NO. 68814-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RONALD LEE GRAY, III,

Appellant.

RECEIVED COURT OF APPEALS DIVISION ONE SEP 05 2013

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

SUPPLEMENTAL BRIEF OF RESPONDENT

2013 SEP -5 PM 4:03

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

A. SUPPLEMENTAL ISSUE PRESENTED 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 2

GRAY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL 2

1. Gray Has Failed To Meet His Burden Of Proving That He Was Entitled To A Withdrawal Instruction 4

2. Counsel's Performance In Failing To Request A Withdrawal Instruction Was Not Deficient 7

3. Gray Was Not Prejudiced By His Attorney's Failure To Request A Withdrawal Instruction 9

D. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 3

Washington State:

State v. Ager, 128 Wn.2d 85,
904 P.2d 715 (1995) 4, 9

State v. Cienfuegos, 144 Wn.2d 222,
25 P.3d 1011 (2001) 11

State v. Craig, 82 Wn.2d 777,
514 P.2d 151 (1973) 5, 6, 7

State v. Dennison, 115 Wn.2d 609,
801 P.2d 193 (1990) 5, 6

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011) 3

State v. Griffith, 91 Wn.2d 572,
589 P.2d 799 (1979) 4, 11

State v. Hernandez, 53 Wn. App. 702,
770 P.2d 642 (1989) 3

State v. Jeffries, 105 Wn.2d 398,
717 P.2d 722 (1986) 3

State v. Johnston, 143 Wn. App. 1,
177 P.3d 1127 (2007) 4, 8

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991) 3

State v. Riley, 137 Wn.2d 904,
976 P.2d 624 (1999)....4, 7, 8

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987)....3

State v. Walden, 131 Wn.2d 469,
932 P.2d 1237 (1997)....4, 9, 11

State v. Wilson, 26 Wn.2d 468,
174 P.2d 553 (1946)....5, 12

Other Jurisdictions:

Bellcourt v. State, 390 N.W.2d 269
(Minn. 1986)....6

Statutes

Washington State:

RCW 9A.16.020....4

RCW 9A.16.050....4

Other Authorities

WPIC 16.02....8

WPIC 16.04....8

WPIC 17.02....8

A. SUPPLEMENTAL ISSUE PRESENTED

A defendant claiming ineffective assistance of counsel predicated on counsel's failure to request a jury instruction must show that he was entitled to the instruction, counsel was deficient in failing to request it, and he was prejudiced by the failure. Gray claims that his attorney should have requested an instruction on "revived self-defense," meaning that a first aggressor may nonetheless rely on self-defense if he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting from further aggressive action. Here, Gray was not entitled to such an instruction, because he never withdrew from the conflict. Rather, he continuously threatened Travers and his girlfriend. Moreover, counsel was not deficient in failing to request such an instruction, as there is no pattern instruction on the theory, and the cases discussing it relate to whether self-defense and first aggressor instructions should be given at all. Finally, Gray has not shown prejudice, because the evidence overwhelmingly demonstrated that he did not act in self-defense, and because his attorney was better able to argue his theory of the case without the instruction. Did Gray receive effective assistance of counsel?

B. STATEMENT OF THE CASE

The State incorporates by reference the Statement of the Case included in the initial Brief of Respondent.

C. ARGUMENT

GRAY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Gray argues that he was denied the effective assistance of counsel when his attorney failed to request that the jury be instructed as to the theory of "revived self-defense." Specifically, Gray contends that the jury should have been told that, even if he was a first aggressor, he could still be entitled to defend himself if he had withdrawn from the conflict. However, Gray was not entitled to such an instruction because the uncontested evidence demonstrated that he did not withdraw from the conflict to the extent that he abandoned his aggressive behavior and communicated that surrender to Travers.

A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his attorney's actions, such that the defendant was deprived of a fair hearing.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (adopting the Strickland standard in Washington). Counsel is deficient if his "representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991).

