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

STATE OF WASHINGTON, RESPONDENT

v.

ALLAN L. TURNIPSEED, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The court erred in overruling defense counsel's objection to the damaged recording of the State's expert witness.
2. The court erred in giving the "first aggressor" jury instruction.
3. The court erred in instructing the jury that unanimity was required in answering the special verdict question.

B. ISSUES

1. When it becomes apparent that the recorded deposition of an expert witness has been damaged and portions of the recorded testimony are garbled, and particularly when it becomes apparent that defense counsel's cross-examination of the witness has been garbled and distorted, does the court violate the defendant's rights under the confrontation clause by overruling defense counsel's objection to the admissibility of the recording?
2. The defendant twice pulled a gun in response to the victim threatening him with a tire iron. There was evidence that, after holstering his gun for a second time, the defendant stood in front of the victim's car and stated he was

effecting a citizen's arrest. Does this evidence justify giving a first aggressor instruction?

3. The court instructed the jury that in answering a special verdict: "If you unanimously have a reasonable doubt as to this question, you must answer 'no.'" Does the potentially coercive nature of this instruction require reversal of the firearm enhancement to the defendant's sentence?

C. STATEMENT OF THE CASE

Allan Turnipseed and his friend Jeff Salsbury were standing by the street behind Mr. Turnipseed's house when Josh Smith drove into their neighborhood. (RP 730-31) As he drove past Mr. Turnipseed, his passenger threw a beer can out the car window. (RP 93) Mr. Turnipseed said to him, "Hey pick up your damn garbage." (RP 732) At this, Mr. Smith jumped out of his car, exchanged words with Mr. Turnipseed, and began rummaging in the trunk of his car. (RP 732) Then he got back in the car and took off fast. (RP 96, 98, 733) Mr. Turnipseed and Mr. Salsbury both felt threatened by Mr. Smith's actions and demeanor. (RP 733)

The following day, as Mr. Turnipseed was driving near his house, he saw Mr. Smith driving into the neighborhood again. (RP 195) The two men exchanged remarks, which rapidly escalated into an argument. Mr. Smith threatened Mr. Turnipseed and came at him with a raised crowbar or tire iron. (RP 196, 212, 403-04) Mr. Turnipseed pulled out a handgun and Mr. Smith dropped the crowbar. (RP 120, 196, 404-05) Mr. Turnipseed pocketed his gun, but the argument continued and Mr. Smith made more threatening remarks. (RP 198, 405) Mr. Smith picked up the crowbar and Mr. Turnipseed again pulled out his handgun. (RP 198, 214)

Mr. Smith returned to his car, and Mr. Turnipseed told him he was making a citizen's arrest and asked one of the neighbors to call the police. (RP 199) Mr. Smith responded with fairly threatening remarks. (RP 199) Mr. Turnipseed attempted to get in front of the car to prevent Mr. Smith's leaving and Mr. Smith drove at him, striking him in the leg. (RP 199-200, 406-07) As the car accelerated towards him Mr. Turnipseed feared for his life. (RP 596)

Mr. Turnipseed fired two shots into the car, striking Mr. Smith in the chest and neck. (RP 200, 407) Mr. Smith died of these injuries a short time later. The State charged Mr. Turnipseed with murder. (CP 1)

No eyewitness had an unobstructed view of the driver's side of Mr. Smith's vehicle at the time of the shooting. The parties presented theoretical reconstructions of the critical events through the opinions of expert witnesses. (RP 499, 587-619, 654-88, 825-59, CP 478-510)

The incident occurred on Eighth Avenue, which is a gravel road. (RP 181) K-9 officer Logan located a spent shell casing on the south side of the dirt alley. (RP 224)

The State presented a videotaped deposition of firearms expert Ed Robinson. (RP 499; CP 481) Mr. Robinson identified the cartridge casing found at the scene as having come from Mr. Turnipseed's firearm. (CP 493) He testified that he had test fired ten shots from the pistol taken from Mr. Turnipseed, at a location where the cartridges would likely land on grass, and measured the location of the ejected cartridges relative to the point of firing. (CP 494) He determined that on average, the casings landed eight feet to the right and four feet behind the point of discharge. (CP 495) He explained that the results would differ if the orientation of the gun differed. (CP 495)

At several points in Mr. Robinson's testimony there was a technical difficulty with the recording, such that portions of his statements were distorted and could not be understood. (CP 494, 500) As a result, the description of his testing procedure is incomplete, although what can be understood suggests that some of the ejected cartridges did not land on the grass. (CP 494) During cross-examination, Mr. Robinson testified to the variation in distances that formed the basis of his calculated average. (CP 500-01) Again, distortions in the tape make the testimony difficult to understand, but apparently the lateral distance ranged from four feet four inches to twelve feet eight, and the distance behind varied from two feet four inches to five feet two inches. (CP 500-01; see CP 324)

Mr. Robinson was asked to address how the results would vary from his calculations if a cartridge struck a solid surface such as a rock or concrete. (CP 507) Once again, the recording was distorted but what remains of his response suggests that the results would differ significantly from his test results. He then explained:

The only part of the ejection pattern then that's true is that it ejected in that general direction which caused it to hit the intervening object and now the ultimate location of the object is worthless.

