

No. 46008-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL M. PIERRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge
Cause No. 12-1-00997-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether taking challenges for cause to the jury venire at sidebar violates a defendant's right to a public trial.

2. Whether the to-convict instruction for felony harassment omitted an essential element of the crime and thus relieved the State of its burden to prove every element of the crime.

3. Whether the self-defense instruction given by the court was incorrect under the facts of this case.

4. Whether defense counsel provided ineffective assistance by failing to object to the elements instruction for felony harassment or failing to preserve an objection to the self-defense instruction given by the court.

B. STATEMENT OF THE CASE.

The State accepts Pierre's statement of the procedural facts of the case, as well as the substantive facts with the following additions. Pierre states that Joseph Musekamp identified the other occupants of the apartment as his cousin and sister. He actually told the police they were his cousin and the cousin's girlfriend. RP 60.¹ When Hagoodhenry appeared from the hallway, she appeared dazed and wobbly, her hair was messy, and she was holding her arm as if she had been assaulted. RP 63.

C. ARGUMENT.

1. The trial court did not err by taking challenges for cause at sidebar because (1) that procedure does not

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the three-volume trial transcript.

implicate the right to a public trial and (2) the courtroom was not closed.

Pierre argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court heard and decided challenges for cause and excused five jurors at sidebar. The court made a record of that sidebar, with no objection from either party. RP 37-38. A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). “Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). The initial question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial

motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an undercover police officer was testifying and he feared public exposure would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
4. The court must weigh the competing interests of the proponent of the closure and the public.
5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

That analysis is not required unless the public is “fully excluded from the proceedings within a courtroom,” Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

[A] “closure” occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93. Pierre’s argument presumes that the sidebars constituted a closure of the courtroom, but under this definition, the courtroom was never closed and there was no requirement for a Bone-Club analysis.

Sometimes it is not important to determine whether the courtroom was closed or not. Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure, even if the public is excluded. Sublett, 176 Wn.2d at 71. To decide whether a particular process must be open to the general public, the Sublett court adopted the “experience and logic” test formulated by the United States

Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). The “experience” prong requires the court to determine if “the place and process have historically been open to the press and public.” Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The “logic” prong addresses “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If both questions are answered in the affirmative, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding to the public. Id.

The experience and logic test was formulated to determine whether the core values of the right to a public trial are implicated. Sublett, 176 Wn.2d at 73. The right to a public trial exists to “ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

[T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, . . . the inability of the defendant’s family to contribute their knowledge or insight to the jury selection, and

the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

There is no dispute that the sidebars at issue in this trial occurred in the courtroom and the courtroom was open. Pierre offers no authority, nor can the State find any, to show that sidebars have not historically been conducted out of the hearing of the jurors and spectators. That is the whole purpose of the sidebar—so that the jury does not hear the discussion, and if the jurors cannot hear, neither can the spectators. The alternative would be to excuse the jury each time some issue needed to be addressed outside of its presence.

In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court wishes to caution counsel or hear more than a simple “objection, Your Honor.” This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

Ticeson, 159 Wn.2d at 386, n. 38. Sidebars do not violate any of the core values of the public trial right.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), the Court of Appeals assumed, without deciding, that a sidebar conference constituted a closure. Id. at 917. In that case, challenges for cause to the jury venire had been held at a sidebar. Id. at 915. Applying the Sublett experience and logic test, the court concluded that it was not error to handle challenges at a sidebar. Despite its earlier assumption, the court held that “[t]he sidebar conference did not close the courtroom.” Id. at 920.

The court in Love further explained that the written record of the challenges to potential jurors satisfied the public interest in monitoring the integrity of trials. Love, 176 Wn. App. at 919-20. This court adopted the reasoning of the Love court and held that the public trial right does not attach to challenges during jury selection. State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014).²

Pierre argues that Dunn and Love were wrongly decided. Appellant’s Opening Brief at 11. He cites to State v. Wilson, 174

² Petitions for review were filed in Love, No. 89619-4, and Dunn, No. 90238-1; consideration of those petitions was stayed on August 5, 2014, pending a decision in State v. Smith, No. 85809-8. Smith was decided on September 25, 2014.

