, 119 Wn.2d 251, 266, 830 P.2d 646 (1992). The State submits that in this case, the defense approached the question of self-defense from a tactical standpoint of arguing “deadly force versus deadly force.” The trial court felt that they had presented enough evidence to support their theory of the case and gave the instructions that the defense had requested.

If the instruction is an adequate statement of the law, does not mislead the jury, and is one that is proposed by the defendant himself, he may not request an instruction and later complain on appeal that the requested instruction was given. Ball v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976); State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Boyer, 91 Wn.2d 342, 344-345, 588 P.2d 1151 (1979).

In our case, the State did not submit self-defense instructions in their proposed jury instructions. (CP 9; 36). The self-defense instructions were proposed by the defense when it filed its proposed instructions with the court. (CP 31). No exceptions were taken to the instructions and the court instructed the jury accordingly. Court's Instructions to the Jury (CP 38) are attached hereto and by this reference incorporated herein.

As part of those instructions, Instruction No. 10 dealt with the concept of great bodily harm which was proposed by the defense. The jury was also provided instructions on the concept of a deadly weapon (Instruction No. 11), the concept of substantial bodily harm (Instruction No. 12), and then instructed specifically on the concept of self-defense (Instruction No. 13) and defendant's right to protect himself against the danger of great bodily harm (Instruction No. 14). These are instructions that the defendant had specifically requested be given to the jury and, because of the nature of the testimony, are adequate and correct statements of the law.

Even though the defendant proposed the jury instructions for tactical reasons, the defendant maintains that this was ineffective assistance of counsel. This is based, primarily, on two cases that have recently questioned concepts of self-defense: State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004) and State v. Marquez, 131 Wn. App. 566,

127 P.3d 786 (2006). Yet in neither case, was the defendant only faced with the concept of deadly force.

For example, in the Rodriguez case, that defendant was confronted by the victim who was complaining about the noise that Rodriguez was making. After a series of confrontations and shoving matches, the two were talking near an apartment building. The victim shoved the defendant who stumbled. The defendant then pulled out a knife that he had on his person and stabbed the victim in the ensuing struggle. Rodriguez had testified that he armed himself with the knife because he was afraid of the victim and that he took it out to try to keep the victim at bay. He told the jury that he did not stab the victim deliberately. (Rodriguez, 121 Wn. App. at 182-183).

In our case, unlike Rodriguez, the defendant was not armed with a weapon. The victim pulled the knife and attacked our defendant with the knife. The only threat in our case was the threat of deadly force or death.

In the Marquez case, the defendant and his girlfriend were confronted by the victim and his friends in what turned into a racially-tinged verbal confrontation. This then turned into a fist fight. The victim was punching one of the female companions of the defendant and he approached this victim and hit him in the head with a flashlight. Once the

victim was down on the ground, the defendant and another kicked him in the head.

The trial court here defined great bodily injury to exclude less serious assault. Without a separate “great bodily injury” definition for self-defense, this exclusion could have caused a reasonable juror to interpret the defense-of-another instruction as prohibiting consideration of Marquez’s subjective impressions of all the facts and circumstances, i.e., whether Marquez reasonably believed Brian’s assault of Sampson would result in great personal injury to her. Rodriguez, 121 Wn. App. at 186. In contrast, a correct statement of the law is that 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).

- (State v. Marquez, 131 Wn. App. at 577).

The State submits that there is no way that the jury could have become confused or prevented from properly interpreting the self-defense instructions in our case because of the nature of the assault facing the defendant. The only degree of force necessary under the conditions as they appeared to our defendant was a use of deadly force. This was the tactical approach taken by the defense and this was the reason that they did not object to the jury instructions that were proposed.

It is true, that in certain situations, the term “great bodily harm” or “great bodily injury” places too high a standard for one who tries to defend himself against a danger less than great bodily harm but still

threatens injury. Where the defendant raises a defense of self-defense or use of non-deadly force, this standard may impermissibly restrict the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury. State v. Walden, 131 Wn.2d at 477; State v. L. B., 132 Wn. App. 948, 953, 135 P.3d 508 (2006). However, in our case, there was no fear of anything but the threat of deadly force. There is no evidence that this defendant was concerned or frightened by a mere battery which would result in mere injury. As such, the State submits, that the jury was properly instructed.

In the event that the court does not wish to use this approach, this can still be looked at in terms of harmless error. A jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and affects the framework under which the trial proceeds. State v. Eaker, 113 Wn. App. 111, 120, 53 P.3d 37 (2002). An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. State v. Eaker, 113 Wn. App. at 120. “Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence.” State v. Eaker, 113 Wn. App. at 120.

