71948-3

COA NO. 71948-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PENEUETA,

Appellant.

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

The Honorable William Downing, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT'S UNSUPPORTED FIRST AGGRESSOR INSTRUCTION REQUIRES REVERSAL.

a. The court erred in giving the aggressor instruction because the assault itself cannot form the evidentiary basis for that instruction and there is otherwise no evidence of an act of first aggression.

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." State v. Riley, 137 Wn.2d 904, 912, 976 P.2d 624 (1999). In keeping with that principal, the State recognizes the provoking act cannot be the actual assault. Brief of Respondent (BOR) at 18; see State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, 951, review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990); State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

The aggressor doctrine is inapplicable in that circumstance because the claim of self-defense attaches to the assaultive act itself. Where the accused commits no aggressive act prior to the act done in self-defense, there is nothing for the victim to lawfully respond to and the aggressor

doctrine is not triggered. An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Riley, 137 Wn.2d at 909-10.

Thus, the aggressor instruction is unjustified when the defendant's only interaction with the victim was the assault that is claimed to have occurred in self-defense. See Wasson, 54 Wn. App. at 159. In Wasson, the eventual victim Reed tried to break up a fight between Wasson and another man by attacking the other man and then coming toward Wasson. Id. at 157-58. Wasson yelled at Reed to stop and shot him when he did not do so. Id. In holding that the aggressor instruction was unwarranted, the court noted, "Mr. Wasson never initiated any act toward Mr. Reed until the final assault." Id. at 159.

Merely bringing a firearm to a situation where a conflict is likely does not turn a person into an aggressor under the law. See Brower, 43 Wn. App. at 902. The incident in Brower began when Brower pursued a woman to Olympia because he feared she was stealing the vehicle he loaned her. Id. at 895. He and his companion both brought firearms for protection. Id. at 896. Once there, Brower's companion argued with the woman's friend Martin, who followed them down the stairs as they left. Id. On the stairs, Brower thought he saw a knife in Martin's hand, so he

turned suddenly, stuck his revolver in Martin's stomach, and told him to go back inside. Id. Even though Brower sought out this high-conflict situation and brought his firearm, the court held the evidence was insufficient to justify an aggressor instruction because Brower did not display the weapon before the assault. Id. at 902. "If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself." Id.

As in Brower, Peneueta's only aggressive act was the assault itself. That sole aggressive act cannot support an aggressor instruction.

Trying to distinguish Brower, the State argues each act of firing the gun could support a charge of second degree assault. BOR at 21. It is unclear what the State hopes to squeeze from that notion, but each act of firing the gun could not support a separate charge.

Assault is a course of conduct crime. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984-85, 329 P.3d 78 (2014). Peneueta could not have been convicted of multiple counts of assault against the same victim for each shot because the assaultive acts occurred in the same location over a short period of time, there were no intervening events, and there was no evidence to suggest different intent or motivation for these actions or that he had time to reconsider his actions. Villanueva-Gonzalez, 180 Wn.2d at 985-86. Peneueta was not even entitled to a unanimity instruction on the

issue of which act of shooting constituted the assault because the multiple shots were part of a continuous course of conduct.[1]

Peneueta fired multiple shots in a span of three seconds. Ex. 13 (camera view four at 10:49:18-20). The first shot constituted an assault. Whether justified or unjustified, the assaultive act cannot be used as the basis for an aggressor instruction because the assault itself cannot be the provocative act. Bea, 162 Wn. App. at 577; Kidd, 57 Wn. App. at 100; Wasson, 54 Wn. App. at 159; Brower, 43 Wn. App. at 902. The immediately ensuing shots also constituted part of the ongoing assault, and so they cannot be used as the basis for an aggressor instruction either. The State's attempt to break up Peneueta's continuous conduct into distinct acts fails.

In considering the aggressor instruction standard, the important thing is that there is no evidence that Peneueta fired a shot, which provoked the other side into drawing a gun, which in turn caused Peneueta

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[1] State v. Thompson, 169 Wn. App. 436, 475, 290 P.3d 996 (2012) (no unanimity instruction is required where the evidence indicates a continuing course of conduct), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013); State v. Stockmyer, 83 Wn. App. 77, 87-88, 920 P.2d 1201 (1996) (no unanimity instruction required where assaults took place in a "matter of seconds" and were continuous course of conduct); State v. Howard, 182 Wn. App. 91, 103, 328 P.3d 969 (2014) (no unanimity instruction required where two attempts to kill occurred in an unbroken sequence of events, at the same home, and using the same weapon).

to fire more shots. The evidence does not support that chronology of events.

Riley shows the type of provoking conduct that could have occurred (but did not) in this situation. Riley claimed self-defense after a gang-related confrontation that began when Riley insulted Gustavo Jaramillo. Riley, 137 Wn.2d at 906. Jaramillo then threatened to shoot Riley, but did not draw his gun. Id. It was undisputed Riley was the first to draw a weapon. Id. at 907. He pointed his gun at Jaramillo and demanded Jaramillo hand over his gun. Id. at 906. Riley testified Jaramillo was reaching for his gun when Riley shot him. Id. at 906-07. The Court held Riley engaged in provoking conduct when he drew his gun and pointed it at Jaramillo while demanding Jaramillo's gun. Id. at 909. Riley is a case where the defendant escalated an altercation by drawing his gun and, when the victim reacted to that provocative act, claimed to have fired in self-defense. Id.

