

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 Reply Brief

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ARGUMENT

I. THE COURT SHOULD NOT HAVE GIVEN AN AGGRESSOR INSTRUCTION.

An accused person who presents some evidence of self-defense has a constitutional right to instructions requiring the state to disprove lawful use of force beyond a reasonable doubt. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013); *State v. George*, 161 Wn. App. 86, 96, 249 P.3d 202 (2011); U.S. Const Amend. XIV. Washington courts disfavor aggressor instructions. Such instructions are rarely necessary to permit the parties to argue their theories of the case. *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010) (*citing State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)).

A. The evidence did not support giving the disfavored aggressor instruction.

The court should not have given an aggressor instruction in this case. Mr. Moody did not bite Lacey until after Lacey had punched him several times. RP 149, 167, 200, 203, 266. Even so, the state argues that an aggressor instruction was appropriate. Brief of Respondent, pp. 5-7 (*citing State v. Wingate*, 155 Wn.2d 817, 822-24, 122 P.3d 908 (2005)). But *Wingate* held only that an aggressor instruction was appropriate in a

case with conflicting evidence. *Id.* at 823. In that case, the state presented evidence that the accused had pulled out a sawed-off shotgun, cocked it, and then pointed it at several people before shooting one of them. *Id.* at 819-20.

Wingate is inapplicable for two reasons. First, there was no conflicting evidence in Mr. Moody's case. Mr. Moody did not testify. All of the evidence came from the corrections officers and the sheriff's deputy who investigated the incident. Both testified that they had Mr. Moody in gooseneck holds and were punching him in the back when he bit Lacey. RP 113, 147, 149, 167, 200, 203, 266.

Second, the defendant in *Wingate* engaged in affirmative conduct by cocking his gun and pointing it at several people. *Wingate*, 155 Wn.2d at 819-20. Mr. Moody's actions consisted only of words and passive resistance. RP 58-290. He did not engage in aggressive conduct. Nor did he have access to weapons, or even to normal clothes. RP 64. Unlike in *Wingate*, there was no evidence here that Mr. Moody took any action to start a fight.

An erroneous aggressor instruction deprives the accused of his/her constitutional right to present a self-defense claim. *Stark*, 158 Wn. App. at 960-61. Still, respondent argues that the instruction was proper because it did not prohibit Mr. Moody from arguing his theory of the case. Brief of

Respondent, pp. 8-10. This is incorrect: the instruction informed jurors that self-defense was “not available as a defense.” *Id.*; CP 37. Mr. Moody’s ability to argue the instruction’s inapplicability did not cure the constitutional error. *See e.g. Stark*, 158 Wn. App. at 960-61.

An aggressor instruction is not appropriate unless the state proves aggressive conduct by the accused. The conduct must consist of more than mere words. It must be reasonably likely to 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).

Here, the state did not produce evidence of any affirmative act by Mr. Moody that provoked the fight. RP 58-290. Nonetheless, Respondent argues that Mr. Moody acted as an aggressor when he “disregarded commands” and “resisted” the officers’ attempts to further restrain him. Brief of Respondent, p. 7. But ignoring commands and passively resisting does not constitute the affirmative aggressive conduct necessary to support the instruction. *See e.g. Wingate*, 155 Wn.2d at 819-20 (describing extensive affirmative conduct warranting an aggressor instruction).

A valid self-defense claim requires acquittal even if the state proves each element of an assault. The state must also disprove the lawful use of force in order to convict. *McCreven*, 170 Wn. App. at 462. Even

so, the state argues that any instructional error was harmless, pointing to evidence that an assault occurred. Brief of Respondent, pp. 11-12. But Mr. Moody did not contest that he bit Lacey. Instead, he claimed that he acted in self-defense. Respondent's argument ignores the law of self-defense.

The aggressor instruction relieved the state of its burden to disprove self-defense. *Stark*, 158 Wn. App. at 960-61. 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 state cannot prove that the error was harmless beyond a reasonable doubt. *Id.*

The court erred by giving the first disfavored aggressor instruction. The facts did not support an aggressor instruction in this case. *Stark*, 158 Wn. App. at 959. Mr. Moody's conviction must be reversed. *Id.*

B. 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.

The state does not meaningfully address this issue. See Brief of Respondent, p. 8. Accordingly, Mr. Moody relies on the argument set forth in his Opening Brief.

II. THE PROSECUTOR COMMITTED FLAGRANT, ILL-INTENTIONED, PREJUDICIAL MISCONDUCT BY ENCOURAGING THE JURY TO CONVICT MR. MOODY BECAUSE “BAD PEOPLE ARE IN JAIL.”

A prosecutor commits misconduct by making arguments designed to inflame the passions or prejudices of the jury. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). It is also misconduct for a prosecutor to argue that the accused person’s “bad character” is evidence of guilt. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000).

During closing argument in Mr. Moody’s case, the prosecutor stated:

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 on the evidence in the case. *Glasmann*, 175 Wn.2d at 704; *Hofbauer*, 228 F.3d at 699. Even so, the state claims that the argument was proper because it is probative of the officers’ mental states and necessary to “educate the jurors on the situation those officers faced.” Brief of Respondent, pp. 15.¹

¹ Respondent cites at length to cases that do not address prosecutorial misconduct but that note in other contexts that prisons and jails are necessarily tightly controlled environments. Brief of Respondent, p. 14 (citing *In re Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984); *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)). The
(Continued)

First, the prosecutor's improper argument focused on the "bad people" in jail, not on the officers. Second, even if the argument had centered on the officers, their mental states were not relevant to any element at issue in Mr. Moody's case. Indeed, even the argument outlined by Respondent would have been designed to arouse sympathy for the officers, not to encourage conviction based on the evidence. Brief of Respondent, pp. 14-16.

An accused person cannot "invite" the error of prosecutorial misconduct. *State v. Jones*, 144 Wn. App. 284, 299, 183 P.3d 307 (2008). Still, the state argues that the prosecutor's statements were permissible because they were in response to Mr. Moody's self-defense claim. Brief of Respondent, p. 16. Arguments about "bad people" who do "bad things" are not a proper response to a validly raised self-defense claim. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging the jury to convict because Mr. Moody had been in jail and "bad people are 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.

state fails to make any meaningful link between that and the prosecutor's argument that "bad people are in jail." Brief of Respondent, p. 14. The authority respondent relies upon is irrelevant to Mr. Moody's claim.

III. THE STATE FAILED TO PRESENT ANY EVIDENCE THAT MR. MOODY HAD PRIOR CONVICTIONS.

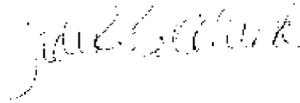
Respondent appears to concede that the state failed to present any evidence of Mr. Moody's alleged prior convictions at sentencing. Brief of Respondent, p. 17. Accordingly, Mr. Moody relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Moody's Opening Brief, his conviction must be reversed. In the alternative, his case must be remanded for resentencing.

Respectfully submitted on July 1, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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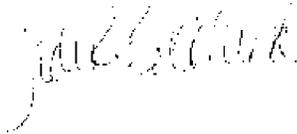
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply 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 July 1, 2014.



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