

NO. 36998-2-II
COURT OF APPEALS, DIVISION II

COURT OF APPEALS
DIVISION II
JULY 27 PM 1:24
STATE OF WASHINGTON
BY *Amn*
DEPUTY

STATE OF WASHINGTON,

Respondent

vs.

SILVINO M. PEREZ,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 07-1-00973-0

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PM 5/29/08

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 26, an acts on appearance instruction, and Instruction No. 18, the definition of great bodily harm, which both misstated the law of self defense by requiring that Perez have reasonable grounds to believe he was facing “great bodily harm” where the law, Instruction No, 24, only requires that a defendant entitled to self defense instructions fear “injury.”
2. The trial court erred in denying Perez’s motion for a new trial based on the inconsistencies in the self defense instructions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in giving Instruction No. 26, an acts on appearance instruction, and Instruction No. 18, the definition of great bodily harm, which both misstated the law of self defense by requiring that Perez have reasonable grounds to believe he was facing “great bodily harm” where the law, Instruction No, 24, only requires that a defendant entitled to self defense instructions fear “injury?” [Assignments of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

1. Procedure

Silvino M. Perez (Perez) was charged by first amended information filed in Thurston County Superior Court with one count of attempted murder in the second degree or in the alternative with assault in the first degree. [CP 9-10]. Both alternative crimes carried deadly weapon allegations. [CP 9-10].

Prior to trial, Perez was afforded his right to represent himself pro se. [10-30-07 RP 3-27]. Perez was tried by a jury, the Honorable Gary R.

Tabor presiding. Perez proposed instructions including instructions on self defense (definition and acts on appearances (WPIC 17.04)) [CP 153, 154], but attempted to change the wording of these instructions so that they were consistent, which the court denied. [Vol. IV RP 625-633]. The jury found Perez guilty of assault in the first degree and entered a special verdict finding that he was armed with a deadly weapon at the time of the crime. [CP 202, 203, 204, 205; Vol. IV RP 774-779].

Prior to sentencing, Perez made a motion for a new trial based the inconsistencies in the self defense instructions Nos. 24 and 26 (definition and acts on appearances), which the court denied. [CP 206-217, 195-197; 11-21-07 RP 9-18]. The court then sentenced Perez to a standard range sentence of 271-months plus 24-months for the deadly weapon enhancement based on an undisputed offender score of 8 for a total sentence of 295-months. [CP 219-228, 242-244, 245-268; 11-21-07 RP 39-44].

Timely notice of appeal was filed on November 21, 2007. [CP 229-239, 271]. This appeal follows.

2. Facts

The facts of this case reveal essentially two versions of the events of May 28, 2007.

First, Thomas Anderson's version. Anderson was at the home of his friends, brother Corey Aldridge and sister Amber Heller. [Vol. II RP 354-355]. Heller's puppy made a mess on the floor of Aldridge's bedroom and she didn't clean it up fast enough or well enough. [Vol. II RP 357-358]. Anderson confronted Heller and the two fought with Anderson shoving Heller to the floor. [Vol. II RP 357-358]. Anderson was asked to leave and went to the home of Gary Edwards. [Vol. II RP 358-362]. A short time later, a burgundy Astro Van arrived and Heller along with three men got out. [Vol. II RP 363-367]. One of the men, Anderson identified in court as Perez, came up to him asked him he had fought with Heller then learning Anderson had said, "Are you ready to get your ass beat," and jumped Anderson. [Vol. II RP 367-372, 386]. Anderson fought back, but during the fight he was stabbed five times—one of the stab wounds cut his heart. [Vol. II RP 372-375]. When Anderson fell from the stab wounds, Heller and the men fled in the Astro Van. [Vol. II RP 379]. Anderson was taken to Harborview for surgery to treat his stab wounds. [Vol. II RP 383-384].

Second, Perez's version. Heller contacted Perez telling him about the fight she had had with Anderson and it was decided to go confront Anderson. [Vol. III RP 555, 557, 567]. Heller, Perez, and two other men drove around in Perez's burgundy Astro Van looking for Anderson. [Vol.

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 Perez'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. 24, [CP 195-196] *see* RCW 9A.16.020 and WPIC 17.02, that Perez'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. 26, [CP 197], an acts on appearance instruction; it contradicts Instruction No. 24. Instruction No. 26 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. 18 [CP 193], 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. 26 and 18) are misstatements of the law on self defense in that they exceed the bounds of law in requiring the jury to find that Perez believed he was in actual danger of “great bodily harm” rather than the lawful injury.

Recently, in State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (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 Perez'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—Perez's and Anderson's. Any misstatement in the instructions that placed a higher burden on Perez 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*.

Moreover, Perez afforded the court two opportunities to correct this mistake by arguing at trial the instructions inconsistencies [Vol. IV RP 625-633], and in making a motion for a new trial after the verdict based on these inconsistencies [11-21-07 RP 9-18]. In both instances, the court denied Perez the relief to which he was entitled—an accurate statement of the law of self defense so that the jury could properly evaluate the evidence. Based on the argument set forth above, this court should reverse Perez’s conviction for assault in the first degree as the jury was not properly instructed on self defense.

E. CONCLUSION

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

DATED this 29th day of May 2008.

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WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 29th day of May 2008, 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:

Silvino M. Perez
DOC# 870549
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Carol La Verne
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(and the transcript)

U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
MAY 29 11:25 AM '08
BY _____
DEPUTY _____

Signed at Tacoma, Washington this 29th day of May 2008.

Patricia A. Pethick
Patricia A. Pethick