69841-9

FILED
September 14, 2015
Court of Appeals
Division I
State of Washington

NO. 69841-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JUSTICE,

Appellant.

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

The Honorable Barbra L. Linde, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

MULTIPLE ERRORS RELATING TO THE AGGRESSOR INSTRUCTION REQUIRE REVERSAL OF JUSTICE'S CONVICTIONS.

In his opening brief, appellant Michael Justice argued the court erred in giving the aggressor instruction because there was no evidence of a provocative act apart from the assault itself. The court also erred in giving the aggressor instruction because it was incomplete and failed to inform jurors "words alone" are insufficient to defeat a self-defense claim. Because defense counsel did not request clarifying language about "words alone" being insufficient provocation, Justice argued he received ineffective assistance of counsel. Finally, Justice argued prosecutorial misconduct deprived him of his right to a fair trial, because the prosecutor invited jurors to rely on the assault itself as the provocative act depriving Justice of his right to act in self-defense – which is clearly not the law.

In response, the state argues the aggressor instruction was supported by what it characterizes as the defense theory of the case. The state further argues that the incompleteness of the instruction was not preserved for review. Regarding ineffective assistance of counsel, the state claims Justice cannot establish prejudice. Finally, the state argues the prosecutor did not misstate

the law because under the alleged defense theory, Justice's "initial shot was not the assault itself." Brief of Respondent (BOR) at 19. These arguments should be rejected because they don't make sense and violate principles of judicial estoppel.

(i) The Aggressor Instruction Was Unsupported.

It is well settled "The provoking act cannot be the actual assault." State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 951, review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011). In an attempt to get around this well settled law, the state argues the instruction was supported by what it characterizes as the defense theory of the case:

> Justice claimed at trial that, while he admittedly fired the first shot, he aimed it at the ground and had no intention of injuring Ed Roy. This was arguably a provocative act and, under Justice's theory of the defense, it was not the assault itself.

BOR at 19.

Earlier in its brief, when relating Justice's testimony, the state supposed:

> Justice insisted that he only fired once.[18]
>
> [18] Presumably, Justice was referring to the number of shots he fired from his initial position at the driveway into the parking lot, on the south side of the street. Once Justice ran down the alley to the north, he and

> Roy were exchanging shots. RP 413-14, 1906; Ex. 12.

BOR at 14.

Thus, the state seems to be suggesting that Justice's theory of the case was that the alleged shots from the alley constituted the charged assaultive conduct, not the shot Justice admittedly fired from the south side of the street depicted on the video. From this, the state argues the initial shot could qualify as the belligerent act entitling the state to an aggressor instruction. This makes no sense.

First of all, the state is the party who brought the charge. Justice does not get to pick the act the state relies on for the charged assaultive conduct – which, as discussed infra, clearly was not the alleged shots from the alley.

Second, the state mischaracterizes the defense theory. The theory was that Justice fired one shot into the grass and ran away. RP 1797, 1927, 2070. Justice did not act with intent to inflict great bodily harm and there was therefore no assault. Alternatively, he had the right to defend himself when he fired the initial shot because Roy was reaching for his gun. RP 2072-84. But Justice

never admitted or agreed that he fired shots from the alley. RP 1797, 1927.

Although there were shell casings found in the alley, the state presented no ballistics evidence. RP 478-482, 1304-05. And although the video shows Justice turn around a couple times while heading north up the alley, it's not clear he fired any shots, because there is no visible recoil, as there was with that initial shot. Ex 1.

But the main problem with the state's argument is that it is not how it charged or prosecuted the case. That the assault charged and prosecuted was the initial shot could not be any clearer from the state's closing argument and the fact that it relied on the transferred intent from that initial shot as the basis for the assaults on the Tonge-Seymours:

> Instruction number 20 – number 20 also pertains to any claim of self-defense as to the assault in the first degree, and I invite you to go over this instruction carefully as well, because it says if the defendant created a necessity, if he created the necessity for acting in self-defense or the defense of another, then it's not self-defense. If he provoked the incident, then it's not self-defense. And that's what we have here. Mr. Justice cannot claim self-defense here because he is the one who created the situation that everyone on that street was subjected to when he decided to fire his gun.

. . . Now, transferred intent, everyone on the stand and Mr. Hancock and I would both agree that the defendant was not intending to hit Shelley Tonge-Seymour or her daughter Emma on that particular day, but what the law does is it protect – protects innocent people who are otherwise caught in the crosshairs of someone like Mr. Justice should he have struck them. This instruction says that accident is not a defense. If he had accidentally hit them or accidentally assaulted them by making them think that they were about to be struck by bullets, that is not a defense.

