

FILED

AUG 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 28738-6-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSE REYES RAMIREZ, Appellant.

BRIEF OF APPELLANT

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Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

A. The court erred by refusing to give the following jury instruction requested by appellant Ramirez: “Great personal injury’ means an injury that the defender reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defender or another person.”

B. The court erred by refusing to declare a mistrial because of prosecutorial misconduct.

C. The conviction must be reversed because the State failed to disprove beyond a reasonable doubt that Mr. Ramirez acted in self-defense.

Issues Pertaining to Assignment of Error

1. Did the court err by refusing to give the “great personal injury” instruction requested by Mr. Ramirez when the instructions given to the jury did not permit him to adequately argue self-defense? (Assignment of Error A).

2. Did the court err by refusing to declare a mistrial when the deputy prosecutor committed misconduct by consistently using the word “assault” during questioning of witnesses? (Assignment of Error B).

3. Did the State fail to disprove beyond a reasonable doubt that Mr. Ramirez acted in self-defense? (Assignment of Error C).

II. STATEMENT OF THE CASE

Mr. Ramirez was charged by second amended information with one count of second degree assault with a deadly weapon enhancement and one count of third degree malicious mischief. (CP 37-38). The case proceeded to jury trial in November 2009.

Mr. Ramirez worked in the maintenance department at Wahluke Winery in Mattawa, Washington. (11/12/09 Afternoon Session RP 30; 11/16/09 RP 16). Maintenance gave box cutters to its workers. (11/13/09 RP 58). Humberto Ruvalcaba also worked at the winery as a barrel worker. (11/13/09 RP 53). On May 20, 2009, at around a quarter to five in the afternoon, an incident occurred between the two men. (11/13/09 RP 55).

Mr. Ruvalcaba said Mr. Ramirez was playing with a box cutter, showing it off to him. (11/13/09 RP 58). After Mr. Ruvacabal told him to quit playing around, Mr. Ramirez cut his shirt. (11/13/09 RP 59, 62). He looked angry. (11/13/09 RP 62). Mr. Ruvalcaba grabbed the box cutter and broke off the blade as Mr. Ramirez tried to cut him. (11/13/09 RP 63, 64).

Mr. Ruvalcaba pushed him into a tank. (11/13/09 RP 64). Mr. Ramirez got up with a second box cutter and came slashing at Mr. Ruvalcaba. (11/13/09 RP 64. 65). He told him to stop, but Mr. Ramirez kept slashing at his stomach and neck area. (11/13/09 RP 66). Mr. Ruvalcaba was cut on his left arm and chest. (11/13/09 RP 66). He said he took no swings at Mr. Ramirez. (11/13/09 RP 79). He thought the cut on his arm was not that bad so he checked out of work and went home. (11/13/09 RP 69).

Later that day, Mr. Ruvalcaba went to the Wahluke Medical Clinic. (11/13/09 RP 34) He had a 3-inch laceration near the left elbow that required eight stitches to close. (11/12/09 Afternoon Session RP 68; 11/13/09 RP 35, 37). At the time of trial, he still had a scar. (11/13/09 RP 70).

Juan Barragan saw the incident. (11/13/09 RP 97). He said after the push, Mr. Ramirez came up slashing at Mr. Ruvalcaba with a box cutter. (11/13/09 RP 102). Mr. Barragan said Mr. Ruvalcaba was acting scared and did not do anything to defend himself. (11/13/09 RP 103). Less than three hours after the incident, Mr. Barragan saw him at the Wahluke Medical Clinic where he was being treated. (11/13/09 RP 109).

After the State rested, Mr. Ramirez made a motion for mistrial because of the deputy prosecutor's consistent use of the word "assault." (11/13/09 RP 114-115). The court denied the motion. (11/13/09 RP 115-116).

