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Court of Appeals
Division III
State of Washington
9/18/2019 3:59 PM

No. 36473-9-III

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

STATE OF WASHINGTON, Respondent

v.

LISA MICHAEL, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JUDGE JULIE McKAY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF FACTS..... 2

III. ARGUMENT..... 5

 A. The State Did Not Disprove Self Defense Beyond A Reasonable Doubt. 5

 1.The State Bears The Burden To Prove The Absence Of Self Defense Beyond A Reasonable Doubt..... 5

 2.Ms. Michael Reasonably Believed She Was About To Be Injured And Used Reasonable Force. 7

 B. The Prosecutor Committed Prosecutorial Misconduct By Misstating The Law And It Unfairly Prejudiced Ms. Michael..... 8

 C. The Trial Court Abused Its Discretion When It Declined To Impose An Exceptional Sentence Based On Mitigating Factors. 11

 1.To A Significant Degree, The Victim Was An Initiator, Willing Participant, Aggressor or Provoker of The Incident: Failed Self Defense Claim..... 13

 2.The Nature of The Offending Conduct Was At The Very Low End Of The Range 15

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Cases

<i>In re Pers. Restraint of Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007).....	12
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	5
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	9
<i>State v. Fowler</i> , 145 Wn.2d 400, 38 P.3d 335 (2002).....	15
<i>State v. Gaines</i> , 122 Wn.2d 502, 859 P.2d 36 (1993)	15
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	5
<i>State v. Ha'mim</i> , 132 Wn.2d 834, 940 P.2d 633 (1997)	12
<i>State v. Hinds</i> , 85 Wn.App. 474, 936 P.2d 1135 (1997).....	14
<i>State v. Hutsell</i> , 120 Wn.2d 913, 845 P.2d 1325 (1993)	15
<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	13
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	12
<i>State v. Milbradt</i> , 68 Wn.2d 684, 415 P.2d 2 (1966).....	6
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000)	9
<i>State v. Pomeroy</i> , 18 Wn.App. 837, 573 P.2d 805 (1977).....	16
<i>State v. Shilling</i> , 77 Wn.App. 166, 889 P.2d 948 (1995)	16
<i>State v. Teas</i> , 7 Wn.App.2d 277, 432 P.3d 454 (2019).....	16
<i>State v. Wright</i> , 131 Wn.App. 474, 127 P.3d 742 (2006).....	8

Federal Cases

<i>In re Winship</i> , 397 U.S.358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 5	
--	--

Constitutional Provisions

Wash. Const. art. I §3	5
------------------------------	---

Statutes

RCW 9.94A.010	11
RCW 9.94A.010(1)(3)(6).....	11
RCW 9.94A.535(1).....	11, 12

RCW 9A.16.020(3)..... 7
RCW 9A.36.021 5

I. ASSIGNMENTS OF ERROR

- A. The Evidence Was Insufficient To Sustain A Conviction for Assault Second Degree.

LEGAL ISSUE: A claim of self-defense becomes another element the State must prove beyond a reasonable doubt. Where the evidence shows the defendant had reasonable fear of injury and did not use more force than necessary, did the State fail to disprove the element of self-defense?

- B. The Prosecutor Misstated The Law In Rebuttal Argument Which Prejudiced Ms. Michael's Right To A Fair Trial.

LEGAL ISSUE: Where the trial court did not provide the jury a "first aggressor" instruction, did the Prosecutor prejudicially misstate the law in closing argument by telling the jury it did not matter if the alleged victim used the "deadly weapon" first?

- C. The Trial Court Erred When It Declined To Impose An Exceptional Downward Sentence.

LEGAL ISSUE: The Legislature has provided a list of illustrative considerations for a sentencing court when determining whether to impose an exceptional sentence based on mitigating factors. Did the sentencing court err

when it failed to consider the factors raised by the defendant, and simply went through the list of illustrative factors?

II. STATEMENT OF FACTS

Spokane County prosecutors charged Lisa Michael with one count of assault in the second degree. CP 1. The matter proceeded to a jury trial. Ms. Michael maintained a defense of self-defense and the court gave a self-defense jury instruction. CP 57.

Fifty-one-year-old Lisa Michael was unemployed, subsisting by use of food stamps, and a 750 dollar per month social security disability payment. CP 66. Her disability severely limits her physical mobility and she was in imminent need of recommended surgeries to her back and knee. CP 66.

In the early morning of March 21, 2018, Ms. Michael and Carmen Gardipee went to a Spokane home where Selena Joe and numerous other homeless individuals stayed. The home was known as a “chronic nuisance” house, a flop house, and a party house. 1RP 133, 136,141,147-48. Ms. Joe and Ms. Michael had known each other for their entire lives. 1RP 135.

