

FILED
COURT OF APPEALS
DIVISION II

03 AUG 05 11:03:00

STATE OF WASHINGTON
BY  DEPUTY

NO. 37177-4-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,
RESPONDENT
VS.
DESHA J. DAVIS
APPELLANT

[SAG] BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
THE HONORABLE GARY R. TABOR, JUDGE
CAUSE NO. 07-1-01517-9

DESHA J. DAVIS

ASSIGNMENT OF ERROR

1] THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 18 THE FIRST AGGRESSOR INSTRUCTION WITH OUT SHOWING EVIDENCE DEFENDANT WAS THE AGGRESSOR PG1-3

2] THE TRIAL COURT ERRED BY GIVING THE JURY AN INSTRUCTION THAT DOESNT ALLOW THE DEFENDANT TO ARGUE HIS THEORY IN MULTIPLE ASSILANT ATTACKS PG4-5

3] DEFENDANT WAS PREJUDICED BY PROSECUTER MISCONDUCT, AND WITH OUT THIS MISCONDUCT IT IS LIKELY DEFENDANT WOULDNT HAVE BEEN FOUND GUILTY. PG 6-10

MR DAVIS CHALLENGES JURY INSTRUCTION NO.18 THE AGGRESSOR EXCEPTION TO SELF DEFENSE, WE ALSO FIND THAT THE EVIDENCE DOES NOT SUPPORT THE UNDERLYING BASIS FOR THE AGGRESSOR INSTRUCTION: THAT THE DEFENDANT INTENTIONAL CONDUCT PROVOKED A FORSEABLE BELLIGERENT RESPONSE. STATE V WASSON 54 wn app156.

WE BEGIN BY NOTING THAT NITHER DAVIS NOR THE STATE ORGINALLY PROPOSED JURY INSTRUCTION NO.18 AND DAVIS OBJECTED TO THE INSTRUCTION BEING GIVING. [CR 424_-425] FEW SITUATIONS COME TO MIND WHERE THE NECESSITY FOR AN AGGRESSOR INSTRUCTION IS WARRANTED. THE THEORIES OF THE CASE CAN BE SUFFICIENTLY ARGUED AND UNDERSTOOD BY THE JURY WITH OUT SUCH INSTRUCTION. STATE V. ARTHUR 42wn app 120.

WHILE AN AGGRESSOR INSTRUCTION SHOULD BE GIVEN WHERE CALLED FOR BY EVIDENCE AN AGGRESSOR INSTRUCTION IMPACTS A DEFENDANTS CLAIM OF SELF DEFENSE, WHICH THE STATE HAS THE BURDEN OF DISPROVING BEYOND A REASONABLE DOUBT. ACCORDINGLY COURTS SHOULD USE CARE IN GIVING AN AGGRESSOR INSTRUCTION. STATE V. RILEY 137 wn 2.d.

DAVIS ALSO NOTES THAT AGGRESSOR INSTRUCTIONS ARE NOT FAVORED. STATE V. KIDD 57wn app95, STATE V BIRNEL 89wn app459. IT IS ERROR TO GIVE SUCH AN INSTRUCTION IF IT IS NOT SUPPORTED BY CREDIBLE EVIDENCE FROM WHICH THE JURY CAN CONCLUDE THAT IT WAS THE DEFENDANT WHO PROVOKED THE NEED TO ACT IN

SELF DEFENSE. STATE V. WASSON 54wn app158 159. THE PROVOKING ACT MUST BE INTENTIONAL AND ONE THAT A JURY COULD REASONABLY ASSUME WOULD PROVOKE A BELLIGERENT RESPONSE FROM THE VICTIM. WASSON 54 app at 159 'citing state v. arthur 42wn app120.