Miguel Rodriguez testified Mr. Ramirez had a good reputation in Mattawa for the trait of peacefulness. (11/13/09 RP 156). Julia Cardozo said her brother, Mr. Ramirez, had a good reputation in Mattawa of being a law-abiding citizen. (11/16/09 RP 13).

Mr. Ramirez was not working with Mr. Ruvalcaba on May 20, 2009. (11/16/09 RP 17). On three or four prior occasions, Mr. Ruvalcaba had threatened him by saying he was bigger and could beat him up anytime. (11/16/09 RP 18). Mr. Ramirez was working in the barrel room fixing hoses with a box cutter. (11/16/09 RP 19). Talking and playing around with Mr. Ruvalcaba, he cut his shirt and told him he would pay for it. (11/16/09 RP 19). Mr. Ramirez bent down to keep working with the box cutter when he felt somebody punch him and "throw [him] on the chest." (11/16/09 RP 20). He fell back and hit his head on a tank. (11/16/09 RP 20). On the floor trying to get up, Mr. Ramirez "saw this big old man coming into me," felt scared, and put his arms in front of his face. (11/16/09 RP 20).

He had the box cutter in his right hand and was walking back when the other fellow kept on coming and swinging at him. (11/16/09 RP 20). Mr. Ramirez did not remember cutting Mr. Ruvalcaba. (11/16/09 RP 20-21). The incident ended, but Mr. Ruvalcaba kept on following Mr. Ramirez and told him, "You still going to get it." (11/16/09 RP 21-22). Mr. Ramirez checked out of work. (11/16/09 RP 22). Mr. Ruvalcaba was in his truck behind the car of Mr. Ramirez, who was afraid he would run him over when he was crossing. (11/16/09 RP 22-23).

Mr. Ramirez eventually went home. (11/16/09 RP 23). After a police officer showed up some two hours later, Mr. Ramirez said it took a long time, meaning he wanted to talk to somebody to tell them what happened. (11/16/09 RP 23). Mr. Ramirez was 35 years old, five feet three inches tall, and weighed 136-137 pounds. (11/16/09 RP 23). He was scared "of the huge person that was after him." (11/16/09 RP 24). Mr. Ruvalcaba was about five feet nine inches tall and weighed 242 pounds on May 20, 2009. (11/13/09 RP 28, 93).

The State took no exceptions to the court's instructions, but the defense took exception to the failure to give its proposed

instruction on “great personal injury” and the use of deadly force as to Mr. Ramirez’s self-defense claim. (11/16/09 RP 55).

The jury found Mr. Ramirez guilty of second degree assault, but not while armed with a deadly weapon, and acquitted him of third degree malicious mischief. (11/17/09 RP 2-3; CP 134). This appeal follows.

III. ARGUMENT

A. The court erred by refusing to give the “great personal injury” instruction requested by Mr. Ramirez because the instructions given to the jury did not permit him to adequately present his claim of self-defense.

The court refused to give this instruction proposed by the defense:

“Great personal injury” means an injury that the defender reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defender or another person. (CP 77, 86).

This instruction is reflected in WPIC 2.04.01.

Mr. Ramirez’s lawyer took exception to the court’s instructions:

The defense is objecting to these instructions that as a whole they do not make the law of self-defense in

this case manifestly clear. Specifically that we believe we should be allowed the great personal injury instructions and the deadly force instruction.

In noting the exception, the court stated:

. . . [T]he record has been made that counsel would like to have a great personal injury instruction. The court has noted in its research that the case that's involved in that question . . . *Walden* . . . does note an additional paragraph in addition to what the defendant has proposed. That additional paragraph speaks of not being able to use deadly force in the event that it's an ordinary battery. We have to go down the road of defining what an ordinary battery is then.

But the court believes the WPICs provide a sufficient, clear definition of the amount of force that a defendant can use in self-defense, but that instruction by themselves are complete and allow the defendant to argue that he can use force if it's reasonable under the circumstances and the amount of force that can be used is what is reasonable under the circumstances. And a further instruction that deadly force can be used if there is great personal injury is unnecessary.

