

No. 66067-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL ANTHONY MOORE,

Appellant.

RECEIVED
APPELLATE DIVISION
JAN 11 2011

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

D. STATEMENT OF THE CASE 2

E. ARGUMENT 4

MR. MOORE’S ATTORNEY RENDERED
CONSTITUTIONALLY DEFICIENT
REPRESENTATION WHEN HE FAILED TO SEEK A
JURY INSTRUCTION ON SELF-DEFENSE DESPITE
THERE BEING “SOME EVIDENCE” PRESENTED
TO ESTABLISH SELF-DEFENSE..... 4

1. Mr. Moore had the right to the effective assistance of
counsel..... 4

2. The trial court must instruct on self-defense where there
is some evidence supporting it. 6

3. There was some evidence in the record that Mr. Moore
acted in self-defense. 8

4. Mr. Moore suffered prejudice from counsel’s failure to
request a self-defense instruction..... 9

F. CONCLUSION 11

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 2, 4, 5

U.S. Const. amend. XIV 6

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22..... 4

Article I, section 3..... 6

FEDERAL CASES

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)..... 4

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)..... 5

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)..... 4

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 7

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)..... 5

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)..... 4

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)..... 6

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... 4, 5, 6, 9

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)..... 6

WASHINGTON CASES

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) 7

State v. Arth, 121 Wn.App. 205, 87 P. 3d 1206 (2004) 8

State v. Box, 109 Wn.2d 320, 745 P.2d 23 (1987)..... 7

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 7

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 9

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 7, 8, 9

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1998) 5

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 6

State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (1993)..... 7

State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003) 6

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) 7

A. SUMMARY OF ARGUMENT

Paul Moore and his girlfriend were in a heated argument when his girlfriend threw a large heavy flashlight at Mr. Moore. He responded by striking his girlfriend. Defense counsel did not ask the court to instruct the jury on the prosecution's burden of disproving self-defense as an essential element of second degree assault. Defense counsel's deficient performance relieved the prosecution of its burden of proving every element of the offense, when there was credible evidence that Mr. Moore acted in self-defense, and denied Mr. Moore his constitutionally rights to the effective assistance of counsel and a fair trial by jury.

B. ASSIGNMENTS OF ERROR

1. Mr. Moore's constitutionally protected right to counsel was infringed when his attorney failed to seek a jury instruction on self-defense.

2. Mr. Moore was denied his right to due process of law and fair trial by jury when his attorney waived the State's obligation to prove all essential elements of an offense beyond a reasonable doubt.

3. The trial court erred in denying Mr. Moore's motion for a new trial based upon counsel's failure to seek a self-defense jury instruction.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A defendant has a Sixth Amendment right to counsel and to the effective representation of counsel. Here, Mr. Moore's attorney waived the prosecution's obligation of disproving that he had not acted in self-defense by failing to request a self-defense instruction, even though there was credible evidence that he had acted in self-defense. A defendant is entitled to a new trial where he can establish his attorney performed deficiently and that he was prejudiced by the ineffective representation. Is Mr. Moore entitled to a new trial?

D. STATEMENT OF THE CASE

In the early morning hours of October 17, 2009, Danny Moore agreed to give a ride from North Seattle to his residence in Redmond, to Paul Moore and Paul's girlfriend, Tristan Morris.¹ 4/14/2010RP 78. Danny had met Paul and Ms. Morris the year before at the Torchlight Parade in Seattle. 4/14/2010RP 78. The

¹ Danny Moore and Paul Moore are not related. The two men will be differentiated in this brief by use of their first names.

three people made a stop first in the University District and arrived at Danny's residence at approximately 11 a.m. 4/14/2010RP 79-80.

Paul and Ms. Morris engaged in an escalating argument during the entire journey to Redmond. 4/14/2010RP 80. Ms. Morris was seated in the rear of Danny's van while Paul was seated in the front passenger seat. 4/14/2010RP 81. Ms. Morris attempted to get out of the van through the front passenger door, but Paul was in the way.² 4/134/2010RP 81. Ms. Morris took a flashlight, described as a "black, pretty heavy Boeing flashlight," and threw it at Paul. 4/14/2010RP 82. Paul turned and struck Ms. Morris in the face with his fist several times. 4/14/2010RP 82-83. The three then went into Danny's residence. 4/14/2010RP 86.

Paul was subsequently charged with one count of assault in the second degree.³ CP 40. The jury was not instructed on self-defense. Paul was convicted as charged. CP 43.

² Danny could not determine whether Paul's action was intentional or not. 4/14/2010RP 81.

³ Paul was also charged with assault in the fourth degree for a separate matter involving Ms. Morris. CP 41.

Paul moved for a new trial based on, among other reasons, the lack of a self-defense instruction. CP 45. Following a hearing, the trial court denied the motion. 8/26/2010RP 8-9.

E. ARGUMENT

MR. MOORE'S ATTORNEY RENDERED
CONSTITUTIONALLY DEFICIENT
REPRESENTATION WHEN HE FAILED TO SEEK A
JURY INSTRUCTION ON SELF-DEFENSE DESPITE
THERE BEING "SOME EVIDENCE" PRESENTED
TO ESTABLISH SELF-DEFENSE

1. Mr. Moore had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the

right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A criminal defendant can rebut the presumption of reasonable performance by

demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Whether counsel's actions constitute a “strategic choice,” “[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable). See also *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms” (quoting *Strickland*, 466 U.S. at 688)).

