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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35956-5-III

STATE OF WASHINGTON, Respondent,

v.

BRANDON THOMAS TULLAR, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Brandon Tullar faced a charge of second degree assault arising from a fight with another inmate, Jonathan Cook, in the Okanogan County Jail. Pretrial, he moved to exclude any reference to his alleged gang membership, and the trial court reserved on its admissibility pending Tullar's testimony at trial. Nevertheless, during direct examination of both a law enforcement witness and Cook in the State's case in chief, and without any context that would render the information relevant, the jury heard that Tullar was alleged to be a gang member. The trial court erroneously denied Tullar's motion for a mistrial.

The jury heard conflicting accounts of what transpired. In support of the State's version of events, the State presented the testimony of Cook as well as the investigating officers. In their version, Tullar spoke to Cook in a derogatory fashion to instigate a fight, then jumped Cook in his cell and beat him. The defense presented testimony from two other inmates who had witnessed the fight. They both testified that the parties mutually agreed to fight and went upstairs, but when Tullar walked into Cook's cell, Cook punched him repeatedly from behind in the back of the head and placed him in a choke hold, at which point Tullar fought back until Cook gave up.

After the State rested but before the defense witnesses testified, Tullar's trial attorney advised the court that he intended to withdraw the claim of self-defense and rely instead of a defense of mutual combat, apparently unaware that mutual combat is not allowed as a defense to a jail fight as a matter of public policy. Subsequently, after the close of the evidence, he renewed his request for a self-defense instruction. The trial court denied it, stating that without Tullar's testimony as to his mental state, the evidence did not support giving it and also observing that Tullar had withdrawn it. The jury convicted Tullar as charged, and he was sentenced to more than six years in prison.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Tullar's motion for a mistrial when the State elicited inadmissible and inflammatory testimony about Tullar's alleged gang membership.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in declining to give Tullar's self-defense instruction.

ASSIGNMENT OF ERROR NO. 3: Tullar's trial counsel was ineffective for withdrawing the defense of self-defense when the evidence supported

it and when no strategic reason existed to rely upon a mutual combat defense for a jail fight.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the repeated introduction of inflammatory gang evidence that the court has not determined to be admissible was so substantially prejudicial to Tullar that a new trial was required.

ISSUE NO. 2: Whether the trial court's refusal to give an instruction on self-defense because Tullar did not testify on his own behalf was warranted when sufficient evidence was presented by independent witnesses who observed the altercation that would have allowed the jury to assess whether Tullar reasonably anticipated imminent harm when Cook attacked him by surprise from behind and attempted to place him in a choke hold.

ISSUE NO. 3: Whether defense counsel's strategy to abandon the self-defense claim in favor of a mutual combat defense was unreasonable when the defense case established Cook as the first aggressor and the mutual combat defense is unavailable to incarcerated combatants as a matter of law.

IV. STATEMENT OF THE CASE

Brandon Tullar and Jonathan Cook were both inmates in the same section of the Okanogan County Jail. RP 62. During an hourly cell check around 11:00 p.m., a corrections officer saw Cook sitting with his back to the door and believed something was wrong. RP 63. He asked Cook to turn around and saw blood and bruising on Cook's face. RP 64. He escorted Cook to the medical area and then officers inspected the other inmates, including Tullar, for blood, bruises, or injuries, but saw nothing noteworthy. RP 65-66, 71, 103-04.

Cook was initially unwilling to tell the officers what had happened. RP 67. He was transported to the hospital, where doctors diagnosed him with multiple fractures to his nose and cheeks and sutured a cut on his cheek. CP 63, RP 76, 81, 88, 104, 133. Cook had red marks and swelling on his hands that he attributed to trying to defend himself. RP 92. Later, after he returned from the hospital and learned that he would be responsible for the costs of his treatment, he blamed Tullar for his injuries. RP 105-06.

The State charged Tullar with second degree assault. CP 6. Before trial, Tullar asserted defenses of mutual combat and self-defense. RP 22. He also moved to exclude evidence of any alleged gang

membership, and the trial court reserved on the motion, indicating it would revisit the issue if Tullar testified. RP 50. The court also granted Tullar's motion requiring the State to advise its witnesses of the court's rulings on evidentiary matters. RP 48.