Wn. App. 328, 298 P.3d 148 (2013); Strode, 167 Wn.2d 222; and State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), to support his argument that challenges to potential jurors in the venire must be made in such a manner that the spectators may hear them. In Strode, the court held that it was error to hold a portion of voir dire in the judge's chambers without conducting the Bone-Club analysis. It did not specifically address challenges either for cause or peremptory challenges, although challenges for cause were also made and decided in chambers. Strode, 167 Wn.2d at 224, 231. In Wise, ten potential jurors were questioned in chambers, and six were excused for cause, but the opinion does not specify whether the challenges were also heard and decided in chambers. Id. at 7-8. In Wilson, two jurors were excused by the bailiff, before voir dire began, because they were ill. Wilson, 174 Wn. App. at 332. The court distinguished between this situation and “for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom.” Id. at 344. The distinction in these cases, then, is between what happens in chambers and what happens in the courtroom that has not been closed to the public, or between pre-voir dire jury selection and voir dire.

Pierre does not claim that the courtroom was closed to the public, only that the challenges to the jury venire were made at a sidebar where the public could not hear what was being said. He points to State v. Slerf, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012),³ where this court remarked in a footnote that “if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held outside Slerf’s and the public’s purview.” Id. However, in Slerf’s case the challenged conduct had occurred in chambers, Id. at 775, and the footnote is dicta. Dunn was decided two years later and specifically held that it was not error to conduct challenges to the venire at sidebar. Since Pierre filed his opening brief, this court has decided State v. Webb, No. 43179-3-II (August 26, 2014). In that case, the parties exercised peremptory challenges by passing back and forth a sheet of paper. The court relied on Love and Dunn to find that this procedure did not violate the defendant’s right to a public trial. Webb, *slip op.* at 3.

The Supreme Court recently addressed the question of whether evidentiary rulings made at sidebar violate the defendant’s

³ Slerf was reversed on the public trial issue only. State v. Slerf, 87844-7 (September 25, 2014).

right to a public trial. State v. Smith, 85809-8 (September 25, 2014). That court, applying the logic and experience test of Sublett, held that sidebars do not implicate the public trial right, and therefore there is need to address whether the sidebar constitutes a closure and if so, whether the closure is justified. Id., *slip op.* at 14-15.

During the evidentiary portion of Pierre's trial, there were several sidebars. RP 171, 186, 343, 387, 406, 465, 585, 657, 710, and 786. Pierre has not assigned error to those or argued that they violated his right to a public trial. There seems to be no reason to conclude that challenges to potential jurors at sidebar violate the right to a public trial and other sidebars do not. Since the Smith court⁴ has held that sidebars do not even implicate the public trial right, there was no error.

2. An element of the crime of harassment was omitted from the to-convict instruction, but it was harmless error.

Pierre is correct that at least a portion of an element of the crime of harassment was omitted from the to-convict instruction. Pierre was charged with felony harassment as provided in RCW

⁴ In Smith, the sidebars actually occurred outside the courtroom and were for the purpose of addressing evidentiary rulings. Smith, *slip op.* at 3.

9A.46.020(1)(a)(i) and (2)(b)(iii). CP 5. 9A.46.020 reads, in relevant part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;

.....

- (2)(b) A person who harasses another is guilty of a class C felony if any of the following apply:
 - (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made:

The jury was given an elements instruction which provided:

To convict the defendant of the crime of harassment as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 24, 2012, the defendant knowingly threaten (sic) Jason Winner immediately or in the future;
- (2) That the words or conduct of the defendant placed Jason Winner in reasonable fear that the threat would be carried out;
- (3) That at the time the threat was made Jason Winner was a criminal justice participant who was performing his official duties;
- (4) That the defendant acted without lawful authority; and
- (5) That the threat was made or received in the State of Washington.

