

No. 42618-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER PAYTON,

Appellant.

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STATE OF WASHINGTON
BY _____
CLERK

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Vicki L. Hogan, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Christopher Payton was deprived of his Article I, § 21 and Sixth Amendment rights to trial by jury when the trial court entered an order dismissing a count without prejudice even though the jury had entered a verdict of “not guilty” to one of the crimes submitted to the jury under that count.

Further, the court’s order violates the Article 1, § 9 and Fifth Amendment prohibitions against double jeopardy, because it allows Payton to be retried for an offense for which he was placed in jeopardy which terminated when he was acquitted.

2. The trial court erred in giving a “first aggressor” instruction which was not supported by the facts or the law.
3. Payton’s due process rights to have the prosecution disprove self-defense were violated.
4. Appellant assigns error to jury instruction 16, which provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 138.

5. The sentencing court erred in ordering forfeiture of Payton’s property without statutory authority for that order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. For Count I, two charges were submitted to the jury: attempted first-degree murder and the lesser offense of attempted second-degree murder. On the verdict form for the attempted first-degree murder, the jury entered a verdict of “not guilty.” They did not fill out the verdict form for the lesser charge.

Did the trial court err and violate Payton’s rights to trial by jury in later entering an order in which the court dismissed

count I “without prejudice” despite the jury’s clear verdict of acquittal of the higher crime submitted to them under that count?

Does the court’s improper order further violate the prohibitions against double jeopardy where it allows the prosecution to retry Payton on “count I” without dismissing the first-degree attempted murder charge for which the jury specifically entered a verdict of acquittal which the court itself accepted and which has not been overturned?

2. “First aggressor” instructions are disfavored and should only be given when they clearly apply. Did the court err in giving such an instruction in this case when it was not supported by the facts or the law?
3. Further, because “first aggressor” instructions negate a claim of self-defense, were Payton’s due process rights to have the state disprove self-defense violated by the improper instruction?
4. RCW 9.92.110 specifically prohibits ordering forfeiture of the property of a citizen based solely upon the conviction of a crime. Instead, there must be separate statutory authority authorizing such forfeiture.

Did the sentencing court err and violate RCW 9.92.110 when it ordered Payton to forfeit his property as part of the sentence even though there was no statutory authority to do so?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Christopher Payton was charged by amended information with first-degree attempted murder, first-degree assault and second-degree assault, all with deadly weapon enhancements and an allegation the crimes were “domestic violence incidents.” CP 11-13; RCW 9A.28.020; RCW 9A.32.030(1)(a); RCW 9A.36.011(1)(a); RCW 9A.36.011(1)(c); RCW 9A.36.021(1)(c); RCW 9.94A.530; RCW 9.94A.533.

Pretrial and trial proceedings were held before the Honorable Judge Vicki L. Hogan on March 11, April 14, May 17, June 7, August 1, 22-25, 29-31 and September 1, 2011, after which the jury found Payton not guilty of the first-degree attempted murder but guilty of the other two charges and enhancements. CP 161-72.¹

On September 23, 2011, Judge Hogan imposed a standard-range sentence. RP 724-26; CP 176-89. She also signed a “motion and order for dismissal” of count I. CP 190-91.

Payton appealed and this pleading follows. See CP 192.

2. Testimony at trial

Gloria Morris and Christopher Payton were living together in a house with Morris’ son, Kurama Youkai, on October 31, 2010, when an altercation occurred. RP 111. Youkai had been out drinking and hanging out and got home around 2 or 2:30 in the morning. RP 120-21. Morris got home about a half an hour later and said she was not feeling well. RP 124. She went into the guest room and put a note on the door saying she was sick and not to bother her. RP 124.

At about 3 or sometime after that, Youkai heard someone come into the house and move around inside. RP 125-26. He then heard some yelling and a sound that he thought was “the door getting kicked in,” after

¹The verbatim report of proceedings consists of eight volumes, which will be referred to as follows:
the six chronologically paginated volumes containing the proceedings of March 11, April 14, May 17, June 7, August 1, 22-25, 29-30, September 1 and 23, 2011, as “RP;”
the volume containing formal exception to instructions on August 30, 2011, as “2RP.” and
the volume containing proceedings on August 31, 2011, as “3RP.”

which he heard a scream. RP 126. Youkai had just purchased a “stun gun” taser for himself for his birthday, so he grabbed it and ran towards the sound. RP 111-18, 126, 149. He said he saw Morris “pretty much pinned” on the lower mattress of a bunk bed and Payton standing with a hatchet in his right hand. RP 128. Morris was screaming and “reaching for her phone and purse.” RP 128.

Youkai described Morris as “laid out” on the bed, and also as “braced by her hands, you know, leaning up, trying to set up.” RP 128. He also said that the lamp was the only light on in the room. RP 130, 154. He was nevertheless sure that he saw the hatchet in Payton’s hand. RP 129-30. But he never told police anything about seeing Payton with the hatchet “over his head” when Youkai came into the room. RP 410.

