

NO. 285405-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

JAN 20 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

THE STATE OF WASHINGTON, Respondent

v.

DANIEL DAVID BEA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00353-3

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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ISSUES

- A. Whether there was substantial evidence in the record that justified giving the jury the "first aggressor" instruction.**
- B. Whether the defendant may raise for the first time on appeal the impropriety of the jury instruction on the deadly weapon special verdict, and whether any error was harmless.**
- C. Whether the prosecutor's closing argument was improper, and if so, whether such argument prejudiced the defendant and such prejudice could not have been cured had the defendant objected at trial.**

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The appellant, Daniel Bea, brought this action to appeal the trial court's jury instructions and the prosecutor's comments during closing arguments in the jury trial conducted on July 21 and 22, 2009. (App. Brief, 1-2).

B. COURSE OF THE PROCEEDINGS

In a jury trial held in the Benton County Superior Court on July 21-22, 2009, the defendant

was found guilty on July 23, 2009, by jury-verdict of the crime of assault in the first degree, and found by special verdict that the defendant was armed with a deadly weapon at the time of the offense. (CP 114-115, 118-119).

C. STATEMENT OF FACTS

Carlos Cruz had a party at his residence. (RP 07/21/09, 7, 64). Daniel Bea and his girlfriend, Shakira, went to Mr. Cruz's house that night. (RP 07/21/09, 64, 89). Mr. Bea and Shakira had an argument in the bathroom in the early morning hours. (RP 07/21/09, 3, 64, 71). Mr. Cruz, along with several other people, went to the bathroom door, knocked, and asked Mr. Bea and his girlfriend to leave. (RP 07/21/09, 3-4, 65, 71, 78). The bathroom door was forced open and broken. (RP 07/21/09, 15, 82). The defendant came out of the bathroom, and he and Mr. Cruz began fighting. (RP 07/21/09, 4, 91). They wrestled, and Mr. Cruz admitted to hitting Mr.

Bea, and that Mr. Bea hit him as well. (RP 07/21/09, 4, 82). One witness described Mr. Bea as "jump[ing] into [Mr. Cruz]." (RP 07/21/09, 65). Other people present were trying to, and eventually did, separate Mr. Bea and Mr. Cruz. (RP 07/21/09, 4, 72). At least one witness said Mr. Bea was again told to leave the house. (RP 07/21/09, 66. At least two people present thought Mr. Bea was leaving after he was separated from Mr. Cruz. (RP 07/21/09, 84, 91-92). One witness testified that the door and garage were open so Mr. Bea could leave. (RP 07/21/09, 65-66). Carla Brancatto also testified that people moved to the side to let Mr. Bea out, and they thought he was going to leave. (RP 07/21/09, 74). Mr. Cruz also testified no one was blocking the door. (RP 07/21/09, 11). Carla Brancatto also testified that she was holding Mr. Cruz back after he and Mr. Bea were separated. (RP 07/21/09, 72). Mr. Bea went to the kitchen and grabbed at least one knife, possibly two, and

then began walking toward Mr. Cruz. (RP 07/21/09, 65, 72, 92). Mr. Bea could have left, but did not. (RP 07/21/09, 4). When Mr. Bea began walking toward Mr. Cruz, Mr. Cruz pushed Carla Brancatto out of the way. (RP 07/21/09, 72). Mr. Bea stabbed Mr. Cruz. (RP 07/21/09, 4, 66, 92). Eric Bernal testified that he punched Mr. Bea to try to get him off of Mr. Cruz. (RP 07/21/09, 85). He also testified he did not hit Mr. Bea at any time before the stabbing. (RP 07/21/09, 85). Mario Cortes testified that he helped pull Mr. Bea off of Mr. Cruz, and hit Mr. Bea during that process. (RP 07/21/09, 95-96). Mr. Cortes also testified that he had not had any contact with Mr. Bea until after Mr. Bea stabbed Mr. Cruz. (RP 07/21/09, 96).

Dr. Leandro Cabanilla treated Mr. Cruz for five stab wounds, which included irrigation of the wounds and applying antibiotics. (RP 07/21/09, 45-46). He also testified that Mr. Cruz had a nondisplaced fracture in the seventh rib on

his left side near one of the stab wounds. (RP 07/21/09, 45).

The only instruction given on intent was as follows: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." (CP 91).

Also included in the jury instructions was the "first aggressor" instruction:

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, force upon 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 106).

Further, the jury was also given instructions on self-defense, recklessness and criminal negligence, as well as assault in the second degree, and assault in the third degree. (CP 94-95, 99, 103-105).

Finally, an instruction in regard to the deadly weapon special verdict was given:

You will also be given a special verdict form. If you find the defendant not guilty of any crime, do not use the special verdict form. If you find the defendant guilty of any crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

(CP 111).

In closing, the prosecutor argued that intent "includes the expected result of your actions." (RP 07/22/09, 124). The prosecutor used the example of pouring Pepsi out of a bottle in order to fill the bottle with water, where even though the intent was simply to refill the bottle, the natural consequence of dumping out the bottle was that the floor would get wet. (RP 07/22/09, 124-125). The prosecutor then compared this to stabbing someone more than once, with

enough force to break the knife and fracture the rib of the victim, to argue that great bodily harm was a natural consequence of taking such an action. (RP 07/22/09, 126).

