

FILED  
COURT OF APPEALS  
DIVISION II

08 JUL 25 AM 10:55

No. 37177-4-II

STATE OF WASHINGTON

BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

DESHA J. DAVIS,

Appellant.

---

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

The Honorable Gary R. Tabor, Judge  
Cause No. 07-1-01517-9

---

BRIEF OF RESPONDENT

---

Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

1. Under the facts of this case, Instruction 16 was a correct statement of the law of self-defense; however, had there been any error, it was harmless beyond a reasonable doubt ..... 1

2. Davis did not receive ineffective assistance of counsel..... 7

D. CONCLUSION..... 8

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990) .....	6
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	7, 8
<u>State v. LeFaber,</u> 128 Wn.2d 896, 913 P.2d 369 (1996) .....	3
<u>State v. Pirtle,</u> 127 Wn.2d 628, 904 P.2d 245 (1995) .....	2
<u>State v. Walden,</u> 131 Wn.2d 469, 932 P.2d 1237 (1997) .....	2, 3, 4

### **Decisions Of The Court Of Appeals**

<u>State v. Douglas,</u> 128 Wn. App. 555, 16 P.3d 1012 (2005) .....	2
<u>State v. L.B.,</u> 132 Wn. App. 948, 135 P.3d 508 (2006) .....	5, 7
<u>State v. Woods,</u> 138 Wn. App. 191, 156 P.3d 309 (2007) .....	3, 4

### **U.S. Supreme Court Decisions**

<u>Strickland v. Washington,</u> 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	7
---	---

A. ISSUES RELATING TO ASSIGNMENTS OF ERROR.

1. Whether Instruction 16 misstated the law of self defense, and if so, whether such error is harmless or requires reversal of the appellant's conviction for Assault in the First Degree.

2. Whether Davis's trial attorney provided ineffective assistance of counsel for failing to object to Instruction 16.

B. STATEMENT OF THE CASE.

The State accepts Davis's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. Under the facts of this case, Instruction 16 was a correct statement of the law of self-defense; however, had there been any error, it was harmless beyond a reasonable doubt.

Davis does not contest the accuracy of the law stated in Instruction 14. [CP 37] He does assign error to Instruction 16, which reads as follows:

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.

[CP 38]. He argues that the phrase "serious bodily injury" is incorrect, and is particularly prejudicial in light of Instruction 13, which defines "great bodily harm":

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

[CP 37]. This instruction was included after the “to-convict” instruction for first degree assault, and was placed there to define “great bodily harm” as used in Instruction 9. [CP 35] There is no indication that it was intended to be read as part of the self-defense instructions.

An appellate court reviews challenged jury instructions de novo, considering the instructions as a whole when examining the effect of any particular phrase. The challenged portion of an instruction is read in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient when both sides can argue their theories of the case, they are not misleading, and when read as a whole properly state the law to be applied. State v. Douglas, 128 Wn. App. 555, 562, 16 P.3d 1012 (2005) (citing to Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). “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 896, 900, 913 P.2d 369 (1996).

Self-defense instructions must “more than adequately” inform the jury of the law of self-defense. Walden, *supra*, at 473. A defendant must have only a “subjective, reasonable belief of imminent harm from the victim.” There need not be actual imminent harm. LeFaber, *supra*, at 899. The standard is both objective and subjective:

Evidence of self –defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” . . . This standard incorporates both objective and subjective elements. The subjective portion required the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Walden, *supra*, at 473-74, (cites omitted).

Davis cites to State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007), which held that, under the facts of that case, an instruction based on WPIC 17.04, similar to Instruction 16 in this case, placed too high a burden on the defendant. In that case, Woods had used a knife against a victim who, he claimed, had hit

his hand with a hammer. In the opinion of the court, the jury could have found that Woods reasonably believed the victim was going to injure him, even if he was not expecting great bodily harm. “In cases not involving death, the use of force is justified if the defendant reasonably believed he was about to be injured. Instruction 13 wrongly instructed the jury that the type of injury Mr. Woods had to fear in order to defend himself was one involving great bodily harm.” Woods, *supra*, at 314.

In Walden, *supra*, the defendant brandished a knife at three teenagers who he said he believed were going to beat him up. The jury instructions given at his trial were different than those in this case and in Woods, but informed the jury that Walden could use deadly force only if he was in fear of death or great bodily harm. The instructions further defined “great bodily injury”. Walden, *supra*, at 472. The reviewing court there found that the instructions were internally inconsistent, the definition of “great bodily injury” misstated the law, and the error was not harmless.