Ms. Joe used drugs the night before and said she was asleep in a living room chair. 1RP 142. She reported she was awakened by Ms. Gardipee and Ms. Michael, saying, “I was – felt

like I was smacked, something, smacking me, punching me in the face or smacking me in the head saying –I don't know—but ...I don't know." 1RP 135. She immediately jumped up, facing Ms. Michael. She said Ms. Michael accused her of stealing a phone. 1RP 135.

Ms. Joe said the three of them stopped physically fighting several times and exchanged words. Eventually, she kicked Ms. Michael down and picked up a vase. 1RP 136,143. She struck Ms. Michael with the vase, causing injury to her which later required emergency room treatment of stitches and staples to her head. 1RP 143.

Ms. Joe reported Ms. Michael and Ms. Gardipee got the vase away from her, held her down and hit her with it. She grabbed her phone, left the room, and called 911. 1RP 136. In order to make it an officer priority call, Ms. Joe told the 911 dispatcher that she had been stabbed by two people. 1RP 142-143. She gave a false name several times because she had a warrant for her arrest. 1RP 138. When officers arrived, she declined medical treatment. 1RP 154.

When interviewed by officers, Ms. Michael said she went to the home, walked inside, and Ms. Joe hit her with a vase. She

pushed Ms. Joe aside, turned around, left and went to her own home. 1RP 157. She later testified that her physical condition was so compromised she had difficulty walking and could not have started a fight with anyone. 1RP 137.

During closing argument, the prosecutor stated:

The first injury doesn't matter. If you read your instruction, it's an assault. It's that -- if Lisa Michael, if you find that she struck, touched or in any offensive manner did any of those things to Selena Joe, it doesn't matter if Selena Joe got the vase first. It just matters what happened in the beginning of that assault.

2RP 274.

During deliberations, the jury sent an inquiry to the court: "Under assault second degree does it matter who used the vase 1st?" CP 64. The jury found Ms. Michael guilty. CP 61-62.

At sentencing, defense counsel asked the court to impose an exceptional sentence below the standard range, based on mitigating circumstances. CP 65-76. The court considered each of the illustrative factors listed in RCW 9.94A.535(1), rather than the specific factors offered by the defense. 11/2/18 RP 19-22. The court concluded that based on the illustrative factors there were not substantial and compelling reasons to justify a departure from the standard range. 11/2/18 RP 19-22. The court imposed the low end

of the standard range, 22 months of incarceration. 11/2/18 RP 22.

Ms. Michael made a timely appeal. CP 104-119.

III. ARGUMENT

A. The State Did Not Disprove Self Defense Beyond A Reasonable Doubt.

1. The State Bears The Burden To Prove The Absence Of Self Defense Beyond A Reasonable Doubt.

The State's case against Ms. Michael's claim of self defense is underwhelming. To convict Ms. Michael of assault in the second degree, the State must prove that she assaulted Ms. Joe with a deadly weapon. RCW 9A.36.021.

When a defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). Here, even when viewed in a light most favorable to the State, the State did not meet its obligation to disprove every element of the charged crime beyond a reasonable doubt. Wash. Const. art. I §3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

A person can defend herself against an assault. *State v. Milbradt*, 68 Wn.2d 684, 686-87, 415 P.2d 2 (1966). The trial court gave Jury Instruction No. 12:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that she is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident. The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to assault in the second degree.

CP 57

And Jury Instruction No. 13:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 58.

Thus, the requirements for the State to disprove self-defense for assault in the second degree are (1) the person unreasonably

believed she was about to be injured; (2) the force used was more than necessary. RCW 9A.16.020(3).

2. Ms. Michael Reasonably Believed She Was About To Be Injured And Used Reasonable Force.

Ms. Joe had known Ms. Michael for her entire life. It is reasonable to assume she was aware Ms. Michael was on social security disability and she had limited ability of movement because of those physical disabilities (knee and back). Ms. Joe had the upper hand when she kicked Ms. Michael to the floor. Ms. Joe grabbed the vase and used it as a weapon in a manner that left Ms. Michael needing stitches and staples for a head injury. It was reasonable for Ms. Michael to believe she was going to be further injured by Ms. Joe.

Ms. Michael did not use more force than was necessary. Ms. Michael's use of the vase against her assailant was in a manner that caused such little injury that Ms. Joe did not want or need medical attention. Rather, use of the vase by Ms. Michael enabled all parties to end the interaction: Ms. Joe called 911 and Ms. Michael left the home.

