

No. 42153-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donald King,

Appellant.

Thurston County Superior Court Cause No. 10-1-01633-7

The Honorable Judge Paula Casey

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ASSIGNMENTS OF ERROR

1. Mr. King's conviction was entered in violation of his Fourteenth Amendment right to due process.
2. The trial judge erred by refusing to instruct the jury on self-defense.
3. The prosecutor committed prejudicial misconduct that violated Mr. King's right to due process.
4. The prosecutor committed prejudicial misconduct by appealing to the passions and prejudices of the jury.
5. The prosecutor committed prejudicial misconduct by arguing that Angelina Brockley's faith in the legal process had been shaken by Mr. King's prior acquittal.
6. The prosecutor committed prejudicial misconduct by arguing that Brockley "had just gotten a not guilty verdict" and thus "had doubts that the system would work for her."
7. The trial court miscalculated Mr. King's offender score.
8. The evidence was insufficient to prove that Counts I and II should be scored separately rather than as the same criminal conduct.
9. The trial court erred by failing to find that Counts I and II were the same criminal conduct.
10. The trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence.
11. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.
12. The trial court erred by sentencing Mr. King with an offender score of five.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the court to instruct the jury on all essential elements of an offense. Where an accused person presents some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on self-defense violate Mr. King's Fourteenth Amendment right to due process?
2. A prosecutor commits misconduct by making arguments that contradict the court's instructions and that appeal to the passions and prejudices of jurors. Here, the state's attorney contradicted the court's instruction that certain evidence could only be used to prove the absence of an accident or mistake, but instead argued that the evidence related to Brockley's credibility and implied that jurors should convict to ensure that the legal system did not fail Brockley a second time. Did the prosecutor commit prejudicial misconduct that violated Mr. King's Fourteenth Amendment right to a fair trial?
3. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose. In this case, Mr. King was convicted of twice assaulting Angelina Brockley at the same time and place, with the same overall criminal purpose. Did the trial judge abuse her discretion by scoring Counts I and II separately?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Angelina Brockley and Donald King were engaged to be married. RP (3/22/11) 51, 53. She suffered from paranoid schizophrenia, and he suffered from anxiety. RP (3/22/11) 170-172; RP (5/5/11) 16.

Despite a No Contact Order, they lived together. This order stemmed from an allegation of domestic violence in May of 2010. RP (3/7/11) 4; RP (3/21/11) 62-63. Mr. King exercised his right to trial on that charge, and was acquitted in January of 2011. RP (3/7/11) 8.

The couple got into an argument on October 25, 2010. RP (3/21/11) 10; RP (3/22/11) 56-59. They had both been drinking, and the argument became physical. RP (3/22/11) 58-59, 170. According to Brockley, she punched Mr. King, giving him a black eye. He pushed her away, and she fell into a glass table, which broke. She said that he also kicked her and punched her. RP (3/22/11) 62-65, 67-70, 162-164, 169, 179. A corrections officer and an attorney confirmed that Mr. King had a black eye. RP (3/22/11) 169, 194, 206.

Mr. King was arrested, and charged with two counts of Assault in Violation of a No Contact Order. CP 2-6. Multiple phone calls and letters to Brockley from the jail led to additional charges: eleven counts of

Violation of a No Contact Order, and Tampering with a Witness. RP (3/22/11) 76-81, 89-154; CP 2-6.

At trial, Mr. King's attorney sought self-defense instructions, based on Brockley's testimony that she'd punched Mr. King immediately before he pushed her into the glass table. RP (3/22/11) 69, 169, 179. The court denied the request, ruling:

I am going to find that there is no evidence from which a jury can conclude that the defendant believed he was about to be injured since he has not testified himself. Accordingly, the self-defense instruction will not be given.
RP (3/22/11) 210.

The state introduced, over defense objection, the details underlying the earlier incident—of which Mr. King had been acquitted. RP (3/7/11) 24-28; RP (3/22/11) 53-56, 74-75. The court gave a limiting instruction, indicating that the jurors could only consider that evidence to determine if the current assault charges were the result of an accident or mistake. Instruction No. 35, Court's Instructions to the Jury, Supp. CP. During her closing argument, the state urged the jury to consider the earlier incident:

After Angelina has had her confidence shaken by the whole process, the legal process, she receives a letter explaining to her how to end it, and she wants to cooperate.
RP (3/23/11) 253.

She knew the defendant could very well get out of jail again and come back in her life. She had just gotten a not guilty verdict. She had doubts that the system would work for her, and the defendant reinforced and took advantage of those doubts.... Angelina knew

that called in the police hadn't worked. Testifying the first time hadn't worked.
RP (3/23/11) 274-275.