There is a strong presumption that counsel's representation was effective. Lord, 117 Wn.2d at 883. The presumption of effectiveness will only be overcome by a clear showing of ineffectiveness derived from the record as a whole. State v. Hernandez, 53 Wn. App. 702, 708, 770 P.2d 642 (1989). The defendant bears the heavy burden of proving both deficient performance and prejudice. State v. Grier, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

Where an ineffective assistance of counsel claim is predicated on the failure to request a jury instruction, the defendant must demonstrate that he was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that he was prejudiced by

the failure to request the instruction. State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). Gray is unable to meet this burden.

1. Gray Has Failed To Meet His Burden Of Proving That He Was Entitled To A Withdrawal Instruction.

Gray was not entitled to the jury instruction he complains his attorney should have sought. "A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence in the record." State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). Jury instructions are sufficient if they correctly and clearly state the applicable law and allow each party to argue his theory of the case. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A defendant is not entitled to an instruction for which there is no evidentiary support. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

In order to have the jury instructed on a theory of self-defense, a defendant bears the burden of producing some evidence that he subjectively and reasonably believed that he was in danger of imminent death or great personal injury, and that the force used was not more than necessary. RCW 9A.16.020(3), .050; Riley, 137 Wn.2d at 909; State v. Walden, 131 Wn.2d 469, 473-75, 932 P.2d 1237 (1997). If such evidence

is produced, a first-aggressor instruction may also be appropriate. "It is settled law that one who was the aggressor or who provoked the altercation . . . cannot successfully invoke the right of self-defense to justify or excuse the homicide, unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." State v. Wilson, 26 Wn.2d 468, 480-81, 174 P.2d 553 (1946); see also State v. Craig, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973); State v. Dennison, 115 Wn.2d 609, 617-18, 801 P.2d 193 (1990).

Here, Gray did not produce any evidence that he withdrew from the conflict with Travers "in such a manner as to have clearly apprised his adversary that he in good faith was desisting . . . from further aggressive action." Wilson, 26 Wn.2d at 480-81. To the contrary, the undisputed evidence was that, although Gray backed a short distance away from Travers, he continued to threaten him and his girlfriend. Specifically, Gray made a gesture as if he had a gun, 3RP 16-17, 61-62; 4RP 117, threatened to kill Travers, 3RP 71-73, 78-81; 4RP 146, and threatened to kill Williams, calling her a "whore." 3RP 18-19, 70-71; 4RP 117, 146. He did so constantly, even though Travers had also backed away, and he turned around and faced Travers and Williams as he yelled at them.

3RP 59-61; 4RP 147, 162-63. While Travers followed Gray, trying to get him and his friends to leave the neighborhood, Gray never stopped threatening to murder and rape Travers and Williams. 4RP 164-65; 5RP 6-7, 12-13. There was no break in Gray's aggression towards Travers and Williams between the first punch Gray threw and the moment when Gray repeatedly stabbed Travers, even if there was a break in the fisticuffs. 4RP 151-52.

In short, Gray never clearly desisted from aggressive action; rather, he "engaged in conduct which gave the victim good cause to believe that he was threatened with bodily harm. He did not abandon his threatening behavior or give the [victim] any reason to believe he was no longer in danger." Craig, 82 Wn.2d at 784; see also Dennison, 115 Wn.2d at 618 (holding that a burglary defendant was not entitled to a self-defense instruction where the defendant did not drop his gun or tell the victim he was surrendering); Bellcourt v. State, 390 N.W.2d 269, 272 (Minn. 1986) (holding that, before a right to self-defense may be revived, a first aggressor "must clearly manifest a good-faith intention to withdraw from the affray and must remove any just apprehension of fear the original victim may be experiencing") (cited in Dennison, 115 Wn.2d at 617-18). Thus, because there was no evidence in the record whatsoever that Gray

withdrew from the conflict, had counsel requested an instruction regarding withdrawal, it would have been denied.

