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Court of Appeals
Division II
State of Washington
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NO. 50203-8-II

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

STATE OF WASHINGTON, Respondent

v.

TIANA LEEANN KEE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01626-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

LAUREN R. BOYD, WSBA #50016
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The first aggressor instruction was proper because there was evidence that the defendant first hit the victim.

II. The State does not intend to seek a cost bill.

STATEMENT OF THE CASE

On August 2, 2016 the State charged Tianna Leeann Kee (hereafter 'Kee') with second degree assault for an incident that occurred on August 1, 2016. CP 1.

Kee went to trial on the charge on March 1, 2017. RP 5. The State presented testimony from five witnesses. RP 44 - 144. Testimony established that on August 1, 2016, Kee assaulted Adam Ostrander by punching him in the face and breaking his nose.

The victim's brother, Brandon Lester testified first for the State. RP 44. He testified that on August 1st he was in Washougal, Washington with the victim. RP 46. They were listening to music and walking down to the Washougal River when an older man came out of his house to tell them to stop the music. RP 47 – 49. A confrontation between the victim and the man ensued but ended when both parties walked away from the issue. RP 49 – 54. As Mr. Lester and the victim were walking away, Kee approached them and asked the victim if he owed the old man any money.

RP 53 – 55. Kee and the victim got into a verbal confrontation and exchanged curse words. RP 56, 59 – 60. The confrontation escalated when Kee asked the victim if he wanted her to "mess [his] little ass up" and the victim told her to do it. RP 61. Kee then hit the victim on the side of the face with a closed fist. RP 62 – 63. To try to get away from her, the victim also kicked and hit Kee. *Id.* In all, Kee hit the victim three or four times, breaking his nose with her last hit. RP 63, 143. Mr. Lester testified that the victim did not become aggressive until after Kee first hit him in the face. RP 73.

The victim, Adam Ostrander testified consistently with Mr. Lester's account. RP 76 – 97. He testified that Kee first hit him before he became aggressive. RP 83, 88 – 89. Witness Roxanne Shelby also testified that she saw Kee strike the victim. RP 104. Officer Ryan Castro testified that Kee admitted to punching the victim when he got in her face during the altercation. RP 127.

The defense presented testimony from Cody Bemis, the man with whom the defendant had the original encounter. RP 145. Mr. Bemis testified about his confrontation with the victim. RP 145 – 49. He also testified that he saw the victim swing at Kee first. RP 151.

Kee testified in her defense. RP 169. She stated that when she approached the victim he was angry and using profanity. RP 171 – 72. Kee testified that the victim advanced toward her with closed fists, told her to hit him, called her names, and at some point attempted to hit her. RP 172 - 73. She stated that she hit the victim to defend herself after he had first swung at her. RP 173 – 74.

After the close of evidence, the trial court's instructions to the jury included the first aggressor instruction, which 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 defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 77, RP 207. The defense objected to this instruction arguing that the testimony and evidence did not support it. RP 196. The trial court ruled that because there is testimony going both ways as to who was the aggressor, the instruction was appropriate. *Id.*

On March 2, 2017 the jury found Kee guilty of second degree assault. CP 80, RP 246. She subsequently filed a notice of appeal on April 2, 2017. CP 106.

ARGUMENT

I. The first aggressor instruction was proper because there was evidence that the defendant first hit the victim.

The record contains sufficient credible 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.

Whether a trial court correctly instructed a jury is reviewed de novo if the court's decision was based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). However, if based on a factual dispute, whether jury instructions were proper is reviewed only for abuse of discretion. *Id.* at 771 - 72. A challenged instruction is reviewed within the context of the instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Instructions are adequate if they allow a party to argue her theory of the case, do not mislead the jury, and do not misstate the law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Proper jury instructions are necessary for a fair trial. *State v. Morgan*, 123 Wn.App. 810, 814, 99 P.3d 411 (2004).

