

No. 50203-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIANA LEEANN KEE,

Appellant.

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

The Honorable Robert A. Lewis

BRIEF OF APPELLANT

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A. INTRODUCTION

There is an old adage that “sticks and stones may break my bones, but words can never hurt me.” The State charged Tiana Leeann Kee with assault in the second degree. The alleged victim testified that she approached him using confrontational and derogatory words which precipitated a fight. Kee testified that she acted in self-defense. The trial court instructed the jury that where 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. The court erred in giving the first aggressor instruction because words alone do not constitute sufficient provocation. Consequently, reversal is required because the court’s error precluded the jury’s consideration of Kee’s self-defense claim, denying Kee her constitutional right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in giving the first aggressor jury instruction which negated appellant’s claim of self-defense.

2. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required because the trial court erred in giving the first aggressor instruction where the evidence showed that an exchange of

words provoked the fight and words alone are insufficient to support giving the first aggressor instruction?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Kee is presumably still indigent where there has been no evidence provided to this Court that Kee's financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE

1. Procedure

On August 2, 2016, the State charged appellant, Tiana Leeann Kee, with one count of assault in the second degree. CP 1. The case proceeded to trial on March 1, 2017, before the Honorable Robert Lewis. RP 5. A jury found Kee guilty as charged. RP 246-49; CP 80. On March 8, 2017, the court sentenced Kee to 180 days in confinement, allowing her to serve the sentence under work release, ordered 12 months of community service, and imposed legal financial obligations. RP 256-58; CP 95-97. Kee filed a timely notice of appeal. CP 106.

2. Facts

On the evening of August 1, 2016, police officers were dispatched to a neighborhood in Washougal in response to a 911 call. RP 122-23. Amanda Ostrander informed the officers that her son, Adam Ostrander, was assaulted. RP 123. The officers interviewed Adam Ostrander, Brandon

Lester, and Tiana Kee. RP 124-26. Ostrander was taken to the hospital and x-rays showed that he had a broken nose. RP 139, 143.

a. Testimony of Officer Ryan Castro

When Officer Castro arrived at the scene, Ostrander was holding a towel to his bleeding nose and appeared to be crying. RP 124. Castro spoke with Kee in front of Cody Bemis's house. Kee said she approached Ostrander and Lester and asked them what was wrong and if they owed Bemis money. When Ostrander advanced toward her and got close up to her face, she told him to back away. He got up to her face again and kept telling her to hit him so she punched him in the face. Ostrander kicked her in the thigh and she fell to the ground. RP 126-27, 130. Castro saw dirt on the side of her jeans but no noticeable injuries. RP 127-28. Kee said she should not have gotten involved. RP 129.

b. Testimony of Adam Ostrander

On August 1, 2016, Ostrander and his younger brother, Brandon Lester, were walking through their neighborhood to the Washougal River to go swimming with friends. RP 77-78. As they passed by a house playing loud music, an elderly man on the porch asked them to turn off the music. A confrontation ensued between Ostrander and the man, but Ostrander ended up walking away. RP 78-82.

Then a female, later identified as Kee, approached him, cursing and asking him if he owed the elderly man money. RP 82-83. They were cursing back and forth and he started to walk away but she made a derogatory comment so he told her “bitch go home.” RP 83, 98-99. Kee said if he did not be quite, she would “kick his ass.” RP 83. When he told her to go ahead, she hit him in the face four times and broke his nose. RP 83. He kicked her in the legs and hit her with closed hands in the face, knocking her down. RP 89, 99. She got up and walked off while he was tending to his broken nose. RP 101.

Ostrander and Lester called their mother who arrived at their location and called the police. RP 93. Before the police came, he and Lester agreed not to tell the officers that he hit Kee because he was afraid of getting in trouble for what he had done. RP 92, 100-01.

c. Testimony of Brandon Lester

Lester and his brother were listening to music and walking to the river when an older man came out of his house and asked them to turn off the music. He shut the music off and then Ostrander said “it’s a free F-ing country and then it started escalating from there.” RP 47. The man and Ostrander began yelling at each other and the man started pushing Ostrander around. When the man moved toward Lester, which scared him, Ostrander told him to stop. RP 50-51. The man then turned to Ostrander and started

hitting and shoving him and told them to get out of here. RP 51-52. As they were walking away, Kee approached them and asked Ostrander if he owed the old man money, which he denied. Ostrander said something that made Kee mad and she said “do you want me to ‘F’ you little butt up.” RP 54-56. Ostrander said “bitch get out of here” and she said “do you want me to mess your little ass up and then Adam said just do it and that’s when it escalated.” RP 60-61. Ostrander was yelling and calling Kee names and they started hitting each other. RP 61-62, 66-67, 70-71. Kee hit Ostrander three or four times and broke his nose. RP 62-64.

