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NO. 65864-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH FRANKLIN MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

In this second-degree assault / self-defense case, the following issues are raised:

1. Did the jury instructions as a whole accurately state the law and allow the parties to argue their theory of the case, or did the omission of an option phrase in the definition of assault prevent this?

2. Was the defendant entitled to an instruction on defense of property?

3. Did the court properly give a "first-aggressor" instruction?

4. Was the defendant entitled to a "no duty to retreat" instruction?

5. The defendant agreed to all of the instructions provided by the court. To circumvent waiver issues, can the defendant prove that trial counsel was ineffective for failing to object below and can he prove prejudice stemming from his claim of ineffective assistance of counsel?

6. Did the trial court err in how it handled the taking of objections to the instructions?

7. Did the trial court abuse its discretion in denying the defendant's motion for a new trial raising these same issues?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with Assault in the Second Degree for intentionally assaulting Randall Rasar and thereby recklessly inflicting substantial bodily harm to him--a shattered nose and facial lacerations. CP 1-4. A jury convicted the defendant as charged. CP 114.

Post-trial, the defendant obtained new counsel and tried to get his conviction reversed by claiming that his trial counsel was ineffective for not proposing certain jury instructions and/or not objecting to certain jury instructions provided by the court. CP 29-30, 34-50. The court denied the defendant's motion. 7RP¹ 9; CP 31. The defendant then filed a motion to reconsider. CP 32-33. The court denied this motion as well. 8RP 3.

The defendant received a standard range sentence of six months. CP 83-89. The defendant filed a timely appeal and now raises the exact same issues raised in his motion for a new trial and his motion for reconsideration.

¹ The verbatim report of proceedings is cited as follows: 1RP--7/13/10; 2RP--7/14/10; 3RP--7/15/10; 4RP--7/19/10; 5RP--7/20/10; 6RP--7/21/10; 7RP--8/12/10; 8RP--8/13/10.

2. SUBSTANTIVE FACTS

Randall Rasar is 48-years-old, married, the son of a pastor, and the father of three children. 3RP 88-89, 104. He has also been a UPS driver for almost 30 years. 3RP 89. In those nearly 30 years of work, Rasar has never had a single physical confrontation with anyone—until November 6, 2009, when he delivered a package to the defendant. 3RP 91.

The defendant works at a cement plant and lives at 3714 140th Avenue SE in Bellevue. 3RP 66; 5RP 81. The rundown house is half painted with a number of cars parked in the driveway, some of them in disrepair. 3RP 93-95. At times, because of the number of cars in the driveway, Rasar has had to walk on the grass to deliver packages to the defendant's house. 3RP 93. Despite the grass being a foot tall, the defendant complained about Rasar walking on the grass. 3RP 93. In fact, Rasar has had a number of issues with the defendant in the past. 3RP 92.

On this particular day, Rasar had a package to deliver to the defendant that required a signature. 3RP 101. Rasar arrived at the defendant's house at approximately 6:00 p.m. 3RP 95. He parked his truck in the street at the foot of the driveway, some 40 feet from the defendant's front door. 3RP 96, 132. Rasar then took the

package, his flashlight and a handheld computer device and proceeded up the walkway to the defendant's front door. 3RP 98.

When Rasar rang the doorbell, he did not hear anything. 3RP 99. Although he was wearing earplugs because of the noise from his truck, Rasar also recalled that the defendant had previously disconnected his doorbell because he was a day sleeper. 3RP 100. Rasar then rapped on the door with his flashlight. 3RP 100.

The defendant then answered the door with a very "aggressive" "intimidating" demeanor. 3RP 101. Foregoing any pleasantries or greetings, the first thing the defendant uttered was "don't tap your flashlight on my door." 3RP 101. Rasar apologized and said that he remembered that the doorbell had been disconnected. 3RP 101. The defendant then stepped outside, shut the door behind him and rang the doorbell, saying that he could hear the doorbell just fine. 3RP 102. Rasar responded that he probably didn't hear the doorbell because he had earplugs in. 3RP 102.

The defendant then approached Rasar, getting in his "space" with his face just six inches from Rasar's. 3RP 102. Feeling "intimidated," Rasar asked the defendant to just sign the board.

3RP 103. The defendant signed. 3RP 104. Rasar then turned his back on the defendant and to walk back to his truck. 3RP 105.