Youkai then started using the taser on Payton’s torso “with no effect.” RP 130. Youkai testified that he was shouting things like “stop.” RP 130. Payton then swung the hatchet at Youkai’s neck, back and head several times in a “very quick” amount of time. RP 131. According to Youkai, Payton was yelling “this is none of your business, get out of here,” and “stop touching me with that thing,” referring to the taser. RP 130, 171.

Youkai admitted that he did not really remember if he or Payton had spoken first. RP 167. And Youkai also did not remember if he said anything before he struck Payton with the taser, although he thought he “must” have said something before then. RP 168, 186. The incident was within five seconds so everything was happening fast. RP 168.

Morris testified that she did not hear Payton say anything and did

not hear Youkai say anything except “like a squeal” when he was hit. RP 299.

Youkai said that he did not “tase” Payton until Payton “swung” at Youkai himself. RP 168. But he also testified that he tased Payton and Payton then “began swinging the hatchet” at Youkai. RP 171. Youkai also opined that Payton could see Youkai’s face and knew who Youkai was. RP 186.

After several strikes, Youkai thought Payton either got tired or gave up because he dropped the hatchet and Youkai then grabbed it. RP 132. Youkai was going to use the hatchet on Payton himself but could not lift his arm because of his own injuries. RP 133.

Youkai would later tell police that he would not have “come at” Payton if Payton had not been holding a hatchet and been “trying to punch” Morris in the face. RP 178. He explained that he just interpreted it that way but he did not really see that. RP 178.

Youkai also did not recall telling a detective that Payton was “pretty much strangling” Morris at one point. RP 178. Youkai admitted that he was “taking liberty with the language” when he said that, and that Payton could not have actually been strangling Morris with both hands and holding the hatchet at the same time. RP 179. Youkai had been intoxicated when he went to bed just a short time before the incident occurred but claimed it had no effect on his ability to perceive events at all. RP 179-82.

Morris testified that, earlier that evening, Payton had been in a bad mood but had gone for a walk and felt better. RP 268-72. She ended up

picking him up in the car later in front of a grocery store and for some reason he was frustrated that she had gotten there so quickly. RP 273. He still wanted to go have some drinks so she left him at a local bar and went to another place, herself, where she drank. RP 277. A little later she went back to where she had dropped him off and the club was empty, being locked up. RP 277-78. She looked around, drove around the block and then eventually gave up after texting him that she was there and asking where he was. RP 278. After she got home she was feeling sick and exhausted, so she put a note on the door asking not to be disturbed. RP 279.

Morris said that, after she got home, Payton texted her and asked her to come get him but she said no, "I came. You weren't there. I am not coming back out. It's pouring down rain." RP 279. She said he used profanity at one point in the conversation, saying she had "better come f-ing get" him or she would not "like it" when he got home. RP 281. She still said no. RP 281.

Morris said that, when Payton got home, he sounded angry and was banging on the bedroom door, which she had locked. RP 283. According to Morris, Payton told her she had five seconds to open the door or he was coming in. RP 284. At that point, Morris said, she got out her phone and called 9-1-1. RP 285. She thought Morris had started breaking down the door by that time. RP 306.

When the 9-1-1 operator got on the phone, Morris admitted, Morris lied and told the operator that Payton had hit her when in fact he had not. RP 285, 312.

Morris hid the phone and went to open the door. RP 285-88. Then transpired something about Payton wanting the keys to the car so he could retrieve some money he had given to her earlier that night towards rent. RP 289. She said he wanted her to go out and get the money for him but she refused. RP 290. He was standing in the doorway and then came in holding something, although she did not know what it was. RP 291-92. She said he got “up on” her, which meant sort of in her face, and he had something under his arm. RP 293. According to Morris, she stood up and Payton said something like, “what the F you getting loud for,” after which he punched her in the mouth with his fist. RP 294. She said he hit her very quickly two or three times in her face. RP 297. They were still arguing when Youkai came into the room. RP 296. At some point, Payton said, “shut the fuck up or I will stab you in the head.” RP 576.

Morris admitted that she did not hear her son come into the room. RP 316. She did not hear Youkai say anything but just heard a “crackling sound” first. RP 298, 316, 320. After she heard that sound, Payton turned and Morris “saw this motion and immediately there was blood.” RP 296, 316. Morris said she grabbed the gun she had but it would not shoot. RP 300. She was somehow able to get to her son and started backing him down the hall. RP 133. Youkai said she had a gun in her hand at one point but also that she was using both hands to hold his head and left the gun behind. RP 133, 201. Morris sat Youkai down in the hall and saw Payton go into the master bedroom. RP 133. Morris was still crying and screamed to Payton to call police, after which Youkai saw Payton on the phone to someone, although Youkai did not know if it was the police. RP

135. Youkai said he also told Payton to call the police. RP 175. Payton waited there with Youkai and Morris and the police arrived about five minutes later. RP 136, 175.