NEITHER THE EVIDENCE IN THE RECORD NOR THE APPLICABLE LAW SUPPORT GIVING THIS INSTRUCTION ESPECIALLY GIVEN THE SUPREME COURTS ADMONITION TO USE SUCH INSTRUCTION ONLY "SPARINGLY". STATE V. DOUGALAS 128wn app555. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO ALLOW A JURY TO FIND BEYOND A REASONABLE DOUBT THAT DAVIS HAD CREATED HIS OWN NEED FOR SELF DEFENSE. DAVIS SAT WAITING FOR THE ALLEGED VICTIM TO LEAVE. HE WAS NOT IN AN INHERENTLY AGGRESSIVE POSTURE FOR CONFRONTATION. WITNESS TESTIMONY STATED THAT DAVIS WAS SITTING NOT EVEN COMITING. THEY ALSO STATED THAT THE ALLEGED VICTIM PUNCHED DAVIS BEFOR THE ASSAULT TOOK PLACE.

THERE IS NO EVIDENCE DAVIS DISPLAYED THE WEAPON UNTILL THE TIME OF THE ASSUALT, IF THE DEFENDANT WAS TO BE PRECIVED AS THE AGGRESSOR IT WAS ONLY IN TERMS OF THE THE ASSUALT. STATE V. BROWER 43wn app 893.

THE AGGRESSOR INSTRUCTION EFFECTIVELY DEPRIVED MR DAVIS OF HIS ABILITY TO CLAIM SELF DEFENSE. SEE WASSON 54wn app at160. AN ERROR AFFECTING A DEFENDANTS SELF DEFENSE CLAIM IS CONSTITUTIONAL IN NATURE AND CANNOT BE DEEMED HARMLESS UNLESS IT IS HARMLESS BEYOND A REASONABLE DOUBT.KIDD 57wn app at 101 citing STATE V. MCCULLUM 98wn 2.d 484.

THE RECORD DOES NOT SHOW THAT DAVIS WAS THE AGGRESSOR OR THAT HE WAS INVOLVED IN ANY WRONGFUL OR UNLAWFUL CONDUCT AT THE TIME THE ASSUALT TOOK PLACE RATHER THE EVIDENCE SHOWS THAT IT WAS MORGAN WHO WAS THE AGGRESSOR. FOR THESE REASONS THE AGGRESSOR INSTRUCTION SHOULD NOT HAVE EVER BEEN GIVING.

MR DAVIS ALSO CHALLENGES THE SELF DEFENSE INSTRUCTION
NO. 14

IT IS PREJUDICIAL ERROR TO INSTRUCT THE JURY TO
CONSIDER WHETHER THE THE DEFENDANT REASONABLY BELIEVED
THAT THE "VICTIM ALONE" INTENDED TO INFLICT DEATH OR
GREAT PERSONAL INJURY UNDER SUCH CIRCUMSTANCES. TRIAL
COURT MUST INSTRUCT THE JURY TO CONSIDER ALL RELEVANT
CIRCUMSTANCES, INCLUDING WHETHER THE DEFENDANT REASONABLY
BELIVED THAT THE VICTIM AND "THOSE WHOME THE DEFENDANT
REASONABLY BELIVED WHERE ACTING IN CONCERT WITH THE
VICTIM" HAD A DESING TO INFLICT DEATH OR PERSONAL INJURY.
IRONS 101wn app 544

A SELF DEFENSE INSTRUCTION THAT REQUIRES THE JURY TO
FIND THAT THE DEFENDANT REASONABLY BELIVED THAT THE [VICTIM
[VICTIM] "RATHER THAN THE VICTIM AND THOES THE DEFENDANT
REASONABLY BELIVED WHERE ACTING IN CONCERT WITH THE
WITH THE VICTIM" INTENDED TO INFLICT DEATH OR PERSONAL
INJURY "PRECLUDES THE JURY FROM CONSIDERING THE DEFENDANT
RIGHT TO ACT UPON REASONABLE APPEARCES IN MULTIPLE
ASSAILANT ATTACK" THERBY FAILING TO MAKE THE RELEVANT
LEGAL STANDARD MAINFESTLY APPARENT TO THE AVERAGE JURROR.
IRONS 101wn app 544.

WHEN CONSIDERING "IMMINET DANGER" IN THE CONTEXT OF SELF
DEFENSE, THIS COURT NOTED THAT "IT STANDS TO REASON THAT
THE IMMINENCE OF DANGER... MAY INCREASE WITH THE NUMBER

OF PERSONS SHARING THE PLAN OR PURPOSE OF ATTACK. STATE V. WARD 125 wn app 125wn app 138. IF ANY ONE OF THE FOUR INDIVIDUALS ACTING AS A GROUP OF ONE, WHERE TO INFLICT PERSONAL INJURY OR COMMIT A FELONY AGAINST THE DEFENDANT HE IS ENTITLED TO DEFEND HIMSELF.