As Rasar stepped off the porch, he said, under his breath, "what a jerk." 3RP 107. When Rasar reached his truck, he heard the defendant running up behind him. 3RP 105-06. The defendant grabbed Rasar from behind and slammed his face into the side of the truck. 3RP 107. Rasar fell to the ground as the defendant shoved his face into the asphalt and struck him in the head multiple times. 3RP 108-09. The defendant then left Rasar lying on the ground and went back inside his house. 3RP 109.

Rasar tried to send a text from his handheld computer device but he was bleeding so profusely that the screen got covered with blood and he couldn't read it. 3RP 110. Rasar then went to a nearby house and asked the homeowner if she would call 911. 3RP 111. Crying and in shock, Rasar told the 911 operator that he had been attacked. 3RP 112; Exhibit 5.

Rasar was able to look in a mirror and see that he had been disfigured, with his shattered nose pointing over to the side of his face. 3RP 114, 117. Rasar was transported to Overlake Hospital where lacerations on his face were stitched up. 3RP 117; 5RP 22,

24. Rasar subsequently underwent two surgical operations to repair the damage to his nose. 3RP 119.

The defendant's version of the incident was markedly different than Rasar's. The defendant was expecting a delivery so around 4:00 p.m., he turned on the porch light for the delivery person. 5RP 119. He then went to do some work in his kitchen. 5RP 120.

When Rasar arrived with the package, the defendant claimed he rang the bell repeatedly and pounded on the door multiple times. 5RP 127. The defendant answered the door and said that he asked Rasar if it was really necessary to pound on the door so hard and ring the doorbell too. 5RP 128. Rasar told the defendant he had earplugs in and said he thought the doorbell was disconnected. 5RP 128-29. The defendant then stepped out of the house, pushed the doorbell and just looked over at Rasar. 5RP 129. The defendant then "craned my neck" over to look at Rasar's earplugs and then signed for the package. 5RP 131.

After handing the package to the defendant, Rasar then took two steps down, turned back towards the defendant and said, "enjoy your package, jerk." 5RP 132. Perceiving that there was

“some kind of problem,” the defendant stepped out of the doorway to talk with Rasar because he was “perplexed.” 5RP 132, 175.

Wanting to “defuse the situation,” the defendant approached Rasar and said “hey,” whereupon Rasar shouted at the defendant to leave him alone and then took his flashlight and struck the defendant in the cheek. 5RP 142-43, 176. The defendant claimed the flashlight weighed two pounds and that he was pretty scared that he might be hit again and knocked out. 5RP 144, 146.

“To avoid getting hit,” the defendant then “placed” his hand on Rasar’s shoulder and began to move him forward down the driveway towards the street. 5RP 146-47. The defendant said that he wanted Rasar off his property because he was in fear of being hit again with the flashlight. 5RP 150.

As the defendant was escorting Rasar down the driveway, he said he was worried about running into the truck because of the darkness. 5RP 152-53. Sure enough, he walked right into the truck hard enough that he rebounded off it and fell to the ground. 5RP 153. He did not testify that Rasar hit the truck too, only that Rasar was somewhere off to his left. 5RP 154

The defendant said that he got up off the ground and proceeded back towards his house. 5RP 154. He then found

Rasar's flashlight and hat on the ground and shouted out that he would bring them to him. 5RP 154-55. Finding Rasar in his truck, the defendant said "here's your hat and your flashlight, now please leave." 5RP 157. The defendant did not see any blood on Rasar's face. 5RP 157.

When officers arrived and arrested the defendant, they observed no injuries to him. 3RP 70. Still, a week later the defendant went to his family doctor—with instructions that he was to give only limited information to the doctor about the incident. 5RP 161, 193. A CT scan and x-rays proved negative and no tissue swelling was observable, but the defendant's family doctor still opined that the defendant had a bruise on his cheek and elbow. 6RP 17, 31, 37-38. The defendant admitted at trial that when he went back into his house, he told his wife that Rasar had taken a swing at him but he did not tell her that he had been struck in the face. 5RP 92, 163.

Additional facts are included in the sections below that they pertain.

C. ARGUMENT

1. SUMMARY OF ARGUMENT.

The defendant's appeal primarily concerns the propriety of the jury instructions, both instructions provided and instructions not provided by the court. Specifically, the defendant claims that the instructions were defective because (1) the WPIC definition of assault provided did not include the optional phrase that the assault was done "with unlawful force," (2) the court should have included a defense of property instruction, (3) a WPIC "first-aggressor" instruction should not have been provided because it was not applicable under the facts of the case, and (4) the court should have provided a "no duty to retreat" instruction. The defendant did not object to the instructions given by the court. In order to circumvent the fact that his challenge to the instructions has been waived, the defendant argued below in a motion for a new trial, and argues on appeal, that trial counsel was ineffective. In the argument section to follow, the State will first address the propriety of the instructions--ignoring for purposes of argument the ineffective assistance of counsel claim. The State will follow this section with an argument section dealing with the ineffective assistance of counsel claim.