Instruction No. 15, CP 80.

The jury was also given Instruction No. 13, defining the crime of harassment.

A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the defendant harasses a criminal justice participant who is performing his or her official duties at the time the threat is made.

CP 79.

Pierre maintains that because the words “to cause bodily injury” were left out of the to-convict instruction, the State was relieved of its burden to prove every element of the crime beyond a reasonable doubt. Appellant’s Opening Brief at 15. Pierre did not object to this instruction in the trial court, although he did object to another instruction. RP 216-17, 483.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id., at 656. An appellate court may refuse to review a claim of error

not raised in the trial court, but a party may raise a “manifest issue affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3); State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). An instruction omitting an element of the charged crime can be of constitutional magnitude. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). A manifest error of constitutional magnitude requires a showing of actual prejudice. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id. at 99 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

An incorrect jury instruction may be harmless error as long as the jury is properly instructed that the State has the burden of proving every element of the offense beyond a reasonable doubt. State v. Montgomery, 163 Wn.2d 577, 600, 183 P.3d 267 (2008). The jury in Pierre’s trial was so instructed. Instruction No. 4, CP 75. To find an erroneous instruction to be harmless, the record must demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. Whether there is harmless error depends

on the facts of the case. Id., (citing to State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005)).

Generally speaking, the to-convict instruction must contain all of the essential elements of the offense. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The jury is entitled to view that instruction as a complete statement of the law, and not be required to search other instructions in order to find the elements of the crime. Id. at 8. Even so, the Washington Supreme Court has recognized exceptions, such as in State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002), where the element which elevated a misdemeanor to a felony was set forth in a separate instruction accompanying a special verdict. Mills, 154 Wn.2d at 8.

“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, not every omission in an instruction does relieve the State of that burden.

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Washington Supreme Court in Brown adopted that holding. Brown, 147 Wn.2d at 340. “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” Id. at 341 (citing to Neder, 527 U.S. 1t 18).

Pierre maintains that this instruction is not harmless error because “it cannot be concluded beyond a reasonable doubt that the verdict would have been the same without the error.” Appellant’s Opening Brief at 15. He asserts that the jury could have concluded Pierre was just blowing off steam or his threat was so inchoate as not to be understood as a threat. But those arguments don’t necessarily relate to the missing words from Instruction No. 15. Officer Jason Winner testified that Pierre was angry and using profanity. He said he’d beat or kick Winner’s ass, he didn’t care if Winner had a badge, “you don’t know who you’re messing with,” and he would find Winner on the street. RP 86-87. Officer Kimberly Seig testified that Pierre said it didn’t matter if Winner was a cop, he’d beat his ass. RP 177.

Pierre testified at trial. The following is an excerpt from his direct examination.

Q: Now, after this happened, apparently Officer Winner indicates that you said some things to him about how you were going to beat him up and some other references to that kind of thing. Did you—do you have any malice currently toward Officer Winner?

A: No, I do not.

Q: Okay. Did you have any intention in the future to cause any bodily harm to—

A: No.

Q: --Officer Winner or follow through with anything that you said?

A: I'm sorry. What do you mean? As to what I said?

Q: That you were going to beat him up or going to kick his ass or—

A: Um, I—I don't recall the exact words that I said, but it was something along the lines of the fact that he came in the bathroom and pointed the pistol at me and told me to get the fuck on the ground—or get the fuck—put your fucking hands up. And at some point along afterwards, it—the female had had the Taser pointed at me and said that were (sic) going to tase me, and I was just irate at this point.

Q: Here's the—here's the—here's a question, an important one. I'm sure we're wondering. Why did you say those things at that time?

A: I was irate.

Q: You were upset?

