

NO. 35490-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JASON FRAZIER,

Appellant.

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

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY
The Honorable Toni A. Sheldon, Judge
Cause No. 06-1-00023-4

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 13, an acts on appearance instruction, and Instruction No. 14, the definition of great bodily harm, which both misstated the law of self defense by requiring that Frazier have reasonable grounds to believe he was facing “great bodily harm” where the law only requires that a defendant entitled to self defense instructions fear “bodily harm.”
2. The trial court erred in allowing Frazier to be represented by counsel who provided in effective assistance of counsel in failing to object to Instruction No. 13 as a misstatement of the law after having proposed a correct instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in giving Instruction No. 13, an acts on appearance instruction, and Instruction No. 14, the definition of great bodily harm, which both misstated the law of self defense by requiring that Frazier have reasonable grounds to believe he was facing “great bodily harm” where the law only requires that a defendant entitled to self defense instructions fear “bodily injury?” [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Frazier to be represented by counsel who provided in effective assistance of counsel in failing to object to Instruction No. 13 as a misstatement of the law after having proposed a correct instruction? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Jason Frazier (Frazier) was charged by information filed in Mason County Superior Court with one count of assault in the second degree (Count I) and one count of felony harassment (Count II). [CP 65-66].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Frazier was tried by a jury, the Honorable Toni A. Sheldon presiding. Frazier had no objections and took no exceptions to the Court's Instructions to the Jury, which included instructions on self defense. [Vol. IV RP 380]. The jury found Frazier guilty of assault in the second degree (Count I) and not guilty of felony harassment (Count II). [CP 25, 26, 27].

The court sentenced Frazier on Count I to a standard range sentence of 12-months based on an offender score of 1. [CP 8-23; Vol. V RP 472-475].

Timely notice of appeal was filed on October 25, 2006. [CP 6]. This appeal follows.

2. Facts

The facts of this case reveal essentially two versions of the events of November 26, 2005.

First, Luther Maners's version. Maners, who was living on David and Pamela Shafer's property—the Shafers were neighbors of Frazier but didn't get along with Frazier—and went to see another neighbor, Ken Swanlund, who had been collecting his mail. [Vol. II RP 83-86, 97, 102; Vol. III RP 186, 204, 300]. Upon arriving at Swanlund's property, Maners was confronted by Frazier and Frazier's friend, Aaron Martin. [Vol. II 96-99, 101-104]. Frazier and Maners exchanged words and

Frazier, who had a baseball bat, hit Maners on the back of the head causing gash that required stitches/staples. [Vol. II RP 104-114]. Maners fled to the Shafer's, and the Shafers called 911. [Vol. II 114-115, 120-121; Vol. III RP 188-189, 201].

Second, Frazier's version. Ken Swanlund contacted Frazier telling him that Maners had offered to sell him some property that Frazier had claimed had been stolen from his home. [Vol. III RP 265-272, 295-296]. Swanlund arranged for Maners to come to his property and unbeknownst to Maners for Frazier to also be there. [Vol. III RP 265-272, 295-296]. Frazier upon confronting Maners exchanged words over the fact that Maners was trying to sell property stolen from Frazier's home. [Vol. III RP 265-272, 295-300]. Frazier recovered his property and Maners seemingly left. [Vol. III RP 265-272, 295-300]. As Frazier was walking home with his recovered property, Maners jumped out of some bushes at Frazier holding a knife. [Vol. III RP 300-301]. Frazier grabbed a Mag-lite flashlight that he always carried in his jacket and hit Maners in order to protect himself. [Vol. III RP 301-302].

No baseball bat, nor any Mag-lite flashlight, nor any knife was admitted in evidence. [CP 53].

D. ARGUMENT

- (1) FRAZIER'S CONVICTION SHOULD BE REVERSED WHERE THE COURT IN GIVING INSTRUCTIONS NOS. 13 AND 14 MISSTATED THE LAW ON SELF DEFENSE.

Due process requires the State prove every element of the crime charged beyond a reasonable doubt. Fourteenth Amendment to the United States Constitution; Art. 1, sec. 3 of the Washington Constitution; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Seattle v. Nordby, 88 Wn. App. 545, 554, 945 P.2d 269 (1997). Where the issue of self defense is raised, the absence of self defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). Where the State is relieved from proving the absence of self defense, an error of constitutional magnitude results, which may be raised for the first time on appeal. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. [Emphasis added]. State v. Rodriguez, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004). However, jury instructions must more than adequately convey the

law of self defense. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Read as a whole, the jury instructions must make the relevant legal standards manifestly apparent to the average juror. State v. Walden, 131 Wn.2d at 473. A jury instruction misstating the law of self defense amounts to an error of constitutional magnitude and is presumed prejudicial. State v. LeFaber, 128 Wn.2d at 900.

Here, the court instructed the jury on self defense. This case does not involve any issue regarding the appropriateness of that decision. The issue presented is whether the court properly instructed the jury by accurately stating the law on self defense. The court did not and Frazier's conviction should be reversed.