...

. . . If you could establish that a discharged cartridge case had hit an intervening object, trying to establish an ejection pattern from the ultimate location of the cartridge case would be inappropriate.

(CP 508)

The presentation of the video recording of the deposition was not reported. (RP 499) After the recording had been presented, the court noted on the record that defense counsel had objected during the playing of the recording. (RP 499) Defense counsel explained that the objection was based on the garbling of the recording because of apparent difficulties. (RP 499) The court ruled that the recording was sufficiently complete to be admissible. (RP 499)

Based on evidence and interviews gathered by the police officers, Detective Aaron Morrison, a collision reconstruction expert, conducted several tests at the scene of the shooting. (RP 587, 592-93) He determined that if Mr. Turnipseed had been standing in front of Mr. Smith's car when Mr. Smith began accelerating toward him, he would not have been able to avoid being struck by the car's bumper. (RP 597, 630) He also opined that a mark on the leg of Mr. Turnipseed's pants could not have been caused by being struck by the bumper and was consistent with his having been struck by the front tire turning to the right. (RP 618-19, 621) Detective Morrison concluded that although Mr.

Turnipseed may have been standing directly in front of Mr. Smith's car at some point, by the time Mr. Smith accelerated toward him, Mr. Turnipseed was standing more toward the driver's side of the car. (RP 628)

Detective Tracy Hansen, also a collision reconstruction expert, examined Mr. Smith's car and concluded there was no evidence Mr. Turnipseed had been on the hood of the vehicle. (RP 665) She concurred in Detective Morrison's opinion that Mr. Turnipseed could not have been standing in front of Mr. Smith's car when Mr. Smith began to accelerate. (RP 667)

In forming her opinion, Detective Hansen relied on Mr. Robinson's calculations as to the ejection pattern of the recovered casing and created a diagram showing where the casing would have landed under various scenarios. (RP 682; CP 478-510) Detective Hansen's understanding was that the ejection pattern was consistent. (RP 679, 703) Based on the location where the shell casing was recovered, she determined that by the time Mr. Turnipseed fired the shots, both he and Mr. Smith's car had moved several feet along the roadway, and that Mr. Turnipseed was still moving when he fired the shots at the driver's window. (RP 678; 685-87)

Richard Chapman testified as an accident reconstruction expert for the defense. (RP 825-29) Mr. Chapman reviewed the materials that had been provided to Detectives Morrison and Hanson. (RP 831-33) Mr. Chapman concluded Mr. Turnipseed was initially standing a couple of feet in front of the left headlight as the car began to accelerate towards him. (RP 846) He was struck on his left leg, fell on the left front fender of the car and was carried by the car for a very short period of time, one to three seconds at a speed of fourteen to seventeen feet per second. (RP 836-37, 842, 846) As Mr. Turnipseed fell off the fender and stumbled alongside the car he would have fired the shots that killed the driver. (RP 859)

In its rebuttal case, over defense objection, the State presented expert testimony showing that Mr. Turnipseed's blood contained chemicals indicating he had used marijuana shortly before the shooting. (RP 1007-16)

The court gave jury instructions on self-defense including, over defense counsel's objection, the "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 kill, 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 the defendant's acts or

conduct provoked or commenced the fight, then self-defense is not available as a defense.

(RP 1068-69)

The court instructed the jury respecting a special verdict on the use of a deadly weapon:

INSTRUCTION NO. 38

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count I and for Count II.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded

INSTRUCTION NO. 39

You will also be given a special verdict for counts I and II. If you find the defendant not guilty on either or both counts, do not use the special verdict form for the respective count. If you find the defendant guilty on either or both counts, you will then use the respective 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 either special verdict form "yes," and 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 419-20)

The special verdict form asked the jury to decide "Was the defendant, ALLAN L. TURNIPSEED, armed with a firearm at the time of the commission of the crime in Count I?" The jury answered "yes."

(CP 426)

The jury found Mr. Turnipseed guilty of first degree manslaughter while armed with a firearm. (CP 424, 426) The court imposed the maximum standard range sentence of 162 months including the firearm enhancement. (CP 457)

D. ARGUMENT

1. ADMITTING THE DAMAGED RECORDING OF THE FIREARMS EXPERT'S TESTIMONY VIOLATED THE CONFRONTATION CLAUSE AND DISTORTED THE JURY'S UNDERSTANDING OF OTHER EXPERT TESTIMONY.

On the next day of trial after Mr. Robinson's deposition was shown to the jury, defense counsel objected to the admission of an item of evidence that Mr. Robinson had identified and used in his testimony. (RP 676) The court apparently did not recall having heard Mr. Robinson's testimony or having seen the exhibit explained and used by him. (RP 677) A reasonable inference is that as a result of the distortions and interruptions in the damaged recording a person who had viewed the recording would not have a clear memory of the content of the testimony.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. Const. amend. VI. The State can present prior testimonial statements of an absent witness only if the

defendant has had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A claimed violation of the confrontation clause is reviewed *de novo*.

