

No. 45457-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jerome Moody,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00298-9

The Honorable Judge Michael Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Moody's custodial assault conviction violated his Fourteenth Amendment right to due process.
2. The trial court erred by giving Instruction No. 11.
3. The trial court erred by including a "first aggressor" instruction in its instructions to the jury.
4. The trial court improperly stripped Mr. Moody of his self-defense claim.

ISSUE 1: In a self defense case, an aggressor instruction may only be given if evidence suggests the accused provoked a fight with an intentional act beyond mere words. Here, there was no evidence that Mr. Moody did anything other than speak and passively resist before the fracas began. Did the court violate Mr. Moody's Fourteenth Amendment right to due process by giving a first aggressor instruction?

ISSUE 2: The aggressor instruction informs the jury that the accused may not use force against someone who is already using lawful force. In a custodial assault case, self defense must be premised on the officer's use of excessive force, which is inherently unlawful. Did the trial court err as a matter of law by giving an aggressor instruction in this custodial assault case?

5. The prosecutor committed misconduct that was flagrant and ill-intentioned.
6. The prosecutor improperly urged jurors to convict based on passion and prejudice.
7. The prosecutor improperly argued that a conviction could be based in part on Mr. Moody's bad character.

ISSUE 3: A prosecutor commits misconduct by encouraging the jury to rely on passion, prejudice, or the accused's alleged bad character instead of the evidence in the case. Here, the prosecutor argued that jurors should convict based in part on Mr. Moody's status as a jail inmate, which demonstrates that

he is a bad person. Did prosecutorial misconduct deprive Mr. Moody of his Fourteenth Amendment right to a fair trial?

8. The trial court failed to properly determine Mr. Moody's criminal history, offender score, and standard range.
9. The prosecution failed to prove that Mr. Moody had prior felony convictions.
10. The trial court erred by including in Mr. Moody's criminal history offenses that were neither admitted, acknowledged, or proved.
11. The trial court erred by sentencing Mr. Moody with an offender score of six.
12. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence)
13. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 4: In order for a prior conviction to add a point to an offender score, the state must present some evidence that the conviction actually exists. Here, the court relied on the prosecutor's bare assertions that Mr. Moody had six prior felony convictions. Did the court err by sentencing Mr. Moody with an offender score of six, absent any evidence that he had prior convictions?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jerome Moody was on suicide watch in the Cowlitz County Jail.

RP 71. When other inmates looked into Mr. Moody's cell to check on him, he held his "suicide smock" up to the window so they could not see in. RP 72. When corrections officer Munger walked by and asked him to pull the smock down so the officer could see in, Mr. Moody did so. Each time Munger left, Mr. Moody put it back up. RP 103.

After fifteen minutes, Munger decided to put Mr. Moody into a restraint chair. RP 73. Munger asked Mr. Moody to "cuff up" by putting his hands through the cuff port in the door. RP 70, 75. Mr. Moody did not do so, so Munger opened the door and pointed his taser at him. RP 77. Mr. Moody backed up and sat on his bunk. Munger put his taser away. RP 77.

Munger and two other officers then grabbed Mr. Moody to put him into the restraint chair. RP 88. Mr. Moody cooperated. RP 88, 110. Once Mr. Moody was sitting in the chair, the officers tried to strap him in. RP 89. When they did that, Mr. Moody pulled his arms into his chest. RP 90, 111.

Munger bent Mr. Moody forward and held his head down using a hair hold. RP 89, 111. Two officers had his arms in gooseneck holds. RP

113, 147. Officer Lacy punched Mr. Moody in the spine several times. RP 149, 167, 200, 203, 266. Mr. Moody could not breathe and felt like the officers were choking him so he bit Lacy on the arm. RP 129.

The state charged Mr. Moody with custodial assault for biting Lacy. CP 1-2.

At trial, the court instructed the jury based on the special standard of self-defense for custodial assault cases:

A person may use force upon or toward a person known to be a correctional officer only when that person is in actual and imminent danger of serious injury from an officer's use of excessive force...
CP 36.

Over Mr. Moody's objection, the court also instructed the jury using the state's proposed "aggressor instruction:"

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, or attempt to use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.
CP 37.

The prosecutor relied on the aggressor instruction to argue during closing that Mr. Moody could not raise self-defense because he created the situation:

... the defendant created this situation where he is now using that situation to claim self-defense to justify his actions of biting a cop doing the very thing that he wanted to do.

RP 311.

[T]hey take him, as softly as they can, but they still have to control the situation because he's created a situation and they need to take control of it for his safety... Now, I think the state has shown rather clearly that he was the one that created this situation.

RP 335.

The prosecutor also argued that the jury should consider the fact that the incident took place in a jail:

And let's face it, it's jail. People do bad things in jail. Bad people are in jail, and they know how to take bad things into jail...

RP 334.

The jury found Mr. Moody guilty of custodial assault. RP 355.