THE COURT CONCLUDED THAT ALTHOUGH THE INSTRUCTION ALLOWED IRONS TO ARGUE HIS THEORY OF THE CASE, IT LEFT HIM WITH THE BURDEN OF OVER COMING THE INCONSISTENCY BETWEEN THE INSTRUCTION AS WRITTEN AND HIS THEORY THAT HE REASONABLY BELIEVED HE WAS IN IMMINET DANGER OF DEATH OR PERSONAL INJURY FROM MULTIPLE ASSAILANT NOT JUST [THE VICTIM]. HARRIS 122wn app 547, [QOUTING] IRONS 101 wn app 544.

THERE IS UNDISPUTED TESTIMONY THAT THERE WERE MORE THAN ONE INDIVIDUAL IN THE HOUSE WITH THE ALLEDGED VICTIM AND AT LEAST ONE HAD A BAT. I THINK THAT THE INSTRUCTION LEADS TO THE MISTAKE OF THE LAW.... THE INSTRUCTION IN MY OPINION LEADS THE JURY TO BELIVE THAT THEY ARE ONLY TO CONSIDER THE ACTION OF [THOMAS MORGAN] AND THAT IS NOT TRUE.

AND I WOULD INSERT ["] THE DEFENDANT REASONABLY BELIVED THAT THE GROUP OR A MEMBER OF THE GROUP INTENDED TO COMMIT A FELONY AND INFLICT DEATH OR PERSONAL INJURY["] THAT IS THE EVIDENCE IN THIS CASE.

DAVIS NEXT BRINGS UP THE FACT HE WAS PREJUDICED AT TRIAL DUE TO PROSECUTOR MISCONDUCT.

WE BEGIN BY NOTING THERE IS MISCONDUCT AND IS PREJUDICIAL WHEN IN CONTEXT THERE IS A SUBSANTIAL LIKELIHOOD THAT THE MISCONDUCT AFFECTED THE JURYS VERDICT A DEFENDANT MAY RAISE THE ISSUE OF PROSECUTOR MISCONDUCT FOR THE FIRST TIME ON APPEAL. STATE V. DHAIWAL150 wn 2.d 2005

DAVIS CONTENDS THAT REVERSAL IS REQUIRED DUE TO THE FOLLOWING INSTANCES OF PROSECUTORIAL MISCONDUCT.

IN [CR 272] DETECTIVE LOUISE ADAMS TESTIFIED TO THE JURY THAT CRISTINA LAMONO TOLD HER ABOUT A KNIFE NOT THAT DAVIS TOLD HER ABOUT A KNIFE

Q.HAD SHE MENTIONED THAT A WEAPON WAS INVOLVED BY SOMEONE ELSE OTHER THAN THE STABBING THAT MR DAVIS UNDERTOOK?

A.SHE TALKED ABOUT A KNIFE BUT SHE NEVER ACTUALLY SAW A KNIFE.

IN [CR412 413] PROSECUTOR MAKES STATMENTS THAT LOUISE ADAMS TESTIFIED THAT CRISTINA LAMONO TOLD HER THAT DAVIS SEEN MORGAN WIYH A KNIFE.

Q.OKAY AND YOU ACTUALLY TALKED ABOUT THE ASSAULT WITH HER, ISNT THAT RIGHT?

A. DAVIS NO I DIDNT

Q.YOU DIDNT? WELL, CRISTINA GAVE A SATEMENT TO THE POLICE ABOUT

WHAT YOU TOLD HER ABOUT IT. REMEMBER, I ASKED DETECTIVE ADAMS ABOUT CRISTINA STATMENTS?