Because of this instruction regarding transferred intent, the defendant acted with the intent to assault Edward Roy. Another person is assaulted as a result, Shelly and Emma. Then under the law the defendant is deemed to have had the same intent towards Shelly and Emma that he did towards Edward Roy, who we can all agree was his intended target. . . .

Now, aside from transferred intent, I anticipate Mr. Hancock, due to the way his client testified on the stand, will talk to you about the fact that his client, although he fired a gun in Ed Roy's direction, did not have the intent to cause great bodily harm to Edward Roy.

But what other intent could there be when someone fires a gun in another person's direction? It's not as if Mr. Justice fired the gun in the air. The trajectory and the fact that not only Ed Roy but Emma and – and Shelly knew that bullets were whizzing past them – so did Elissa Rosenberg – demonstrates that the defendant was shooting in Ed Roy's direction.

And if you're going to pull the trigger on a gun and point it in someone's direction, what other intent could you have? And if you need some additional evidence of the defendant's intent, watch the four minutes preceding when he pulled the trigger and ask yourself how the defendant was feeling towards Ed Roy when he pulled the trigger of that gun . . . .

RP 2014-2017. Clearly, there can be no transferred intent for an assault on the Tonge-Seymours from the shots allegedly fired from the alley, as they were already out of harm's way. The state made no argument whatsoever that the assault on Roy was based on the alleged shots from the alley. The state should not be able to argue something different on appeal.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006) (citing Cunningham v. Reliable Concrete Pumping, 126 Wn. App. 222, 108 P.3d 147 (2005)). The doctrine is concerned with inconsistent assertions of fact and applies "if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." CHD, Inc. v. Taggart, 153 Wn. App. 94, 102, 220 P.3d 229 (2009); Johnson v. Si-Cor Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001). It preserves respect for judicial proceedings, and seeks to avoid inconsistency, duplicity, and waste of time. In re Estates of Smaldino, 151 Wn. App. 356, 363, 212 P.3d 579 (2009), review denied, 168 Wn.2d 1033, 230 P.3d 1061 (2010).

Courts focus on three core factors when deciding whether to apply judicial estoppel:

> "(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (internal quotation marks omitted) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 529, 538-539, 192 P.3d 352 (2008)).

All three core factors are present in Justice's case. First, the state's position on appeal that Justice's testimony about shooting into the grass constituted the provocative act justifying the aggressor instruction is clearly contrary to its assertion below that the initial shot was the assault, as depicted on the video and by the trajectory of the bullet. It is contrary to the state's argument below that the initial shot also constituted an assault against the Tonge-Seymours, based on transferred intent. Finally, it is contrary to the state's assertion below that Justice could not claim self-defense because "he is the one who created the situation that everyone on

that street was subjected to when he decided to fire his gun." RP 2015 (emphasis added).

Second, judicial acceptance of the state's inconsistent position in this proceeding would create the perception this Court was misled. While this Court may affirm on alternate grounds, acceptance of the state's position here would completely ignore how the case was actually prosecuted and argued to the jury.

Third, permitting the state to assert an inconsistent position and change the facts at this stage would provide an unfair advantage for the prosecution and create an unfair detriment to the defense. The state relied on the charged assault as the provoking act defeating Justice's self-defense claim. That is how the case was argued to the jury. To allow the state now to say that the jury could have relied on Justice's act of firing in the grass – which the state argued below was contrary to the video – as the provocative act and could have convicted based on the alleged shots from the alley would be to create a legal fiction. Fairness demands that this Court judge the errors on appeal against the backdrop of what actually happened at trial.

Allowing the State to change the facts at this stage of the game undermines respect for the judicial process. It also

encourages inconsistency, duplicity, and waste of time. This Court should reject the state's argument that Justice's testimony he shot in the grass justified the giving of the aggressor instruction.

Alternatively, the state argues the aggressor instruction was appropriate because the jury could reasonably determine Justice provoked the fight, and because Justice made the first move by drawing his weapon. BOR at 22-23 (citing State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008)). These alternate arguments should be rejected as well.

The state argues a jury could determine from watching the video that Justice provoked the fight – "the video shows Justice shouting and gesturing at Roy (Ex 1 File 13 at 10:40:09-10:40:13), and then shooting twice before Roy shoots back." BOR at 22. But again, however, the state cannot rely on the assault as the provoking act. What is left of the state's argument is that Justice provoked the fight by shouting and gesturing at Roy. BOR at 22. This is not sufficient, however, because "words alone" do not give rise to a reasonable apprehension of bodily harm. Riley, 137 Wn.2d at 909-11.