The state filed a summary of Mr. Moody's alleged criminal history. CP 4. The state did not present any evidence that Mr. Moody actually had any criminal history. RP 368-91. Mr. Moody did not admit or acknowledge any prior convictions. RP 368-91. Nonetheless, the court found that Mr. Moody had all of the prior convictions listed on the criminal history sheet. The court sentenced him with an offender score of six. CP 36-37.

This timely appeal follows. CP 56.

ARGUMENT

I. THE COURT VIOLATED MR. MOODY’S RIGHT TO DUE PROCESS BY GIVING A FIRST AGGRESSOR INSTRUCTION THAT STRIPPED HIM OF THE OPPORTUNITY TO CLAIM SELF DEFENSE.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 43636 -1-II, 2014 WL 710682, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Feb. 25, 2014). Whether sufficient evidence justifies giving a first aggressor instruction in a self-defense case is also reviewed *de novo*. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). Erroneously instructing on the aggressor doctrine creates a constitutional error requiring reversal unless the state can prove that it was harmless beyond a reasonable doubt. *Id.* at 961.

B. The court erred by instructing the jury in a manner relieving the state of its burden of proof.

If a person accused of assault produces some evidence that s/he acted in self-defense, the state must then prove beyond a reasonable doubt that the use of force was unlawful. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013); U.S. Const Amend. XIV. The evidence is taken in a light most favorable to the defense. *State v. George*, 161 Wn. App. 86, 96, 249 P.3d

202 (2011). The burden is low, and need not rise to the level of a reasonable doubt. *Id.* An accused person who meets this burden has a constitutional right to have the jury consider self-defense. *Id.*, at 100-101.

A person who was the first aggressor in the interaction may not claim self-defense. *Stark*, 158 Wn. App. at 959. The state has the burden of production to justify instructing the jury on the first aggressor rule. *Id.* To obtain an aggressor instruction, the state must show (1) an intentional act (other than the charged crime), (2) that is more than mere words, (3) that a jury could reasonably assume would provoke a belligerent response. *Stark*, 158 Wn. App. at 960 (*citing State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999)); *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989).

Washington courts disfavor aggressor instructions. *Stark*, 158 Wn. App. at 960 (*citing State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)). Such instructions are rarely necessary to permit the parties to argue their theories of the case. *Id.* Additionally, courts should “use care” when giving aggressor instructions because they could relieve the state of its burden of proof in a self-defense case. *Id.* (*citing Riley*, 137 Wn.2d at 910 n. 2).

1. The evidence did not support an aggressor instruction.

The trial court erred by giving a first aggressor instruction in Mr. Moody's case. *Id.*; CP 37. Mr. Moody was in custody and on suicide watch when he allegedly assaulted Lacy. RP 71. He did not have access to any weapons, or even normal clothes. RP 64. He did not bite Lacy until after Lacy had punched him several times. RP 149, 167, 200, 203, 266.

Mr. Moody's spoken words and refusal to follow the officer's commands cannot justify giving the first aggressor instruction. *Riley*, 137 Wn.2d at 911. Likewise, his passive refusal to submit to the restraint chair once the fracas had begun is not evidence that he "provoked" the interaction by an intentional act. *Id.*

The state did not introduce evidence of any affirmative action on the part of Mr. Moody that provoked the fight. RP 58-290. The court erred by giving the first aggressor instruction. *Stark*, 158 Wn. App. at 959.

The state cannot show that the error was harmless beyond a reasonable doubt. *Id.* at 961. The prosecution relied heavily on the first aggressor instruction to argue that Mr. Moody could not claim self-defense because he "created" the situation. RP 335, 338. The instruction relieved the state of its burden to disprove self-defense beyond a

reasonable doubt. *Stark*, 158 Wn. App. at 961. Mr. Moody was prejudiced by the court's improper instruction. *Id.*

The court violated Mr. Moody's right to due process and relieved the state of its burden of proof by giving an aggressor instruction that was not warranted by the facts of the case. *Id.* Mr. Moody's conviction must be reversed. *Id.*

2. The first aggressor instruction is never warranted in cases involving custodial assault, because the instructions on self-defense already require the jury to find that officers responded to a provocation with excessive force.

Generally, a person may lawfully act in self-defense based on apparent danger as well as actual danger. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). But a person may use self-defense against a police officer or correctional officer only when s/he is in *actual* imminent danger of serious bodily injury or death. *State v. Bradley*, 141 Wn.2d 731, 743, 10 P.3d 358 (2000). The actual risk of injury or death must be the result of "*excessive force*" by law enforcement or correctional officers. *State v. Westlund*, 13 Wn. App. 460, 466, 536 P.2d 20 (1975) (cited by *Bradley*, 141 Wn.2d at 737-38) (emphasis added); CP 36.

Washington courts have never condoned applying the aggressor doctrine in a custodial assault case like this one. The policy considerations underlying the aggressor doctrine do not pertain when a

person defends him/herself from excessive force by corrections or police officers.

