

NO. 45663-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID M. HENKLEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Christine Schaller, Judge
Cause No. 12-1-01684-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in taking challenges for cause at sidebar during jury selection.
02. The trial court erred in giving the first aggressor instruction.
03. The trial court erred in not erred in imposing consecutive sentences for counts I and II?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court violated Henkleman's right to a public trial in taking challenges for cause at sidebar during jury selection?
[Assignment of Error No. 1].
02. Whether the trial court committed reversible error in giving court's instruction 26, the first aggressor instruction?
[Assignment of Error No. 2].
03. Whether the trial court erred in imposing consecutive sentences for counts I and II believing it was required to do so under RCW 9.94A.589(1)(b)?
[Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

David M. Henkleman was charged by information filed in Thurston County Superior Court December 7, 2012, with three felonies, each with deadly weapon allegation: murder in the second degree of Casey Heath while armed with a deadly weapon, count I, assault in the first degree of Eric Cooper while armed with a deadly weapon, count II,

and assault in the second degree of John Poole while armed with a deadly weapon, count III, contrary to RCWs 9A.32.050(1)(a) or (1)(b), 9A.36.011, 9A.36.021(1)(c), 9.94A.533(4)(a) and (b), and 9.94A.825. [CP 6-7].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 12-37]. Trial to a jury commenced November 6, 2013, the Honorable Christine Schaller presiding.

Henkleman was found guilty, including enhancements, sentenced within his standard range, and timely notice of this appeal followed. [CP 108-113, 171-181, 218].

02. Substantive Facts

Near 1:30 in the morning on December 5, 2012, Olympia police responded to the report of a stabbing at a local tavern. [RP 311, 335, 367, 408].¹ The suspect, later identified as Henkleman, had fled the scene but was soon apprehended after being “tazed” by the police as he yelled ““I didn’t do it”” while holding a knife up to his throat. [RP 407, 476-79, 578, 628]. Approximately seven hours later [RP 1068], following advisement and waiver of rights, Henkleman denied or couldn’t recall going into the tavern and had almost no memory of other events prior to

¹ Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled Volumes 1-8.

his arrest. [RP 197-98, 1069, 1072]. Testimony was presented invoking retrograde extrapolation to estimate that his blood alcohol level at the time of the incident was approximately .25. [RP 240-41, 305, 599, 606, 610].

02.1 Count I: Murder in the Second Degree

Henkleman arrived at the tavern earlier that morning around 1:20, and after ordering a drink went outside to the tavern's fenced smoking area, which was occupied by six people. [RP 215, 315, 342, 394, 396-99]. He immediately approached and sat down next to Heath who was sitting at a table with Cooper and Poole. [RP 399, 429-431, 958]. Henkleman briefly talked to Heath before making a sudden movement with his right hand toward Heath's torso [RP 958, 960-62], at which point Heath jumped up over the table and ran to the door leading back into the tavern, where Henkleman caught up to him and the two became involved in a physical altercation before Heath fell to the ground. [RP 432-33, 963-66]. He was pronounced dead at the scene, the victim of 13 injuries, eight of which were stab wounds. [RP 375-76, 755-56].

02.2 Count II: Assault in the First Degree

Cooper went to assist Heath when he saw him "hitting the floor." [RP 436]. Beyond that, the evidence is conflicting. Cooper, who admitted to being drunk at the time [RP 451], asserted that

he punched Henkleman in the mouth [RP 437, 450] only after he “came at me.” [RP 435].

[H]e turned around and looked at me and took a step forward, so I said, oh, I better hit him, so I hit him.

[RP 436-37].

Evidence to the contrary indicated that Henkleman was walking backward as Cooper and later Poole approached. Antonina Ruedas, who was sitting nearby, moved toward Heath after he had fallen to the ground when she “noticed he wasn’t moving his legs...” [RP 687]. “I walked over to where (Heath) was on the ground.” [RP 688]. Henkleman was standing near Heath’s feet. [RP 691]. There was a man behind her and to her left.

[RP 674].

Whoever was to the left of me that was coming that way, also, I just remember the defendant backing up...

....

So when I stopped paying attention to him (Henkleman), he was in the process of backing up this direction.

[RP 674].

I didn’t see the knife until right before he backed - - he was getting backed up.

[RP 675].

