

NO. 39858-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WARD,

Appellant.

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COURT OF APPEALS
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STATE OF WASHINGTON
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IDENTITY

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to have the jury instructed as to his theory of the case.

1. Appellant was denied a public trial.

Issues Pertaining to Assignments of Error

1. The defense presented evidence from which the jury could have concluded appellant was acting in self-defense when he assaulted the alleged victim. Based on this, defense counsel argued appellant had withdrawn from the fight and was defending himself from the alleged victim, whom appellant believed was armed and advancing, when appellant struck him with a rock. The jury was never instructed on self-defense, however. Should appellant's conviction be reversed?

2. The trial court and parties had an off-the-record, jury instructions conference in chambers. The trial court did not conduct a Bone-Club¹ inquiry before doing so. Was appellant denied a public trial as provided for in the federal and Washington constitutions?

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 19, 2009, the Lewis County Prosecutor charged appellant Daniel Ward with second-degree assault with a deadly weapon. CP 142-43. The charges were later amended, with the prosecutor adding one count of malicious harassment. CP 136-37. A trial was held and the jury found Ward guilty of assault with a deadly weapon, but found him not guilty of malicious harassment. CP .22-25. With no criminal history, Ward was sentenced to 21 months (which included a mandatory twelve-month enhancement). CP 12-21. He appeals. CP 1-11.

2. Substantive Facts²

Late in the night of February 13, 2009, a group of Rochester high school students and former students gathered at a party somewhere on a logging road in Lewis County. RP 63, 334, 360, 381. Ward had been drinking beer by a bon fire when his ex-girlfriend, Lindsey Hepburn, arrived in the same car as Arthur Moses. RP 360, 382. Ward had never met Moses. RP 360.

² Ward testified at trial and gave a statement to police. RP 360-62, 367, 375-89. Because of the particular legal issue raised herein, the facts are told primarily from Ward's perspective.

Ward walked up from the fire to where the cars were parked. RP 360. Ward saw Hepburn and Moses with arms linked and became angry. RP 360, 382. Ward confronted Moses, but he did not appear to want to fight. RP 360, 382. Ward pushed Moses, and Moses pushed back. RP 361. Moses ran and Ward chased after him. RP 361, 382. Moses eventually got into the truck in which he had arrived. RP 375, 385. He tried to lock the doors but was not fast enough. RP 375, 385. Ward and his brother Dustin Ward (Dustin), who had joined in the chase, were able to get in the truck and punch Moses. RP 361. Eventually, the fight moved outside the truck.³ RP 375.

Once outside the truck, Moses tripped and fell backward. RP 361, 375. Ward ended up on top, straddling Moses and punching him. RP 361, 375. Eventually, however, Ward got off Moses and moved five feet away. RP 376. Moses was angry. RP 376. He got up and took a swing at Ward. RP 376. Ward ducked, tackled Moses to the ground, and hit him. RP 377. Suddenly, Ward felt an extreme pain in his back -- a pain "like [Ward] had never felt before." RP 362, 377. Ward quickly got off Moses. RP 377.

³ Dustin did not participate in the fight once it left the truck. RP 207.

Although Ward never saw a knife, he assumed Moses had stabbed him. RP 362, 388. After getting off Moses, Ward tried to back away. RP 378. While Ward and Moses both were standing, Moses did not back down; instead, he continued to push toward Ward.⁴ RP 361, 378, 380-81. Concerned Moses would stab him again, Ward grabbed a rock and hit Moses on the head.⁵ RP 361, 378. When Moses fell to the ground, Ward backed away at least ten feet but kept his eye on Moses, until Moses was subdued by friends. RP 378-79. Even after this, Moses continued to want to fight, but Ward did not respond.⁶ RP 378-80.

Ward and Moses both ended up in the hospital. RP 84, 346. Moses received two stitches on his head. RP 84. In contrast, Ward had multiple stab wounds on his back, three of which were notably deep. RP 346. Moses admitted to having a knife and stabbing Ward, but police never found the knife. RP 81-82, 340-41.

⁴ A State witness testified Moses was pushing toward Ward. RP 253, 255-56.

⁵ This was the basis for the assault charge. CP 136-37.

⁶ A State witness testified Moses was still looking to fight after Ward had withdrawn. RP 211, 226-27.

C. ARGUMENT

I. WARD WAS DENIED HIS RIGHT TO HAVE THE JURY INSTRUCTED ON HIS THEORY OF THE CASE.

A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when it is supported by sufficient evidence in the record. State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). The issue of self defense is properly raised if the defendant produces “any evidence” tending to show self-defense. State v. Adams, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982) (“[O]nly where no plausible evidence appears in the record upon which a claim of self-defense might be based is an instruction on [self defense] not necessary”); see also, State v. Walker, 40 Wn. App. 658, 661-662, 700 P.2d 1168 (1985).