The aggressor doctrine is based on the logic that one cannot use lawful force to defend against lawful force. *Riley*, 137 Wn.2d at 911. If the accused person is the one who started the fight, then it is the other party who is entitled to use lawful force in self-defense. *Id.* The aggressor may not then claim self-defense against the self-defense. *Id.*

In a custodial assault case, however, the accused must present evidence that the officers' excessive use of force placed him/her in actual danger. *Westlund*, 13 Wn .App. at 466. Excessive force is unlawful by definition. Thus, the logic of the aggressor doctrine – that the accused is not entitled to use force against another's lawful use of force – does not apply.

At least some evidence suggested that Mr. Moody bit Lacy because the officers were choking him. RP 129. When taken in a light most favorable to Mr. Moody, this evidence established that he was in actual danger as a result of excessive force by the officers. *George*, 161 Wn. App. at 96. The evidence required the court to instruct on self-defense. *Id.*; CP 36. In order to find Mr. Moody's use of force lawful, the jury had to find that the officers used excessive force responding to any

provocation. CP 36. The court had no reason to give the disfavored aggressor instruction as well. *Stark*, 158 Wn. App. at 960.

The court erred by giving an aggressor instruction lowering the state's burden to disprove self-defense beyond a reasonable doubt. *Stark*, 158 Wn. App. at 959. The state cannot show that the error was harmless beyond a reasonable doubt. *Id.* at 961. Mr. Moody's conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. MOODY A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

- B. The prosecutor committed misconduct by encouraging the jury to convict based on passion, prejudice, and Mr. Moody's allegedly bad character, rather than the evidence in the case.

Prosecutorial misconduct can deprive the accused of a fair trial.

Glasmann, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash.

Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.* It is also misconduct for a

prosecutor to argue that the accused person's "bad character" constitutes evidence of guilt. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000).

During closing argument in Mr. Moody's case, the prosecutor argued that the fact that Mr. Moody was in jail made him more likely to be guilty:

And let's face it, it's jail. People do bad things in jail. Bad people are in jail, and they know how to take bad things into jail...
RP 334.

The prosecutor's argument improperly encouraged the jury to convict Mr. Moody based on passion and prejudice and the allegedly "bad" nature of people in jail rather than based on the evidence. *Glasmann*, 175 Wn.2d at 704; *Hofbauer*, 228 F.3d at 699.

Mr. Moody was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. The state bore the burden of disproving that Mr. Moody had acted self-defense beyond a reasonable doubt. Rather than focus on the relevant evidence, the prosecutor argued that the fact that Mr. Moody had been in jail justified the officers' actions. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Moody's case. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging the jury to convict because Mr. Moody had

been in jail. *Glasmann*, 175 Wn.2d at 704; *Hofbauer*, 228 F.3d at 699.

Mr. Moody's conviction must be reversed. *Glasmann*, 175 Wn.2d at 704.

III. THE COURT MISCALCULATED MR. MOODY'S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

B. Mr. Moody's sentence must be vacated because the state failed to prove that he had any prior convictions.

The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been "admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The burden is on the prosecution to establish the accused's criminal history by a preponderance of the evidence. *Id.*

The prosecutor's written summary of the accused's alleged criminal history does not prove that the prior convictions actually exist.

Id., at 910. Such “bare assertions, unsupported by evidence do not satisfy the state’s burden to prove the existence of a prior conviction.” *Id.* at 910. This is true even when defense counsel does not object. *Id.* at 915.

At sentencing, the state did not present evidence that Mr. Moody had any prior convictions. RP 368-91. Nonetheless, the court found that Mr. Moody had an offender score of six based on six prior felony convictions. CP 43-45 (findings 2.2-2.3).

The court appears to have taken its findings verbatim from the prosecutor’s criminal history summary sheet. CP 3-4. The state’s criminal history sheet was not evidence and was insufficient to demonstrate that Mr. Moody had any prior convictions. *Hunley*, 175 Wn.2d at 909-10.

Because the state failed to prove that Mr. Moody had any criminal history, the court’s findings and offender score are not supported by the evidence. Findings 2.2, 2.3, and Mr. Moody’s sentence must be vacated. *Id.* The case must be remanded for resentencing with an offender score of zero. *Id.*

CONCLUSION

The court erred by giving the disfavored aggressor instruction. The facts did not support the instruction. Additionally, the aggressor instruction is never warranted in a custodial assault case. Accordingly,

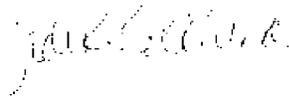
Mr. Moody's conviction must be reversed and the case remanded for a new trial.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by encouraging the jury to convict Mr. Moody based on passion and prejudice and his alleged bad character rather than the facts of the case. This misconduct requires reversal.

In the alternative, the state did not present any evidence that Mr. Moody had prior criminal history to justify his offender score of six. Mr. Moody's sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on March 10, 2014,

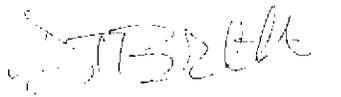
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CERTIFICATE OF SERVICE

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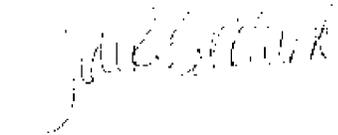
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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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 March 10, 2014.



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