2. Counsel's Performance In Failing To Request A Withdrawal Instruction Was Not Deficient.

Gray has failed to demonstrate that his counsel's performance was deficient in failing to request a withdrawal instruction. First, as discussed above, such an instruction would not have been appropriate under the facts of this case, as Gray adduced no evidence that he withdrew from the conflict and communicated that withdrawal to Travers so that he would have reason to believe he was no longer in danger.

Second, the cases cited by Gray do not stand for the proposition that an instruction on withdrawal should be given to the jury. Rather, Craig and Riley address the question of whether a self-defense or first aggressor instruction should have been given in the first instance. In Craig, the Supreme Court affirmed the trial court's refusal to give a self-defense instruction, because the evidence was clear that the defendant was the first aggressor and had not unequivocally withdrawn from the combat. Craig, 82 Wn.2d at 783-84. In Riley, the Supreme Court concluded that there was adequate evidence in the record to support the giving of a first aggressor instruction. Riley, 137 Wn.2d at 909-10. In

neither case did the defendant seek, or the Supreme Court approve, instructing a jury on the theory of withdrawal. These cases should be read—as defense counsel, the prosecutor, and the trial court here read them—as providing guidance as to when instructions regarding self-defense and first aggressor are appropriate.[1] 5RP 47-55.

Third, although there are pattern jury instructions regarding self-defense and first aggressor, WPIC 16.02, 16.04, 17.02, there is no such instruction regarding the theory of withdrawal advocated here. Gray has not pointed to any case that recommends or approves such an instruction. In the absence of such guidance, it cannot be said that Gray has met his heavy burden of overcoming the presumption of effective representation. Indeed, he has failed even to articulate here specifically what instruction he believes ought to have been given. Compare State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127, 1138 (2007) ("[Defendant] fails to identify any specific jury instruction that should have been proposed by trial counsel. Because [defendant] has not identified what jury instructions should have been proposed, he cannot show that he was entitled to that instruction or that trial counsel was ineffective for not seeking the instruction."). Counsel's performance in failing to request a

[1] Although Gray's trial brief is not in the record, it is clear that counsel was familiar with Riley, as the court mentioned it by name and citation in referring to defense counsel's argument, and defense counsel himself discussed it as well. 5RP 49-55.

withdrawal instruction—in the absence of either facts to warrant it or clear law to support it—was not deficient.

3. Gray Was Not Prejudiced By His Attorney's Failure To Request A Withdrawal Instruction.

Not only has Gray failed to prove deficient performance, but he has failed to demonstrate prejudice. Again, as discussed above, there was inadequate evidence in the record to support the giving of such an instruction; indeed, there was none.

Additionally, Gray's jury should not have been instructed on the theory of self-defense at all, because he failed to adduce sufficient evidence to put the issue before the jury. Where defenses requiring proof of multiple elements are raised, there must be some evidentiary support for each element before an instruction on the defense is properly given. Ager, 128 Wn.2d at 95. As discussed above, self-defense requires proof that the defendant subjectively believed he was at risk of imminent death or great personal injury, that that belief was objectively reasonable, and that the force used was not more than necessary. Walden, 131 Wn.2d at 473-75. Gray failed to adduce adequate evidence on any of these three elements, let alone all of them.

Specifically, Gray failed to show that he subjectively believed that he was in imminent danger of death or great bodily injury. He did not testify in his own defense. 5RP 27-28. In speaking to the police after the incident, Gray never stated that he was afraid; rather, he denied being present, denied having a knife, and denied stabbing anyone, even when confronted with video evidence that he had stabbed Travers. 3RP 97, 108-09, 117; 4RP 52-51. And, by standing up and immediately attempting to re-engage Travers after he was thrown to the ground, Gray demonstrated that he was unafraid. 4RP 117, 146.