A: And I was being assaulted.

Q: Okay. Was your pride hurt?

A: Yes, it was.

RP 398-99. On cross examination, this exchange occurred:

Q: Now, when you were taken to the couch, you started telling Officer Winner that you were going to beat his ass, didn't you?

A: On the couch? No, I don't believe so.

Q: When you were taken out. Did you tell him that? Did you tell him you were going to beat his ass?

A: I don't recall.

Q: Okay. Did you tell him you were going to find him on the streets and hunt him down? Did you tell him that?

A: No.

Q: You didn't—you don't recall, or you didn't say that?

A: No. I never said that.

Q: Did you tell him you didn't care if he had a badge; you were going to come after him?

A: No. I told him I didn't care if he had a badge. He has no try (sic) right to try to sit there and assault me.

Q: Okay. And did you tell him, quote, you don't know who you're messing with, unquote? Did you tell him that?

A: No, I don't believe so.

Q: Did you tell him that if I'd hit you, it would have been even worse?

A: Yeah. The whole situation would have been way worse.

Q: If you'd hit him?

A: You're danged right it would be.

Q: So that wasn't a threat; that was just a statement?

A: That was a statement.

Q: You weren't threatening him at any time—

A: Nope.

Q:--in that exchange—

A: --no.

Q: --so "beat my ass" was not a threat—or to beat his ass?

A: No. There was something said along the lines of—with the scuffle, after he had told me to get the fuck on the ground. And it was at some point, I'll beat your ass. And then that's when I repeated you're going to come into my house and tell me you're going to beat my ass and shoot me?

Q: So he told you he was going to beat your ass?

A: That's correct.

RP 432-34.

It is apparent from this testimony that there was little dispute about what words were used. Winner said Pierre was angry and directed them at him as a threat. Pierre said he only repeated back

what Winner said in the form of a question, or was merely making a statement, although he admitted he was "irate." There is also no real dispute that the reference was to action that would cause bodily injury. Instruction No. 13 informed the jury that harassment is knowingly threatening to cause bodily injury immediately or in the future. The State was never relieved of the burden of proving that the threat was to inflict bodily injury. Pierre argues that he could have been just blowing off steam, but does not claim the language used would not be a threat of bodily harm. Appellant's Opening Brief at 15. If Pierre knowingly uttered the words, and by his words or conduct placed Winner in reasonable fear that he would carry out the threat, the elements were proven. There was evidence that Pierre had already assaulted the officer, making it reasonable for Winner to take him seriously. Under the circumstances of this case, there is a basis to conclude, beyond a reasonable doubt, that had the words ""to cause bodily injury" been in the to-convict instruction, the outcome of the trial would have been the same. Without prejudice, there is no manifest error of constitutional magnitude. O'Hara, 167 Wn.2d at 99.

3. The self-defense instruction given by the court was correct under the facts of this case, but even if it

weren't it would be harmless error because Pierre was not entitled to a self-defense instruction at all.

Pierre argues that the self-defense instruction given by the court was incorrect because it applied to an arrest situation, while Pierre was not arrested. He maintains that the court should have given a general self-defense instruction. Appellant's Opening Brief at 22-23.

Pierre proposed a self-defense instruction taken from WPIC 17.02:

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 23.

The State objected to any self-defense instruction being given. RP 468-69. The trial court agreed that the instruction proposed by Pierre was incorrect, but did find that a self-defense instruction should be given. RP 478. After discussion with the parties, the court modified WPIC 17.02.01, and the following instruction was used.

It is a defense to a charge of Assault in the Third Degree that the force used was lawful as defined in this instruction.

A person may use force to resist a physical direction by a known police officer only if the person receiving the physical direction is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 78.

During the colloquy regarding this instruction, the court remarked that it would be against public policy to give an instruction that would tell the jury people have the right to disregard orders from the police. RP 478. Pierre argues that this public policy rationale is misplaced. Appellant's Opening Brief at 22. Defense

counsel did not object to the instruction drafted by the court, although he did express a preference for slightly different wording. RP 481-85.