To be entitled to such an instruction, one must produce evidence from which the jury can infer the defendant subjectively believed he was in imminent danger, was responding with only that degree of force necessary to repel the danger, and his subjective beliefs were reasonable, given only what he knew. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). A finding of actual danger is not necessary to establish self-defense,

but the defendant needs to demonstrate that he reasonably believed that he was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

Generally, the right of self defense cannot be successfully invoked by an aggressor or one who provokes an altercation; however, it may be raised when the original aggressor in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). "Some evidence of aggressive or threatening behavior, gestures, or communication by the victim is typically required to show that the defendant's belief that he or she was in imminent danger of great bodily harm was reasonable." Janes, 64 Wn. App. at 141(citing Walker, 40 Wn. App. at 663).

Ward produced sufficient evidence to support a self-defense instruction. He testified he had twice tried to disengage from the fight before he hit Moses with a rock, but Moses was still advancing. RP 377-81. Ward got off Moses and ultimately hit him with a rock because he feared Moses was armed and would use the weapon against him again. Id. From Ward's perspective, this fear was legitimate, because at the time he hit Moses, Ward knew

Moses already had used some kind of weapon on his back -- resulting in sever pain. Id. When Moses continued to advance after Ward withdrew, Ward was reasonably concerned and acted in order to repel an imminent attack. Id. That he used no more force than was necessary is evident by testimony showing Moses wanted to continue the fight, and had to be restrained by friends, even after Ward hit him with the rock and was backing away. Id.

The testimony of two eyewitnesses called by the State corroborated critical points of Ward's testimony. First, one witness testified he saw Moses advancing on Ward when Ward hit him with the rock. 2RP 253, 255. Another witness testified that even after Ward had withdrawn, Moses continued to yell at Ward that he wanted to fight. RP 211, 227.

Based on the testimony of Ward and these other witnesses, there was sufficient evidence from which the jury could have concluded Ward reasonably believed he was in imminent danger of being stabbed again by Moses, and that he was responding with only the degree of force necessary to repel the danger. There was also sufficient evidence from which the jury could have concluded, although Ward was the original aggressor in the fist-fight, he had

withdrawn by the time he defended himself from Moses with the rock.

Although the evidence supported a self defense instruction, it was never given. The record is unclear whether the trial court denied a defense request or whether defense counsel failed to formally request the instruction. At one point, defense counsel announced he would be requesting a self defense instruction. RP 329. Later, the trial court held an off-the-record instructions conference. RP 401-02. After the conference, the parties went back on the record. Id. When given the chance back on the record, defense counsel did not object to the instructions. Id. Ultimately, the trial court's instructions did not include a self-defense instruction. CP 27-52.

Regardless of whether the trial court refused a proposed self defense instruction or whether defense counsel unreasonably failed to request it, the failure to give it constitutes reversible error.

On the one hand, if defense counsel had proposed the instruction, the trial court should have given it. Ward was entitled to have the jury instructed as to his theory of the case. Griffith, 91 Wn.2d at 574. Given the evidence discussed above, the jury could have reasonably concluded Ward acted in self defense. Thus, the

Court's failure to give the instruction cannot be considered harmless and reversal is required. See, State v. Allery, 101 Wn.2d 59, 598, 682 P.2d 312 (1984).

On the other hand, if defense counsel failed to ask for the instruction, or object on the record to the trial court's failure to give it, reversal is still required due to counsel's ineffective assistance. Effective assistance of counsel is guaranteed under the federal and state constitutions. U.S. Const. Amends. VI, XIV; Wash. Const. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant receives constitutionally inadequate representation if: (1) defense counsel's performance fell below an objective standard of reasonableness; and (2) such deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-89. Defense counsel may be ineffective for failing to propose a jury instruction where the defendant was entitled to the instruction. State v. Kruger, 116 Wn. App. 685, 693-94, 67 P.3d 1147 (2003).

Given this record, defense's counsel's failure to request the instruction was objectively unreasonable. There was no legitimate tactical reason for not asking for a self-defense instruction. Defense counsel indicated to the trial court the defense would be

presenting a self-defense theory. During argument, defense counsel suggested Ward had acted in self-defense when he stuck Moses. RP 359-60. The self-defense theory did not conflict with the defense's other theory that the rock was not actually a deadly weapon. In fact, it was arguably stronger. Yet, counsel failed to either submit the instruction or object to the court's refusal of the instruction on the record.

Defense counsel underestimated the need for the self defense instruction, apparently believing that the jury could fully consider the self defense theory based on his argument alone.⁷ This was objectively unreasonable. Case law clearly holds an affirmative defense is "impotent" unless accompanied by the necessary instructions. Kluger, 116 Wn. App. at 694-95 (citation omitted).

