

NO. 39858-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WARD,

Appellant.

FILED
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STATE OF WASHINGTON
BY [Signature]

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. APPELLANT WAS DENIED HIS RIGHT TO HAVE THE JURY INSTRUCTED ON SELF DEFENSE.....	1
2. APPELLANT WAS DENIED HIS RIGHT TO A PUBLIC TRIAL.....	4
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Callahan</u> 87 Wn. App. 925, 943 P.2d 676 (1997)	3
<u>State v. Craig</u> 82 Wn.2d 777, 514 P.2d 151 (1973)	2
<u>State v. Duckett</u> 141 Wn. App. 79, 803 (2007)	5
<u>State v. Janes</u> 121 Wn.2d 220, 850 P.2d 495 (1993)	2

A. ARGUMENT IN REPLY

1. APPELLANT WAS DENIED HIS RIGHT TO HAVE THE JURY INSTRUCTED ON SELF DEFENSE.

In his opening brief, appellant Daniel Ward asserts he was denied due process when the jury was not instructed on self defense. Brief of Appellant (BOA) at 5-11. In response, the State claims the evidence was insufficient to warrant the giving of such an instruction. Brief of Respondent at (BOR) at 14-18. As shown below, the State's argument is not supported by the record.

First, the State argues Ward was not entitled to the instruction because the evidence shows he was clearly the initial aggressor in the fist fight that ultimately led to the assault of A.M. with a rock. BOR at 14-15. This argument is irrelevant, however, because there was evidence Ward had withdrawn from the fist fight before defending himself with the rock.

The State appears to have lost sight of the fact that the charge was based only on Ward's hitting A.M. with the rock – it was not based on any prior assault that may have occurred during the fist fight. By not distinguishing between the fist fight and the charged assault with a deadly weapon, the State's arguments are vague and fail to directly respond to appellant's arguments.

Ward has never denied he was the initial aggressor to the fist fight. BOA at 3, 6-7. Instead, it was the defense's theory Ward had withdrawn prior to the charged act of hitting A.M. and was only defending himself at that point. BOA at 6-7. As explained in appellant's opening brief, Ward, having withdrawn, was still eligible for a self defense instruction even though he had been the initial aggressor of the fist-fight. *Id.* (citing State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973), and State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)).

In support of a self defense instruction, appellant cites not only Ward's testimony, but that of two State witnesses who corroborated critical aspects of his testimony. BOA at 6-7. In response, the State argues this evidence was not "credible" because "[e]very eye witness (and the victim) to this assault said that Ward started the altercation." BOA at 14. Again, this misses the point. Although the evidence shows Ward started the fist fight, the relevant question is whether there was some evidence in the record that Ward withdrew and reasonably feared A.M. would attack him with the knife again before hitting A.M. with the rock. Given Ward's testimony and that of the other two witnesses, there was sufficient evidence to support giving an instruction.

The State also suggests Ward's testimony could not support a self-defense instruction because it conflicted with other eye witness testimony. BOA at 15-16. This argument is fundamentally flawed, however, because it asks this court to view the evidence in the light most favorable to the State, not the defense.¹ As pointed out in appellant's opening brief, when viewed in the light most favorable to the defense, the testimony was sufficient to support a self defense instruction. BOA at 4, 6-7.

Finally, the State claims the fact that defense counsel did not request a self defense instruction demonstrates that there was not sufficient evidence to support one. BOR at 16, 18. This circular logic should be rejected. Counsel's failure to request an instruction for whatever reason simply does not trump the factual record that exists showing that the instruction was supported.

More importantly, the record shows defense counsel actually believed the evidence supported a self-defense theory. Defense counsel argued a self defense theory in closing argument. RP 359-

¹ Despite its factual analysis to the contrary, the State concedes that case law establishes courts must view the evidence in the light most favorable to the defense when determining whether there is sufficient evidence to support a self-defense instruction. BOR at 12, citing State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

60. He also suggested during sentencing that the jury had had a full opportunity to consider this defense. RP (10/2/09) at 6.

Given this record, the State's suggestion that defense counsel had concluded the evidence did not support a self defense instruction is specious. Instead, the record shows defense counsel simply failed to appreciate the need for an instruction to support this theory. As argued in appellant's opening brief – this amounted to ineffective assistance.

For the reasons stated herein and in appellant's opening brief, this Court should find appellant was denied due process when the jury was not instructed on self-defense and reverse.

2. APPELLANT WAS DENIED HIS RIGHT TO A PUBLIC TRIAL.

Appellant asserts he was denied his right to a public trial when the trial court held an off-the-record conference in chambers to decide how the jury would be instructed. BOA at 11-16. In response, the State argues that because there is no case law directly on point saying that jury instruction conferences must be held on the record, this Court need not consider appellant's argument. BOR at 22-23. However, the fact that there is no case law on point does not mean that a constitutional violation did not

occur. Instead, it means this is a case of first impression, making it all the more important for this Court to address this issue and give guidance to courts below.

The State also suggests that because the trial court gave the parties a chance to note objections on the record, the court essentially cured any open-trial violation. BOR at 21-22. This argument ignores the purposes behind the constitutional public trial guarantee, which include: ensuring a fair trial, fostering public understanding and trust in the process, making the parties perform more responsibly, and giving judges the check of public scrutiny. See, e.g., State v. Duckett, 141 Wn. App. 79, 803 (2007). These goals are lost when the process of discussing and selecting jury instructions is not conducted on the record in open court. Offering an opportunity for the parties to note exceptions may technically preserve a right of appeal regarding the instructions given, but it does not foster public understanding or trust in the process or permit public scrutiny. Hence, the process used here does not meet constitutional requirements.

For the reasons stated above and those in appellant's opening brief, this Court should find Ward was denied his right to a public trial and reverse.

B. CONCLUSION

For the reasons stated herein and all those stated in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 29th day of June, 2010

Respectfully submitted,

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vs.)	COA NO. 39858-3-II
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)	
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 JUNE 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2010.

x *Patrick Mayovsky*