In the defense attorney's closing, he argued first that there was no great bodily harm, based on the victim's injuries. (RP 07/22/09, 134-135). Defense counsel then argued that Mr. Bea acted in self-defense, or at most had committed assault in the second degree. (RP 07/22/09, 140-141). In response, the prosecutor argued, "You are responsible for what the normal consequences of your actions." (RP 07/22/09, 143). The prosecutor again argued, "To jab a knife into somebody with enough force to break a rib, I don't care what you were going to say that is going to cause huge personal injuries." (RP 07/22/09, 144).

ARGUMENT

- A. THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A JURY INSTRUCTION ON "FIRST AGGRESSOR."**

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000).

In order to raise self-defense as a defense, the defendant bears the initial burden of producing some evidence that he or she reasonably believed there was danger of imminent harm. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). However, an aggressor who provokes an altercation cannot invoke the right of self-defense. *Id.* “Where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137 Wn.2d at 909-910. See also *State v. Douglas*, 128 Wn. App. 555, 562-563, 116 P.3d 1012 (2005) (citing *Riley* with approval)).

In *Riley*, the Court upheld giving the aggressor instruction despite the defendant's claim of self-defense, as there was evidence presented at trial that Riley drew his gun first and aimed it at the victim during the altercation. *State v. Riley*, 137 Wn.2d at 909.

In *Douglas*, the Court of Appeals found the aggressor instruction improper where there was no evidence in the record that the defendant engaged in any unlawful or wrongful conduct prior to shooting the victim, nor any evidence that the defendant's conduct precipitated the fight with the victim. *State v. Douglas*, 128 Wn. App. at 564. In that case, the Court saw no evidence in the record that established the defendant acted to provoke the victim, but rather the evidence showed that it was the victim who was the aggressor. *Id.*

Here, there was credible, substantial evidence that the defendant was the primary aggressor, and thus the instruction was proper.

The evidence showed that the defendant was arguing with his girlfriend in the bathroom, and asked to leave. (RP 07/21/09, 3-4, 65, 71, 78). When the defendant did not leave, the bathroom door was forced open and the defendant and the victim began to fight. (RP 07/21/09, 4, 82, 91). One witness even testified that the defendant jumped into the victim as he came out of the bathroom. (RP 07/21/09, 65). The victim and the defendant were then separated. (RP 07/21/09, 4, 72). The defendant was again told to leave the residence at that time, and could have left, but instead went to the kitchen and grabbed a knife, then came back and attacked Mr. Cruz. (RP 07/21/09, 11, 65-66, 72, 74). These facts are sufficient to warrant the first aggressor instruction, as they are evidence that the defendant's conduct provoked the initial assault outside the bathroom, and that instead of leaving, he came back and attacked the victim again, stabbing him. Unlike *Douglas*, the State

produced evidence that the defendant was the initial aggressor, so the instruction was proper.

B. THE DEFENDANT DID NOT OBJECT AT TRIAL TO THE SPECIAL VERDICT JURY INSTRUCTION, AND THIS COURT SHOULD NOT ADDRESS THE MERITS OF HIS OBJECTION, AND ANY ERROR THAT RESULTED WAS HARMLESS.

Under RAP 2.5 (a):

Errors Raised for First Time on Review.

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

To satisfy the "manifest" constitutional error exception, there must be actual prejudice shown, and the trial court record must be sufficiently developed to determine the merits of the constitutional claim. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). The defendant must show that the claimed error had practical and identifiable consequences in the

trial. *State v. Israel*, 113 Wn. App. 243, 54 P.3d 1218 (2002). An Appellate Court should review claims raised for the first time on appeal if they 1) are of constitutional magnitude, 2) are "manifest" and 3) affected the outcome. *State v. Lynn*, 67 Wn. App. 339, 342-346, 835 P.2d 251 (1992). Every alleged error in a criminal case is not assumed to be of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). "'[M]anifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. . . . A purely formulistic error is insufficient." *State v. Lynn*, 67 Wn. App. at 345. "Some reasonable showing of a likelihood of actual prejudice is what makes a 'manifest error affecting a constitutional right.'" *Id.* at 346.

Specifically, the issue above was not raised in the recent case *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), which dealt with juror unanimity on a school bus stop enhancement

instruction. Perhaps the defendant in *Bashaw* properly raised the issue at trial; perhaps the prosecution overlooked the issue. Whatever the reason may be, the Court in *Bashaw* did not address the issue of RAP 2.5 and the propriety of raising such an issue for the first time on appeal.