I was mostly trying to look at (Heath). I just remember, at one point, him (Henkleman) backing up. I just remember him backing up where the double - - the double gates were. That direction.

Q: Are you using the words “backing up” because he’s actually walking backwards?

A: Yes

Q. Okay.

A. I was not paying attention to who. The people from the left were following him that way, yes.

[RP 693].

By all accounts, there was consensus that Cooper threw the first punch, striking Henkleman in the face. [RP 436-37, 1021]. As the encounter escalated, Cooper was stabbed by Henkleman, though he didn't realize it until after he had knocked Henkleman to the ground [RP 438, 455],² when he backed away and focused on his injury: "I was more trying to keep myself from bleeding, keeping pressure on my wound." [RP 439]. Evidence showed that the knife blade had gone through Cooper's leather jacket before slightly penetrating the skin under his left armpit. [RP 194, 344, 462].

02.3 Count III: Assault in the Second Degree

Poole also went to Heath's assistance, and

² Cooper testified that while he had felt something puncture his side during the struggle, he was unaware he had been stabbed. [RP 438].

following Cooper's interaction with Henkleman [RP 968, 1029-1030], kneed and elbowed Henkleman, who, he claimed—sometimes, at least—had returned to assaulting Heath.³ [RP 972-74].

He got up, spun around and stuck me with - - that's when I realized he had a knife. He stuck me in my arm, and, basically, he - - after that, he just got up and jetted.

[RP 974, 1037].

I did not know he had a knife. I just thought he was punching.

[RP 1038].

D. ARGUMENT

01. THE TRIAL COURT VIOLATED HENKLEMAN'S RIGHT TO A PUBLIC TRIAL BY TAKING CHALLENGES FOR CAUSE AT SIDEBAR DURING JURY SELECTION.

Both the Sixth Amendment to the United States Constitution and art. I, §§ 10 and 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010). This right is not, however, unconditional, and a trial court may close the courtroom in certain situations. State v.

³ Poole's version of this sequence shifted as the trial progressed, sometimes saying that Henkleman, after his encounter with Cooper, returned to assaulting Heath [RP 972-74, 1037], while at another time responding: "I really didn't notice." [RP 1036]. When questioned about this inconsistency, he flippantly admitted he was just coming up with answers: "Yeah, I am. That's what I'm here for, right?" [RP 1037].

Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). Such a closure may occur only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514; State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Sublett, recognized that our Supreme Court has developed a two-step process for

determining whether a particular proceeding implicates a defendant's public trial right:

First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

Given this court's acknowledgement in Wilson, 174 Wn. App. at 335-40, that the Washington Supreme Court has established that the public trial right applies to jury selection, Henkleman addresses only whether the trial court violated his right to a public trial by taking challenges for cause at sidebar during jury selection. See State v. Wise, 176 Wn.2d at 11-12.

The record demonstrates that during the jury selection process eight prospective jurors were excused for cause at sidebar:

THE COURT: I want to go ahead and put on the record the sidebar that we had at the beginning of the time when the jury process was occurring. During that time period, the lawyers indicated that they did not have any argument as it related to requests for excusing jurors for cause. There was an agreement during that sidebar that juror numbers 15, 31, 41, 44, 49, 46, 48, and 36 would be excused for cause based upon the different physical conditions they had or hardships as it related to sitting for

the length of this trial. Is there anything you wish to add, Mr. (prosecutor)?⁴

(PROSECUTOR): No, Your Honor.

THE COURT: Ms. (defense counsel)?

(DEFENSE COUNSEL): No, Your Honor.

[RP 85-86].

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where the issue was whether Love’s right to a public trial was violated because the trial court entertained peremptory challenges at the clerk’s station, Division III of this court held that the public trial right does not attach to the exercises of challenges during jury selection, reasoning that neither “prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public.” Id. at 920. This court tracked this analysis when confronted with the same issue in State v. Dunn, ___ Wn. App. ___, 321 P.3d 1283 (2014):

We agree with Division III that experience and logic do not suggest that exercising peremptory challenges at the clerk’s station implicates the public trial right.

Id. at 1285.⁵

⁴ This was put on the record at the conclusion of the jury selection process. [RP 85; CP 61].

⁵ A petition for review was filed in Love under cause no. 89619-4, which was stayed by our Supreme Court on April 4, 2014. Similarly, a petition for review was filed in Dunn on May 7 and is scheduled to be considered on August 5, 2014 under cause no. 90238-1.

