

NO. 68814-6-1

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

REC'D
AUG 28 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RONALD GRAY,

Appellant.

2013 AUG 28 PM 4:19
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

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

The Honorable Leroy McCullough, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel when defense counsel failed to request a revived self-defense instruction (revival instruction).

Supplemental Issue Pertaining to Supplemental Assignment of Error

Defense counsel requested a self-defense instruction, which was given. In response, the State requested a first aggressor instruction, which was also given. Even after acting as the first aggressor, however, a person may again claim self-defense if the person withdraws from combat. The vehicle to raise this type of argument is a revival instruction. Yet, defense counsel failed to request a revival instruction despite the fact such an instruction was warranted by the evidence and did not conflict with other defense theories. Was appellant denied effective assistance of counsel?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On August 7, 2011, around 10:30 p.m., Gray and his friends moved through an Auburn neighborhood while being verbally disruptive. 2RP 41, 83; 4RP 113. At that time, LeRoy Travers and his girlfriend Coral Williams were returning from a rafting trip and unloading the car. 4RP 112. Travers told Gray to leave. 4RP 113.

A physical confrontation ensued with Travers punching Gray to his knees and then kicking him down to the ground. 4RP 114-16, 159. Travers claimed Gray hit him first. 4RP 144.

Travers and Gray began to separate, but both continued to yell aggressively toward one another. 3RP 17, 38, 41, 42, 79. At this point, Gray walked away and was not a physical threat to Travers. 3RP 64. Eventually, when Gray was approximately 120 feet away, he said something that provoked Travers (i.e. "I am going to kill your whore" or "I am going to rape your wife"). 3RP 18, 69, 71; 4RP 117. Travers – whose adrenaline was pumping – came running across the street and grabbed Gray's shoulders. 3RP 20, 42-43, 58; 4RP 146, 164; 5RP 6. While holding Travers off, Gray stabbed Travers several times. 3RP 72, 89-90.

At trial, defense counsel asked that the jury be given a self-defense instruction. 5RP 21-22. The trial court agreed. 5RP 24. In response, the State asked for a first-aggressor instruction. Defense counsel objected, arguing that after the fist-fight, Gray had retreated and Travers chased him down after Gray provoked Travers verbally. 5RP 47-49, 52. The trial court granted the State's request to give the first-aggressor instruction. 5RP 54-55. Defense counsel did not ask for a revival instruction to counter the

first-aggressor instruction. 5RP 55.

During closing argument, defense counsel asserted that Travers instigated and dominated the fist-fight, beating Gray to the ground and kicking him. 5RP 97, 99, 100. Defense counsel also briefly suggested, even if Gray had thrown the first punch, it did not matter because the fist-fight constituted a separate altercation from the stabbing incident. RP 97-98.

Defense counsel pointed out, after the fist-fight, Gray had collected himself and moved 120 feet away before the stabbing altercation. 5RP 96, 99, 10, 106, 109-110. While Gray and Travers were still engaged in a shouting match across the distance, defense counsel explained these words alone were not enough to provoke Travers to come rushing across the 120 feet Gray had retreated and create in Gray reasonable fear of the requisite degree of injury. 5RP 99, 108.

Defense counsel asserted that once Gray had retreated and Travers rushed across the 120-foot gap to start a new physical altercation, Gray was lawfully permitted to stab Travers in order to defend himself from another brutal beating. 5RP 105-06.

C. SUPPLEMENTAL ARGUMENT

GRAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST A REVIVAL INSTRUCTION.

Because the trial court instructed the jury that the first aggressor is not entitled to assert self-defense, Gray received ineffective assistance of counsel when his counsel failed to request an additional jury instruction explaining that withdrawing from the altercation revives the right to self-defense.

A defendant has a Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "This right exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684.

A defendant demonstrates ineffective assistance of counsel by proving: (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Id., at 687; State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88.

Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An attorney's failure to propose a legally adequate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Based on this record, it was objectively unreasonable for counsel to fail to request a revival instruction. The theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the conflict. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Thus, even after acting as the first aggressor, a person may again claim self-defense if the person withdraws from combat. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Here, once defense counsel lost the argument against giving the first aggressor instruction, there was no tactical reason not to

request the revival instruction. If the jury believed the State's theory that Gray was the first aggressor based on his throwing the first punch, the first aggressor instruction trumped Gray's straight self-defense theory regarding the stabbing incident. Hence, it was objectively unreasonable for defense counsel not to seek the necessary instructions and specifically raise a revived self-defense theory. Only then would the jury have had the full opportunity to apply Gray's self-defense theory even if it believed Gray started the fist-fight but had withdrawn before the stabbing altercation.

There was no tactical advantage to not having the jury instructed as to the law of revived self-defense. Counsel for Gray had addressed the possibility Gray might be the first aggressor, but then argued to the jury that Gray had retreated 120 feet before Travers angrily rushed at him. 5RP 97-98. Counsel used that fact to show that Gray did not act with premeditation, that he acted in self-defense, and that he was not the first aggressor. 5RP 96-111. There was no legitimate or tactical reason, however, why counsel could not have effectively argued both a straight self-defense theory and a revived self-defense theory. Yet, without the revival instruction, the jury was unable to assess the case under a revived self-defense theory. Consequently, counsel was deficient in not

requesting an instruction consistent with such a revived self-defense theory.

Counsel's deficient performance resulted in prejudice. Given this record, if the defense had requested a revived self-defense instruction, the trial court's failure to offer the instruction would have been an abuse of discretion because the facts supported the instruction.

The facts, if believed by the jury, support the theory that Gray had withdrawn when he abandoned the fist-fight and physically retreated 120 feet away from Travers. 3RP 16-17, 20, 42, 64. One neighbor reported Gray was no longer a physical threat to Travers. 3RP 64. Indeed, the video recording supports the theory that the fist-fight had ended prior to the stabbing incident, showing Travers coming from some distance away to re-engage with Gray. 5RP 9.

Also, the facts, if believed by the jury, support Gray's claim that he acted in self-defense after he withdrew from the fist-fight. Travers had already gotten the best of Gray in the fist-fight. 4RP 128-29, 159. Even after Gray moved away and was no longer a physical threat, witnesses said Travers ran full speed and grabbed Gray's shoulders. 3RP 20, 42-43, 58; 4RP 146, 164; 5RP 6.

Based on this record, the giving of a revival instruction would have been required.

Given the facts stated above, had the jury been properly instructed, it may have concluded Gray had withdrawn and that his right to self-defense had been revived, preventing his convictions. Consequently, the deficiency of counsel prejudiced Gray.

For the reasons stated above, this Court should find defense counsel's failure to request a revived self-defense instruction denied Gray effective assistance of counsel and requires reversal of Gray's conviction

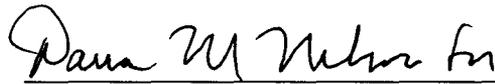
D. CONCLUSION

For the reasons stated above, this Court should reverse Gray's convictions.

DATED this 28th day of August, 2013.

Respectfully submitted,

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RONALD GRAY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD GRAY
DOC NO. 345750
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF APRIL, 2013.

X Patrick Mayovsky

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COURT OF APPEALS
STATE OF WASHINGTON