73217-0

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Court of Appeals
Division I
State of Washington

NO. 73217-0-I

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

STATE OF WASHINGTON,

Respondent / Cross-Appellant,

v.

DAWN SULLIVAN,

Appellant / Cross-Respondent.

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

The Honorable Carol A. Schapira, Judge

REPLY BRIEF OF APPELLANT & CROSS-RESPONDENT

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1. SULLIVAN'S PROPOSED MULTIPLE ASSAILANTS INSTRUCTION CORRECTLY STATED THE LAW, DID NOT COMMENT ON THE EVIDENCE, AND WAS NECESSARY TO ARGUE SULLIVAN'S SELF DEFENSE THEORY

This court has recognized that it is in the "realm of common experience" that the amount of force reasonably necessary to repel an attack increases when more than one person attacks. State v. Irons, 101 Wn. App. 544, 558, 4 P.3d 174 (2000). Sullivan proposed an instruction that recited this correct and commonsense statement of the law so that she could fully and cogently argue her theory of the case: because both Bohannon and Cissell attacked her, it was reasonably necessary for her to use an increased level of force to defend herself. CP 75. Without this instruction, the remaining self defense instructions were ambiguous because "they did not make it manifestly clear to the jury that it could consider the fact that [Sullivan] was faced with multiple assailants." Irons, 101 Wn. App. at 552; Br. of Appellant at 27-30; see also State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (holding that jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror'") (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)).

The use-of-force instruction stated it was lawful to use force "upon or toward the person of another." CP 41. This instruction contemplates only one attacker, using the singular "person of another." Cf. Irons, 101 Wn. App. at 552. Thus, it was not made manifestly clear to jurors that they could consider the reasonableness of Sullivan's use of force against two attackers rather than against Bohannon alone given that Bohannon was the only "person of another" against whom Sullivan ultimately used any force. Br. of Appellant at 29-30. Because the instructions on lawful use of force did not make manifestly clear that Sullivan was lawfully permitted to use an increased amount of force because two people attacked her, reversal is required.

The State posits Sullivan's proposed instruction was a comment on the evidence because it "suggested the court's attitude toward the amount of force that could reasonably be used in the case, and inaccurately conveyed that the proposition is a matter of law . . . ." Br. of Resp't at 31-32. The State is incorrect. The instruction merely clarified that the jury could take into account that Sullivan faced the physical attacks of two men instead of one in considering her self defense claim. The instruction did not quantify the amount of force reasonably necessary; nor did it express an "attitude" about this quantum of force. The jury was still free to consider whether the amount of force Sullivan used to repel both her attackers was reasonably

necessary. "The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury." State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976). The instruction here conveyed no feelings about the value of Sullivan's testimony, but provided only the legally correct statement that the lawful amount of force increases when force is used to repel multiple persons. Sullivan's proposed Irons instruction was not a comment on the evidence.

The State also contends Sullivan's proposed instruction was superfluous because the other self defense instructions did not suggest "the jurors are limited to consideration of the acts of the eventual victim in determining whether the force used by the defendant was lawful." Br. of Resp't at 34. This argument ignores that the jury was only instructed to consider the reasonableness of the force used upon or toward "the person" of another. As discussed, this limited the jury's consideration of reasonable use of force against Bohannon's attack alone rather than against Bohannon's attack *combined with* Cessill's. See Irons, 101 Wn. App. at 552. The trial court's failure to give the Irons instruction deprived Sullivan of a full and fair opportunity to argue that her use of force to counter the simultaneous attacks of Bohannon and Cissell together was reasonable and lawful.

The State's argument also overlooks that an Irons instruction is a correct statement of the law. A defense attorney "should not have to convince the jury what the law is." State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984); Br. of Appellant at 30-31. As the Irons court recognized, without a multiple assailants instruction, Sullivan was left with the burden of overcoming the inconsistency between the self defense instructions as written and her theory that she was in imminent danger from multiple assailants. 101 Wn. App. at 559; Br. of Appellant at 30-31. The multiple assailants instruction was necessary to Sullivan's theory of the case, not superfluous. The trial court's failure to give this instruction requires reversal.

At the end of its argument on this issue, the State also posits that Sullivan invited the error because she proposed the standard use-of-force instruction. Br. of Resp't at 34 (citing CP 41, 75; RP 492-93). But Sullivan did not just propose the standard use-of-force instruction; she proposed that instruction in conjunction with the Irons multiple assailants instruction, contending that only the instructions in combination would fairly allow her to argue her theory of the case. CP 41, 75; RP 485-86. That Sullivan proposed one instruction that was given does not mean that Sullivan somehow invited error as to another proposed instruction that was denied. The State's invited error argument makes no sense and should be rejected.

2. THE PROSECUTION'S FLAGRANT AND ILL INTENTIONED ARGUMENT THAT SULLIVAN WAS FEIGNING SEXUAL ASSAULT AND THEREFORE WAS NOT CREDIBLE WARRANTS REVERSAL

The State contends that its deputy's closing argument that Sullivan was not credible because she feigned fear of sexual assault was proper because it was reasonably inferred from the evidence. Br. of Resp't at 38-42. But Sullivan never once stated she feared sexual assault and the "inferences" the State draws are not reasonable. The prosecutor's flagrant and ill intentioned argument that jurors should not believe Sullivan because she was crying rape requires reversal.