The tape of Morris' 9-1-1 call was played at trial, as was the phone call Payton had made to police. RP 288, 522-24. A voice mail message Youkai later found on Morris' phone which was sent sometime before the incident said something like "someone is going to die tonight" and appeared to be from Payton. RP 187-88. An officer testified that Youkai told her that he had heard what sounded like a physical altercation had gone into the bedroom and seen Payton hitting Morris, so Youkai had "tased him," after which Morris turned around and started hitting him. RP 383. The same officer said that Morris told her that Payton was saying "someone is going to die tonight" and "it was over" and had searched the room a little before suddenly hitting her in the face with something, after which her son had come in. RP 403. She also told the officer she thought she would have been killed if her son had not come into the room. RP 404-405.

A paramedic firefighter who responded testified that Youkai told her that Payton was hitting Youkai's mom so Youkai used the taser on Payton several times, after which Payton attacked Youkai with the hatchet. RP 434.

Payton testified that he had been having some concerns for the safety of the neighborhood due to things he had seen, so he secured the home, locking the doors and talking about weapons, including Morris' gun. RP 462. He had put some knives and things around for possible use

as protection and had brought the hatchet inside for protection and she said no, so he took it back outside. RP 466. He had brought it back in a few days before this event, after he heard someone outside and had walked through the home checking rooms, ultimately leaving the hatchet in the bunk bed room. RP 469. It was a few days before the incident. RP 471.

Payton testified that his messages to Morris that night that he was going to be “cut throat now” meant basically that it was over and that he had met a girl named Latifa and spent some time with her that night. RP 487. When he got home, he asked Morris for the car keys to look for the charger for his phone, then he went back and knocked on the door to the room where Morris was, to give her back the keys. RP 494. Payton did not break in the door or anything like that; instead Morris let him in the door. RP 494-95.

Payton said he and Morris were having an argument about why she did not pick him up and he told her to get her shoes on and go get his money out of the car because she is the one that left it there. RP 498. He said she was face-to-face with him and he did not push her or punch her in the face but they were verbally aggressive with each other. RP 500-501. She screamed when he pulled on her to see if she had anything in her hand or under the blanket. RP 502. It was at that point that he “heard the electricity.” RP 502. Payton could feel the taser and as he was going to the ground he felt the wall and the hatchet he had left there, so he grabbed it. RP 505. He then started swinging towards the little light on the taser. RP 505.

Payton testified that he could not see the person who was tasing

him, and that person had made no noise before entering the room, nor had they said anything. RP 505. He said his vision was partially obscured as he was going down, because his “hoody” went across his head sideways, but he was “defending” with the hatchet. RP 506. He reacted out of fear and swung until the person fell. RP 507.

Payton stepped over the guy and turned on the light and then saw who it was. RP 512. He told Youkai that he had not known it was him, handing Youkai the hatchet. RP 513, 515. Payton had not known whether Youkai was in the home, as they often did not interact and Youkai would stay with friends or out. RP 509-510.

D. ARGUMENT

1. THE COURT ERRED AND VIOLATED PAYTON’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AS WELL AS RUNNING AFOUL OF THE PROTECTIONS AGAINST DOUBLE JEOPARDY

Under both the state and federal constitutions, a defendant in a criminal case has a right to trial by jury. See State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); Art. I, § 21; Sixth Amend. Article I, § 21 has been held to provide greater protection for jury trials than the federal constitution in certain situations. Williams-Walker, 167 Wn.2d at 896. In this context, however, both the state provision and the Sixth Amendment protect against a trial court exceeding the authority of the verdicts rendered by the jury. Id. Where a judge exceeds that authority, for example by imposing a sentence not authorized by the jury’s verdict, the error is not subject to “harmless error” analysis but must be corrected. Id.; see, e.g., State v. Recuenco (Recuenco III), 163 Wn.2d 428,

180 P.3d 1276 (2008) (exceeding authority by imposing a sentence not authorized by the jury's verdict).

In this case, this Court should reverse the trial court's order dismissing count I "without prejudice," because the entry of that order was in violation of Payton's rights to trial by jury, directly contradicted the jury's verdict and runs afoul of the state and federal protections against double jeopardy.

a. Relevant facts

On the second day of deliberation, at about 9:30 in the morning, the jury sent out a note which read, "we can not [sp] agree on a count in this case. What do we do now?" CP 115. The parties met and discussed whether the court should bring the jurors in and read them the "standard WPIC" on "deadlock." RP 702. Counsel for Payton agreed to the instruction, but also said the court should poll the jury and if they said they were deadlocked on a particular count, the court should "declare that portion of the case is hung and unresolved and have them declare their verdict on the balance." RP 702. The court agreed. RP 704.

After further discussion, counsel again said, "[t]hey are going to declare their verdicts on whatever counts they agree on. If whatever is left unfilled out, I think that it's obvious they were unresolved on those counts." RP 702. The court again agreed. RP 704.