An attorney’s failure to pursue a defense may constitute deficient performance. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.2d 735 (2003) (failure to present diminished capacity defense).

2. The trial court must instruct on self-defense where there is some evidence supporting it. The due process clause of the Fourteenth Amendment requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). Self-defense is a “lawful act” that negates the *mens rea* of criminal intent. *State v. Box*, 109 Wn.2d 320, 328-29, 745 P.2d 23 (1987). When a defendant raises self-defense, the State bears the burden to disprove it. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. *Walden*, 131 Wn.2d at 473; *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). Evidence of self-defense does not need to come from the defendant’s testimony. In order to raise the issue of self-defense, “there need only be some evidence admitted in the case from whatever source” which tends to prove that the defendant acted in self-defense. *State v. Summers*, 120 Wn.2d 801, 819, 846 P.2d 490 (1993).

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all [that] the defendant knows and seeing all [that] the defendant sees.” *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This evaluation is both subjective and objective. *Walden*, 131 Wn.2d at 474. The subjective prong requires fact-finders to consider all the facts and

circumstances known to the defendant and the objective prong requires fact-finders to use this information to determine what a similarly situated reasonably prudent person would have done. *Walden*, 131 Wn.2d at 474.

Once the issue of self-defense is raised, “from whatever source,” the court should instruct the jury as to the elements and definition of self-defense, as well as the State’s burden of proving the absence of self-defense beyond a reasonable doubt. *McCullum*, 98 Wn.2d at 500.

3. There was some evidence in the record that Mr. Moore acted in self-defense. Mr. Moore’s attorney did not seek a self-defense instruction, which was neither a legitimate or reasonable decision. Self-defense was factually and legally available based on the evidence presented in the prosecution’s case-in-chief. A defendant need not testify to receive a self-defense instruction, and there could be no legitimate reason for relieving the prosecution of its burden of proving an additional element beyond a reasonable doubt.

The right to a self-defense instruction arises by examining the evidence in the light most favorable to the defendant. *State v. Arth*, 121 Wn.App. 205, 213, 87 P. 3d 1206 (2004).

Here, Ms. Morris and Paul were in a heated argument when Ms. Morris suddenly and without warning hurled a dangerous object at Paul, narrowly missing him. Paul immediately responded by striking Ms. Morris. Paul may have reasonably struck Ms. Morris to prevent further attempts by Ms. Morris to harm him.

Thus, the record contains some evidence of self-defense, “from whatever source.” Paul was entitled to an instruction requiring the prosecution to prove the absence of self-defense beyond a reasonable doubt. *McCullum*, 98 Wn.2d at 500.

Further, there can be no legitimate reason for defense counsel to have forgone the self-defense instructions to which his client was entitled in the interest of any reasonable strategy or tactical advantage. Self-defense increases the State’s burden of proof and could only benefit his client. There is no tactical reason for making it difficult for the defendant to be acquitted. *State v. Kylo*, 166 Wn.2d 856, 870, 215 P.3d 177 (2009).

4. Mr. Moore suffered prejudice from counsel's failure to request a self-defense instruction. In order to establish prejudice, Mr. Moore “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* The defendant is not required to establish his innocence or even demonstrate “that counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693.

A credible defense to Paul's actions based on some trial evidence was that he acted in justifiable self-defense. The jury could have appreciated Paul's precarious position, his subjective fear for further harm, and would have found his use of reasonable force justified.

Defense counsel's inexplicable failure to demand the prosecution be held to the higher burden of disproving self-defense let the jury to decide the case without even considering Paul's reasonable belief that he had no choice but to react with enough force to stop any further aggression. The failure to ask for self-defense instructions denied Paul his right to have the jury consider an essential element of the charged offense that, had the jury been properly instructed, would likely have led to a different result.

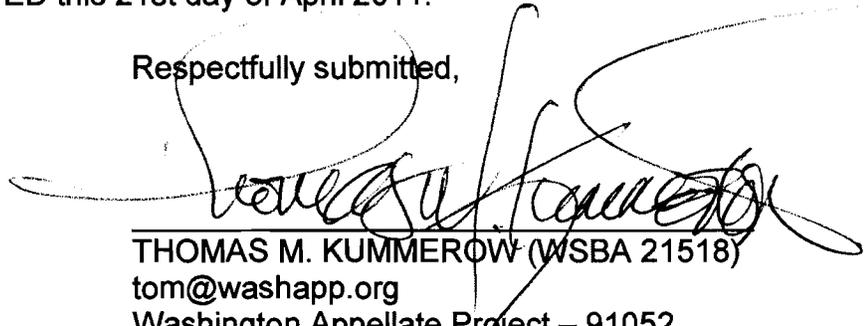
Paul is entitled to reversal of his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Moore requests this Court reverse his convictions and remand for a new trial.

DATED this 21st day of April 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and contact information.

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STATE OF WASHINGTON,)
)
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)
 v.)
)
 PAUL ANTHONY MOORE,)
)
 Appellant.)

NO. 66067-5-I

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