Thus, the question becomes whether Justice's words, combined with his gestures to someone at the other end of the

block give rise to a reasonable apprehension of harm. The answer is no. In support of its argument to the contrary, the state relies on approximately five seconds of video in which Justice's appears to raise his arms two or three times.[1] It happens very quickly. And immediately afterward, Justice is calmly walking with his hand in his pocket up until the time of the shooting when he is just standing in the street. And importantly, Roy was all the way down the block at this point. RP 1105. Roy testified that when he started walking back, Justice was gesturing as if "trying to signal for me to come down that way," which hardly sounds like an act reasonably likely to provoke a belligerent response. RP 1110-11. Accordingly, Justice's "words alone" and gesticulation did not justify the giving of the aggressor instruction.

Next, the state claims the aggressor instruction was proper because Justice made the first move by drawing his weapon. Again, however, this was the assault, as charged and prosecuted in this case. It cannot also be the provocative act justifying the aggressor instruction. In the cases where the drawing of a weapon supported

[1] Justice disputes the state's characterization of the video showing Justice "gesticulating wildly" and "cumulating in Justice lifting up his shirt," although it does appear Justice briefly lifts up his arms and touches the bottom of his shirt. See BOR at 23: Ex 1.

giving the aggressor instruction, the assault occurred later, not at the time the weapon was drawn. See e.g. Riley, 137 Wn.2d at 908-09.

Finally, the state argues it had the right to counter Justice's defense by arguing that:

> [T]he first shot, even if fired into the ground (and thus not the actual assault), was nevertheless an intentional act reasonably likely to provoke a belligerent response, thus creating the necessity for Justice to act in self-defense by firing at Roy. Under this scenario, Justice was the first aggressor, and was not entitled to claim self-defense.

BOR at 24.

The problem with this theory is that it amounts to revisionist history. The state made no such argument. Rather, it argued the video did not support Justice's theory, and the first shot was the assault – not only of Roy, but of the Tonge-Seymours. The state's argument on appeal is disingenuous. In short, the evidence did not support the court's aggressor instruction.

(ii) The Court's Giving of the Incomplete Aggressor Instruction Was Manifest Constitutional Error.

The court's giving of the aggressor instruction without clarifying language that "words alone" do not defeat a self-defense claim was manifest constitutional error that may be raised for the first time on appeal. To meet RAP 2.5(a) and raise an error for the first

time on appeal, an appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial. State v. O Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010).

As our Supreme Court held in Riley:

> [W]ords alone do not constitute sufficient provocation. Therefore, the giving of an aggressor instruction where words alone are the asserted provocation is error. A "victim" faced with only words is not entitled to respond with force. As a leading treatise explains, the reason one generally cannot claim self-defense when one is an aggressor is because "the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense." 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 657–58 (1986) (footnotes omitted). If words alone, and in particular insulting words alone, could justify the "victim" in using force in response and preclude the speaker from self-defense, principles of self-defense would be distorted. The right of self-defense would be rendered essentially meaningless because even if the "victim" responded with deadly force, the speaker could not lawfully defend with force and would instead be faced with the risk of suffering injury or a criminal conviction. In addition, such a rule would effectively permit violence by a "victim" of mere words, contrary to the underpinnings of the initial aggressor doctrine. As noted, the 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. For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. However, mere words alone do not give rise to reasonable apprehension of great bodily harm. If applied in a case like this one, a rule that words alone preclude the

> speaker from claiming self-defense could lead to the conclusion that insults about gang affiliation justify a violent response.

State v. Riley, 137 Wash. 2d at 910-12.

An improper aggressor instruction is prejudicial because it guts a self-defense claim. State v. Bower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). Under the circumstances here, the giving of an *incomplete* aggressor instruction gutted Justice's self-defense claim. That Justice was yelling was the one fact upon which all witnesses agreed. BOA at 12-22 (describing witness testimony). In fact, one witness testified Justice's words were so offensive they were likely to lead to escalation. RP 794. With no admonition that "words alone" do not deprive someone of their right to act in self-defense, it is likely jurors relied on the undisputed testimony describing Justice's profane insults to find he was the initial aggressor.

The error in the instruction is constitutional because it impacted Justice's ability to present a defense. The error actually affected Justice's rights at trial because it allowed jurors to discount his defense based on an incorrect understanding of the law.