With the jurors back out, the court first warned that it only wanted an answer of "yes" or "no," then asked the presiding juror if there was a reasonable probability of the jury reaching an unanimous verdict on the deadlocked count within a reasonable time. RP 705. The presiding jury

said, “[n]o.” RP 706.

At that point, the court instructed the jury as follows:

All right. What I would instruct you, ladies and gentlemen, is to return to the jury room, based upon the answer that you have given from the Presiding Juror, and complete the verdict form, or verdict forms as to any counts on which you are able to reach agreement, and then notify my Judicial Assistant.

You can go back into the jury room on that aspect.

RP 706.

With the jury again out of the room, the court said it was not willing to declare a mistrial at that point because it did not even know “what count” was involved. RP 706. The judge also said she wanted to have the jury “complete the verdict forms as directed,” opining that it would be a quick procedure because the question was “specific as to one count.” RP 706.

In addition, the judge said, “for the record,” she would need to examine the verdict forms “when they come out, obviously, then based upon their answers” would have to declare a mistrial as to the relevant count, if that was what the forms indicated. RP 707.

When the jurors returned, the verdict form for count I was filled out as follows: “[w]e, the jury, find the Defendant **not guilty** of the crime of Attempted Murder in the First Degree as charged in Count I.” RP 707, CP 165.² Verdict Form IA, the form asking the jury about the lesser offense of attempted second-degree murder, was blank. CP 166.³ For the

²For the Court’s convenience, a copy of the document is attached as Appendix A.

³A copy of the document is attached as Appendix B.

other counts, the verdict forms indicated that the jury found Payton guilty as charged. RP 707-708; CP 167-71.

At that point, the court excused the jury. RP 710. The judge then expressed some confusion about the jury's note that it was deadlocked, given that the jury then "answered as to each of the three charged offenses a verdict." RP 710. The prosecutor then declared her belief that, if she wanted to, "the State could elect to retry Mr. Payton on the Attempted Murder Two count," and the court should grant a mistrial as to that count. RP 710. Counsel said he agreed that the law provided that, although there might be "double jeopardy and merger" issues which applied. RP 710.

The court then stated it would "declare a mistrial as to the Attempted Murder Second, finding that the jurors were hung on that count." RP 711.

The day of sentencing, the prosecutor filed a document titled "MOTION AND ORDER FOR DISMISSAL AS TO COUNT I ONLY WITHOUT PREJUDICE" in which the prosecutor moved for dismissal of count I. CP 190.⁴ The document said that, because the defendant was convicted of the other counts and "is facing a lengthy sentence in prison on" those charges, "[i]t would not b[e] a good use of judicial resources to re-try the defendant on Count I." CP 190. The "Order" portion of the document, also drafted by the prosecutor and signed by the judge, provided that "Count I only is hereby dismissed Without [sp] prejudice." CP 191.

⁴A copy is attached as Appendix C

b. The court's order was entered in violation of Payton's rights to trial by jury and violates prohibitions against double jeopardy

The trial court erred in entering its written order dismissing count I “without prejudice,” because that order was not authorized by the jury’s verdict and violates Payton’s state and federal constitutional rights to jury trial. Further, the order exposes Payton to an impermissible risk of being subjected to double jeopardy.

First, the order was not authorized by the jury’s verdict and thus was entered in violation of Payton’s rights to trial by jury. Unless there is a knowing, voluntary and intelligent waiver of the right to trial by jury, the defendant in a criminal case is entitled to have a jury make the decision as to his guilt. See, e.g., State v. Hobble, 126 Wn.2d 283, 298, 892 P.2d 85 (1995); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982) (holding that our state provides greater protection of the right to trial by jury and requires trials in situations where there is no concomitant federal right). As the Court declared in Pasco, for criminal cases where there is a possible term of imprisonment, “the constitution requires that a jury trial be afforded unless waived.” Pasco, 98 Wn.2d at 100.

Because of the rights to trial by jury, there are limitations on the authority of a trial court in relation to a jury’s verdict. A jury’s decision becomes a “verdict” when the court accepts it and the jury is discharged. See State v. Badda, 68 Wn.2d 50, 60-62, 411 P.2d 411 (1966); see also RCW 4.44.460 (“[i]f the court determines that the verdict meets the requirements contained in this chapter and in court rules, the clerk shall file the verdict. The verdict is *then* complete and the jury shall be

discharged from the case.”) (emphasis added).

Further, once the verdict of the jury is entered and the jury discharged, the authority of the trial court in relation to the verdict is limited. See Beglinger v. Shield, 164 Wash. 147, 153, 2 P.2d 681 (1931). At that point, the court may only “amend or correct [the jury’s] verdict . . . [as to] matters of form or clerical error,” but may not make any “material alteration in the substance of the verdict,” even if the verdict is “imperfect.” Beglinger, 164 Wash. at 153, quoting, 27 R.C.L. 895.