It's all a test of reasonableness and we would be adding several additional instructions that's not in the WPICs, or at least one that's not in the WPICs if we go down the road of saying that deadly force can be used if there's great personal injury or threat of a great personal injury.

It's just unnecessary, that the instructions as laid out in the WPICs and laid out in this court's instructions are a complete and sufficient instruction on the body of law we have in Washington on self defense. (11/16/09 RP 55-57).

Generally, jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their

theories of the case, and properly inform the jury, when read as a whole, of the applicable law. *State v. Rodriguez*, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004). But self-defense instructions are subject to more rigorous scrutiny. 121 Wn. App. 185. It is not “all a test of reasonableness.” Rather, jury instructions must “more than adequately” inform the jury of the law on self-defense in order to pass appellate scrutiny. 121 Wn. App. at 185 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

Self-defense jury instructions, read as a whole, must make the relevant legal standard “manifestly apparent to the average juror.” *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting *State v. Painter*, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)). Self-defense requires only a “subjective, reasonable belief of imminent harm from the victim.” *Rodriguez*, 121 Wn. App. at 185. The jury need not find actual imminent harm. *Id.* The instructions should allow the jury to step into the defendant’s shoes and, from that perspective, determine reasonableness from all the attendant facts and circumstances as they appeared to the defendant. *Allery*, 101 Wn.2d at 594.

The defense theory of the case was that Mr. Ramirez had to use deadly force to defend himself because he faced great

personal injury. He was compelled to do so because the State had charged him with second degree assault with the alternate means of “deadly weapon and intentional assault” or “reckless infliction of substantial bodily harm.” (CP 37). Moreover, he was charged with a deadly weapon enhancement. (CP 37). As authority for giving the “great personal injury’ instruction, defense counsel relied on *Walden*.

Mr. Ramirez met his burden of producing some evidence of self-defense. The burden then shifted to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Jones*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

The degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *Walden*, 131 Wn.2d at 474. Deadly force can only be used in self-defense if the defendant reasonably believed he was threatened with death or “great personal injury.” *Id.* That is what Mr. Ramirez believed here.

He was accused of using a deadly weapon both in the second degree assault charge and the deadly weapon enhancement. Facing those charges, he had to defend on the theory that his use of deadly force, with what the jury could have

determined was a deadly weapon, constituted justifiable self-defense because he was threatened with great personal injury. *Walden*, 131 Wn.2d at 474. But the court's refusal to give the "great personal injury" instruction did not allow him to argue this theory of the case on self-defense.

The missing instruction did not adequately convey the law of self-defense as it applied to Mr. Ramirez's circumstances. *Rodriguez*, 121 Wn. App. at 185. Since the jury could not subjectively stand in his shoes and consider all the facts and circumstances known to him, it could not use this information to determine objectively what a reasonably prudent person similarly situated would have done. *Walden*, 131 Wn.2d at 474.

By failing to give the requested instruction on "great personal injury," the court, by omission, misstated the law to the jury. Further adding to the confusion was that the definition of "deadly weapon" in instruction 12 for the charge of second degree assault (CP 110) was different than its definition in instruction 19 for the deadly weapon enhancement (CP117). Indeed, the record reflects the jury was confused because it asked the court which definition, 12 or 19, applied for the special verdict on the deadly weapon enhancement. (11/17/09 RP 5-9). The inconsistent definitions of

“deadly weapon” coupled with the court’s failure to give the “great personal injury” instruction justifying the use of deadly force were clear misstatements of the law. Therefore, they must be presumed to have misled the jury in a manner that prejudiced Mr. Ramirez. *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977).