A defendant is entitled to jury instructions explaining his theory of the case if the evidence supports such instructions. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). If a trial court refused to give a requested jury instruction based upon a factual dispute, that ruling is reviewed for abuse of discretion. If the refusal is based on a ruling of law, the review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Both parties agree that Winner was not attempting to arrest Pierre, but rather to detain him to investigate the report of domestic violence. The instruction regarding self-defense in an arrest situation is, particularly as modified by the trial court, more appropriate to the facts of this case than WPIC 17.02, which applies when law enforcement is not involved. The critical concern is whether a police officer is involved, not the specific action taken by that officer. In State v. Ross, two police officers were investigating a traffic infraction when the two suspects behaved in a threatening manner and a wrestling match ensued. They were charged with assaulting an officer who was performing his official

duties. State v. Ross, 71 Wn. App. 837, 838-39, 863 P.2d 102 (1993). At trial, the jury was instructed that the use of force “upon or toward a uniformed police officer performing his official duties” is lawful only when the person is “actually about to be seriously injured.” Id. at 840. The issue in Ross was whether there had to be actual danger; in affirming the conviction, and referring to the statute as it was codified at the time, the court said:

One of the purposes of RCW 9A.36.031(1) was to prevent assaultive behavior which interferes with a police officer’s obligations to insure a peaceful and orderly *detention* or arrest. . . . [O]ne of the plain purposes of adding subsection (g) was to avoid fine and *insubstantial distinctions between investigation, detention, and arrest*, during all of which an officer should be protected from physical violence.

Id. at 842-43, emphasis added. Ross was cited with approval in State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000) (“actual danger is standard for self-defense in assault on law enforcement”). In Bradley, the court, relying on public policy, found that the use of force against arresting officers and correctional officers in the jail should be treated the same. Id. at 743. It is the fact of law enforcement action that is important, not the specific act that the officer is taking, that changes the standard to “actual and imminent danger” rather than what the person reasonably believes. The self-

defense instruction was correct as to the degree of threat required before the defense was applicable.

Pierre disagrees with the trial court's policy rationale for the instruction given, and cites to Riksem v. City of Seattle, 47 Wn. App. 506, 511, 736 P.2d 275 (1987), for the proposition that public policy considerations properly belong with the legislature, not the courts. Appellant's Opening Brief at 22. In Riksem, however, the question was whether or not a court could find a statute invalid on public policy grounds; it cannot. Id. at 511. The issue was not whether the trial court could take public policy into account when ruling on proposed jury instructions. The instruction given in this case was not error.

a. Even if the instruction were incorrect, it would be harmless error because Pierre was not entitled to a self-defense instruction.

Even if the court did give the wrong instruction, it was harmless error because Pierre was not entitled to a self-defense instruction at all. To be entitled to a self defense instruction, the defendant must admit to the conduct charged. "One cannot deny that he struck someone and then claim that he struck them in self-defense." State v. Aleshire, 89 Wn.2d 67, 568 P.2d 799 (1977); State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986) (defendant

not entitled to self-defense instruction where he testified that the victim accidentally fell, not that he feared for his own safety and pushed her).

Pierre testified at trial and consistently denied striking or trying to strike Winner. He was asked on direct examination if he remembered clenching his fist and taking a swing at the officer. He replied, "That never happened." RP 393-94. He testified that he pulled away from Winner as Winner tried to grab Pierre's arm, RP 385, and then Winner pushed him out into the hallway. RP 386-87. He was then slammed face-first into a corner, RP 391, then he went to one knee, and then the "situation just kind of dispersed, I guess, you know?" RP 392.