State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007) *citing* *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006); *see* *State v. White Eagle*, 12 Wn. App. 97, 102, 527 P.2d 1390 (1974).

Although defense counsel had an opportunity to cross-examine Mr. Robinson at the time of his deposition, the distorted portions of the recording prevented the effectiveness of that cross-examination. Although a careful reading of a transcript of the recording enables the reader to infer some of the substance of Mr. Robinson's testimony, his description of the substantial variance in the results as to the ejection pattern is difficult to discern with any certainty. For the jury, the difficulty would be greater since not only would careful examination of the testimony be impossible, but the frequent garbled interruptions would be distracting, as evidenced by the judge's difficulty in remembering the testimony.

The outcome of the case depended on the jury's ability to understand and evaluate the reconstruction testimony provided by the experts. The expert's testimony relied, in part, on the evidence provided

by Mr. Robinson. As a result, the jury was deprived of information that was important to its understanding of the evidence.

The court's ruling rejecting defense counsel's objection to the use of the deposition, both during the playing of the recording and afterwards, violated Mr. Turnipseed's constitutional right to cross-examine a key witness in his trial, undermining the fairness and reliability of the trial.

2. THE EVIDENCE DID NOT SUPPORT GIVING A
"FIRST AGGRESSOR" INSTRUCTION.

An initial aggressor instruction is disfavored and should not be given absent evidence to support it. *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

"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. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). "It is prejudicial error to submit an issue to the jury that is not warranted by the evidence." *Clausing*, 147 Wn.2d at 627. Prejudicial instructional error requires reversal. *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001).

The trial court errs if it gives an aggressor instruction when there is no evidence that the defendant's conduct precipitated the need for self-defense. *State v. Wasson*, 54 Wn. App. at 158-59. *State v. Riley*, 137 Wn.2d at 909. "[C]ourts should use care in giving an aggressor instruction" because the State has the burden of disproving the defendant's self-defense claim beyond a reasonable doubt. *Riley*, 137 Wn.2d at 910 n. 2. "[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." *Riley*, 137 Wn.2d at 910 n. 2, quoting *State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985).

"[W]ords alone do not constitute sufficient provocation" to warrant an aggressor instruction because a victim faced with only words is not entitled to respond with force. *Riley*, 137 Wn.2d at 911. An aggressor instruction is properly given if there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. *Riley*, 137 Wn.2d at 909-10. "The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim." *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). "[T]he provoking act must [. . .] be related to the eventual assault as to which self-defense is claimed," *Wasson*,

54 Wn. App. at 159, and it must be “intentional.” *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). Further, the provoking act cannot “be the actual assault.” *Kidd*, 57 Wn. App. at 100 (citations omitted).

Testimony showed Mr. Turnipseed twice drew his handgun, but in each case this was preceded by, and in response to, Mr. Smith’s making threatening gestures with a tire iron, accompanied by verbal threats. Although not all witnesses agreed on the factual issue of whether Mr. Turnipseed stood in front of Mr. Smith’s car, nothing in the record would support the inference that the act of standing in front of a car was an act that would be reasonably likely to provoke a belligerent response.

The expert witnesses disagreed on the factual issue of whether Mr. Turnipseed was standing in front of the car when Mr. Smith began accelerating, but it was undisputed that while it was accelerating some part of the car, whether the bumper or headlight on the driver’s side or the left front tire, struck Mr. Turnipseed in the leg.

Given that the two confrontations involving the tire iron and the gun had ended, and there is no evidence of Mr. Turnipseed thereafter intentionally committing any act reasonably likely to provoke a belligerent response prior to being struck by Mr. Smith’s car, the court erred in giving the “aggressor” instruction over defense counsel’s objection.

Giving the aggressor instruction was not harmless.

3. THE COERCIVE SPECIAL VERDICT INSTRUCTION
CANNOT BE FOUND HARMLESS.

The jury must be unanimous in order to answer “yes” to a special verdict question about the grounds for a sentence enhancement, but need not be unanimous to answer “no.” *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003) *Bashaw* expressly disapproved a jury instruction that required unanimity in order to answer “no” to the special verdict question. The instruction in *Bashaw* stated: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn. 2d at 139. The instruction to Mr. Turnipseed’s jury similarly required unanimity to answer “no.”

Because this is a criminal case, all twelve of you must agree in order to answer either special verdict form “yes,” and 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 420)

In *Bashaw*, as here, the jury answered “yes” to the special verdict questions. 169 Wn. 2d at 147. But the court recognized that there was no way to determine whether the jury instruction may have had a coercive

effect and concluded that the erroneous instruction could not be found harmless beyond a reasonable doubt. *Id.* at 147-48.

The jury instruction on answering the special verdict question as to the firearm enhancement in this case was erroneous and the sentence enhancement must be vacated. *Id.* at 148.

E. CONCLUSION

Denial of Mr. Turnipseed's right to cross-examine the State's expert and the giving of the "first aggressor" instruction were both highly prejudicial error and require a new trial. The improper special verdict instruction requires vacation of the firearm enhancement.

Dated this 7th day of September, 2010.

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