Where the State has not proved every element of a crime beyond a reasonable doubt, the remedy is reversal and vacation of

the conviction. *State v. Wright*, 131 Wn.App. 474, 479, 127 P.3d 742 (2006).

B. The Prosecutor Committed Prosecutorial Misconduct By Misstating The Law And It Unfairly Prejudiced Ms. Michael.

The court in this case declined to give the jury a “first aggressor” instruction:

...I do not believe it is clear-cut as to who the aggressor is in this case is, based upon the testimony that was given by Ms. Joe, by Ms. Gardipee, and by the officers testifying as to...what was relayed to them...

1RP 246.

Even though Ms. Michael had been charged with second degree assault with a deadly weapon, the State argued “..there was striking and touching, and it was offensive even though an injury – injury isn’t required – there was also injury.” 2 RP 263.

Nevertheless, in closing argument, the prosecutor said, “The first injury doesn’t matter. If you read your instruction, it’s an assault. It’s that—if Lisa Michael, if you find that she struck, touched or in any offensive manner did any of those things to Selena Joe *it doesn’t matter if Selena Joe got the vase first*. It just matters what happened in the beginning of that assault.” 2RP 274. This was an incorrect statement and it served to covertly provide the jury a first aggressor instruction.

It is well-settled law that counsel's statements to the jury must be limited to the law as set forth in the instructions to the jury. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). When the prosecution argues an incorrect statement of law, which conflicts with the court's instructions to the jury and which exceeds the scope of argument, the defendant has been prejudiced, and reversal is warranted. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984).

In *Davenport*, the defendant had been charged with burglary of a residence. In closing argument, defense counsel argued the fact there was no direct evidence which placed the petitioner in the burglarized residence. The prosecutor's rebuttal argument to the jury was "It doesn't make any difference actually who went into the house...they are accomplices". *Id.* at 761. Because the defendant had not been charged as an accomplice, and the jury had not been instructed on accomplice liability, the argument was an incorrect statement of the law of the case and conflicted with the jury instructions.

The Supreme Court held that errors that deny a defendant a fair trial are per se prejudicial. *Id.* at 762. On review, the Court must examine the entire record, and determine whether there is a

substantial likelihood that the misconduct affected the jury verdict. *Id.* The Court there noted the deliberating jury asked for a definition of accomplice. *Id.* at 764. The Court found the prosecutor's rebuttal remarks were improper conduct, the jury considered the remarks, and the defendant had been prejudiced by them. *Id.* at 765.

Similarly, here the prosecutor misstated the law and argued something that was not rightfully before the jury: that when Ms. Michael allegedly hit Ms. Joe (presumably assault in the fourth degree), it no longer mattered that Ms. Joe hit her with the vase first. In rebuttal argument, the State introduced and argued the idea of first aggressor negation of self-defense. This misled and confused the jury, as no first aggressor instruction had been given to them.

The record supports the conclusion that the jury was confused and considered the improper statement in its deliberation as it queried the court to find out if it mattered who used the vase first. CP 64. Any mistaken impression conveyed to the jury was due to the improper conduct of the prosecutor.

This matter should be reversed. *State v. Davenport*, 100 Wn.2d at 767.

C. The Trial Court Abused Its Discretion When It Declined To Impose An Exceptional Sentence Based On Mitigating Factors.

A court generally must impose a sentence within the standard range set by the SRA for the offense. The Legislature in part set the accountability to ensure punishment is proportionate to the offense and the offender criminal history, commensurate with the punishment imposed on others committing similar crimes, and to make frugal use of government resources. RCW 9.94A.010(1)(3)(6). The standard range sentencing guidelines do not eliminate discretionary decisions affecting sentencings. RCW 9.94A.010.

RCW 9.94A.535(1) affords the trial court broad discretion in considering mitigating factors which support an exceptional downward sentence for an offender. Courts are authorized to impose sentences outside the standard range if, considering the purposes of the SRA there are substantial and compelling reasons justifying an exceptional sentence and the Legislature has not necessarily considered the factor when it established the standard range. RCW 9.94A.010 et seq.

By statute, the list of mitigating factors “are illustrative only and not intended to be exclusive reasons for exceptional

sentences.” RCW 9.94A.535(1). Thus, a court may use a nonstatutory factor to justify imposing a more lenient sentence than that set by the standard range. *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997) (abrogated on other grounds *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)).

The court must find the mitigating circumstance by a preponderance of the evidence and must find there are substantial and compelling reasons justifying the reduced sentence. RCW 9.94A.535; *State v. Korum*, 157 Wn.2d 614, 637, 141 P.3d 13 (2006).

The appellate Court reviews a trial court's consideration of a request for a mitigated exceptional sentence for abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). A trial court abuses its discretion when it imposes a sentence based on a legal misunderstanding of its own discretion. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007).