d. Testimony of Tiana Kee

Kee had just gotten off work and it was a nice day so she headed toward Bemis’s house to work on his yard. She heard yelling near the house and saw Ostrander swing at Bemis. RP 169-70. As she approached the house, Bemis went back to his porch and Ostrander and Lester started walking toward the river. Kee asked them what was going on and if they owed Bemis money because Bemis helps out young kids. Ostrander said he did not owe Bemis money and appeared very angry. RP 171. They started yelling and cursing at each other as Ostrander put his face up to hers. She became afraid when he “advanced toward me with closed fists multiple times - telling me to hit him - calling me names as well.” RP 171-72. He approached her and took a couple of swings, hitting her in the jaw. To

defend herself, she hit him in the face. RP 173-74, 187-88, 190-91. He kicked her several times and she fell to the ground. RP 173-74.

After Kee got up, a woman across the street screamed that she had hit Ostrander. Through trees and shrubs, she could see the woman standing in her driveway. RP 174-77. Kee walked away to Bemis's house and sat on the porch. RP 177-78. Thereafter, the police came and she explained everything that happened. RP 178.

e. Testimony of Cody Bemis

Bemis was sitting on his porch when Ostrander and Lester came walking down the street playing loud music. When Bemis asked them to turn the music down, Ostrander started yelling and cussing at him. He walked onto the property and kept angrily yelling at Bemis to "hit me, I'm twenty." RP 145-47. Bemis grabbed Ostrander by the shoulder to turn him around and asked him to leave, but he swung at Bemis a few times. Bemis swung back in defense and Ostrander eventually walked off but he was still angry. RP 147-48, 157-58. During the altercation, Lester stayed back and turned down his music. RP 148-49.

As Bemis returned to his porch and looked to make sure Ostrander was leaving, he saw Ostrander and Kee meet on the street corner. Ostrander swung at Kee first and she swung back. When Kee fell, Bemis ran out to the street. RP 150-51. After his neighbor yelled at them, they separated.

Ostrander walked toward the river and Kee came to his house. RP 152. She was hurting from falling down, but he did not see any injuries. RP 164-65.

f. Testimony of Roxanne Pearce-Shelby

Pearce-Shelby lives across the street from Bemis. RP 105-06. She heard yelling and screaming and then saw Kee hit Ostrander, “I saw a kid - I thought he was a young kid - and then I saw her hit him and that’s basically all I saw.” RP 107. She heard the hit because it was loud. RP 110. They were already fighting by the time she saw them. RP 117. When she told Kee to stop, she went on her way. RP 107. Ostrander had a bloody nose so she brought him an ice pack. RP 107, 110-111. She spoke with the police when they arrived. RP 112.

E. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN GIVING THE FIRST AGGRESSOR JURY INSTRUCTION WHICH NEGATED KEE’S CLAIM OF SELF- DEFENSE.

Whether the State produced sufficient evidence to justify a first aggressor instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948 (2011).

“Aggressor instructions are not favored.” *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)(citing *State v. Wasson*, 54 Wn. App. 156, 161, 772 P.2d 1039, review denied, 113 Wn.2d 1014, 779 P.2d 731

(1989); *State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985).

This Court recognized that the aggressor instruction should be used sparingly:

[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction. 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. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005)(quoting *State v. Riley*, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999)(citation omitted)).

The provoking act must be intentional and one that a “ ‘jury could reasonably assume would provoke a belligerent response by the victim.’ ” *Bea*, 162 Wn. App. at 577 (citing *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) quoting *State v. Arthur*, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985), *review denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989)). The provoking act cannot be the actual assault. *Kidd*, 57 Wn. App. at 100 (citing *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986)).

Over defense objection, the trial court instructed the jury that:

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 defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 77 (Instruction No. 17); RP 196.

The record substantiates that the trial court erred in giving the first aggressor instruction which negated Kee's claim of self-defense. During Adam Ostrander's direct examination, he was asked what happened after the altercation with Bemis:

Q: And what happened after that?

A: After that I had a lady come down and address me and start cursing at me and asked me if I owed the gentleman money or - that's the main thing what I remember is her asking me about the money. And I proceeded to conversate (ph) with her for about thirty seconds and then walk away from her and she made a derogatory comment and I told her to - bitch go home. And that's when she threatened me that if I don't be quite that she was going to kick my ass. And I turned around and told her to go ahead. And that's when she proceeded to hit me in the face four times and the fourth hit is when I actually broke my nose.

Q: Okay.

A: And I did strike her once after that with both hands.

....

Q: All right. And after you said - told her to go home what happened after that?

A: It's when she told me that I should be - I'd better be quiet or she'd kick my ass.

Q: Where was she and where were you when she said that?

A: She was right on the corner of the gentleman's property - on like a little bare spot between the corner - the asphalt and the altercation happened there.

