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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ORIGINAL

No. 30170-2-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Donald J. LaFavor,
Appellant

Appeal from the Superior Court of Spokane County

REPLY BRIEF OF APPELLANT

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I. ISSUES ON REPLY

1. Was defense counsel ineffective in failing to propose jury instructions for voluntary intoxication, requiring reversal and a new trial?
2. Did the conviction for Second Degree Assault under these facts unlawfully infringe upon the homeowner's right to bear a firearm in his home for self-defense contrary to the 2nd and 14th Amendment of the U.S. Constitution and Washington State Constitution Article I § 24?

II. ARGUMENT ON REPLY

1. **Defense counsel was ineffective for failing to propose jury instructions for self-defense and voluntary intoxication.**

The right to effective assistance of counsel is constitutionally guaranteed by the Sixth Amendment of the U.S. Constitution and Article I Section 22 of the Washington State Constitution. "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A reasonably competent attorney must be sufficiently aware of relevant legal principles to enable him to propose an instruction based on pertinent cases. *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816, 820 (1987). And if an instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Jury instructions, when read as a whole, “must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Here, any reasonably competent defense attorney would request an instruction for voluntary intoxication under the facts of this case. “Evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.” *State v. Thomas*, 109 Wn.2d 222, 227, 743 P.2d 816 (1987).

In this case, Detective Hill testified extensively about the presence of alcohol in the home: pinkish alcohol in a glass, a yogurt cup of alcohol, open cans of beer, and glasses of wine. The detective also observed a bottle of wine and more wine in the bathroom. (RP 199) In the refrigerator was a partially consumed bottle of Jim Beam. (RP 199) A number of bottles of alcohol were found under the kitchen sink. The State offered into evidence photographs of the alcohol in the home. (RP 200-201) Additionally, Detective Madsen testified he interviewed Mr. LaFavor at Sacred Heart Medical Center and Mr. LaFavor was fairly disorganized and confused. (RP 222) Mr. LaFavor stated he had been drinking vodka all day, and had no general recollection of what occurred. (RP 228) Mr. LaFavor admitted to drinking a half pint of vodka. (RP 238). Finally, the sentencing court explicitly found that alcohol played a

part in the crime. (RP 293) In spite of all of this alcohol-related evidence and the centrality of intoxication to the case, defense counsel proposed no instructions concerning voluntary intoxication. This omission constituted ineffective assistance of counsel.

2. The conviction for Second Degree Assault under these facts infringes on the homeowners right to bear a firearm in his home for self-defense contrary to the 2nd and 14th Amendment and to Washington State Constitution Article I § 24.

The defendant in this case merely displayed a firearm while standing in the doorway of his apartment. The prosecution argued in closing that “A man’s home is his castle...Mr. LaFavor didn’t open up the door with a gun just available and ready in case of danger.” (RP 262) “You can defend your home against somebody attacking you. What you cannot do is open your door, stick out a gun just because somebody is banging on your door.” (RP 266) The prosecutor’s arguments suggest that it is unlawful to display a gun in self-defense.

Given the prosecutor’s argument the importance of the 14th and 2nd Amendment right to keep and bears arms as applied to the states in *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020, 3050, ___ U.S. ___ 2010. The United States Supreme Court held self-defense is “the central component of second amendment right.” *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2801; see also *Id* at ___ 128 S. Ct.

2783, 2817 noting that handguns are “overwhelmingly chosen by American society for the lawful purpose of self defense.” The court concluded citizens must be permitted “to use handguns for the core lawful purpose of self-defense.” *Id.* at ___ 128 S. Ct. at 2810

The Washington State Constitution provision in Article I § 27 has been interpreted to protect the citizens right to possess firearms outside the home. *State v. Rupe*, 101 Wn.2d 664, 706-708, 683 P.2d 571 (1984) The government argues that there is no connection here between the defendants right to bear a firearm and the facts of this case. This argument ignores the defense failure to request a self-defense instruction which raises issues of constitutional magnitude. *State v. Acosta*, 101 Wash.2d 612, 615-16, 683 P.2d 1069 (1984), *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997) When the case then involves yet a second constitutional right which is the right to bear a firearm in defense of the the home and the defendant receives no instruction on these basic fundamental rights do the the jury instructions, read as a whole, “make the relevant legal standard apparent to the average juror.” *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997) Where not one but two constitutional rights are implicated the failure to properly instruct the jury requires but one proper decision. Trial counsel was ineffective in failing to seek instructions to allow the jury to be aware of the “relevant legal

standards". The defense seeks remand for ineffective assistance of counsel consistent with applicable law cited herein.

III. CONCLUSION

The case before the court involves significant questions of constitutional magnitude including the Sixth Amendment right to effective representation, Fourteenth Amendment right to due process, Second Amendment right to bear firearms in the home, as well as the Washington Constitution Article I § 24 concerns. The defendant here must be given a new trial where the jury was not fully instructed on the basic legal questions before them.

Respectfully submitted this 2 day of July, 2012



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