Indeed, the Supreme Court has held, “any other rule would permit the trial judge to substitute his own judgment in the place of that of the jury upon matters of substance.” Beglinger, 164 Wash. at 153.

In this case, the court erred and made a material alteration of the substance of the verdict on Count I when it entered the order dismissing that count “without prejudice” to the prosecution pursuing it again. For the general verdict on that count, the jury received two verdict forms: one for attempted first-degree murder, the original charge, and one for attempted second-degree murder, the “lesser.” CP 165-66. On the verdict form for attempted first degree murder, the jury’s verdict could not have been more plain: Payton was found “not guilty. . . of the crime of attempted murder in the first degree as charged in count I.” CP 165. And the court accepted that verdict, then discharged the jury. RP 716. Even if it would ever be proper for a court to enter an order contradicting a jury’s verdict by reviving a charge for which the defendant was acquitted, it certainly was not proper at this time.

It seems entirely likely that the court’s order dismissing count I

“without prejudice” to the prosecution refiling the charge and seeking conviction on it again despite the jury’s clear verdict of acquittal on the first-degree attempted murder charge was simply an unintended error. The court did specifically discuss it with the parties and reach the correct conclusion - that of granting a dismissal of the attempted first-degree murder but a mistrial on the second-degree charge. RP 710-12.

Regardless of the reason for the improper order, however, it must be reversed, because it was entered in clear violation of Payton’s rights to trial by jury.

Another serious problem with the court’s order is that it runs afoul of the state and federal rights to be free from double jeopardy. There can be no question that jeopardy attached and was final after the court accepted the jury’s verdicts and discharged them. See, e.g., Green v. U.S., 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (clear that jeopardy has attached and come to an end after a jury verdict of “not guilty” and discharge of that jury); see State v. Heaven, 127 Wn. App. 156, 162, 110 P.3d 835 (2005) (“[a]s a general rule, jeopardy attaches in a jury trial when the jury is sworn in, and it terminates with a verdict of acquittal”).

Further, the rights to be free from double jeopardy specifically protect against a “second prosecution for the same offense after conviction or acquittal.” State v. Jones, 97 Wn.2d 159, 160, 641 P.2d 708 (1982). Here, the “not guilty” verdict of acquittal rendered by the jury and accepted and entered by the court terminated jeopardy and precludes further efforts by the state to convict Payton of attempted first-degree murder for this incident. But the order entered by the court, keeping the

count in abeyance but subject to revival *in its entirety*, potentially subjects Payton to further jeopardy for the charge of attempted first-degree murder, included under that count and not dismissed by the court despite the jury's verdict of acquittal.

The trial court not only exceeded the authority it had under the jury's verdict of acquittal for the attempted first-degree murder charge, it entered an order directly contrary to that acquittal. In so doing, it violated Payton's state and federal rights to trial by jury and placed Payton at risk of double jeopardy. This Court should so hold and should reverse and remand with instructions to correct the order of dismissal of count I to reflect the jury's verdict of "not guilty" on attempted first-degree murder and "unable to agree" on the lesser crime of attempted second-degree murder.

2. THE TRIAL COURT ERRED IN GIVING THE "FIRST AGGRESSOR" INSTRUCTION AND PAYTON WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO HAVE THE PROSECUTION BEAR THE BURDEN OF DISPROVING SELF-DEFENSE BEYOND A REASONABLE DOUBT AS A RESULT

Reversal and remand for a new trial is also required, because the trial court erred in giving the "first aggressor" instruction and the result was that Payton was deprived of his due process rights to have the prosecution bear the full weight of its constitutionally-mandated burden of disproving self-defense, beyond a reasonable doubt.

- a. Relevant facts

In initial discussion of the jury instructions, counsel's only objection was to the "first aggressor" instruction proposed by the state. RP

606. Counsel pointed out that this type of instruction is supposed to be “used sparingly” and that the other self-defense instructions were legally sufficient to allow the parties to argue their theories of the case. RP 607.

Counsel also argued that the “first aggressor” instruction did not apply under the facts of the case. RP 607. He noted that Payton was raising the self-defense claim against Youkai, not Morris, but that it was the assault of Morris which was being portrayed as the “aggressive” act. RP 607.

The prosecutor argued that the defense was “misstating” things by arguing that the instruction should not apply. RP 608. She claimed that Payton’s “actions in beating Kumara’s mother created the situation where Kumara had to go in to save his mother.” RP 608. Because Payton “created the situation,” the prosecutor argued, he was the “primary aggressor” and could not claim self-defense when a new person arrived and started assaulting him, ostensibly to try to stop the first assault. RP 609.

Without explanation, the court simply declared it had “considered argument[s] of counsel” and would give the instruction. RP 609. Counsel later formally excepted to that ruling. 2RP 6.

b. The court erred and violated Payton’s rights in giving the instruction

The court’s decision to give the “first aggressor” instruction was in error, because the instruction did not apply. Further, the erroneous instruction deprived Payton of his due process rights to have the state disprove self-defense, beyond a reasonable doubt, by improperly negating

his claim of self-defense.