Similarly, the issue was not raised in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In that case, when the jury informed the trial judge that it could not agree on the aggravated factor in the special verdict, the trial judge ordered additional deliberations to see if unanimity could be reached. *Id.* Therefore, the failure to object at trial to the aggravating factor concluding instruction was not an issue, and actually twice at trial the defendant moved to strike the aggravating factor. *Id.*

In the present case, the alleged error is not of "constitutional magnitude." The trial court properly instructed the jury on the

elements of assault in the first degree, and that it must be unanimous to find that the defendant was armed with a deadly weapon at the time the defendant committed the offense, and that the State had the burden of proof for all elements of the offense. (CP 3, 78, 111). The jury was also properly instructed as to what constitutes a deadly weapon. (CP 92). Absent is any allegation that such an instruction implicates a constitutional right.

In addition, the defendant has failed to identify practical consequences or *actual prejudice* as a result of the instruction. The defendant has not alleged that the special verdict would have been different absent the instruction, or that there was insufficient evidence showing the defendant was armed with a deadly weapon. Significantly, to find the defendant guilty of assault in the first degree, it was necessary for the jury to find that he was armed with a deadly weapon; he could not have

been found to have caused the victim "great bodily harm" if the jury had not found him to be armed with the knife. (CP 88). Further, the defendant alleged he acted in self-defense; he *admitted* having the knife. (RP 07/22/09, 110-111). The defendant has failed to point out affirmatively, in the trial record, how the error had any identifiable consequences. Thus any such error was harmless.

Finally, if the defendant felt the instruction was not appropriate, he should have made an objection at trial. The trial court would have had the opportunity to correct the instruction. The State may have agreed with the defendant's objection. In any event, this Court should decline to review the defendant's argument under RAP 2.5(a).

C. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER, AND IN THE ALTERNATIVE, THE DEFENDANT CANNOT ESTABLISH ANY PREJUDICE AS A RESULT.

To establish prosecutorial misconduct, the defendant must prove that the prosecutor's

conduct was improper, and that it prejudiced his right to a fair trial. *State v. Jackson*, 150 Wn. App. 877, 882-883, 209 P.3d 553 (2009); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The alleged improper statements should be viewed in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578. Prejudice can only be established where there is a "substantial likelihood that the misconduct affected the jury's verdict." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). When no objection is raised at trial, failure to do so constitutes a waiver unless the statement is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *Dahliwal*, 150 Wn.2d at 578. Finally, when a prosecutor "purports to instruct the jury on a point of law, such statements must

be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

First, the prosecutor's comments were not improper. Unlike the *Sandstrom v. Montana* case, no jury instruction was given *requiring* the jury to presume that a person intends the ordinary consequences of his voluntary acts. *Sandstrom v. Montana*, 442 U.S. 510, 513, 99 S.Ct. 2450, 61 L.Ed. 39 (1979). Rather, the prosecutor argued based on the evidence presented at trial, the nature of the force used by the defendant during the attack, the number of times he stabbed the victim, that the defendant had intended what the normal results of such action would be; i.e., to cause great bodily harm to the victim. (RP 07/22/09, 126). Defendant concedes that this was not a misstatement of the law, nor does it directly conflict with the instruction on intent:

"A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." (CP 91).

However, should the Court conclude the remarks were improper, the defendant has failed to establish the likelihood that those comments affected the jury's verdict or establish any prejudice, or that they could not have been cured. After initially arguing a person intends the normal consequences of his actions, the prosecutor then went over the evidence that the defendant had acted *to purposefully inflict* great bodily harm, including: the number of times the defendant stabbed the victim, the fact that he used enough force to break the knife and break the victim's rib, and the placement of all the wounds on the victim's torso as opposed to an arm or leg. (RP 07/22/09, 126-127). Further, the jury was also given instructions on self-defense, recklessness, criminal negligence, as well as

assault in the second degree, and assault in the third degree. (CP 94-95, 99, 103-105). The defense argued in closing that great bodily harm had not been caused, based on the evidence presented regarding the victim's wounds, and that "at most" this was a second-degree assault, if not self-defense. (RP 07/22/09, 133-141). Considering the evidence presented, the entirety of the prosecutor's closing remarks, and all of the jury instructions given, the jury was not *required* to presume that the defendant acted with intent to cause great bodily harm, but was given several instructions on various levels of intent and related offenses, and the opportunity to choose which, if any, should apply. Specifically, the self-defense instruction directs the jury that the State has the burden of proving, beyond a reasonable doubt, that the use of force was unlawful. (CP 104).

In addition, had the defendant objected, the Judge could have instructed the jury specifically

that they were not required to *presume* the defendant's intent from the act of stabbing the victim, but could draw reasonable inferences from the evidence presented with regard to intent. Thus, even if improper, the record is void of any prejudice suffered by the defendant, and the trial court should be affirmed.

CONCLUSION

The defendant has not met the burden of showing that the "first aggressor" instruction was improper, as there was substantial evidence in the record that supported such an instruction. In addition, Defendant has not made the required showing under RAP 2.5 to raise the first time on appeal the propriety of the deadly weapon special verdict instruction. Finally, even if the prosecutor's closing remarks regarding intent improperly directed the jury on that element, the defendant has failed to establish any effect of those remarks on the verdict or demonstrate any

resulting prejudice, and thus any such error was harmless.

RESPECTFULLY SUBMITTED this 19th day of
January 2011.

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