

NO. 37177-4-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

DESHA J. DAVIS,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
03 JUN -6 PM 1:18  
STATE OF WASHINGTON  
BY *[Signature]*

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

Cause No. 07-1-01517-9

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PATRICIA A. PETHICK, WSBA NO. 21324  
Attorney for Appellant

P.O. Box 7269  
Tacoma, WA 98417  
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 16, an acts on appearance instruction, which both misstated the law of self defense by requiring that Davis have reasonable grounds to believe he was facing “serious personal injury” where the law and Instruction No. 14 only requires that a defendant entitled to self defense instructions fear “injury.”
2. The trial court erred in allowing Davis to be represented by counsel who provided in effective assistance of counsel in failing to object to Instruction No. 16 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. 16, an acts on appearance instruction, which both misstated the law of self defense by requiring that Davis have reasonable grounds to believe he was facing “serious personal injury” where the law and Instruction No. 14 only requires that a defendant entitled to self defense instructions fear “injury?” [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Davis to be represented by counsel who provided in effective assistance of counsel in failing to object to Instruction No. 16 as a misstatement of the law after having proposed a correct instruction? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Desha J. Davis (Davis) was charged by information filed in Thurston County Superior Court with one count of assault in the first degree (Count I), one count of unlawful possession of a controlled substance (Count II), and one count of unlawful use of drug

paraphernalia—a misdemeanor (Count III). [CP 4-5]. Count I included a sentence enhancement allegation that during the commission of the crime Davis was armed with a deadly weapon. [CP 4-5].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Davis was tried by a jury, the Honorable Gary R. Tabor presiding. Davis proposed accurate instructions regarding his defense of self defense including instructions on the definition and an acts on appearance instruction. [CP 12-20]. However, Davis failed to object or take exception to the court's instructions on self defense, particularly Instruction No. 16, the acts on appearances instruction that changed Davis's proposed and accurate language of "injury" to "serious personal injury." [CP 20, 38; Vol. III RP 423-428]. The jury found Davis guilty as charged on all counts and entered a special verdict finding that Davis was armed with a deadly weapon during the commission of Count I. [CP 45, 46, 47, 48; Vol. IV RP 512-516].

The court sentenced Davis on Count I to a standard range sentence of 301-months (277-months sentence plus 24-months for the sentence enhancement), on Count II to a standard range sentence of 18-months, and on Count III (a misdemeanor) to a sentence of 3-months all to run concurrently for a total sentence of 301-months based on an undisputed offender score. [CP 49-58, 59, 60, 61, 62, 63-82; 12-24-07 RP 3-17].

Timely notice of appeal was filed on December 28, 2007. [CP 83].

This appeal follows.

2. Facts

On August 18, 2007, Thomas Morgan (Morgan), Justin Jensen (Jensen), Gail Hanna (Hanna), and Amber Wesley (Wesley) went to the home of Phil Wildberger (Wildberger) looking for Davis, who owed Morgan some money. [Vol. I RP 10-13, 50-53; Vol. II RP 325]. Upon arriving at Wildberger's home, the group entered Wildberger's home where a confrontation between Morgan and Davis ensued with Morgan demanding his money and Davis failing to respond. [Vol. I RP 15-17, 20-23, 54-60; Vol. II RP 172, 326]. Eventually, Morgan, who had been yelling at Davis, stomped his foot then Davis shoved Morgan. [Vol. I RP 23-25, 60-64]. Morgan responded by punching Davis in the mouth and Davis responded by fighting back hitting Morgan about the neck and body. [Vol. I RP 23-27, 60-64; Vol. II RP 326-328]. Morgan began exclaiming that he was hurt bad and the group left Wildberger's home only then discovering that Morgan had been in fact stabbed a number of times. [Vol. I RP 27-29, 64-66]. Morgan was taken to St. Peter's Hospital for treatment of his injuries. [Vol. I RP 29-31, 66-68; Vol. II RP 128-144].

The police were contacted regarding the incident, which resulted in a search for Davis. [Vol. I RP 100-106; Vol. II RP 260, 281, 305-312]. Davis was eventually found in a bedroom in an apartment. [Vol. I RP 113-119; Vol. II RP 285-288, 305-317]. When the police found Davis in the bedroom they also found a substance suspected to be cocaine, a rolled bill covered with white powder, glass pipes, and baggies. [Vol. I RP 113-119; Vol. II RP 285-288, 305-317].