The court did, partially, given an accurate instruction to the jury on the law of self defense in Instruction No. 12, [CP 43] *see* RCW 9A.16.020 and WPIC 17.02, that Frazier's use of force was reasonable if believed he was "about to be injured."

However, the court grossly misstated the law on self defense in Instruction No. 13, [CP 44], an acts on appearance instruction; it contradicts Instruction No. 12. Instruction No. 13 states:

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.

[Emphasis added]. The court further compounded this misstatement of the law on self defense by giving an instruction on the definition of “great bodily harm,” Instruction No. 14 [CP 45], which requires a probability of “death,” or “significant serious permanent disfigurement,” or “a significant permanent loss or impairment of the function of any bodily part or organ.” These instructions (Nos. 13 and 14) are misstatements of the law on self defense in that they exceed the bounds of law in requiring the jury to find that Frazier believed he was in actual danger of “great bodily harm” rather than the lawful bodily injury.

Recently, in State v. Woods, Slip Opinion No. 24910-7-III, ___ Wn. App. ___, ___ P.3d ___ (April 24, 2007), Division III confronted the same issue presented by the instant case—instructional errors on self defense. In holding it was reversible error to instruct the jury in one instruction that a defendant need only establish bodily injury and in a second instruction that the defendant in fact can only act (in self defense) on the appearance of “great bodily harm,” the court analyzed the leading cases on the subject. *See* State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001); State v. L.B., 132 Wn. App. 948, 135 P.3d 508 ((Div. I 2006); and the State Supreme Court case of State v. Walden, *supra*. Division III concluded that

because the term “great bodily harm” is an injury far more severe than bodily injury that is required by law it is imperative that a trial court use the correct language when instructing on self defense. *See also State v. Corn*, 95 Wn. App. 41, 975 P.2d 520 (1999) (great bodily harm instruction not harmless). Moreover, Division III noted that the acts on appearance instruction including the term “great bodily harm,” the same instruction at issue in the instant case, based on WPIC 17.04, was applicable to deadly force cases:

WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

State v. Woods, *supra*; quoting State v. L.B., 132 Wn. App. at 953.

Like Division III in Woods, this court should find that the contradictory instructions on self defense in this case were a misstatement of the law and reverse Frazier’s conviction.

Finally, because prejudice is presumed when an instruction misstates the law, a defendant is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt. State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). An instructional error is harmless only if it is “trivial, or formal, or merely academic” and “in no way affected the final outcome of the case.” State v. Walden, 131 Wn.2d at

478. Here, the error was not harmless beyond a reasonable doubt in that the jury was given two versions of the events—Frazier’s and Maners’s. Any misstatement in the instructions that placed a higher burden on Frazier than contemplated by law thereby alleviating the State of its burden of disproving self defense, or made it difficult or more confusing for the jury to accurately decide which of these versions to believe cannot be said to have “in no way affected the final outcome of the case.” A truism given that it was the State’s burden to disprove self defense. *See Acosta, supra*. This court should reverse Frazier’s conviction for assault in the second degree.

(2) FRAZIER WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO INSTRUCTION NO. 13 AS A MISSTATEMENT OF THE LAW AFTER HAVING PROPOSED A CORRECT INSTRUCTION. ¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853

¹ While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued above by failing to object to Court's Instructions Nos. 13 and 14, [Vol. IV RP 380], or take exception to the court's failure to give his proposed instruction—an accurate statement of the law regarding “acts on appearances² (Frazier's counsel proposed no instruction on the definition of great bodily harm), [CP 57], then both elements of ineffective assistance of counsel have been established.

While the invited error doctrine precludes review of invited errors including instructional errors, *see* State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Studd, 137 Wn.2d 533, 551, 973 P.2d

² Frazier's counsel proposed the following acts on appearance instruction:

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 bodily harm, although if 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.

[Emphasis added]. [CP 57].

1049 (1999), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), *citing* State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131 (1995); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Technically, this case does not involve invited error in that Frazier's counsel did not propose the instructions given by the court that constituted a misstatement on the law of self defense; he proposed accurate instructions. However, Frazier's counsel did not object to the giving of these instructions, nor take exception to the court's failure to give his proposed instruction, which was an accurate statement of the law. Reasonable attorney conduct includes a duty to investigate the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). If proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel, *see* State v. Aho, 137 Wn.2d at 745-46, then surely failing to object or take exception to the failure to give an accurate instruction on the law constitutes the same. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to so act, and had counsel done so, the trial court would have accurately instructed the jury on self defense.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent as argued above—but for counsel's failure to object/take exception to the misstatement of the law on self defense the State would have been held to the appropriate burden regarding disproving self defense, and the jury would have been accurately instructed on the law, without contradiction, and better able to assess the two versions of the event with the result that Frazier would in all likelihood not have been convicted.

E. CONCLUSION

Based on the above, Frazier respectfully requests this court to reverse and dismiss his conviction.

DATED this 7th day of May 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 7th day of May 2007, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 7th day of May 2007.

Patricia A. Pethick
Patricia A. Pethick

STATE OF WASHINGTON
COUNTY OF PIERCE
MAY 7 11:35 AM '07
BY _____
STATE OF WASHINGTON
COUNTY OF PIERCE