An instructional error is harmless only if the error is trivial or formal or merely academic and was not prejudicial to the substantial rights of the defendant and in no way affected the final outcome of the case. *Walden*, 131 Wn.2d at 478 (quoting *Wanrow*, 88 Wn.2d at 237)); *see also State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). The errors here were neither trivial, nor formal, nor merely academic. They misstated the law of self-defense as applied to Mr. Ramirez’s circumstances. The instructional errors were not only prejudicial, but also affected the final outcome of the case as shown by the inconsistent verdict of the jury. The conviction must be reversed and the case remanded for new trial.

B. The court erred by refusing to declare a mistrial when the deputy prosecutor committed prejudicial misconduct by consistently using the word “assault” during questioning of witnesses.

The deputy prosecutor used the word “assault” in his questioning of witnesses. (11/13/09 RP 55, 97). The court

sustained defense objections. (*Id.*). After the State rested, defense counsel made a motion for dismissal/mistrial because of the “consistent use of the word ‘assault’ by the State.” (11/13/09 RP 115). The court denied the motion to dismiss:

I don’ see that as a basis to dismiss the case. . . . [I]n this instance, there were some objections raised. The Court sustained them. The Court will also find that that term was no so unduly prejudicial so that the jury can’t decide the case base[d] upon the facts produced in court from the testimony of the witnesses and be so prejudiced that they wouldn’t be able to follow the instructions.

When defense counsel advised the court his motion should have been one for mistrial, the court denied that motion as well:

And that motion is dismissed. The Court will also say that at any time that the Court has made any instructions, instructed the parties, or made any orders in limine or rulings on evidentiary questions, that both counsel have been compliant with the Court’s rulings and haven’t tried to skirt those rulings at all and been cooperative with the Court. So we don’t have that kind of flavor in this court if the transcript doesn’t show that already. (11/13/09 RP 115, 116).

Here, the deputy prosecutor characterized the incident between Mr. Ramirez and Mr. Ruvalcaba as an “assault” in his questioning of witnesses. Referencing the nature of a crime may sometimes be proper. *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). This is not one of those times. The improper

references constituted prejudicial prosecutorial misconduct, which denied Mr. Ramirez's right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). When there is a substantial likelihood that a prosecutor's improper comments affected the verdict, reversal is required. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

The deputy prosecutor insisted on using the word "assault" to characterize the incident. An objection had been sustained the first time he did it. (11/13/09 RP 55). There was no excuse for doing it again, but he did. The defense objection was sustained. (11/13/09 RP 97). The deputy prosecutor's misconduct can hardly be called inadvertent. The jury was charged to determine whether an assault took place. Using the word "assault" during questioning improperly told the jury the answer the deputy prosecutor wanted. Although Mr. Ramirez was acquitted of malicious mischief in the same incident, the jury did convict him of assault.

The court abused its discretion by denying the motion for mistrial. *Brown*, 132 Wn.2d at 563. In the circumstances here, there is indeed a substantial likelihood the deputy prosecutor's improper use of the word "assault" affected the jury's verdict, which must therefore be reversed. *Id.*

C. The State failed to disprove beyond a reasonable doubt that Mr. Ramirez acted in self-defense.

The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Once the defendant raises some credible evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

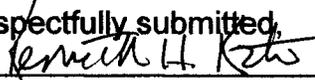
Here, the evidence showed Mr. Ramirez was scared of an angry man who outweighed him by 100 pounds and shoved him into a tank. He defended himself. Even when the evidence is viewed in a light most favorable to the State, it still failed to disprove self-defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 621. The conviction must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ramirez respectfully urges this Court to reverse his conviction of second degree assault and remand for new trial.

DATED this 2nd day of August, 2010.

Respectfully submitted,

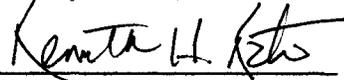


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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on August 2, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on D. Angus Lee, Grant County Prosecutor, PO Box 37, Ephrata, WA 98832-0037; and Jose Reyes Ramirez, 21456 Rd. SW 24.7, Mattawa, WA 99349.

DATED this 2nd day of August, 2010, at Spokane, WA.



Kenneth H. Kato
Kenneth H. Kato