The jury convicted on all counts. CP 7-8.

At sentencing, the defense argued that the two counts of assault comprised the same course of conduct. Brockley had testified that both contacts—the kick and the push—occurred during the same argument: “all the same thing”. RP (3/22/11) 164. The court found that the assaults were not the same course of conduct, and sentenced Mr. King accordingly. RP (5/5/11) 19; CP 7-17.

Mr. King timely appealed. CP 18-29.

ARGUMENT

I. THE TRIAL JUDGE INFRINGED MR. KING'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). To determine whether an accused person is entitled to instructions on self-defense, a reviewing court takes the evidence in a light most favorable to the accused person. *State v. George*, 161 Wash.App. 86, 96, 249 P.3d 202 (2011).

B. Mr. King was entitled to instructions on self-defense because there was at least “some evidence” supporting the defense.

Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007). Due process requires the state to prove every element of the crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission in the court’s instructions that relieves the state of its burden to prove every element violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wash.2d 67, 941 P.2d 661 (1997).

An accused person is entitled to instructions on the defense theory of the case if the evidence supports the instructions. *State v. Werner*, 170 Wash.2d 333, 337, 241 P.3d 410 (2010). A defendant is entitled to self-defense instructions if there is “some evidence” of self-defense. *Id.* The court must draw all reasonable inferences in the light most favorable to the accused person. *State v. Webb*, 162 Wash.App. 195, 208, 252 P.3d 424 (2011). The burden on the defendant is low, and the evidence need not even create a reasonable doubt. *George*, at 96. The erroneous refusal to instruct on self-defense requires reversal if the accused person is prejudiced by the error. *Werner*, at 337.

Self-defense incorporates both subjective and objective components. *George*, at 96-97. The subjective prong requires the court to “place itself in the defendant’s shoes and to view the defendant’s actions in light of all the facts and circumstances known to the defendant.” The objective prong requires the court to “determine what a reasonably prudent person would have done in the defendant’s situation.” *Id*; *Woods*, at 198.

In this case, Brockley testified that she punched Mr. King in the face while sitting on his lap, and that he pushed her away and onto a glass table, which broke. RP (3/22/11) 69, 169, 179. She further testified that he was just trying to get her off him when he pushed her away. RP (3/22/11) 181. Corrections Officer Shield confirmed that Mr. King had a red eye and a cut above his eye when admitted to the jail on the night of the incident. RP (3/22/11) 206. Attorney Pilon photographed Mr. King’s black eye on the day following the incident. RP (3/22/11) 194. In closing, the prosecutor acknowledged that Brockley had punched Mr. King just before he pushed her. RP (3/23/11) 270-271.

When taken in a light most favorable to Mr. King, this evidence amounts to at least “some evidence” of self-defense. One reasonable inference that could be drawn from this sequence of events is that Mr. King pushed Brockley because he feared she might cause further bodily

harm (in addition to the black eye she inflicted).¹ Thus, a jury could infer from Mr. King's response that he subjectively believed he was about to be injured. Furthermore, a reasonable person, when punched in the eye, might reasonably react by pushing the assailant away, as Mr. King did.

Accordingly, the trial court erred by refusing to instruct the jury on self-defense. In fact, the trial judge applied an erroneous legal standard when she held that self-defense could not be raised absent testimony from the defendant. RP (3/22/11) 210. A defendant's testimony is not a necessary prerequisite to a proper claim of self defense. *See, e.g., Matter of Personal Restraint of Benn*, 134 Wash.2d 868, 952 P.2d 116 (1998) (self-defense raised despite defendant's failure to testify).

Mr. King's entire defense to the assault charges rested on his self-defense claim. The failure to instruct the jury on self-defense necessarily prejudiced him; in the absence of appropriate instructions, his attorney was unable to argue his defense to the jury.

The trial judge's refusal to instruct the jury on self-defense violated Mr. King's Fourteenth Amendment right to due process. *Woods, supra*;

¹ His response might also be taken as evidence of intent to retaliate (as the prosecutor suggested in closing), or as evidence of an accidental/involuntary movement. These alternate explanations must be discarded, however, when the evidence and all reasonable inferences are taken in a light most favorable to Mr. King.

Winship, supra. His assault convictions must be reversed and the charges remanded to the trial court for a new trial. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT INFRINGING MR. KING’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A JURY TRIAL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *E.S., at 702*. A manifest error affecting a constitutional right may be raised for the first time on review.² RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

² In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.³ *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show that constitutional error is harmless beyond a reasonable doubt. *State v. Irby*, 170 Wash.2d 874, 886, 246 P.3d 796 (2011).