On cross examination, Pierre said he realized Winner was a police officer "after the scuffle." RP 425. When asked if he took a swing at Winner, he said, "No, I did not," and "How could I do that with my hands up?" RP 427. At no time during his testimony did he say that he hit Winner. He agreed that he told Winner that if he (Pierre) had struck Winner, things would have been worse, RP 433, which certainly implies that he denied striking the officer.

In closing argument, defense counsel referred to Pierre pushing Winner back. RP 549. He argued that Winner was "[t]he

only person who says that he was—took a swing at him, punched him, pushed him, anything like that . . . ” RP 552-53. Counsel argued that Pierre must not have assaulted Winner, because a reasonable police officer would have arrested and handcuffed him. RP 554. “He didn’t hit Officer Winner. What he was doing was, he was pushing him off of him.” RP 557.

Defense counsel further argued that Pierre’s actions were not self-defense. “Ladies and gentlemen, he’s the victim. This is not like self-defense. He literally is the victim here. We’re prosecuting the victim.” RP 558. “I don’t believe that the State has proven, even through its witnesses, that a punch was ever thrown. I don’t believe that the State has proven that was even assaulted (sic) . . . “If you did feel that a punch was thrown or the chest was—that it was struck with the palm, if you do believe that, again, not supported by Officer Seig’s testimony or anyone’s testimony except Officer Winner. But if you believe that, you can apply a self-defense argument.” RP 571. “He’s a victim. He didn’t do this.” RP 574.

Pierre did not admit to any of the actions which would constitute third degree assault. What his counsel argued is “I didn’t do it, but if you don’t believe me then it was self-defense.” He was

not entitled to the self-defense instruction unless he admitted to the actions that constitute the assault.

“An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis.” State v. Lundy, 162 Wn. App. 865, 871-72, 256 P.3d 466 (2011) (citing to Brown, 147 Wn.2d at 332). “We may hold the error harmless if we are satisfied ‘beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” Lundy, 162 Wn. App. At 872 (citing to State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (internal quotation marks omitted) (quoting Brown, 147 Wn.2d at 341). Had the court refused to give a self-defense instruction the results of the trial would have been the same. Therefore, any error was harmless.

4. Defense counsel’s performance did not constitute ineffective assistance of counsel.

Pierre argues that his attorney provided ineffective assistance of counsel by failing to object to the elements instruction for felony harassment and for failing to preserve an objection to the self-defense instruction given by the court.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient;

and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). “The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious.” Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

a. The elements instruction.

As argued above, the omission of the words "to cause bodily injury" from the to-convict instruction was, at worst, harmless error. There is no reason to conclude that the outcome of the trial would

have been different had they been included in that instruction. Further, given the standard for finding ineffective assistance of counsel as outlined above, it would be difficult to fault defense counsel for failing to notice something that apparently also escaped the prosecutor and the trial judge. Not every mistake is ineffective assistance of counsel, and Pierre has not met his burden of showing error and prejudice resulting from it.

b. The self-defense instruction.

First, the language of the self-defense instruction as given by the court was not error under the facts of this case. Second, defense counsel's performance was certainly not deficient, because he succeeded in getting a self-defense instruction where Pierre was not entitled to one. Even if the instruction were erroneous, he was better off than he would have been with no instruction. He does not explain how he was prejudiced by this instruction, only that the prejudice is "self-evident." Appellant's Opening Brief at 24.

The record of the trial as a whole shows that defense counsel vigorously and tenaciously defended Pierre. He did not receive ineffective assistance of counsel.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Pierre's convictions.

Respectfully submitted this 7th day of October, 2014.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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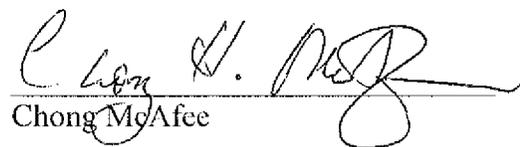
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--AND--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of October, 2014, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

October 07, 2014 - 11:01 AM

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