An instructional error is harmless only if it “is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no other way affected the final outcome of the case.*”

Walden, *supra*, at 478 (emphasis in original).

State v. L.B., 132 Wn. App. 948, 135 P.3d 508 (2006), concerned a juvenile adjudication, in which there was no jury, but the trial court applied WPIC 17.04 (which uses the words “great bodily harm”) in finding that the evidence did not support the respondent’s self-defense argument. Id., at 951-52. Division One of the Court of Appeals found that:

The term “great bodily harm” places too high of a standard for one who tried to defend himself against a danger less than great bodily harm but that still threatens injury. Where the defendant raises a defense of self-defense for use of nondeadly force, 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.

Id., at 953.

Even so, the court in L.B. found that the error was harmless.

[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. . . . An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. . . . It is the State’s burden to prove the error was harmless beyond a reasonable doubt. . . . Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence. . .

Id., at 954.

In Walden and Woods, neither defendant claimed that the victim was using or threatening to use deadly force or that they possessed deadly weapons. In L.B., the respondent claimed he thought the victim was reaching for a gun, but there was no evidence of one and the court did not believe his testimony, a credibility determination that is for the trier of fact and which cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In this case, Davis testified that the victim raised his shirt to display a gun [RP 353] and during the argument reached for it. [RP 360, 362] He testified at some length that he was scared [RP 360] and grabbed the knife because "I ain't gonna let you kill me." [RP 362] Deadly force was most definitely at issue. Therefore, Walden, L.B., and Woods are distinguishable. Based on the defense theory that the victim was armed with a gun and planning to use it on Davis, there is no possibility that the jury could have reached a different conclusion, even if the jury instruction had merely used the word "injury". Therefore, there was no prejudice to Davis and the error was harmless. "Had the trial court substituted the word 'injury' in place of 'great bodily harm' in its recitation of the standard for self-defense, it would have reached the same conclusion that the State had disproved L.B.'s self-defense claim.

Thus, the misstated standard of self-defense was harmless beyond a reasonable doubt.” L.B., *supra*, at 955. The same reasoning applies to Davis’s case. Even if the jury had been instructed as Davis proposed, the evidence they heard was that Davis believed the victim was attempting to inflict serious personal injury. Davis certainly responded with deadly force. Had the jury believed his testimony about the gun, the language in Instruction 16 would have been appropriate for his self-defense argument. The phrase “great personal injury” places too high of a burden on the defendant only if the danger he is defending against is less than that.

If the jury, like the judge in L.B., did not believe that there was any reason for self-defense, the language didn’t matter. The error, if any, was harmless beyond a reasonable doubt.

2. Davis did not receive ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). He must overcome the strong presumption that counsel’s representation was adequate and effective. McFarland, *supra*, at

335. To show prejudice, he must establish that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.

During an off-the-record instruction conference, memorialized on the record [RP 426-27], the language of Instruction 16 was debated and all parties agreed that the language was appropriate for the charge of first degree assault. Trial counsel here applied his judgment and legal expertise to the issue. Because Instruction 16 was correct under the facts of this case, or was harmless error if not, there is no reasonable probability that the outcome would have been different without counsel’s “error.”

D. CONCLUSION.

Instruction 16 was a correct statement of the law under the facts of this case, but even if it weren’t, the error would be harmless beyond a reasonable doubt. Defense counsel was not ineffective. The State respectfully asks this court to affirm Davis’s conviction for first degree assault with a weapons enhancement.

Respectfully submitted this 24<sup>th</sup> day of July, 2008.

  
\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 37177-4-II,  
on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

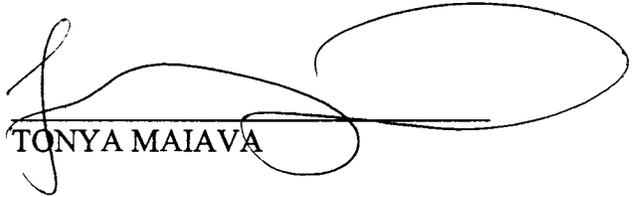
FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL 25 AM 10:55  
STATE OF WASHINGTON  
BY MAIAVA  
DEPUTY

TO:

PATRICIA A. PETHICK  
ATTORNEY AT LAW  
PO BOX 7269  
TACOMA WA 98417

I certify under penalty of perjury under laws of the State of  
Washington that the foregoing is true and correct.

Dated this 24<sup>th</sup> day of July, 2008, at Olympia, Washington.

  
TONYA MAIAVA