Q: Where were you when she said it to you?
A: I was probably within - right in front of her - right within arm's distance.
Q: What did you think when she said I should kick your ass or whatever she said?
A: Well I turned around and made a - a smart ass comment of - told her to go ahead.
Q: Why did you say that?
A: At the moment it was just reaction.
Q: What happened after that?
A: She hit me in the face about three times. I was then kick - trying to kick her - basically away from me and the fourth hit is when it broke my nose and then I did lay a closed hand on her chin.

RP 82-83, 87-88.

Brandon Lester also testified about what happened when Kee approached Ostrander:

Q: What's the first thing you remember happening?
A: - she asked Adam if he owed the guy any money and Adam said no cause I've only been living here for - a couple months. And then she asked the old man if he didn't. The old man - I didn't hear the response from the old man. And then I don't remember what Adam said but it made her mad. And then she said do you want me to 'F' you little butt up and Adam said do it and then that's when it escalated.
Q: That's when -
A: It's escalating and getting into physical.

.....

Q: Okay. And then what happened - you said between Adam and the Defendant - what happened?
A: They - Adam said a cuss word towards her - that - she - he said the 'B' word - get out of here - go home.
Q: So he called her a bitch?
A: Yeah.
Q: And said bitch get of here?

A: Yeah.
Q: Okay.
A: And then she's like do you want me to mess your little ass up and then Adam said just do it and that's when it escalated.

RP 55-56, 60-61.

“The first-aggressor instruction is proper when the record shows that that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred.” *Douglas*, 128 Wn. App. at 562-63. According to Ostrander and Lester, it was the exchange of words between Kee and Ostrander that provoked the fight. Ostrander and Kee were cursing at each other and Ostrander dared Kee to hit him. Even if Kee started cursing first, “words alone do not constitute sufficient provocation.” *Riley*, 137 Wn.2d at 911. Neither Ostrander nor Lester accused Kee of any provoking act, such as putting up her fists or lunging at him. There was absolutely no evidence that Kee was involved in wrongful or unlawful conduct before the fight. Ostrander and Lester claimed that she said “I’d better be quiet or she’d kick my ass” and “do you want me to mess your little ass up,” but as the Washington Supreme Court reiterated, “words alone, and in particular insulting words alone,” are insufficient to support giving the aggressor instruction. *Riley*, 137 Wn.2d at 911.

The trial court’s error in giving the first aggressor instruction allowed the State to argue that Kee “initiated his entire incident. She was

the first person to speak to Adam Ostrander.” RP 209. The State argued further that “walking up to someone and saying do you owe him money with a raised tone and saying to someone I should kick your ass is pretty darn aggressive.” RP 243. The State continued to argue that Kee “said at some point she became afraid of Mr. Ostrander because he was in her face with his fists down. But again she made a choice. There was no reason for her to walk up there - there was no reason for her to become a part of it. And as the court mentioned one of the instructions says if she and - is the aggressor in this situation she can’t claim self-defense.” RP 220. The jury was improperly led to believe that Kee was the aggressor because her confrontational words provoked the fight and the jury was instructed that consequently “self-defense was not available as a defense.” CP 77. Jurors are presumed to follow the court’s instructions. *State v. Kirkland*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

The court instructed the jury on self-defense and Kee testified that she acted in self-defense. CP 73-76; RP 169-74. The first aggressor instruction removed self-defense from the jury’s consideration, relieving the State of its burden of disproving self-defense beyond a reasonable doubt. The aggressor instruction was improper because the theories of the case could be sufficiently argued and understood by the jury without such an instruction.

The Supreme Court held in *Riley* that “the giving of an aggressor instruction where words alone are the asserted provocation would be error.” 137 Wn.2d at 911. Accordingly, reversal is required because the trial court’s error in giving the first aggressor instruction effectively precluded the jury’s consideration of Kee’s self-defense claim, preventing her from receiving a fair trial. *Douglas*, 128 Wn. App. at 565.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE KEE REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY:

THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Kee is indigent. The trial court found that Kee is entitled

to appellate review at public expense due to her indigency and entered an Order of Indigency. CP 123-25. This Court should therefore presume that Kee remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court that Kee's financial condition has improved or is likely to improve. Kee is therefore presumably still indigent and this Court should exercise its discretion to not award costs.

F. CONCLUSION

The first aggressor instruction should be given sparingly and carefully because it removes self-defense from the jury's consideration, relieving the State of its burden of disproving self-defense beyond a reasonable doubt. *Riley*, 137 Wn.2d. at 910 n. 2.

For the reasons stated, this Court should reverse Kee's conviction because the trial court committed reversible error in giving the first aggressor instruction.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Kee remains indigent.

DATED this 6th day of October, 2017.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for appellant, Tiana Leeann Kee

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Clark County Prosecutor's Office at CntyPA.GeneralDelivery@clark.wa.gov and by U.S. mail to Tiana Leeann Kee, P.O. Box 1147, Vancouver, Washington 98666.

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

DATED this 6th day of October, 2017.

/s/ Valerie Marushige
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