If there is evidence to support the theory, each side is entitled to have the trial court instruct upon its theory of the case. *State v. Hughes*,

106 Wn.2d 176, 191, 721 P.2d 902 (1986). Prejudicial error occurs when an issue is given to the jury without substantial evidence concerning it. *Id.*

To raise the issue of self-defense at trial, a defendant must produce some evidence that her actions occurred for the purpose of self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). However, where the defendant provoked the altercation or was the first aggressor, she does not have the right to self-defense. *Id.* "Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *Id.* at 909 – 10; *Hughes*, 106 Wn.2d at 192. The first aggressor instruction is also appropriate when there is "conflicting evidence as to whether the defendant's conduct precipitated a fight." *Riley*, 137 Wn.2d at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992); *Hughes*, 106 Wn.2d at 191-92 (citing *State v. Heath*, 35 Wn.App. 269, 666 P.2d 922 (1983)). Words alone do not constitute sufficient provocation to justify a first aggressor instruction. *Riley*, 137 Wn.2d at 911.

Kee cites to *Riley* to argue that the trial court erred when it gave the first aggressor instruction. She then argues that the record in this case shows legally insufficient evidence of provocation beyond words alone. Kee is mistaken. As in *Riley*, Kee's actions precipitating the fight constituted more than mere words. The physical fight was provoked when

Kee hit the victim and not, as claimed in Kee's brief, by the exchange of curse words between the two.

The defendant in *Riley* was charged with first degree assault while armed with a deadly weapon. *Id.* at 906. Conflicting testimony was given about the circumstances surrounding the defendant's self-defense claim and which words were used to provoke the fight, but there was no dispute that the defendant pulled a gun first. *Id.* at 906-07. On appeal, the Washington Supreme Court determined that the trial court properly instructed the jury using the first aggressor instruction because the defendant's actions constituted more than "words alone." *Id.* at 909.

Here, Kee's actions also constituted more than "words alone" when she initiated the conflict with the victim. Testimony from the victim and Mr. Lester established that they were walking away from the altercation with Mr. Bemis when Kee approached them. Their testimony, as well as the testimony from Ms. Shelby established that Kee first punched the victim before the victim became aggressive. The jury also heard the admission that Kee made to Officer Castro about punching the victim first. Although Mr. Bemis and Kee testified differently, the testimony provided by the State's witnesses laid sufficient credible evidence for the jury to find that Kee was the first aggressor. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal."

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citation omitted). Thus, by finding Kee guilty of second degree assault despite her claim of self-defense, the jury made a credibility determination regarding the evidence. This evidence was sufficient to support the first aggressor instruction.

Further, the first aggressor instruction given to the jury did not provide that words alone would be sufficient provocation to preclude Kee's claim of self-defense. The instruction stated that "[n]o person may, by any intentional *act* reasonably likely to provoke ..." It did not refer to words or verbal provocation in any way. Because the jury is presumed to have followed the trial court's instructions, this Court should find that the jury based its verdict on Kee's actions and not on Kee's words. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (stating that a jury is presumed to follow a trial court's instructions); *see also Riley*, 137 Wn.2d at 913-14 (stating in dicta that the first aggressor instruction directs the jury to refer to acts, not speech, when determining whether a defendant's conduct precipitated a confrontation). In closing argument, the prosecutor argued consistently with this instruction. RP 209 – 20. He 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. RP 213, 219.

Testimony from multiple witnesses at trial indicated that Kee first punched the victim thereby provoking the physical confrontation using more than mere words. Because the record contains sufficient evidence for a reasonable jury to find that Kee's actions precipitated the fight, the trial court properly presented the jury with the first aggressor instruction. As no error occurred, this Court should deny Kee's request to reverse her conviction.

II. The State does not intend to seek a cost bill.

The State does not intend to seek a cost bill in this case in the event it substantially prevails on appeal. Kee's argument is therefore moot.

CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm Kee's conviction.

DATED this 29th day of December, 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Lauren Boyd
LAUREN R. BOYD, WSBA #50016
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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Address:
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA, 98666
Phone: (360) 397-2261 EXT 4476

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