Henkleman respectfully disagrees with this court's decision in Dunn, which relied on Division III's decision in Love, for it is well established that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Importantly, our Supreme Court's decisions in Wise and State v. Strode, 176 Wn.2d 58, 292 P.3d 715 (2012), in addition to this court's decision in Wilson, support the claim that peremptory challenges—and by extension challenges for cause—must be made in open court. In Strode, where “for-cause” challenges were conducted in chambers, the court held this practice violated public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

In Wilson, by noting that the public trial right has not historically encompassed excusals for hardship prior to the commencement of voir dire, Wilson, 174 Wn. App. at 337-39, this court differentiated between such excusals under CrR 6.3 and those “for-cause” and peremptory challenges under CrR 6.4, the latter of which must occur in open court. Id. at 342.

The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public's purview and in violation of Henkleman's right to a public trial. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), rev. granted in part, 176 Wn.2d 1031

(2013) (rejecting argument that no public trial violation can occurred where jurors dismissed at sidebar). The error was structural, prejudice is presumed, and reversal is required.

02. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING THE FIRST AGGRESSOR INSTRUCTION.

The trial court gave the first aggressor instruction over Henkleman's objection.⁶ The instruction stated:

[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 the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.] However, the right of self-defense may be revived if the aggressor in good faith withdrew from the aggression at such a time and in such a manner as to have clearly apprised Mr. Cooper and/or Mr. Poole that he in good faith was desisting, or intended to desist, from further aggressive action.

[Court's Instruction No. 26; CP 242].

Aggressor instructions are clearly not favored. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990).

Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case

⁶ Henkleman objected only to the bracketed portion of the instruction set forth below [RP 1244], noting "if the Court is going to give it, of course, I would agree with the State that the revival language is absolutely necessary...." [RP 1249; CP 124].

can be sufficiently argued and understood by the jury without such instruction.

State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

As noted by the Washington Supreme Court:

While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

It is reversible error to give the aggressor instruction where the evidence is lacking that the defendant acted intentionally to provoke an assault against the victim. State v. Wasson, 54 Wn. App. 156, 159-160, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989) (citing State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) (aggressor instruction improper where evidence lacking to show defendant was involved in wrongful or improper conduct which precipitated the charged offense).

If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. (citation omitted). The inclusion of the instruction effectively deprived him of his theory of self-defense; the jury was left to speculate as to the lawfulness of this conduct prior to the assault. (citation omitted).

Id.

In State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), the court, citing Wasson, 54 Wn. App. at 159, citing State v. Arthur, 42 Wn. App. at 124, held that “(t)he provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim.”

The aggressor instruction was improper in this case because Henkleman was not the first aggressor toward either Cooper or Poole, both of whom initiated the contact with Henkleman. [RP 436-37, 972-74, 1021]. The provoking act must be intentional and related to the assault for which self-defense is claimed, but it cannot be the actual assault. State v. Kidd, 57 Wn. App. at 100. The rationale for the instruction is to prevent a defendant from claiming self-defense where he or she “provoked the need to act in self-defense.” State v. Kidd, 57 Wn. App. at 100. Example: A hits B, B responds by hitting A, who then hits B back. That didn’t happen here. Citing Kidd, 57 Wn. App. at 101, the State argued below that the instruction was proper because an aggressor may “provoke a justifiable defense of others response.” [CP 86]. But this is difficult to parse and confuses the matter, for it takes to be true the questionable position, and resulting conclusion, that a person who assaults another forfeits the right to defend against a third party who assaults him or her.

Further, there was insufficient evidence that Henkleman's assault of Heath was intended to provoke a belligerent response from either Cooper or Poole. In Wasson, the defendant and another person, Bartlett, were fighting when interrupted by a third party, Reed, who told them to quiet down, whereupon Bartlett and Reed began fighting before Reed approached Wasson, who then shot him. Wasson, 54 Wn. App. 157. Division III of this court ruled that Wasson was not an aggressor because the fight between he and Bartlett was not related to the encounter involving Reed and Bartlett. Id. at 159. The court noted that Wasson did not initiate the contact with Reed until the assault for which he was charged, and for which he claimed self-defense. Id. at 160.