Tami Kee, a forensic scientist with the Washington State Patrol Crime Lab, testified that the substance found in the bedroom with Davis was in fact cocaine. [Vol. I RP 89-97].

Davis testified in his own defense. He admitted that he did in fact owe Morgan money—he had taken the money from Morgan to obtain methamphetamine but had not done so, and when Morgan arrived at Wildberger's home he did not have Morgan's money. [Vol. III RP 349-351]. Davis had seen the group arrive and apparently arm themselves—Hanna was carrying a bat (while she denied bringing a bat to Wildberger's home merely picking up a bat at the home Wildberger testified he owned no bat). [Vol. I RP 38; Vol. II RP 197; Vol. III RP 355]. When he was confronted by Morgan, who was becoming agitated about not getting his money, Davis believed he saw the butt of a gun in Morgan's waistband and feared for his safety. [Vol. III RP 353-363]. While Davis denied shoving

Morgan, he admitted that when Morgan came at him he did respond in his defense by stabbing Morgan with a steak knife that had been lying nearby. [Vol. III RP 353-363]. Davis denied that the cocaine or the drug paraphernalia found in the bedroom where he was found by the police were his rather they belonged to his girlfriend, Christina who was also found in the bedroom with him. [Vol. III RP 369-373, 409-411].

D. ARGUMENT

- (1) DAVIS'S CONVICTION IN COUNT I FOR ASSAULT IN THE FIRST DEGREE SHOULD BE REVERSED WHERE THE COURT IN GIVING INSTRUCTION NO. 16 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 Davis's conviction on Count I, assault in the first degree, should be reversed.

The court did, partially, given an accurate instruction to the jury on the law of self defense in Instruction No. 14, [CP 37-38] *see* RCW

9A.16.020 and WPIC 17.02, that Davis'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. 16, [CP 38], an acts on appearance instruction; it contradicts Instruction No. 14. 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 serious personal injury, 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. 13 [CP 37], 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" (no definitional instruction of "serious personal injury" was given). These instructions (Nos. 13 and 16) are misstatements of the law on self defense in that they exceed the bounds of law in requiring the jury to find that Davis believed he was in actual danger of "serious personal injury" rather than the lawful bodily 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,” essentially the equivalent of “serious personal injury,” 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 Davis's conviction in Count I.

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—Davis's and the remaining witnesses who observed the altercation. Any misstatement in the instructions that placed a higher burden on Davis 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 Davis's conviction for assault in the first degree (Count I).

(2) DAVIS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO INSTRUCTION NO. 16 AS A MISSTATEMENT OF THE LAW AFTER HAVING PROPOSED A CORRECT INSTRUCTION. <sup>1</sup>

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 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 Instruction No. 16, [Vol. IV RP 380], or take exception to the court's failure to give his proposed

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<sup>1</sup> 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.

instruction—an accurate statement of the law regarding “acts on appearances<sup>2</sup> (Davis’s counsel proposed no instruction on the definition of great bodily harm), 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 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 Davis’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, Davis’s counsel did not object to the giving of the court’s inaccurate instructions, nor take exception to the court’s failure to give his proposed instruction, which was an accurate

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<sup>2</sup> Davis’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 injury, 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. (citing WPIC 17.04)

[Emphasis added]. [CP 20].

statement of the law. [Vol. III RP 423-428]. 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. Moreover, the State would have been precluded from arguing as it did in closing that a great or serious harm was required before Davis

could avail himself of self defense. [Vol. III RP 461-463]. Furthermore, 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 Davis would in all likelihood not have been convicted.

E. CONCLUSION

Based on the above, Davis respectfully requests this court to reverse and dismiss his conviction for assault in the first degree with a deadly weapon and the accompanying enhancement.

DATED this 5<sup>th</sup> day of June 2008.

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
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 5<sup>th</sup> day of June 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:

Desha J. Davis  
DOC# 867890  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Ave.  
Walla Walla, WA 99326

Carol La Verne  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
(and the transcript)

Signed at Tacoma, Washington this 5<sup>th</sup> day of June 2008.

Patricia A. Pethick  
Patricia A. Pethick

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