In the State's case in chief, a correctional officer testified about the version of events Cook related after he got back from the hospital, and Cook also testified about his recollection of the night in question. RP 78-81, 122-31. As the officer began to relate what Cook told him on the night of the altercation, he said, "And then he stated that Tullar is a Norteño 14 gang member --." RP 79. The trial court sustained Tullar's objection and instructed the jury, "Ladies and gentlemen of the jury, you're to disregard that comment and that evidentiary statement just made -- in relation to gang membership. You're to disregard it and it's not admitted." RP 79. At the next recess, the trial court denied Tullar's motion for a mistrial, finding that the violation was not deliberate and a curative instruction was immediately given. RP 99-100.

Subsequently, both the officer and Cook related their versions of the altercation, with some inconsistencies. According to the officer, Cook told him they had gotten in a fight earlier in the day when Cook was on the phone with his mother. Tullar first said he did not want his DOSA

sentence revoked, then began saying derogatory things to Cook to try to provoke a fight. RP 79. Just after the hourly cell check at 10:00 p.m., Cook went up to his room and was reading Christian literature on his bunk when Tullar came into his cell and punched him in the back of the head. RP 79-80. Cook turned around and Tullar elbowed him in the left eye, causing him to lose vision in the eye and fall. RP 80. He tried to defend himself by covering his face with his arms, but Tullar continued to hit him and then began to knee him in the face and body. RP 80-81. After about 3 minutes, Tullar stopped beating him and left the cell. RP 81.

The officer later viewed Cook's cell and observed blood spatters on the wall. RP 82. He also went to Tullar's cell to speak with him. Tullar first claimed ignorance, asking "What fight?" and then denied assaulting anyone. RP 85-86. Tullar had some marks on his hands and his elbow that the officer documented, as well as red marks on his neck. RP 86, 88. Notably, although the jail had cameras in the area, the cameras do not record, and there was no evidence that any officer on duty that night independently observed the altercation through the surveillance system. RP 102-03, 109.

When Cook testified, he also referenced Tullar's alleged gang membership, stating, "He just said that there's -- scraps -- come winter, --

certain gang he's -- that he -- he's from (inaudible)--." RP 122. The State interrupted him and redirected his testimony, but no corrective instruction as given. RP 122.

Concerning the altercation, Cook related that they got into an argument earlier in the day when he made a comment about Tullar appearing nervous about new inmates arriving, and Tullar followed him into his cell and hit him. RP 123. In Cook's trial account, Tullar had been saying things to him for several days to try to pick a fight, and continued on the date in question. RP 124-25. That evening, he was in his cell reading and praying when Tullar came in, said "Hey, punk" and hit him. RP 126. Cook hit the concrete stool with his eye and could not see, contrary to what he earlier told the correction officer about Tullar elbowing him in the eye. RP 126. He yelled for the guards, but Tullar continued to hit him and struck his head against the concrete, a detail his earlier statement did not include. RP 126-27. He admitted he pushed Tullar, tried to tackle him, and might have taken a swing at him. RP 128.

The beating lasted about three minutes. RP 127. Cook said that nobody else was present and afterward, Tullar told him not to say anything because he didn't want to lose his DOSA. RP 130. After leaving, Tullar briefly came back to the cell to try to clean up some of the blood, and then

Cook claimed he crawled toward the door to try to get the attention of the correction officers. RP 131. This was inconsistent with the officer's testimony that he found Cook sitting on his bed with his back to the door. RP 63.

After the State indicated it would rest, Tullar's counsel informed the court that he was withdrawing the claim of self-defense. RP 165-66. Tullar then called two witnesses, both other inmates who had been in custody with Tullar and Cook at the time and witnessed the altercation. RP 169, 187. According to them, Cook and Tullar had been arguing and Cook challenged Tullar to fight. RP 169-70, 188. They both took off their shoes and socks and went upstairs to Cook's cell, with Tullar going first. RP 172, 174, 189-90. Once inside the cell, Cook hit Tullar from behind several times, trying to catch him by surprise. RP 174-75, 188, 190. He attempted to put Tullar in a head lock to choke him, but Tullar was able to escape. RP 175, 190. They then exchanged punches until Tullar got the better of Cook, and Cook stopped fighting back. RP 176, 191, 195. The defense then rested. RP 197.