First, the “first aggressor” instruction was not proper in this case. Such instructions are not favored. See State v. Riley, 137 Wn.2d 904, 911, 976 P.3d 624 (1999). Indeed, as one court has declared, “[f]ew situations come to mind where the necessity for an aggressor instruction is warranted.” State v. Arthur, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985).

A trial court errs if it gives an “aggressor” instruction absent evidence to support it. See State v. Wasson, 54 Wn. App. 156, 158-59, 772 P.2d 1039, review denied, 113 Wn.2d 1013 (1989). Further, there are very serious concerns which occur when such an instruction is improperly given, because of its potential effect. See Arthur, 42 Wn. App. at 124-25; Riley, 137 Wn.2d at 910 n. 2. A “first aggressor” instruction effectively negates any claim of self-defense against which it is raised. Arthur, 42 Wn. App. at 124-25. Because the instruction tells the jury not to even consider a self-defense claim in the “first aggressor” situation, there is a risk with an erroneous “first aggressor” instruction that the jury will erroneously convict even in a case where a valid claim of self-defense exists. Id. The state is thus relieved of its constitutionally mandated burden of disproving self-defense by the erroneous instruction, in violation of the defendant’s due process rights. See Riley, 137 Wn.2d at 910 n. 2.

As a result, because of its potential effect on the defendant’s due process rights to have the state disprove self-defense, the “first aggressor” instruction should only be given in the very limited situations in which it truly applies.

This case did not present such a situation. In general, the act alleged to be the “first aggression” must be directed at the same person against whom the self-defense claim is made. See State v. Kidd, 57 Wn. App. 95, 100, 786 P. 2d 847 (1990). This makes sense because of the harm against which the “first aggressor” instruction is intended to protect. The purpose is to prevent a defendant from being allowed to claim self-defense when his aggression towards the alleged victim “provoked the need to act in self-defense.” See id. Thus, the focus is on the situation where the defendant provokes person X, causing person X to respond, after which the defendant then uses force against person X, hoping to act with impunity under the guise of “self-defense.” See id.

This is in stark contrast to the situation here. Here, the “aggressor” act was alleged to be the assault of Morris. But the claim of self-defense was raised against Youkai, based upon Youkai having come into the room and zapped Payton with the taser. There was no “aggressor” act by Payton against Youkai.

In arguing to the contrary, the prosecution claimed that Payton should not be able to claim self-defense against Kumara Youkai because Payton’s “actions in beating Kumara’s mother created the situation where Kumara had to go in to save his mother.” RP 608. The problem with this theory is that it creates an impermissible presumption that a person who assaults another is not entitled to the same due process rights to self-defense as everyone else, i.e., is not entitled to defend themselves against a third party who starts assaulting them.

Further, there is absolutely no evidence here that Payton’s assault

of Morris was intended to provoke a belligerent response from Youkai so that Payton could then assault Youkai with impunity under a claim of self-defense. Indeed, Youkai was not even present when the alleged assault of Morris began.

Put simply, while there may be an unusual situation in which an assault of a third party could conceivably amount to some kind of “first aggressor” act, this is not that case.

Wasson, supra, is instructive. In that case, the defendant was charged with first-degree assault for shooting a man named Reed. 54 Wn. App. at 156. Wasson had a quarrel with his cousin over attention his cousin was paying to Wasson’s girlfriend, after which Wasson got into his car and revved the engine, rocking the car back and forth. When he refused to stop, the cousin broke a window on the side of Wasson’s car and tried to pull him out. Id. Wasson got out and the two pushed each other to the ground. By this time, or during this time, apparently Wasson became armed with a gun from the back seat of his car. 54 Wn. App. at 157.

The altercation drew the attention of neighbors and Reed, who was visiting someone nearby. Reed came over and told Wasson and his cousin to quiet down. Id. A “second encounter” resulted in a fight between Reed and Wasson’s cousin, in which Reed “struck several blows to [the cousin’s] face and body, knocking him to the ground and across the alley.” Id.

Reed then turned towards Wasson, taking several rapid steps towards him, at which point Wasson shot Reed. Id. At trial, Wasson

claimed self-defense, claiming that they had settled their differences at one point and were discussing who should pay for the car window which had been broken. 54 Wn. App. at 158. He said he had removed the gun from the unsecured car to protect it and they were standing there when Reed suddenly just hit Wasson in the ear, then attacked Wasson's cousin. Wasson said he thought his cousin had been stabbed, so Wasson hid behind a tree, unable to flee because of a recent operation. Id.

When Reed came at him, Wasson said, Reed threatened Wasson, saying he was "next." 54 Wn. App. at 158. Wasson told Reed to stop and then fired when Reed "continued his approach." 54 Wn. App. at 158.