A. YEAH

Q. SO DETECTIVE ADAMS WHO TOOK A TAPED STATEMENT FROM CRISTINA ABOUT WHAT YOU SAID THATS ALL LIES IS THAT RIGHT?

A. I DONT RECALL WHAT THE OFFICER SAID.

Q. DURING THAT STATEMENT CRISTINA TOLD THE OFFICER THAT YOU SEEN TOM WITH A KNIFE.

A. NO I NEVER SAID THAT

A PROSECUTOR MAY NOT MAKE A STATEMENT UNSUPPORTED BY THE RECORD THAT, WHEN VIEWED AGAINST THE BACK DROP OF ALL THE EVIDENCE, TEND TO PREJUDICE THE DEFENDANT TO THE EXTENT THAT THE DEFENDANT IS PRECLUDED FROM OBTAINING A FAIR TRIAL. STATE V. RAY 116wn 2.d 1991

A PROSECUTOR HAS A DUTY TO REFRAIN FROM USING STATEMENTS WHICH ARE NOT SUPPORTED BY THE EVIDENCE AND TEND TO PREJUDICE THE DEFENDANT. STATE V. GOVER 55wn app 1989 A JURY COULD WELL BELIEVE THAT SUCH A STATEMENT BY A SWORN OFFICER OF THE LAW IN WHOM THEY HAVE CONFIDENCE, MIGHT INDICATE THAT SUCH OFFICER WAS ACQUAINTED WITH FACTS WHICH HAD NOT BEEN DISCLOSED TO THE JURY BY TESTIMONY. SUCH A STATEMENT THROWS INTO SCALES THE WEIGHT AND INFLUENCE OF THE PERSONAL CHARACTER OF COUNSEL FOR THE STATE, AND, TO SOME EXTENT AT LEAST, CALLS UPON THE JURY TO SUPPORT HIS JUDGMENT. STATE V. SUSAN 152 wash 365 1929 STATE V. THOMPSON WASH APP 2.D 2008 IN STATE V. THOMPSON THE PROSECUTOR MADE STATEMENT THAT THOMPSON USED THE WORDS

"STOLEN PROPERTY" WHEN HE TOLD HIS INTERROGATORS TO CHECK THE STORAGE UNIT. IF THIS COURT CAN SAY THAT THE PROSECUTOR MISSTATEMENT OF THE EVIDENCE DEALT DIRECTLY WITH THOMPSONS ONLY DEFENSE, IT MUST RULE THE SAME FOR [DAVIS] THE PROSECUTOR USED THE FALSE STATEMENTS FROM DETECTIVE ADAMS TO INFER THAT ALL THE THINGS [DAVIS] WAS SAYING ABOUT THE VICTIM HAVING A GUN WAS FALSE. DUE TO THE MISSTATEMENT OF EVIDENCE THAT DAVIS HAD TOLD HIS GIRL FRIEND THAT THE VICTIM HAD A KNIFE. THIS DEALT WITH [DAVIS] ONLY DEFENSE THAT HE WAS ACTING IN SELF DEFENSE DUE TO THE VICTIM HAVING A GUN.

A PROSECUTOR COMMITS MISCONDUCT WHEN HIS OR HER EXAMINATION SEEKS TO COMPEL A WITNESS IS TELLING THE TRUTH. SUCH QUESTIONING UNFAIRLY INVADES THE JURYS PROVINCE STATE V. JERRELS 83wn app503.

IN THIS CASE PROSECUTOR LYING ABOUT ANOTHER WITNESS TESTIMONY PREJUDICE [DAVIS] BECAUSE THE JURY WOULD SPECULATE THAT DAVIS WAS NOT BEING TRUTHFUL, SO TAINING HIS SELF DEFENSE CLAIM.

WASHINGTON LAW RECOGNIZES THAT A PROSECUTOR HAS A SPECIAL DUTY IN TRIAL TO ACT IMPARTIALLY IN INTEREST OF JUSTICE NOT AS A HEATED PARTISAN. STATE V. REED 102wa 2.d 1984 IN [CR417] PROSECUTOR BRINGS UP FACTS THAT DAVIS REMAINED SILENT AND DIDNT GIVE POLICE A STATMENT.