Riley is not this case. Unlike Riley, there is no evidence that Peneueta drew his gun, thereby provoking the victim (or a cohort) to reach for or pull his own gun, and then fired his gun in response.

The State attempts to artificially chop up Peneueta's fluid course of conduct into distinct acts to conclude that Peneueta engaged in a provocative act before he committed the assaults by shooting his gun. The State thus suggests Peneueta's acts of venturing into Rainier Avenue,

yelling his gang affiliation and drawing his gun were distinguished from the actual assault. BOR at 21.

Those things happened in such rapid succession that it is impossible to distinguish them as aggressive acts separate from the shooting itself. They occurred in a fluid manner, with one happening right on top of the next. 4RP 26-30; 5RP 23, 25-27; Ex. 13. Under that circumstance, it makes little sense to treat those actions as separate from one another in the provocation context.

First, the evidence does not show any meaningful distinction between drawing the gun and firing it. The evidence does not show a break in time between the two actions. 3RP 46, 54; 4RP 25-30; 5RP 25-27; Ex. 13 (camera view four at 10:49:18-20). There is no evidence that someone reacted to the threat of force between the time Peneueta drew the gun and fired it. There is no evidence that Peneueta first drew his weapon, provoked a rival gang member to point a gun at him, and then fired his gun.

Neither "Rico" Flight,[2] Massey, nor anyone in the Black Mercedes testified at trial. So we have no testimony from them that Peneueta's act of walking into the street and yelling his gang affiliation provoked anyone

[2] Amrico ("Rico") Flight's last name is transcribed as "Flite" in the verbatim report of proceedings, but is spelled "Flight" in the information. CP 13.

into responding with their own threat of force. Would anyone be legally justified in pointing a gun or shooting at Peneueta in response to him venturing into the street and yelling his gang affiliation? The State cites no case that suggests walking into the street and uttering a gang affiliation qualifies as a provocative act under the first aggressor standard.

This is why the State heavily relies on the notion that Peneueta drew his gun before anyone else did. BOR at 14, 19-20. But there is no affirmative evidence to show that he did.

The State conflates who fired a gun first with who pulled a gun first. There was conflicting evidence on who shot first. 3RP 71-72; 4RP 30-31; 5RP 26-27, 39, 42. Strutynski, the driver of the gold Lexus, believed Peneueta shot first. 4RP 30-31. But Strutynski did not testify as to who pulled a gun first. She saw Peneueta with a gun in his outreached hand. 4RP 28. She also remembered "an arm outside the window" of the Mercedes holding a gun, but not the motion of bringing the gun out. 4RP 30.

The video shows Peneueta running across the street with his arm raised immediately after shots rang out. Ex. 13 (camera view four at 10:49:15-20). The video does not show Peneueta drawing the gun.

Perkins testified that "Rico" Flight pointed a gun first, at which point Peneueta drew his gun and fired. 5RP 26-27, 39. In a statement to

police, Peneueta said "the Mercedes was the one that pulled the gun." 3RP 71.

No one else testified or gave a statement as to who pulled a gun or when. Contrary to the State's suggestion, Perkins made no prior statement that Peneueta pulled his gun first. 5RP 29-30. Perkins ultimately ended up saying "I don't know" whether Flight *shot* his gun (5RP 42), but did not waffle on the issue that Flight pointed his gun first. 5RP 26-27, 39.

Whether Peneueta pulled his gun before another did is speculation. And speculation is not enough to support an aggressor instruction. An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Riley, 137 Wn.2d at 909-10. Under that standard, the aggressor instruction would be justified if evidence showed Peneueta pulled his gun first, which provoked the other side into drawing a gun, which in turn caused Peneueta to shoot. But the evidence, looked at in the light most favorable to the State, does not support that chain of events. The aggressor instruction should not have been given.

b. The State cannot prove the error is harmless beyond a reasonable doubt.

The State's harmless error argument is flawed. The State argues no reasonable juror could have found Peneueta responded reasonably with lawful force. BOR at 23. In support, it points to Strutynski's testimony that Peneueta fired the first shot. BOR at 23-24. From this, it claims Peneueta fired his gun before the person in the Mercedes drew his weapon. BOR at 24. But as argued above, Strutynski's testimony does not actually show Peneueta fired his gun before the person in the Mercedes pointed his gun.

The State also contends traffic moved freely on Rainier based on Strutynski's testimony and the video, whereas Perkins testified that Flight stopped his vehicle before pointing his gun at them. BOR at 24. The video captures only a limited area and does not rule out the possibility that Flight did stop his car. Ex. 13 (camera view four at 10:48:50 to 10:49:20). Strutynski did not remember anything about the gray Crown Victoria that Flight drove. 4RP 34-35. Regardless, whether the car stopped or continued moving slowly does not negate Perkins's testimony that Flight pointed the gun first.

A rational jury could have believed that Peneueta was justified in shooting his gun in self-defense. The State cannot prove the error in giving the aggressor instruction is harmless beyond a reasonable doubt.

B. CONCLUSION

For the reasons given above and in the opening brief, Peneueta requests that this Court reverse the assault convictions.

DATED this 11th day of March 2015

Respectfully Submitted,

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	)	
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 11TH DAY OF MARCH, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL PENEUETA
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2015.

X Patrick Mayovsky