There is no question that when a trial court improperly gives a first aggressor instruction, it relieves the State of its burden of disproving a criminal defendant's self-defense theory. State v. Stack, 158 Wn. App. 952, 960-61, 244 P.3d 433 (2010). It has the potential to remove self-defense from the jury's consideration. State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). For that reason, it should only be given sparingly and only in those cases where the theories of the case cannot be argued and understood by the jury without the instruction. This was not that case.

Henkleman had a right to defend himself against Cooper and Poole without the jury's consideration of the first aggressor instruction, the absence of which would not have precluded either party from arguing its theory of the case or the jury from understanding the respective arguments, especially where Henkleman never made a claim of self-defense with respect to Heath. He was struck first by both Cooper (punch to the face) and Poole (kneed and elbowed) and then he responded. Though contextually tragic, it's as simple as that.

Henkleman's conviction for assault of both Cooper and Poole must be reversed and remanded for retrial without the first aggressor instruction.

03. THE SENTENCING COURT MISUNDERSTOOD THE EXTENT OF ITS DISCRETION WHEN IT SENTENCED HENKLEMAN TO CONSECUTIVE SENTENCES FOR COUNTS I AND II BELIEVING IT WAS REQUIRED TO DO SO UNDER RCW 9.94A.589(1)(b).

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). As a matter of law, where a standard range sentence is given, the amount of time imposed may not be appealed. RCW 9.94A.585(1); State v.

Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). An appellant, however, may challenge the procedure by which a sentence within the standard range was imposed. Mail, at 710-11; State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986).

Henkleman was sentenced to a term of 427 months total confinement, including 60 months for the three deadly weapon enhancements: 244 months base sentence (without deadly weapon enhancement) for count I (murder second), 123 months for count II (assault first) and 20 months for count III (assault second). [CP 175]. Under RCW 9.94A.589(1)(b), counts I and II were run consecutively to each other and concurrent to count III for a total of 367 months, which, when added to the 60 months for enhancements, totaled 427 months. [CP 172-73, 175].

In its sentencing memorandum, the State argued that the sentence imposed for the assault in the first-degree conviction “must run consecutive to the sentence imposed for the murder conviction. RCW 9.94A.589(1)(b).” [CP 151]. This was repeated at the sentencing hearing: “Requirement that assault in the first degree run consecutive to murder in the second degree - - excuse me - - assault in the first degree runs consecutive to the crime of murder in the second degree....” [RP 12/04/13

5]. In imposing the 123 month base sentence for the assault in the first degree conviction, the sentencing court noted: “This sentence will run consecutive, as is required, to the time that I have imposed on the murder in the second degree charge.” (emphasis added). [RP 12/04/13 58].

This record demonstrates that the sentencing court believed it had no discretion to run counts I and II concurrently. The court’s failure in this regard constituted a fundamental defect inherently resulting in a miscarriage of justice, with the result that Henkleman’s failure to request a mitigated sentence does not bar his challenge here to the consecutive sentences imposed for counts I and II. See State v. Miller, ___ P.3d ___, 324 P.3d 791, 792, 799-800 (2014).

Both the State and the sentencing court failed to recognize that the court had the discretion to impose concurrent sentences for counts I and II as an exceptional downward sentence. There was no binding requirement that the counts “must run consecutive,” at least not since 2007 when our Supreme Court, in In re Personal Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), held that sentencing courts have discretion to impose concurrent sentences for serious violent felonies, despite RCW 9.94A.589(1)(b).

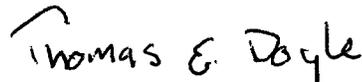
And while the record does not show with certainty that the trial court would have imposed a mitigated exceptional sentence if it had been

aware such was an option, it does show with certainty that at the State's urging the court believed it was "required" to do otherwise. Under these unique circumstances, where the sentencing court clearly did not recognize the extent of its discretion, remand for resentencing is required, given this court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." Mulholland, 161 Wn.2d at 334 (quoting State v. McGill, 112 Wn. App. 95, 100-101, 47 P.3d 173 (2002)).

E. CONCLUSION

Based on the above, Henkleman respectfully requests this court to reverse his convictions and/or to remand for resentencing.

DATED this 13th day of June 2014.



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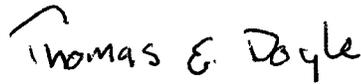
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 13th day of June 2014.

Handwritten signature of Thomas E. Doyle in black ink.

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DOYLE LAW OFFICE

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:

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