B. A prosecutor may not make arguments that contradict the court's instructions and appeal to the passions and prejudices of the jury.

Prosecutorial misconduct "occurs when a prosecutor 'interject[s] issues having no bearing on the defendant's guilt or innocence and improperly appeal[s] to the jury to act in ways other than as dispassionate arbiters of the facts.'" *United States v. Ayala-Garcia*, 574 F.3d 5, 16 (1st Cir. 2009) (alterations in original) (quoting *United States v. Mooney*, 315 F.3d 54, 59 (1st Cir.2002)). Except in unusual circumstances,⁴ a jury must not consider anything outside the historical facts and the court's instructions in reaching its verdict; accordingly, a prosecutor may not urge jurors to

convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking

³ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash. App. 794, 800, 998 P.2d 907 (2000).

⁴ Such as when considering future dangerousness in the sentencing phase of a capital case. See RCW 10.95.070(8).

in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984)

(footnotes omitted).

In addition, a prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984). *State v. Huckins*, 66 Wash.App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is correct. *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Id.*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.*, at 762.

Here, the court gave several instructions meant to prevent a decision based on improper factors. The court told jurors that their task was to decide the facts, apply the law set forth in instructions, and convict only if convinced beyond a reasonable doubt that Mr. King was guilty. Court's Instructions Nos. 1 and 3, Supp. CP. Furthermore, jurors were instructed not to allow their emotions to overcome rational thought

processes, or to be swayed by sympathy, prejudice, or personal preference. Court's Instructions No. 1, Supp. CP. In addition, the jury was instructed not to consider prior assault allegations for any purpose other than to determine "whether the allegations in Count I and Count II were accidents or mistakes." Instruction No. 35, Supp. CP.

Despite this, the prosecutor twice highlighted Mr. King's prior acquittal, argued that the prior allegations had some bearing on Brockley's credibility, and implied that jurors should convict in order to ensure that the legal system didn't fail Brockley a second time. RP (3/23/11) 253, 274. These arguments were improper: They contradicted the judge's instructions, encouraged jurors to see themselves as responsible for Brockley's well-being, and suggested that a guilty verdict could be based on the need to make the legal system work to protect Brockley from future harm, rather than on the evidence.

The prosecutor's arguments conflicted with the court's instructions and urged a decision based on improper factors. This misconduct had practical and identifiable consequences at trial, because it encouraged jurors to focus on the prior acquittal, and to use it for a purpose that conflicted with the court's instructions. Accordingly, it created a manifest error affecting Mr. King's constitutional rights to a jury trial and to due

process, and thus can be reviewed under RAP 2.5(a)(3).⁵ U.S. Const.

Amend. VI; U.S. Const. Amend. XIV; *Ayala-Garcia, supra*.

The errors are presumed to be prejudicial, because they affected Mr. King's constitutional rights. *Toth, at* 615. Accordingly, Mr. King's convictions (on Counts I-III) must be reversed and the case remanded for a new trial.⁶ *Id; Davenport, supra*.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS I AND II SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

C. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

⁵ In addition, they were flagrant and ill-intentioned: the rule in *Davenport* is clear and longstanding, and the court's instructions specifically limited the juror's use of evidence relating to the prior alleged assault.

⁶ The error is harmless with respect to the remaining counts, because Mr. King conceded at trial that he was guilty of repeatedly violating the no contact order. RP (3/23/11) 259.

- D. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997) (citing RCW 9.94A.110); *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court "should focus on the extent to which the

criminal intent, as objectively viewed, changed from one crime to the next....” *State v. Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

E. The sentencing court should have scored Counts I and II as one offense under the “same criminal conduct” test.

Counts I and II stemmed from a single incident: Mr. King was convicted of twice assaulting Brockley during a single incident, at the same time and place, with the same overall criminal objective.

Accordingly, the evidence was insufficient to establish that the two offenses scored separately under RCW 9.94A.589. The court should have found Counts I and II to be the same criminal conduct and scored them as a single offense. RCW 9.94A.589(1)(a); *Garza-Villarreal*. Had the court done so, it would not have sentenced Mr. King with an offender score of five.

Mr. King’s sentence must be vacated and the case remanded with instructions to correct the offender score and hold another sentencing hearing. *Id.*

CONCLUSION

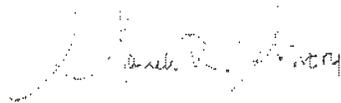
For the foregoing reasons, Mr. King's convictions in Counts I-III must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score.

Respectfully submitted on November 2, 2011.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Donald King, DOC #898027
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston County Prosecutor
paoappeals@co.thurston.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 2, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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