Assuming arguendo, the Court does not find the error preserved, it should still reach the merits of the issue because Justice was prejudiced by his counsel's deficient performance in

failing to request clarifying language in the instruction. BOA at 34-37.

(iii) Justice Was Prejudiced by His Counsel's Deficient Performance.

The state claims Justice's attorney may have made a tactical decision not the ask for clarifying language "words alone" do not defeat a self defense claim:

> Counsel here could reasonably have decided that calling the jury's attention once more to Justice's profanity-laced tirade directed at Roy would be counter-productive. Justice has not established deficient performance.

BOR at 31. The state is mistaken.

Considering that no one disputed Justice was mouthing off and yelling profane insults – including Justice himself – there was no legitimate tactical reason not to instruct jurors they could not rely on such language to find Justice was the aggressor. The risk was too high. Moreover, there would be no need to repeat the exact words Justice used. Accordingly, there was nothing to be gained by remaining silent. Reasonably competent counsel would have requested clarifying language. See e.g. State v. Bogie, 125 Vt. 414, 416-17, 217 A.2d 51 (1996) (jury properly instructed "mere words" are insufficient provocation to be first aggressor).

The state also claims Justice cannot establish prejudice, because the state never argued words alone could make Justice the aggressor. But the problem is the instructions left open the possibility that jurors would in fact discount Justice's defense based on words alone.

Finally, the state argues Justice can't show prejudice because "the video showed much more than 'mere words' – it depicted Justice's aggressive gestures, and showed him firing the first shots." BOR at 31. As argued in the preceding section, however, the video showed Justice raise his arms a few times, well before the shooting and when Roy was at the other end of the block. Moreover, Roy took Justice's gestures as a signal to come back, not as a threat. RP 1110-11. In any event, Justice was merely standing on the street at the time of the shooting, when Roy started approaching him.

Accordingly, the state is left to rely on the shooting itself as the provocative act. And it may well be that the jury did in fact rely on that act, as directed by the prosecutor, which is also error.

In short, there was a very real possibility jurors relied on Justice's words (if the did not rely on the shooting itself) to reject Justice's self-defense claim. Counsel's failure to ask for clarifying language in the aggressor instruction prejudiced Justice.

(iv) The Prosecutor Misstated the Law in Closing Argument

As indicated, the prosecutor argued Justice was not entitled to act in self-defense because "he is the one who created the situation that everyone on that street was subjected to when he decided to fire his gun." RP 2014-15. This was a misstatement of the law depriving Justice of his right to a fair trial, because the intentional act reasonably likely to provoke a belligerent response must be an act separate from the charged assaultive conduct. BOA at 37-40.

In response, the state again argues the alleged defense theory of the case supported the prosecutor's use of the initial shot as the provoking act:

> This argument ignores his own theory of defense. While the incontrovertible evidence from the video forced Justice to admit he fired the first shot, he denied any intent to hit Roy with that shot. RP 1797-98. Justice instead claimed that he "put the bullet in the only place that I thought was safe to put it. In the grass."
>
> The prosecutor was permitted to counter this argument by pointing out that, even under this scenario, Justice could not claim self-defense. By deciding to fire that first shot, Justice provoked the gunfight that ensued. And under Justice's version of events – that the first shot was not fired at Roy and was not intended to hit him – that first shot did not constitute an assault. The argument was thus a proper response to Justice's theory of the case.

BOR at 34.

The state's argument should be rejected. As indicated above, it is the exact opposite of what the state argued below. The state relied on the first shot as the charged assaultive conduct. It was also the act relied upon by the state to support the assault charges against the Tonge-Seymours, based on transferred intent. Thus, it cannot also be the act reasonably likely to provoke a belligerent response.

The prosecutor committed misconduct in closing argument. Although there was no objection, the misstatement resulted in an enduring prejudice incurable by a curative instruction in the same fashion as in State v. Walker, 164 Wn. App. 724, 736 n.7, 265 P.3d 191 (2011).

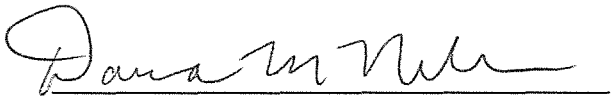
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Justice's convictions. Because the state concedes an Arizona conviction was wrongly included in Justice's offender score, this Court alternatively should remand for resentencing.

Dated this 14th day of September, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

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Respondent,	)	
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v.	)	COA NO. 69841-9-I
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MICHAEL JUSTICE,	)	
	)	
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 14TH DAY OF SEPTEMBER, 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 JUSTICE
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191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF SEPTEMBER, 2015.

X Patrick Mayovsky