After abandoning the self-defense claim, Tullar requested an instruction on mutual combat that advised the jury that an act was not an assault if it was done with the consent of the person assaulted. CP 42, RP

202. The State objected and the court declined to give the instruction, observing that fighting was not allowed in the jail. RP 203-05. Subsequently, Tullar renewed his request for a self-defense instruction based upon the evidence that Cook had thrown the first punch. RP 208. The court also declined to give that instruction for several reasons: Tullar had expressly withdrawn the defense, there was insufficient evidence to support the defense because Tullar had not testified as to his state of mind, and the defense was inconsistent with the claim of mutual combat. RP 210-11.

Subsequently, the jury convicted Tullar of second degree assault and the court sentenced him to a mid-range term of 73.5 months. CP 109, 123, RP 260, 280. It imposed only mandatory legal financial obligations and entered a 10-year no contact order protecting Cook. CP 125, 131, RP 281-82. Tullar now appeals, and has been found indigent for that purpose. CP 135, 137.

V. ARGUMENT

Brandon Tullar did not receive a fair trial. Because the State's witnesses repeatedly volunteered that Tullar was alleged to be a gang member, even though the court had ruled that it would consider the admissibility of gang evidence only if Tullar testified and had ordered the

State to inform its witnesses of its rulings, the verdict was tainted by the jury's exposure to irrelevant and inflammatory allegations that served no purpose but to present Tullar as a dangerous and unsavory character. Furthermore, the trial court deprived Tullar of the opportunity to present a defense when it declined to give his self-defense instruction because Tullar was not obligated to testify to support it. To the extent the court relied upon his attorney's withdrawal of the claim before the presentation of the defense case in favor of a mutual combat defense, the choice to withdraw the defense was unreasonable and lacked any legitimate strategic basis in light of published authority holding that a defense of mutual combat may not be asserted in the case of a jail fight.

As a consequence of these errors, and in light of the evidence at trial, Tullar was unable to counter the State's case at all and his conviction was rendered a certainty. Because the verdict resulted from a constitutionally deficient process, it must be reversed and the case remanded for a new trial.

1. Because the State's witnesses repeatedly testified about Tullar's alleged gang membership, when the evidence was highly inflammatory, irrelevant, and the trial court had not determined it to be admissible, a mistrial was necessary.

Gang evidence falls within the scope of ER 404(b). *State v. DeLeon*, 185 Wn. App. 171, 188, 341 P.3d 315 (2014), *reversed on other grounds*, 185 Wn.2d 478 (2016). Accordingly, before the evidence may be admitted, the trial court must determine on the record (1) that the misconduct occurred; (2) the purpose for which the evidence is sought to be introduced; (3) whether the evidence is relevant to prove an element of the charge; and (4) whether the probative value substantially outweighs the prejudicial impact. *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009). In doubtful cases, the evidence should be excluded. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Further, under ER 403, gang evidence is considered particularly prejudicial because of its inflammatory nature and the risk that the evidence will be used to argue that the “defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *DeLeon*, 185 Wn. App. at 189 (*quoting State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012)). In other words, evidence pertaining to a defendant’s gang membership invites the jury to apply the forbidden inference that gang membership establishes the defendant’s propensity to commit charged crimes, or that he acted in conformity with the gang culture. *See Mee*, 168 Wn. App. at

159. This is particularly the case where, as here, evidence of guilt is conflicting:

In holding that the trial court abused its discretion by admitting gang-related evidence, we note that trial courts should be particularly cautious when weighing the probative value of gang-related evidence against its inherently prejudicial effect. As this case exemplifies, admitting testimony about gangs in general allows the State to argue from that generalized evidence that an individual gang member engaged in the charged criminal conduct because of gang membership. Juries are then encouraged to assume that the defendant adheres to the stereotyped gang actions. Accordingly, the admission of gang evidence may result in a guilty verdict influenced by highly prejudicial propensity evidence, contrary to the principles of a fair trial. That we hold the admission of this evidence did not unfairly prejudice Mee here is entirely dependent on the powerful untainted evidence of his actions related by the other participants in the shooting.