2. THE INSTRUCTIONS PROVIDED BY THE COURT.

The following instructions are the jury instructions provided by the court pertinent to the issues raised on appeal. The court defined the crime of assault in the second degree in accordance with the charging document, statute and WPIC instruction as follows:

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

CP 1, 15; WPIC 35.10; RCW 9A.36.021(1)(a).

The court gave a "to convict" instruction in accordance with the statute and WPIC instruction as follows:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 6th day of November, 2009, the defendant intentionally assaulted Randall Rasar;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Randall Rasar; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 19; WPIC 35.13.

The court provided the following definition of assault as pertinent to the charge:

An assault is an intentional touching or striking of another that is harmful or offensive.

CP 14; WPIC 35.50.

In regards to the defendant's self-defense theory of the case, the court provided the following WPIC instruction:

It is a defense to a charge of Assault in the Second Degree and Assault in the Fourth Degree^[2] that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, 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.

² The defense convinced the court to give a lesser included instruction on assault in the fourth degree. See CP 20-22.

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 of Assault in the Second Degree and Assault in the Fourth Degree.

CP 23; WPIC 17.02.

The court provided the following definition of "necessary" per statute and WPIC instruction as follows:

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 24; WPIC 16.05; RCW 9A.16.010.

And finally, the court gave the WPIC aggressor--defense of self instruction as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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 that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 25; WPIC 16.04.

3. THE DEFENDANT WAS NOT ENTITLED TO ANY SELF-DEFENSE INSTRUCTIONS.

The defendant's appeal is premised upon the assumption that he had presented sufficient evidence of self-defense and that he was therefore entitled to certain self-defense instructions that were not provided (or that the instructions provided were incorrect). However, the facts of the case do not support the giving of any self-defense instructions because the assault that the defendant admitted he committed was not the assault charged.

Generally, a party is entitled to instructions supporting his theory of the case if evidence exists to support the theory. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). To warrant a self-defense instruction, a defendant must produce some evidence that *the crime* occurred under circumstances amounting to self-defense. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

Here, the defendant was charged with assault in the second degree. It was alleged that the defendant intentionally assaulted Randy Rasar and thereby recklessly inflicted substantial bodily harm on him--the shattering of his nose and facial lacerations. The facts supporting the charge against the defendant, the State's case,

consisted of evidence that the defendant ran up behind Rasar just as Rasar reached his truck, and that the defendant then slammed Rasar's face into his truck causing the severe injuries.

In contrast, the defendant's admitted assault that he claims he committed in self-defense did not involve the charged act and injury. Specifically, the defendant admitted to a single assault, one act of self-defense. He testified that some 40 feet away from Rasar's truck, while both men were on his front porch, he grabbed Rasar's shoulder in self-defense after Rasar had hit him with a flashlight.

As for the cause of Rasar's injuries that occurred at Rasar's truck, the defendant did not claim that any assault occurred at this location. Rather, the defendant claimed the two men merely ran into the truck in the darkness--in short--that an accident occurred.

While self-defense and accident are not mutually exclusive defenses,³ herein, to obtain instructions on self-defense, the two defenses at least had to pertain to the same charged act, the same assault, and the same injury. They do not. The defendant's claimed act of self-defense occurred at a different time and location

³ See State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997).

than the assault that caused the charged injury to Rasar. His admitted assault would have amounted to nothing more than an assault in the fourth degree, an unwanted touching--a charge and an act he did not face. Thus, while the trial court gave self-defense instructions, the defendant was not entitled to them, and therefore his claim that the instructions given were deficient is without merit. See e.g., State v. Brigham, 52 Wn. App. 208, 209, 758 P.2d 559 (Although displaying a knife may have been a reasonable response to the physical altercation initiated by the victim, the character of the encounter changed when the defendant stabbed the victim to death and, at that point, his use of force became excessive as a matter of law. Thus, defendant was not entitled to a self defense instruction.), rev. denied, 111 Wn.2d 1026 (1988).