Defense counsel's failure to request a self-defense instruction was prejudicial. As stated above, the jury could have reasonably concluded Ward acted in self defense had it been given proper instructions. Thus, reversal is required. Id.

⁷ At the sentencing hearing, Defense counsel concluded that "the jury found that [the assault] was not in self-defense." 4RP 6. However, the jury found no such thing, since it had not been instructed to consider self-defense.

As explained above, given this record, Ward was entitled to have the jury instructed on self-defense. No such instruction was given. Ward was, thus, denied his right to have the jury fully instructed on all his theories and reversal is required. See, State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786 (1984).

II. WARD WAS DENIED A PUBLIC TRIAL.

Here, the trial court held an off-the-record conference in chambers to decide how the jury would be instructed. RP 401-02. Although it permitted the parties to note any objection in open court afterward, the public did not have the opportunity to view the process for selecting those instructions. This violated the constitutional provisions mandating open trials.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide the accused with the right to a public trial. State v. Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and

accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The purposes behind the constitutional public trial guarantee are to ensure a fair trial, foster public understanding and trust in the process, and give judges the check of public scrutiny. See, State v. Duckett, 141 Wn. App. 79, 803 (2007). Public trials embody a “view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” State v. Strobe, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citations omitted). The public trial right extends beyond the taking of witness testimony at trial. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (preliminary hearings); In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearings); Ishikawa, 97 Wm.2d at 36, 640 P.2d 716 (motions to dismiss).

The purposes behind the open trial provisions are just as applicable to factual hearings as to purely legal ones. Thus, there is no reason why those provisions should not extend to court proceedings pertaining to jury instructions conferences.

Whether a trial court procedure violates the right to a public trial is a question of law which is reviewed de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. Strode, 167 Wn.2d at 229. The Washington Supreme Court has set forth the specific factors a trial court must consider on the record before ordering a courtroom closure, unless the defendant affirmatively agrees to and benefits from the closure.⁸ State v. Momah, 167 Wn.2d 140,151,

⁸ The Bone-Club factors are:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purposed.

217 P.3d 321 (2009); Bone-Club, 128 Wn.2d at 258-59. The remedy for improper closure of the court room, which is “presumptively prejudicial error,” is remand for a new trial.” Strode, 167 Wn.2d at 231.

The circumstances in this case constitute a closure under this Court’s analysis in State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008). There, this Court held that conducting voir dire out of the courtroom constitutes a “closure” that mandates Bone-Club analysis even when the trial court has not explicitly closed the proceedings. Erickson, 146 Wn. App. at 211; see also, State v. Heath, 150 Wn. App. 121, 206 P.3d 712 (2009), State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007); but see, State v. Wise, 148 Wn. App. 425, 436, 200 P.3d 266 (2009).

In Erickson, the trial court asked prospective jurors if any of them wanted to be questioned privately. 146 Wn. App. at 204. Although the trial court in Erickson never explicitly ordered a closure, it interviewed four jurors in the jury room with only counsel and the court reporter present. Id. This Court held that “[b]ecause the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact

on the proceedings, ... it acts as a closure for purposes of Bone-Club.” Id. at 209.

Here, the trial court did not engage in a Bone-Club analysis before it held the off-the-record instructions conference in chambers. RP 401-02. The trial court’s decision not to discuss jury instruction in open court had more than a trivial impact on the proceedings.

Trivial closures have been defined to be those that are brief and inadvertent. Strode, 167 Wn.2d at 230 (citations omitted). The Washington Supreme Court has never found a public trial right violation to be trivial. Id. Here, the conference was not inadvertent. Moreover, at the time the conference was held, the question of whether the jury would be instructed regarding self defense was still pending. The public was denied the benefit of observing the way in which the trial court and/or parties dealt with that issue and the reasoning behind not giving the instruction.⁹ Thus, instead of fostering public understanding and trust in the process – the in-chambers conference fostered mystery and uncertainty. Additionally, it prevented the making of a contemporaneous record

of exactly what was said regarding the self defense instructions. As such, this closure was not trivial and reversal is required. See, Strobe, 167 Wn.2d at 231; Erickson, 146 Wn. App. at 209.

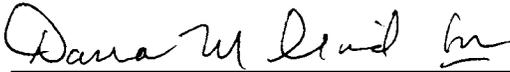
D. CONCLUSION

For the reasons stated above, this Court should reverse Ward's conviction.

Dated this 29th day of March, 2010

Respectfully submitted

NIELSEN, BROMAN & KOCH



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⁹ Included as public spectators at this trial were Ward's family members who appear to have followed the case fairly closely. RP 119, 358.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
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| vs. |) | COA NO. 39858-3-II |
| |) | |
| DANIEL WARD, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MARCH 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
BY 
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MARCH 2010.

x *Patrick Mayovsky*