For its part, the prosecution's theory was that Wasson and his cousin were fighting when Reed approached. For some reason, the cousin threw a punch at Reed but missed after which Reed knocked the cousin to the ground and "approached Mr. Wasson to let him know how he felt," but with "no immediate intention of hitting Mr. Wasson unless he met with resistance." 54 Wn. App. at 158.

The prosecution argued for a "first aggressor" instruction, arguing that the fight between Wasson and his cousin provoked Reed's response and Wasson's subsequent need to "defend" himself by assaulting Reed. Id. Wasson objected that there was no showing he was the aggressor toward Reed at all. Id.

On appeal, the court of appeals agreed. Id. The question, the Court found, was not whether there was evidence of some unlawful act by Wasson, but whether Wasson acted "**intentionally to provoke an assault**

from Mr. Reed” so that he could not then claim “self-defense” to justify his subsequent assault of Reed. 54 Wn. App. at 159 (emphasis added). In fact, the Court noted, there was evidence that Wasson “never initiated any act toward Mr. Reed” until the assault for which Wasson was charged, and for which he was claiming self defense. 54 Wn. App. at 160.

Similarly, in State v. Brower, 43 Wn. App. 893, 721 P.2d 12 (1986), the “first aggressor” instruction was improperly given when the defendant and his friend had been in an apartment and engaged in conduct which agitated a third man, Martin, who then came down the stairs towards the defendant and his friend. The defendant pointed a gun at Martin, ordering him to stay away. 43 Wn. App. at 897. That act was the basis for a later assault charge, against which Brower raised a claim of self-defense. Id. There was no evidence of any aggressive act towards Martin at all prior to the pulling of the gun, so the facts did not support giving a “first aggressor” instruction. 43 Wn. App. at 902.

Here, the facts did not support the “first aggressor” instruction, either. There was no evidence that Payton got into the altercation with **Morris** in an effort to provoke **Youkai** so that Payton could then claim “self-defense” in response. Again, Youkai was not even in the room at the time Payton and Morris began fighting.

In sum, the principle behind the “first aggressor” instruction is not that “anyone who assaults anyone deserves to get assaulted themselves and thus cannot raise self-defense to subsequent assault by a third party.” It is that the entire interaction between two people must be considered when

self-defense is claimed for the assault of one by the other.

Because the “first aggressor” instruction did not apply, the court’s decision to give the instruction caused an impermissible impact on Payton’s claim of self-defense, which the state had the burden of proving beyond a reasonable doubt. Payton was entitled to have the jury fairly consider his self-defense claim in this case. Reversal and remand for a new trial is required.

3. THE COURT ERRED AND VIOLATED PAYTON’S DUE PROCESS RIGHTS IN ORDERING PROPERTY FORFEITED AS A CONDITION OF THE SENTENCE, IN VIOLATION OF RCW 9.92.110, WHICH ABOLISHED THE DOCTRINE OF FORFEITURE BY CONVICTION

Even in the unlikely event this Court did not reverse and remand for a new trial based upon the error in giving the “first aggressor” instructions and the violation of Payton’s due process rights regarding self-defense, Payton would still be entitled to relief from an unlawful order of forfeiture of his process without authority of law.

In section 4.4 of the judgment and sentence, the court entered conflicting orders regarding the forfeiture of property, ordering both that “[p]roperty may be returned to its rightful owner” and telling Payton that he had the right to make a claim for the return of his property within 90 days or it might be disposed of but also that, as a condition of sentence, he was to “[f]orfeit any items in property.” CP 184.

On review, this Court should strike the order of forfeiture from the judgment and sentence as invalid as a matter of law. The authority to order forfeiture is wholly statutory. See State v. Alaway, 64 Wn. App.

796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992); see also Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998).

As this Court said in Alaway, this is true even if the property was used in the commission of a crime, because there is no “inherent authority” to order the forfeiture of such property. 64 Wn. App. at 800-801. Instead, this Court pointed out, any such order must be grounded in “statutory authorization.” 64 Wn. App. at 800-801. Further, the procedures set forth in the relevant statute must be followed. Id.; see also, City of Walla Walla v. \$401,333.44, 164 Wn. App. 236, 262 P.3d 1239 (2011). If a court fails in these endeavors, it acts outside its statutory authority and enters an illegal sentence which may be reviewed for the first time on appeal. See, State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

And because “[f]orfeitures are not favored” in our state, they are enforced only when they are consistent with the “letter” and “spirit” of the law. Id., citing, Bruett, 93 Wn. App. at 295.

Here, there was not even a “law” the “letter” and “spirit” of which this Court could review. There is no authority to order forfeiture of all property simply because a person is convicted of a crime. Indeed, there is authority - and binding law - directly to the contrary. The doctrine of “forfeiture by conviction” has been specifically abolished in this state in RCW 9.92.110, which provides, in relevant part, that “[a] conviction of [a] crime **shall not work a forfeiture** of any property, real or personal, or of any right or interest therein” (emphasis added).

Thus, the mere fact of conviction did not support the order of forfeiture.