4. THE DEFINITION OF ASSAULT.

The court provided the following definition of assault:

An assault is an intentional touching or striking of another that is harmful or offensive.

CP 14.

In pertinent part, the WPIC instruction defining assault is as follows:

[An assault is an intentional [touching] [or] [striking] [or] [cutting] [or] [shooting] of another person[, *with unlawful force*,] that is harmful or offensive [regardless of whether any physical injury is done to the person]. [A [touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] [cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]

11 WAPRAC WPIC 35.50 (emphasis added).

The WPIC comment recommends that the phrase “with unlawful force” be included “if there is a claim of self defense or other lawful use of force.” Here, that phrase was not included and the failure to include that phrase, according to the defendant, is fatal. Such is not the case.

A jury instruction does not deprive a defendant of a fair trial if the instructions, when read as a whole, correctly state the applicable law, are not misleading, and allow each side to present their arguments. State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989), rev. denied, 114 Wn.2d 1022 (1990); State v. Miller, 60 Wn. App. 767, 776, 807 P.2d 893 (1991). When reviewing the propriety of the instructions, the challenged instructions must be considered in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The defendant contends that by omitting this one optional phrase, the jury could not be said to understand that it was the State's burden to disprove self-defense beyond a reasonable doubt. However, a "jury is presumed to read the court's instructions **as a whole**, in light of **all other instructions**. The jury is also to presume each instruction has meaning." State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999) (emphasis in original).

The jury here was specifically instructed that the use of force in self-defense "is lawful." CP 23. They were specifically instructed that self-defense is "a defense to a charge of Assault in the Second Degree." CP 23. And the jury was specifically instructed that "[t]he State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful." CP 23. They were then instructed that "[i]f 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 of Assault in the Second Degree." CP 23.

Taken as a whole, as the court must, and presuming that each instruction has meaning, the argument that the jury would not understand the burden of proof regarding self-defense is not supportable. In re Benn, 134 Wn.2d 868, 922, 952 P.2d 116 (1998)

(the court views the instructions in their entirety and will not parse out a single instruction to examine it in isolation).

This is the exact result reached by the Court of Appeals when this same appellate counsel raised this exact same issue in State v. Prado, 144 Wn. App. 227, 181 P.3d 901 (2008), a case not cited by the defendant. The Court held that the correct legal standard for self-defense "was made manifestly apparent to the average juror" through the WPIC self-defense jury instructions like the ones provided herein. Prado, 114 Wn. App. at 240 (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

5. DEFENSE OF PROPERTY.

Prior to trial, the defendant was specifically asked the nature of his defense, to which he agreed that it was general denial and self-defense. 1RP 21. At no time during the course of trial did the defendant make a claim of defense of property. This included when the court read to counsel, word for word, the self-defense instruction the court intended to provide to the jury. 6RP 55-56. The court did not include the paragraph dealing with defense of property. See CP 23.

After he was convicted as charged, in an attempt to get his conviction reversed, the defendant, for the very first time, claimed that he had also intended to raise a claim of defense of property and that despite the court reading the instruction to him, he did not realize the instruction did not contain the defense of property language. See CP 51-73. The court denied the defendant's motion for a new trial raising this claim. 7RP 9; 8RP 3; CP 31.

A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, rev. denied, 136 Wn.2d 1021 (1998). There is no right to an instruction that is not supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

One may use force in defense of property in limited situations. See RCW 9A.16.020. The WPIC self-defense instruction includes a paragraph on the defense of property. See WPIC 17.02. In pertinent part it provides that "[t]he use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent **a malicious trespass or other malicious interference** with real or personal property lawfully in that person's possession, and when the force is not more than is

necessary." WPIC 17.02 (emphasis added). Malicious means "an evil intent, wish, or design to vex, or injure another person." RCW 9A.04.110(12); WPIC 2.13.

Here, there was no evidence that the defendant assaulted Rasar to protect his property from a malicious trespass or malicious interference. State v. Vander Houwen, 163 Wn.2d 25, 35, 177 P.3d 93 (2008) (it is the defendant's burden to present sufficient evidence justifying the giving of an instruction). While the defendant (primarily through leading questions by his counsel) referred to protecting his "castle," it is clear from the testimony that his stated intent in his claim of defense was his fear of being struck by Rasar, not that Rasar was going to damage his property. The defendant's assertion that he intended to raise this defense is not well taken.

6. AGGRESSOR--DEFENSE OF SELF INSTRUCTION.

The court provided the jury with a familiarly-called "first-aggressor" instruction as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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 that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 25; see WPIC 16.04.