Mee, 168 Wn. App. at 160-61.

In general, gang evidence may be admissible to show a motive to commit the charged crime provided that there is a nexus between the crime and gang membership. *DeLeon*, 185 Wn. App. at 189, 191.

However, generalized evidence of gang membership, behaviors, and culture must be limited unless it (1) shows adherence by the defendant or the defendant's gang to the behaviors and (2) tends to prove the elements of the charged crime. *DeLeon*, 185 Wn. App. at 197.

Here, Tullar drew the trial court's notice to the possibility that gang evidence would be proffered, and the trial court specifically reserved on the issue until Tullar testified. The trial court also granted Tullar's motion requiring the State to inform its witnesses of its rulings. Thus, prior to the State's case-in-chief, the court had not engaged in the required balancing on the record or determined that any testimony about alleged gang membership was admissible, and this limitation should have been communicated to the State's witnesses.

Nevertheless, two of the witnesses violated this prohibition and informed the jury that Tullar belonged to a gang. After the first incident, the trial court instructed the jury to disregard the statement about gang membership, and denied Tullar's motion for a mistrial. But on taking the stand, Cook then repeated the allegation. On the second occasion, no curative instruction was given. The repeated violations undermine the court's finding that they were not deliberate, as they indicate the State either failed to comply with the court's order to advise the witnesses of its evidentiary rulings, or the witnesses disregarded the advisement.

The court should declare a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure a fair result. *State v. Greiff*, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000). The reviewing

court evaluates the denial of a mistrial under an abuse of discretion standard and considers whether there is a substantial likelihood that the error affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). The prejudicial effect of a trial irregularity is determined by considering (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Grieff*, 141 Wn.2d at 921 (citing *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

Applying the factors here indicates the fairness of Tullar's trial was undermined. The irregularity was serious for several reasons: It involved highly prejudicial ER 404(b) evidence that had not been determined to be admissible; the State had prior notice that the court had not admitted the evidence and had been instructed to inform its witnesses of the ruling so they would limit their testimony accordingly; and the violation was repeated. As to the second factor, the irregularity did not involve cumulative evidence, but rather evidence that the jury never should have heard at all because the trial court never found it to be admissible. On the third factor, although the trial court gave a curative instruction after the first violation, it did not give a similar instruction after the second one. Moreover, even if the bell could have been unrung in the first instance by

the curative instruction, striking the bell a second time causes a reverberation that the jury could not reasonably be expected to ignore.

Here, where there was no independent video evidence of the altercation, only competing versions of events that required the jury to assess the credibility of the participants, it is highly likely that the inflammatory allegation that one of the individuals involved in the fight was a gang member affected their consideration of the case. The allegation bolstered Cook's version of events that he was a hapless victim of unwarranted aggression by a violent criminal-type offender. Under the facts of this case, where Tullar preemptively objected to the testimony and the State's witnesses repeatedly proffered it anyway, the trial court should have granted the mistrial to avoid the taint of irrelevant gang allegations, and a new trial is warranted.

2. Because sufficient circumstantial evidence supported a self-defense claim, the trial court's denial of a self-defense instruction infringed upon Tullar's constitutional right to a defense and his privilege to remain silent.

It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Appellate courts review a

trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. Ponce*, 166 Wn. App. 409, 412, 269 P.3d 408 (2012) (citing *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005).