The State submits that the only evidence that the jury had before it was that the defendant was faced with an armed man threatening to kill him. If the jury believed the defendant, it would have believed that he faced a threat of great bodily harm. Because there was no likelihood whatsoever that the requested instruction affected the outcome of the trial, the defendant should not be allowed to claim prejudice.

The defendant also claims ineffective assistance of counsel because of the requested self-defense instructions that were given. To establish ineffective assistance, the defendant must show both deficient performance and resulting prejudice. State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). Prejudice is established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). As argued elsewhere in this brief, the State submits, that there is no likelihood whatsoever that the requested self-defense instruction affected the outcome of the trial and thus the defendant cannot establish prejudice. The defense chose an approach that he wished to utilize with this jury. He proposed and prepared jury instructions specifically tailored to that particular defense. The defendant should not be allowed to complain about it on appeal.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is similar to the first two but a claim that there is insufficient evidence to convict the defendant of Assault in the First Degree. This is based on the claim that the prosecution did not present sufficient evidence to establish beyond a reasonable doubt that the defendant did not act in self-defense. Yet, self-defense instructions were provided to the jury. This really became a question of credibility.

The trier of fact may believe or disbelieve any witness whose testimony it is called upon to consider. State v. Chapman, 78 Wn.2d 160, 469 P.2d 883 (1970). The court has long recognized that it is the function and province of the jury to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact. State v. Snider, 70 Wn.2d 326, 422 P.2d 816 (1967); State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004).

The State submits that the jury was properly instructed on the law of the case, that the defense had an adequate opportunity to argue the nature of the defense that it wished to argue, and it came down to a decision as to whether or not the jury was going to believe the defendant or the victim. The jury chose to believe the victim of the assault and did

not believe the concepts of self-defense that had been offered by the defense.

One of the witnesses called by the State was Dr. Christoph Kaufmann, M.D. Dr. Kaufmann testified that he is a trauma surgeon and has been working in that capacity for over 24 years. (RP 206). He testified that he was working at Emanuel Hospital when the victim, Mr. Tinajero-Gonzales, was brought into the critical care unit by ambulance. The doctor indicated that he was brought immediately into the surgical unit and that 10-15 nurses, anesthesiologists, and other doctors worked on him because of the nature of the multiple stab wounds that he had received to his body. (RP 207). The doctor indicated that if he had not received emergency care there would have been a probability of death for this young man because of the nature and seriousness of the wounds. (RP 212). The doctor indicated that the victim had at least 7-10 stab wounds in the front and an equal number of stab wounds in his back. Plus he had so many stab wounds on his arms that the doctor stopped counting at 30. (RP 214).

The State submits that the jury was supplied enough information to determine whether or not this constituted an Assault in the First Degree and whether or not the State had disproved self-defense beyond a reasonable doubt.

IV. CONCLUSION

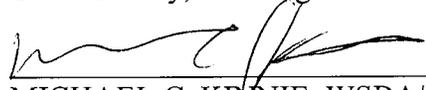
The trial court should be affirmed in all respects.

DATED this 27 day of Feb., 2007.

Respectfully submitted:

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APPENDIX "A"

COURT'S INSTRUCTIONS TO THE JURY

28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JUAN REYES MARQUEZ,

Defendant.

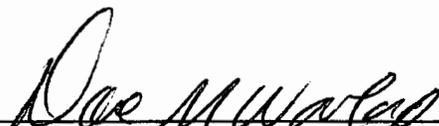
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JUN 14 2006

JoAnne McBride, Clerk, Clark Co.
10:37 AM

COURT'S INSTRUCTIONS TO THE JURY



SUPERIOR COURT JUDGE

6/14/06

DATE

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 7

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 3, 2006, the defendant assaulted Humberto

Tinajero-Gonzalez;

(2) That the assault was committed with a deadly weapon; or

(3) That the assault resulted in the infliction of great bodily harm upon Humberto

Tinajero-Gonzalez;

(4) That the defendant acted with intent to inflict great bodily harm; and

(5) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

An assault is an intentional cutting of another person that is harmful or offensive.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 10

Great 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.

INSTRUCTION NO. 11

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 12

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Instruction #13

It is a defense to a charge of Assault 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 in preventing or attempting to prevent an offense against ~~the~~ ^{himself} and 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.

Instruction # 14

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he 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.

Instruction # 15

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 16

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count 1.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.

A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

INSTRUCTION NO. 17

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 18

You will also be given a special verdict form for the crime of Assault in the First Degree. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

