

29172-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALEKSANDR PAVLIK, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pavlik's constitutional right to present his defense by excluding statements he made regarding self-defense at the time of his arrest, under Respondent's argument that it was "self-serving" hearsay.
2. The "First Aggressor" Instruction, Court's No. 23 was given to the jury in the absence of evidentiary support and thus denied Mr. Pavlik a fair trial by limiting his ability to argue he acted in self defense. (CP 129).
3. The trial court erred by denying Mr. Pavlik's motion for a new trial and/or arrest of judgment.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT PROPERLY EXCLUDE THE DEFENDANT'S SELF-SERVING HEARSAY STATEMENTS?
- B. DID THE TRIAL COURT ABUSE ITS DISCRETION BY GIVING AN AGGRESSOR INSTRUCTION?

C. DID THE TRIAL COURT ERR BY DENYING THE  
DEFENDANT'S MOTION FOR A NEW TRIAL?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY EXCLUDED  
THE DEFENDANT'S SELF-SERVING HEARSAY  
STATEMENTS.

The defendant argues that he should have been permitted to tell the jury that as officers arrived at the scene of the shooting, he yelled various self-serving statements, along the lines of "He was punching me and I shot in self-defense." In a pre-trial motion, the trial court prohibited any mention of the hearsay statements.

The defendant presents several supposed exceptions to the hearsay rule that the defendant claims should have permitted the defendant to present his hearsay statements. However, there is one overriding rule that the defendant fails to counter.

The State has taken the position that the statements by the defendant at the scene of the shooting were self-serving hearsay and therefore inadmissible under ER 801(d)(2). The defendant presents other potential hearsay exceptions to admit the contested statements but does not generate a convincing argument for why the defendant's statements were *not* self-serving hearsay. The defendant presents no caselaw that holds that the rejection of self-serving hearsay can be "trumped" by some other hearsay exception.

Hearsay is defined as:

Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

*State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999) *citing* *State v. Haga*, 8 Wn. App. 481, 495, 507 P.2d 159 (1973)

Out-of-court admissions of a party are not admissible as an exception to the hearsay rule when they are self-serving. *State v. Huff*, 3 Wn. App. 632, 636, 477 P.2d 22 (1970); ER 801(d)(2). Without question, the statements at issue here were self-serving.

The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence

of a manifest abuse of discretion. *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

There can be no doubt that the contested statements were being offered to prove the truth of the matter asserted, *i.e.* that the defendant shot in self-defense. There would be no other reason to admit the contested statements. The defendant has presented no caselaw that indicates that a defendant can yell his defenses out of a car window after shooting an unarmed man.

**B. THE TRIAL COURT'S GIVING OF THE AGGRESSOR INSTRUCTION WAS SUPPORTED BY THE DEFENDANT'S ACTIONS.**

“A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon.” *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008) (*citing State v. Riley*, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999)). The defendant effectively “drew a weapon” by getting his handgun from the trunk of his car and his positioning of the gun on the passenger seat of his car when he pulled into the parking area of Mission Park.

In this case, the facts amply show that it is beyond doubt that the defendant was the aggressor. The first encounter occurred when the victim (according to the victim and his friend) was almost struck by the defendant who was driving an automobile. The defendant was in a car and the victim was on a bicycle. All the defendant needed to do to avoid a further confrontation would be to continue driving away. However, the defendant stopped his car, retrieved a firearm from the trunk and fired the gun, supposedly as a warning. A reasonable observer might ask, in warning of what? The bicyclists were some number of yards away at the time of the first shot. Was the warning for two guys on bicycles not to chase after the car? The defendant had a very confused argument for why he fired the first shot.

Some minutes later, the defendant and his friend had stopped at the parking area of Mission Park. The defendant came back to this location and drove into the parking area with his window down. According to the defendant, the victim leaned into the car and was punching him while trying to get possession of the gun. In response to being punched, the defendant fired into the victim at point blank range. Once more the defendant was the initial aggressor. No matter who started the physical altercation in the car, the defendant was the initial aggressor simply by finding the bicyclists and making contact. All the defendant (if he felt

some overwhelming need to return to that location) need do was to roll up his window. He did not.

Typically, a judge's decisions on jury instructions are reviewed for abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). If there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d at 909-10 (citing *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986)).

Even if the evidence regarding the defendant's conduct in starting a fight is conflicting, an aggressor instruction is still appropriate. *Riley*, 137 Wn.2d at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)).

There were at least two points in this affair where the defendant was clearly the aggressor. The first was when he fired his handgun towards the bicyclists, supposedly in warning and the second was when he tracked down the bicyclists to the parking area of Mission Park and entered with his window down and his gun on the passenger seat. Everything that occurred after that point was a result of the defendant's unneeded, unprovoked and clearly aggressive actions.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MOTION FOR A NEW TRIAL.

“We review a trial court's denial of a motion for a new trial for an abuse of discretion.” *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). In this case, it was not shown at the motion for a new trial that the trial court made any errors. Therefore, there was no reason to grant a new trial.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 2<sup>nd</sup> day of May, 2011.

STEVEN J. TUCKER  
Prosecuting Attorney



Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, )  
 )  
 Respondent, ) NO. 29172-3-III  
 v. )  
 ) CERTIFICATE OF MAILING  
 ALEKSANDR PAVLIK, )  
 )  
 Appellant, )

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I certify under penalty of perjury under the laws of the State of Washington, that on May 2, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

Paul J. Wasson  
Attorney at Law  
2521 West Longfellow  
Spokane WA 99205

and to:

Aleksandr Pavlik  
12218 East Lenora, #3  
Spokane WA 99206

5/2/2011  
(Date)

Spokane, WA  
(Place)

  
(Signature)