Similarly, Gray adduced no evidence that a reasonable person in his position would have feared death or great bodily harm. The uncontested evidence was that Gray was accompanied by two friends at the time of his confrontation with Travers. 5RP 14-15. When Gray punched Travers in the face, Travers limited his response to a single punch and bare-footed kick before walking away and telling Gray to leave. 4RP 116, 137, 143-45. When Travers approached Gray after hearing a further barrage of threats and insults accompanied by a gesture as if reaching for or drawing a gun, he merely grabbed his shoulders; Travers did not punch, kick, or threaten him. 3RP 20-21, 32-33; 4RP 147-48, 152; 15RP 14-15. There was nothing to suggest Travers was armed. Indeed, he was wearing only a bathing suit and tank top. 4RP 116-17, 145.

As with the elements of subjective fear and objective reasonableness of that fear, there was no evidence that Gray's act of stabbing an unarmed man four times in the gut was a reasonable use of force. Although Gray knew that Travers was capable of knocking him to the ground, at the time of the stabbing Travers was only gripping his shoulders. He had not threatened or assaulted him, and did not do so while being stabbed repeatedly. Where all that is reasonably apprehended is a simple battery, there is no right to repel a threatened assault by using a deadly weapon. Walden, 131 Wn.2d at 475; State v. Griffith, 91 Wn.2d 572, 576-77, 589 P.2d 799 (1979). Gray's use of force was excessive as a matter of law, and no self-defense instruction should have been given. Griffith, 91 Wn.2d at 576-77.

In short, there was inadequate evidence in the record for Gray to avail himself of self-defense in the first instance. Given that, a failure to completely define that defense in the jury instructions could not be prejudicial to Gray.

Finally, Gray was not prejudiced by the failure of his attorney to request a withdrawal instruction because, taken as a whole, the instructions that were given still enabled him to argue his theory of the case. Compare State v. Cienfuegos, 144 Wn.2d 222, 230, 25 P.3d 1011 (2001) (holding that, even without the diminished capacity instruction that

should have been given, there was no prejudice because defense counsel was able to argue his theory of the case). In closing, Gray argued that he acted in self-defense. 5RP 105-09. In discussing the first aggressor instruction, counsel said:

> Now, the State would like you to take that [self-defense] away from him by calling him—saying he is the first aggressor, so first aggressor as to what? When does it end? Let's say you find that Mr. Gray is—that he's an aggressive guy and he caused the fight in front of Travers' house. Is that the first aggression? Are you going to go back five minutes? Ten minutes? An hour? You won't get any instructions to give you that answer; that is for the jury to decide.

5RP 107. In other words, counsel was arguing that, while Gray may have been the first aggressor during what he called the first fight, Travers was the first aggressor in what he called the second fight. The jury instructions as given allowed him to argue this theory of the case. Indeed, if a Wilson-style withdrawal instruction had been given, counsel's argument would have been foreclosed. Instead, the jury would have known that Gray remained the first aggressor until "at such a time and in such a manner [he] clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." Wilson, 26 Wn.2d at 480-81. Thus, Gray was better able to argue his case without the more demanding instruction.

Because the withdrawal instruction could not have been given even had counsel requested it, because Gray did not even meet the criteria for the giving of a self-defense instruction, and because counsel was better able to argue the defense theory of the case on the instructions given, Gray was not prejudiced. His ineffective assistance of counsel claim must be rejected.

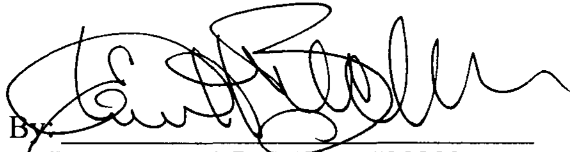
D. CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in the Brief of Respondent, this Court should affirm Gray's conviction for Attempted Murder in the First Degree.

DATED this 5th day of September, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: ___
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Jennifer L. Dobson, at P.O. Box 15980, Seattle, WA 98115-0980, and to Dana M. Nelson, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, the attorneys for the appellant, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. RONALD LEE GRAY, III, Cause No. 68814-6-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.

Dated this 5th day of September, 2013

UBrame
Name
Done in Seattle, Washington