

NO. 47648-7-II

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

STATE OF WASHINGTON,
RESPONDENT/CROSS APPELLANT,

v.

ROBERT MATTHEW OSTASZEWSKI,
APPELLANT/CROSS RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00280-5

STATE'S REPLY BRIEF

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Suzanne Lee Elliott
705 2nd Avenue, Suite 1300
Seattle, Wa 98104-1797
Email: suzanne-elliott@msn.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED April 27, 2016. Port Orchard, WA 
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ARGUMENT 1

 A. THE STATE AS RESPONDENT MAY APPEAL
 THE ERRONEOUS GIVING OF SELF-DEFENSE
 INSTRUCTIONS..... 1

 B. THE INSTRUCTIONS WERE ERRONEOUS
 BECAUSE OSTASZEWSKI'S SUBJECTIVE
 BELIEF THAT HE WAS IN DANGER WAS NOT
 OBJECTIVELY REASONABLE. 3

II. CONCLUSION..... 4

TABLE OF AUTHORITIES

CASES

State v. Bell,
60 Wn.App. 561, 805 P.2d 815 (1991), *rev denied* , 116
Wn.2d 1030..... 4

State v. Sims,
171 Wn.2d 436, 256 P.3d 285 (2011)..... 1, 2

State v. Walden,
131 Wn.2d 469, 932 P.2d 1237 (1997)..... 4

RULES AND REGULATIONS

RAP 2.2..... 1, 2

RAP 2.2 (b)..... 1

RAP 2.4 (a) 1

RAP 2.4(a) 2, 3, 4

I. ARGUMENT

A. THE STATE AS RESPONDENT MAY APPEAL THE ERRONEOUS GIVING OF SELF-DEFENSE INSTRUCTIONS.

Ostaszewski claims that the state may not appeal the trial court's giving of erroneous jury instructions. He claims that this is so because such a cross appeal does not fit within the categories of RAP 2.2 (b). He is correct about RAP 2.2 but mistaken as to the authority under which this cross appeal is prosecuted.

RAP 2.4 (a) in part provides

The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by timely filing a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

By its plain language the rule allows the state to seek relief because if the matter is remanded for a new trial, giving self-defense instructions in light of the facts of the present record would constitute error prejudicial to the state as respondent. Further, the state has complied with the procedural requirements of the rule by timely filing a notice of cross appeal.

In *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011), our Supreme Court considered an appeal of a banishment condition on the

granting of a SSOSA sentence. The state agreed that the provision was in error. But the state, which had objected to the SSOSA disposition in the trial court, asked that the entire sentence be reversed, allowing reconsideration of the SSOSA on remand. *Id.* at 440. The Court held that this constituted a request by the state for affirmative relief because the request was for a remedy that was more than the remedy sought by the appellant. *Id.* at 443. The state had failed to file a cross appeal under RAP 2.4(a). Moreover, the Court held that the subsection (a)(2) allowing relief to the respondent if the necessities of the case require did not apply. Thus, “[a]bsent necessity, the State’s request for affirmative relief of a completely new sentencing hearing was not properly before the Court of Appeals because the State did not file a cross appeal.” *Id.* at 449 (citing RAP 2.4(a)). The concomitant proposition is thus true: the state’s request for affirmative relief would be properly before the Court of Appeals had the state filed a timely notice of cross appeal.

If in fact the state as respondent in *Sims* was constrained by RAP 2.2, our Supreme Court would not have spent several pages of legal analysis explaining why the state was required to file a cross appeal and why the necessities provision was inapplicable. It would have just closed the matter by observing, as Osaszewski claims, that the state as respondent can never seek affirmative relief unless its claim comes under rule 2.2. It

seems likely that Ostaszewski's very experienced appellate counsel knows this. With a timely notice of cross appeal, RAP 2.4(a) clearly allows the state to seek the relief sought by that notice.

B. THE INSTRUCTIONS WERE ERRONEOUS BECAUSE OSTASZEWSKI'S SUBJECTIVE BELIEF THAT HE WAS IN DANGER WAS NOT OBJECTIVELY REASONABLE.

Ostaszewski's reply cites a number of rules and holdings correctly. It is correct, at least under *State v. McCullum*, that self-defense negates Ostaszewski's intent. It is correct that in seeking defense instructions, a defendant need not have proof that as a matter of law would be sufficient to raise a reasonable doubt and that a defendant may rely on all the evidence presented by either party.

But Ostaszewski is incorrect in arguing that Mr. Johannessen's behavior allowed Ostaszewski to shoot him in self-defense. Ostaszewski is aware that mere words do not give rise to a right to act violently in self-defense. But his repose argues that the use of foul language by Mr. Johannessen toward Ostaszewski justified the instructions. And, he is constrained to rely on this argument because nowhere in this record can it be established that Mr. Johannessen ever possessed a gun or ever assaulted or intimidated Ostaszewski with either fists or any other weapon. All that can be established is that Mr. Johannessen offered, verbally only, to fight

Ostaszewski after he, Mr. Johannessen, became aware that Ostaszewski had a firearm and he, Mr. Johannessen, had placed himself at close range in his attempt to find out why Ostaszewski was engaged in nearly two hours of harassing behavior toward Mr. Johannessen and his girlfriend.

Moreover, Ostaszewski ignores the requirement of the law that his subjective belief be reasonable. *See State v. Bell*, 60 Wn.App. 561, 805 P.2d 815 (1991) *rev denied* 116 Wn.2d 1030 (1991); *see also State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (evaluation of self-defense claim is both subjective and objective). Under the facts of this case, Ostaszewski's acts were not those of a "reasonably prudent person." CP 77, instruction #21. And, again, shooting another based upon hearsay and innuendo, here, anything but accurate information or actual observation, simply does not support a finding that Ostaszewski's acts were done "in good faith and reasonable grounds."

The trial court knew that Ostaszewski's conduct was reckless and unreasonable. On this record, his claim of self-defense is objectively unreasonable. Self-defense instructions were erroneously given.

II. CONCLUSION

The state may cross appeal this issue under RAP 2.4(a). The court should affirm Osaszewski's convictions in all respects and hold as well

that the trial court erred in giving Ostaszewski's proposed self-defense instruction.

DATED April 27, 2016.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

April 27, 2016 - 11:16 AM

Transmittal Letter

Document Uploaded: 7-476487-Reply Brief~2.pdf

Case Name: State of Washington v Robert Matthew Ostaszewski

Court of Appeals Case Number: 47648-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

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: Sheri Burdue - Email: siburdue@co.kitsap.wa.us

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

suzanne-elliott@msn.com