Here, the trial court misapprehended its authority to consider nonstatutory mitigating circumstances. It relied solely on and analyzed only the illustrative list of mitigating circumstances defined in RCW 9.94A.535(1). The court abused its discretion when it did

not consider mitigating factors outside of the illustrative list or properly consider the failed defense of lawful use of force.

Ms. Michael motioned the sentencing court for a sentence below the standard range based on three facts: the failed defense of lawful use of force defense presented at trial; the nature of the offending conduct was at the low end of the range of conduct covered by the statute; and third, her medical condition required extensive medical treatment and surgery, which would need to happen at State cost while she was incarcerated. CP 65-66. Ms. Michael challenges the first two factors.

1. To A Significant Degree, The Victim Was An Initiator, Willing Participant, Aggressor or Provoker of The Incident: Failed Self Defense Claim.

In *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997), the Court recited the caselaw supporting consideration of the factual evidence of an affirmative defense which was rejected by the jury. *Id.* The Court concluded “By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be ‘circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct’ from that in other similar cases.” *Id.* at 852. (internal citations omitted).

In considering the failed self-defense claim as a mitigating circumstance, the court said:

You went to the home of Ms. Joe, and the assault happened there. So that alone would indicate to me you are some place where you did not belong, and so that causes some pause with regards to whether what you're indicating as being Ms. Joe as the aggressor to this or not. Now, that's really not what my issue is because the jury did not make that finding, so I'm having a difficult time finding that, although the failed defense allows me to do that.

11/2/18 RP 20.

First, the record is devoid of evidence of how Ms. Michael entered the home, and equally absent from the record is any evidence that Ms. Michael was either asked or told to leave. The testimony was that the home was a flop house, which implies an open-door policy. There was no basis for the court to presume Ms. Michael was in a place she did not belong or lacked permission to enter.

In the context of establishing mitigating circumstances, the "willing participant" factor applies when both the defendant and the victim engaged in the conduct that caused the offense to occur.

State v. Hinds, 85 Wn.App. 474, 481, 936 P.2d 1135 (1997).

It is the sequence of events which supports finding Ms. Joe was a willing participant. Ms. Joe not only kicked Ms. Michael down, but was the first to grab the vase and use it as a weapon.

The court failed to consider that Ms. Joe became a willing participant in the physical fight because she escalated it by using the vase as a deadly weapon.

2. The Nature of The Offending Conduct Was At The Very Low End Of The Range

The SRA allows “variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant’s conduct from that normally present in that crime.” *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). The list of mitigating factors is not exclusive, the trial court may consider reasons for an exceptional downward sentence which are related to commission of the crime, and which make the commission of the crime less egregious than other crimes in the same category. *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002); *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993).

With the assault second degree (deadly weapon) charge, the jury was instructed that a deadly weapon meant any weapon, device, instrument, substance or article which under the

circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantially bodily harm. CP 56. In this case the alleged “deadly weapon” was a vase. The issue here is how it was used should have been considered as substantially less egregious than other crimes in the same category.

Case law has identified objects which are deadly weapons based on how they were used. In *State v. Shilling*, 77 Wn.App. 166, 889 P.2d 948 (1995) the defendant used a bar glass to strike a head blow to the victim. The victim suffered lacerations requiring five stitches. In *State v. Pomeroy*, 18 Wn.App. 837, 573 P.2d 805 (1977) the defendant used a broken beer glass to attack the victim, causing the victim’s eye to need to be removed. In *State v. Teas*, 7 Wn.App.2d 277, 432 P.3d 454 (2019), the defendant used a gun or something dark metal to strike the victim in the head.

In this case, it was Ms. Joe who used the vase as a deadly weapon, injuring Ms. Michael such that she needed stitches. When Ms. Michael used the vase to defend herself, she landed a blow, but not with the same force Ms. Joe used, and certainly in a much less egregious way than found in other crimes.

The jury found Ms. Michael guilty, but because there was such insignificant victim impact than typical for a person committing that offense, the trial court should have fully considered the defense request for an exceptional downward sentence. The court's failure to fully consider the request was an abuse of discretion.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Michael respectfully asks this Court to reverse and vacate her conviction. In the alternative, she asks the Court to remand for consideration of an exceptional downward sentence.

Respectfully submitted this 18th day of September 2019.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on September 18, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Spokane County Prosecuting Attorney at SCPAAppeals@spokanecounty.org and to Lisa Michael/DOC#707586, Eleanor Chase House, 427 W. 7th Ave, Spokane, WA 99204.



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September 18, 2019 - 3:59 PM

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