Each side is entitled to have the jury instructed on its theory of the case. *Ponce*, 166 Wn. App. at 415–16 (citing *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)). As a matter of due process, jury instructions must (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), *review denied*, 170 Wn.2d 1022 (2011). When sufficient evidence supports a theory of defense, it can be reversible error to refuse to instruct on the theory. *Ponce*, 166 Wn. App. at 419 (citing *State v. Griffin*, 100 Wn.2d 417, 419–20, 670 P.2d 265 (1983) (refusal to instruct on diminished capacity was reversible error; generalized instruction on criminal intent was not sufficient to apprise the jury of the effect of diminished capacity on intent); *State v. Conklin*, 79 Wn.2d 805, 807–08, 489 P.2d 1130 (1971) (voluntary intoxication defense

instruction was required where supported by evidence; instruction that “intent to defraud” was a necessary element was insufficient); *State v. Gilcrist*, 15 Wn. App. 892, 895, 552 P.2d 690 (1976), *review denied*, 89 Wn.2d 1004 (1977) (error to refuse to instruct on involuntary intoxication defense)). However, a specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. *Id.* (citing *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L.Ed.2d 322 (1998)).

Whether the refusal to specifically instruct on a theory of defense would prevent the instructions as a whole from correctly apprising the jury of the law or prevent the defendant from arguing his defense theory determines the harmfulness of the error. *Id.* at 419-20 (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (without instruction on intoxication defense jury “was not correctly apprised of the law, and defendants’ attorneys were unable to effectively argue their theory”); *State v. Turner*, 16 Wn. App. 292, 555 P.2d 1382 (1976) (when instructions considered as a whole permit a party to argue his theory of the case, then it is not error to refuse to give other requested instructions)). A court commits reversible error when it refuses to give a defense instruction when the refusal prevents the defense from arguing its theory of the case.

State v. Kidd, 57 Wn. App. 95, 99, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990) (citing *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968)). The trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is completely unsupported by evidence. *Koch*, 157 Wn. App. at 33 (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)).

Here, Tullar requested a self-defense instruction based upon the evidence presented that Cook was the primary aggressor, attacking him from behind in an effort to catch him by surprise and attempting to place him in a choke hold. The trial court concluded that Tullar was not entitled to the instruction because he did not testify, and therefore there was no testimony as to what his belief was. But a defendant's mental state can be inferred from his conduct. *See State v. Elmi*, 138 Wn. App. 306, 313, 156 P.3d 281 (2007), affirmed, 166 Wn.2d 209 (2009); *State v. Thomas*, 109 Wn.2d 222, 227, 743 P.2d 816 (1987) (defendant's conduct is circumstantial evidence of mental state, which may be rebutted by subjective evidence); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977) (all the elements of a charge may be proven by direct or circumstantial evidence). And a defendant has no obligation to testify. U.S. Const. Amend. V; Wash. Const. art. 1, § 9. Under the applicable standard, if the evidence was sufficient for the jury to be able to infer

Tullar's belief of imminent harm, then the instruction should have been given.

In Washington, the use of force is lawful when used by a person about to be injured in attempting to prevent an offense against his person, provided that the force used is not more than necessary. RCW 9A.16.020(3). Because self-defense is a lawful act, it negates the mental state and the "unlawful force" elements of second degree assault. *State v. Acosta*, 101 Wn.2d 612, 616, 618, 683 P.2d 1069 (1984). A defendant is entitled to a self-defense instruction when he presents some evidence demonstrating self-defense, and the burden then shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Significantly, although the self-defense standard includes both subjective and objective elements, neither requires testimony from the defendant to be satisfied. Instead, "[e]vidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *Walden*, 131 Wn.2d at 474 (*quoting State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). To conduct this evaluation, the jury is asked to stand in the shoes of the defendant, considering the circumstances known to him, and compare the

defendant's conduct to what a reasonably prudent person under those circumstances would have done. *Id.*

Here, the evidence presented by the defense witnesses was more than adequate for the jury to apply the standard. Two inmates who witnessed the fight testified that when Tullar went into Cook's cell, Cook sucker punched him in the back of the head multiple times and attempted to put him in a choke hold. During the ensuing struggle, the parties both exchanged punches and Tullar eventually got the better of Cook, who stopped fighting only when he conceded he had been beaten. The jury was not required to peer into Tullar's skull to evaluate his claim of self-defense under these circumstances; they merely needed to place themselves in his shoes and evaluate whether he acted reasonably for a person attacked by surprise.