Q. AND WHEN THE POLICE SHOWED UP YOU OF COURSE IMMEDIATELY TOLD THEM ABOUT THE GUN BEING INVOLVED?

A.NO

Q. BUT YET YOUR AN HONEST GUY IS THAT RIGHT?

STATE MAY NOT COMMENT ON THE EXERCISE OF DEFENDANTS RIGHT TO REMAIN SILENT.STATE V. EASTER 130 wn app 2.d 1996

A COMMENT ON A DEFENDANTS SILENCE OCCURS WHEN THE SILENCE IS USED TO THE STATES ADVANTAGE, EITHER AS SUBSTANTIVE EVIDENCE OF GUILT OR TO SUGGEST TO THE JURY THAT THE SILENCE WAS ADMISSION OF GUILT. STATE V. LEWIS 130 wn 2.d 1996.

DAVIS WAS PREJUDICED BECAUSE THE JURY WOULD THINK THAT DAVIS WAS BEING A "UNHONEST GUY" BY EXERCISING HIS RIGHT TO REMAIN SILENT. THE QUESTION WAS DAMAGING BECAUSE IT TENDED TO IMPUGIN DAVIS OWN HONESTY WHICH WAS THE UNDERLYING BAISIS OF HIS DEFENSE.

IN [CR 418-419] PROSECUTOR REFERS TO THE FACT THAT DAVIS AND THE VICTIM LIVE BY A JAIL CODE "DONT RAT DONT SNITCH" DAVIS TESTIFED TO HAVING NO IDEAL OF SUCH A CODE.IN [CR 480] PROSECUTERS CLOSING ARGUMENTS HE EVEN ALLEDGED DAVIS INVOKED SUCH CODE ON STAND. MERE APPEALS TO JURYS PASSIONS AND PREJUDICE,AS WELL AS PREJUDICAL ALLUSIONS TO MATTERS OUTSIDE THE EVIDENCE ARE INAPPROPRIATE.STATE V. BELGADE 110 wn 2.d

IT IS CLEARLY MISCONDUCT FOR A PROCECUTOR TO ENCOURAGE A JURY TO BASE ITS VERDICT ON FACTS NOT IN EVIDENCE. STATE

v. ONEAL 126wn app 395 2005. A TRAIL COURT ABUSE ITS DISCRETION WHEN IT BASES ITS DECISION ON UNTENABLE GROUNDS OF REASON. COMMENTS CALCULATED TO APPEAL TO THE JURYS PASSIONS AND PREJUDICE AND ENCOURAGE IT TO RENDER A VERDICT ON FACTS NOT IN EVIDENCE ARE IMPROPER. STATE V. STITH 71 wn app 1993.

PROSECUTER MUST DISCUSS THE TESTIMONY AND EVIDENCE ONLY. STATE V. CASE 49 2.d.

STATE V. REEDER 46 wn 2.d 2003. PROSECUTER REAPEATEDLY ASSERTED THAT REEDER HAD THREATEND HIS 1ST WIFE WITH A GUN BECAUSE THERE WAS NOT ONE WORD OF TESTIMONY IN THE RECORD THAT HE THREATEND HIS 1ST WIFE WITH A GUN THE COURT REVERSED HIS COVICTION.

IN DAVIS THE PROSECUTER REAPEATEDLY REFERS TO HIM AND YHE VICTIM LIVING BY THE "CODE OF THE STREETS" WHERE NO EVIDENCE WAS SHOWN THAT ONE LIVED BY SUCH CODE.

THE PROSECUTERS IMPROPER AND PREJUDICIAL STATMENTS WHERE LEGION. AND THEY WHERE INEXUSABLE, THE PROSECUTER FLAGRANT AND EGREGIOUSLY VIOLATED HIS DUTY TO PROVID DAVIS A "FAIR TRIAL" HIS "IMFLAMMATORY COMMINTS WHERE A DELIBRATE APPEAL TO JURYS PASSIONS AND PREJUDICAL" STATE V. BELGARDE 110 wn 2.d. SUCH MISCONDUCT IS SO "FLAGRANT THAT NO INSTUCTION CAN CURE IT" CASE 49 wn 2.d [HOLDING "THE HARM HAD ALREADY BEEN DONE, AND IT COULD NOT HAVE BEEN CURED BY INSTUCTIONS TO DISREGARD THE STATMENTS SO FLAGRANTLY MADE"] THE ONLY APPROPRIATE REMEDY IS A NEW TRIAL.