

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

REPLY BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

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A. ARGUMENT IN REPLY

KEE'S SECOND DEGREE ASSAULT CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN GIVING THE FIRST AGGRESSOR JURY INSTRUCTION WHICH NEGATED HER CLAIM OF SELF-DEFENSE.

The State argues that “[t]he record contains sufficient evidence from which a jury could reasonably determine that Kee provoked the fight using more than words alone when she hit the victim in the face. Because of this evidence, the trial court did not abuse its discretion when it instructed the jury using the first aggressor instruction.” Brief of Respondent at 4.

First and foremost, the State applies the incorrect standard of review. “Whether the State produced sufficient evidence to justify a first aggressor instruction is a question of law and our review is therefore *de novo*.” *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011)(citing *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010)(citing *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011)).

In any case, the State’s argument that the first aggressor instruction was proper because Kee hit Ostrander first fails where it is well established that the provoking act cannot be the actual assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)(citing *State v. Wasson*, 54 Wn. App. 156, 159, 161 772 P.2d 1039, *review denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

As this Court determined in *State v. Douglas*, “A first-aggressor instruction is proper when the record shows that the defendant is involved in wrongful or unlawful conduct *before* the charged assault occurred.” 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005)(emphasis added).

The State argues additionally that because the jury is presumed to follow the court’s instructions, this Court should find that the jury based its verdict on Kee’s actions and not on her words where the prosecutor “reminded the jury that the State’s witnesses testified that Kee first hit the victim and that Kee herself told Officer Castro that she punched the victim first.” Brief of Respondent at 7. According to the State, the prosecutor improperly argued that Kee was the first aggressor because she hit Ostrander first, which further substantiates that Kee was denied a fair trial.

Reversal is required because the trial court’s error in giving the first aggressor instruction precluded the jury from considering Kee’s claim of self-defense in violation of her constitutional right to a fair trial.

B. CONCLUSION

For the reasons stated here and in appellant’s opening brief, this Court should reverse Kee’s conviction.

Given the fact that the State does not intend to seek costs, this Court should acknowledge that costs will not be awarded in this case.

DATED this 29th day of January, 2018.

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.

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

DATED this 29th day of January, 2018.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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Address:
23619 55TH PL S
KENT, WA, 98032-3307
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