The defendant asserts that there was insufficient evidence for the court to give this instruction. The giving of a proposed instruction is within the discretion of the trial court and is reviewed for an abuse of discretion. In re Pouncy, 144 Wn. App. 609, 620, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382 (2010). An instruction is proper if evidence supports the theory upon which the instruction is based. State v. Allen, 116 Wn. App. 454, 465, 66 P.3d 653 (2003).

A first-aggressor instruction is appropriately given in cases wherein the defendant claims self-defense and there is evidence that the defendant's conduct or acts provoked or precipitated the incident for which self-defense is claimed. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999); State v. Douglas, 128 Wn. App. 555, 116 P.3d 1012 (2005). Words alone may not constitute sufficient provocation for the giving of an aggressor instruction. Riley, 137 Wn.2d at 911. However, the conduct that constitutes the provocation need not be the actual striking of a first blow. See State v. Hawkins, 89 Wash. 449, 154 P. 827 (1916) (Hawkins

angrily confronted his neighbor and two friends, accused them of injuring his hog, accused them of lying and then strode directly up to the victim precipitating the incident).

Here, based on the evidence, the jury could find that the defendant emerged from his house in an angry hostile manner, that he shut the door and rang the doorbell in front of Rasar in a condescending manner, and that when Rasar went to explain himself, the defendant confronted Rasar in a confrontational manner, approaching Rasar face-to-face, just inches apart. This action, the jury could find, provoked what the defendant claimed was Rasar's assault upon him. With these facts, the defendant has failed to show that the trial court abused its discretion in providing to the jury the first-aggressor instruction.

7. NO DUTY TO RETREAT.

In Washington, a person has no duty to retreat if they are assaulted in a place they have a lawful right to be. See State v. Avery, 101 Wn.2d 591, 682 P.2d 312 (1984). The WPIC instruction pertaining to this premise provides as follows:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to

stand his ground and defend against such attack by the use of lawful force.

WPIC 17.05.

Post-trial, the defendant claimed he proposed such an instruction. CP 51-73. The trial court did not give the above instruction. It is certainly arguable that one should have been given here as the defendant did have a lawful right to be in the place he was with no requirement that he retreat. See State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003); State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996). However, the defendant cannot show the failure to give such an instruction was prejudicial (see section below).

8. INEFFECTIVE ASSISTANCE OF COUNSEL.

To avoid any claims of waiver, the defendant asserts that his trial counsel was constitutionally ineffective for failing to properly object below and/or to propose certain instructions.⁴ To

⁴ In passing, the defendant also asserts that waiver issues are not present here because he made a motion for a new trial. This would not circumvent the waiver issues. Objections must be made in a timely manner so that the trial court can correct the alleged error. State v. Scott, 110 Wn.2d 682, 686-88, 757 P.2d 492 (1988); State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). Objecting to jury instructions after the fact does not give the trial court an opportunity to correct the alleged improper instructions and is not timely.

demonstrate ineffective assistance of counsel, the defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that without the deficient performance, the result of the trial probably would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, even if counsel was deficient for agreeing to the proposed instructions and/or not proposing other instructions, under the facts of this case, he cannot prove prejudice. Jury instructions are proper if they correctly state the law and if they allow each party to argue its case. State v. Brown, 132 Wn.2d 529, 605 P.2d 546 (1997). The jury instructions here--or absence thereof--did not prevent defense counsel from arguing his theory of the case. Further, defense counsel did not misstate the law to the jury. This is in contrast to State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009), cited by the defendant, wherein defense counsel argued to the jury in accord with jury instructions that misstated the law.

Importantly, this case is also factually different than Williams, supra, and Redmond, supra, two cases in which the court found prejudicial the failure to give a no duty to retreat instruction. In both

Williams and Redmond, the facts were relatively undisputed in regards to how the assault occurred and whether the defendant possessed the ability to retreat from a place he had a lawful right to be.

In Redmond, there was no dispute that Redmond had the right to be where he was--a school parking lot--and also that he had the ability to retreat, and that he punched the victim who had gotten out of a car.

In Williams, two Williams' brothers were involved in the murder of the victim. The situation involved the brothers allegedly trying to disarm the victim but with each brother indicating that the other brother inflicted the fatal blow, along with claiming any assault on the victim was done in self-defense. Relevant here, the fight that led to the victim's death occurred in a street so both brothers had the ability to retreat and lawful right to be where they were. Like the Redmond case, the nature of the assault was not in dispute.