Nor was there other statutory authority for the sentencing court in this criminal case to order the defendant to forfeit property simply based upon convictions for first-degree and second-degree assault. See, e.g., RCW 10.105.010 (authorizing **law enforcement** to hold civil forfeiture proceedings of certain property in criminal cases; providing required procedures); RCW 69.50.505 (authorizing forfeitures relating to controlled substances convictions; providing procedures); RCW 9A.83.030 (forfeitures relating to money laundering cases); RCW 9.46.231 (gambling law violations).

There was no authority for the court to order that Payton must “forfeit all items in property” as a condition of the sentences in this case. This Court should strike the improper order as unsupported by law.

E. CONCLUSION

For the reasons stated herein, this Court should strike the improper order of dismissal without prejudice of Count I and should grant a new trial without the first aggressor instruction. In the alternative, the court should strike the unauthorized order of forfeiture in the judgment and sentence.

DATED this 27th day of April, 2012.

Respectfully submitted,

/s/ Kathryn Russell Selk
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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Christopher Payton, DOC 352734, Coyote Ridge CC, P O Box 769, Connell, WA. 99326.

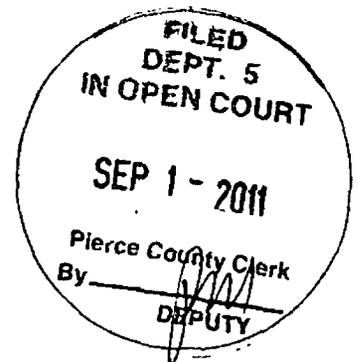
DATED this 27th day of April, 2012.

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

STATE OF WASHINGTON
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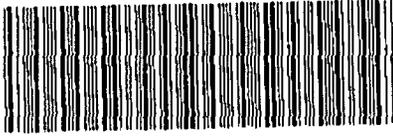
SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs
Christopher Eugene Payton
Defendant.

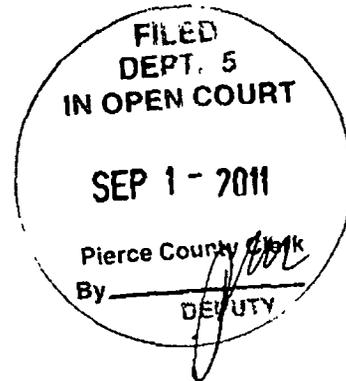
CAUSE NO. 10-1-04626-9
VERDICT FORM - COUNT I

We, the jury, find the defendant NOT Guilty (Not Guilty or Guilty)
of the crime of attempted murder in the first degree as charged in Count I.

[Signature]
PRESIDING JUROR



10-1-04626-9 37059847 VRD 09-02-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

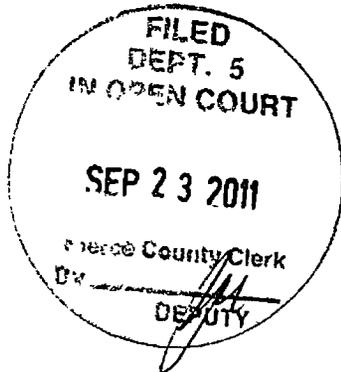
STATE OF WASHINGTON,
Plaintiff,
vs.
CHRISTOPHER EUGENE PAYTON
Defendant.

CAUSE NO. 10-1-04626-9

VERDICT FORM I-A

We, the jury, having found the defendant not guilty of the crime of Attempted Murder in the First Degree as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the lesser included crime of Attempted Murder in the Second Degree.

PRESIDING JUROR



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
 Plaintiff,
 vs.
 CHRISTOPHER EUGENE PAYTON,
 Defendant.
 DOB: 02/26/79
 SID #: WA

CAUSE NO. 10-1-04626-9

MOTION AND ORDER FOR DISMISSAL AS TO COUNT I ONLY WITHOUT PREJUDICE

MOTION

Comes now the plaintiff, herein, by its attorney, MARK LINDQUIST, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing Count I only Without prejudice, on the grounds and for the reason that the defendant was convicted at trial on Count II - Assault in the First Degree Deadly Weapon Enhanced and Count III - Assault in the Second Degree Deadly Weapon Enhanced. The defendant is facing a lengthy sentence in prison on the charges for which he was convicted. It would not b a good use of judicial resources to re-try the defendant on Count I.

DATED: this 23 day of September, 2011

MARK LINDQUIST
 Pierce County Prosecuting Attorney
 by: [Signature]
 ANGELICA MCGAHA
 Deputy Prosecuting Attorney
 WSB#: 36673

ORDER

The above entitled matter having come on regularly for hearing on motion of MARK LINDQUIST, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

ORDERED that Count I only is hereby dismissed Without prejudice, bail is hereby exonerated. Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

DATED the 23 day of September, 2011.

Vicki L. Hogan
JUDGE
VICKI L. HOGAN

FILED
DEPT. 5
IN OPEN COURT
SEP 23 2011
Pierce County Clerk
BY [Signature] DEPUTY