The trial court's denial of the self-defense instruction here was based on similar grounds as in *State v. Thysell*, 194 Wn. App. 422, 374 P.3d 1214 (2016). In *Thysell*, the trial court denied a self-defense instruction because the evidence of self-defense was presented in the State's case-in-chief, not by the defendant. *Id.* at 424-25. The Court of Appeals squarely rejected that logic, observing that the parties are entitled to the benefit of all of the evidence and holding that a self-defense

instruction is required when all of the evidence raises a reasonable doubt as to whether the defendant acted in self-defense. *Id.* at 426.

Here, as in *Thyrell*, there was evidence that Cook started the fight and Tullar fought only as long as necessary for Cook to give up and stop fighting. The trial court's conclusion that a self-defense instruction was unwarranted because Tullar did not testify is unsupported in law and runs counter to his constitutional protections. Because Tullar presented some evidence indicative of self-defense, the instruction should have been given and its refusal deprived him of the opportunity to argue a defense.

3. No strategic reason existed to withdraw the self-defense claim before the defense witnesses testified, when mutual combat was not legally available and the withdrawal left Tullar without any defense to the charge.

Tullar's attorney rendered constitutionally ineffective assistance when he withdrew Tullar's self-defense claim before the defense witnesses testified, in favor of a defense of mutual combat. This decision lacked any strategic justification and prejudiced Tullar by depriving him of any arguable defense to the charge. Accordingly, a new trial is warranted.

A criminal defendant has the right to effective assistance of counsel. U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009), *reversed on other grounds*, 171 Wn.2d 17 (2011).

“To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel’s deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel’s performance, such performance falls “below an objective standard of reasonableness” and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

Here, no tactical justification explains why defense counsel would withdraw the claim of self-defense before the defense witnesses even testified. Prior to trial, both self-defense and mutual combat defenses were asserted. Cross-examination of the defense witnesses elicited that they had both signed a statement describing what they witnessed about a month after Tullar was charged, so defense counsel was presumably aware of their version of events prior to trial. RP 192-93.

The only explanation that can be inferred from the record is that counsel believed Tullar would be required to testify to claim self-defense, and that he could rely instead on a defense of mutual combat. Both of these beliefs are erroneous. As discussed above, Tullar was entitled to a self-defense instruction if the totality of the circumstances supported it, regardless of whether he testified or not. As to the defense of mutual combat, it is unavailable in the case of jail fights as a matter of public policy. *State v. Weber*, 137 Wn. App. 852, 860, 155 P.3d 947 (2007), *review denied*, 163 Wn.2d 1001 (2008). Any defense strategy to rely upon a legally unavailable defense is necessarily unreasonable.

The deficiency prejudiced Tullar's case by depriving him of any argument in his own defense that would save him from a conviction for a felony strike offense. Even his own evidence admitted that he engaged in

combat with Cook, but because he could not argue Cook consented to fight, his only hope to avoid conviction depended on the jury being apprised of the law of lawful force. By withdrawing this defense, trial counsel's strategy amounted to giving it more evidence that Tullar assaulted Cook, without providing it the information needed to consider whether Tullar's actions were a reasonable response to Cook's surprise attack on him. Any jury following the law given to it in light of these decisions had no choice but to convict.

Because trial counsel employed the unreasonable strategy of relying on a defense that was legally unavailable at the expense of a viable claim of self-defense, counsel's performance affected the trial outcome by depriving Tullar of any opportunity of acquittal. By contrast, had counsel maintained the self-defense claim, there was ample evidence from which a jury could have had reasonable doubt as to Tullar's guilt. Under these circumstances, a new trial is required.

VI. CONCLUSION

For the foregoing reasons, Tullar respectfully requests that the court REVERSE his conviction and sentence and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 30 day of July, 2018.

TWO ARROWS, PLLC

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written in a cursive style.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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Walla Walla, WA 99362

Branden Eugene Platter
Okanogan County Prosecutor's Office
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Okanogan, WA 98840-1130

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 30 day of July, 2018 in Walla Walla, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

July 30, 2018 - 1:31 PM

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