Here, in contrast, the factual differences between what the victim said occurred and what the defendant said occurred shows that the failure to give a no duty to retreat instruction could not have been prejudicial. With Rasar testifying that the assault occurred at

his truck when he was attacked from behind and the defendant claiming that any assault--an unlawful touching--occurred on his porch, the jury was forced to make a credibility determination that was not dependent on whether the defendant had an ability to retreat or not. There was no evidence that the assault in the second degree--the shattering of Rasar's nose--occurred on the porch--the only location where any assault occurred that could be characterized as self-defense. Therefore, for the jury to have convicted, they necessarily found that the assault occurred as Rasar described, a version that does not implicate self-defense. Thus, any consideration of whether the defendant had no duty to retreat in "defending" himself was irrelevant.

9. THE DEFENDANT'S ABILITY TO OBJECT TO THE INSTRUCTIONS.

The defendant claims that the trial court erred in failing to provide a copy of the proposed instructions to defense counsel at the time objections were made and that this led to the errors listed above. While the defense may argue it would have been a better practice to have provided copies at an earlier time, the trial court went over each instruction by WPIC number and/or name with the

attorneys, read the self-defense instruction word for word on the record and then took exceptions. The court subsequently provided a copy of the instructions to counsel and asked counsel to review them. With no objections raised, the court then read the instructions to the jury--again with no objections raised.

In a perfect world, the court and the parties should follow the dictates of CrR 6.15 in regards to the dealing of instructions. In pertinent part, CrR 6.15 provides as follows:

(a) Proposed Instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

.....

(c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

CrR 6.15(a) and (c).

The State submitted jury instructions on July 13, 2010.

1RP 4. Defense counsel had their instructions prepared that same day but did not bring them to court. 1RP 23. Defense counsel provided instructions to the court near the conclusion of trial on July 21, 2010. 6RP 44-45. Having received instructions from both parties, the court then gave an "overview" of what the court was thinking in regards to what instructions to give--going through each instruction by name and/or WPIC number. 6RP 48-49. The court indicated that it was inclined to give the instructions as proposed by the State. Id.

The court then read the self-defense instruction on the record, word for word, with defense counsel stating that he was following along. 6RP 55-56. The court told the parties that it

needed an instruction on the definition of "necessary" and a "first-aggressor" instruction. 6RP 56. The court also directly informed counsel it was not inclined to give a "no duty to retreat" instruction. 6RP 56-58. Defense counsel indicated he had no objections to the instructions as proposed. 6RP 58. The court then recessed for lunch. 6RP 61.

After lunch, the parties were provided with a copy of the instructions and the court asked if each counsel had gone through them. 6RP 62. Defense counsel indicated that he had not gone through them yet. 6RP 62. The court instructed counsel to do so. 6RP 62. The jury was then brought in and the defense rested its case. 6RP 63. Subsequently, with no objections raised, the court then read the instructions to the jury. 6RP 64.

Was the letter of the court rule followed in this case--no, it seldom if ever is. But counsel had ample opportunity to propose instructions and object to instructions. Not following the letter of the rule here does not relieve the defendant of his burden to show waiver should not apply to his case.

10. MOTION FOR A NEW TRIAL.

The defendant claims the trial court erred in denying his motion for a new trial that raised these same issues. This claim should be rejected.

The granting or denial of a motion for a new trial is left to the sound discretion of the trial court and will be overturned only upon a showing of an abuse of discretion. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284 (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). For all of the reasons cited above, the trial court could have justifiably rejected the defendant's motion for a new trial. The defendant cannot prove that no reasonable judge would have so ruled.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 3 day of March, 2011.

Respectfully submitted,

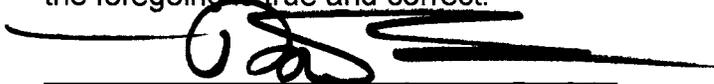
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King County Prosecuting Attorney

By: 
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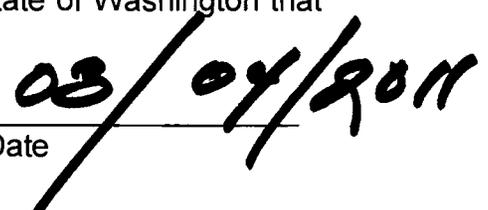
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Avenue, Suite 330, Seattle, WA 98121, containing a copy of the Brief of Respondent, in STATE V. MILLER, Cause No. 65864-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date