The State first asserts that it was reasonable to infer Sullivan feared sexual assault because "Sullivan had testified that about two weeks prior to this incident, she woke up after a night of drinking with Bohannon and Bohannon told her that they had had sex." Br. of Resp't at 38. According to the State, "[t]his testimony certainly suggested that Bohannon had taken advantage of Sullivan when she was unable to resist." Br. of Resp't at 38.

It is unremarkable that people make sexual decisions while drunk that they would not necessarily make while sober, and that some of these drunken sexual decisions might later cause regret or embarrassment. This was Sullivan's precise testimony: "I wouldn't have made a decision to have had an intimate anything if I would have been sober and in my right state. I

was drunk and obviously made a bad decision that I regretted. It wasn't an issue. I just pretended it didn't happen. I was embarrassed." RP 435. Sullivan never remotely indicated that having sex with Bohannon was nonconsensual, that Bohannon "had taken advantage of [her] when she was unable to resist," or that she had been assaulted, sexually or otherwise, in any way. Br. of Resp't at 38. On the contrary, although Sullivan "wasn't happy about" having had sex with Bohannon, Sullivan took responsibility for her own actions, calling it a "bad decision that [she] regretted." RP 399, 435. Further, Sullivan stated this sexual encounter was "not an issue" and she preferred to pretend as though it never happened. RP 399, 435. Sullivan's testimony did not support a reasonable inference that Bohannon sexually assaulted her or that she feared Bohannon sexually assaulted her or would sexually assault her in the future. The State's argument lacks merit.

The State next argues that Sullivan's description of Bohannon and Cissell attacking her gave rise to a reasonable inference of attempted rape. Br. of Resp't at 38-40. The State also asserts defense counsel acquiesced to this inference in her closing. Br. of Resp't at 40-42. But Sullivan and defense counsel repeatedly stated Sullivan was terrified that two men were grabbing, restraining, and hurting her, and that she feared physical injury. RP 413-15, 426, 445, 448, 569-71. Neither Sullivan nor her attorney ever indicated or even hinted that Sullivan was afraid Bohannon and Cissell were

going to sexually assault her rather than just continue to physically assault her. When asked what she was "terrified [Bohannon and Cissell] might do to" her, Sullivan responded, "I just knew that I was getting hurt. That's -- that's all. And I was scared and people were putting their hands on my body and holding me against my will for no reason." RP 415. This testimony did not give rise to a reasonable inference that Sullivan feared sexual assault.

The State also points out that Sullivan repeatedly expressed fear about "'what's going to come next,'" "'how much more are they going to hurt me,'" and "'If they're doing this there's worse to come.'" Br. of Resp't at 39-40 (quoting RP 460, 465). But this testimony does not support a specific inference of sexual assault; it merely supports Sullivan's fear of an escalation of the physical, nonsexual assault she was already experiencing. Just because Sullivan expressed fear and trepidation that Bohannon and Cissell might have intensified their attacks had she not managed to squirm away does not give rise to an automatic inference that her fear and trepidation was based on being sexually assaulted.

What the State appears to be requesting here is a rule that anytime a biologic male physically assaults a biologic female, it is automatically reasonable to draw an inference of attempted rape and argue this inference however it best fits into the State's theory of the case. But not all physical assaults are attempted sexual assaults, nor can they be inferred to be such

simply based on the biologic sexes of those involved. Were it otherwise, where would the State's ability to argue inferences irrespective of the actual evidence end? Would an inference of sexual assault automatically arise in the event two lesbians attacked another woman? Would the inference of fear of sexual assault arise when two men attacked a gay man, or when two gay men attacked another man, or attacked a woman? Without some specific facts in the record to support claims of feared sexual assault, the prosecution cannot reasonably or realistically make such inferences. Sullivan's testimony cannot be fairly construed to support the State's inference that she falsely accused Bohannon and Cissell of attempting to sexually assault her.

Because credibility was essential in this case, the State elected to impugn Sullivan's version of events by attributing to her the repugnancy of falsely reporting rape. This argument was flagrant and ill intentioned because it was designed to appeal to the passions and prejudices of the jury and had no basis in the record. The prosecutorial misconduct deprived Sullivan of a fair trial. This court should reverse.

B. ARGUMENT OF CROSS-RESPONDENT

THIS COURT SHOULD EXAMINE THE STATUTORY SCHEME TO DETERMINE IF TOTAL CONFINEMENT IS THE ONLY MANNER THAT SULLIVAN'S SENTENCE CAN BE SERVED, AS THE TRIAL COURT REQUESTED

Sullivan acknowledges that courts have held that a deadly weapon enhancement imposed under RCW 9.94A.533 is to be served in total confinement. E.g., State v. Fuller, 89 Wn. App. 136, 142, 947 P.3d 1281 (1997). Sullivan also acknowledges the Washington Supreme Court's recent decision in State v. Medina, 180 Wn.2d 282, 288-92, 324 P.3d 682 (2014), which held, for the purposes of calculating credit for time served, (1) King County Community Center for Alternative Programs (CCAP) does not qualify as total or partial confinement under the Sentencing Reform Act of 1981, chapter 9.94A RCW, and (2) defendants are not entitled to presentence credit for time served in CCAP.

The trial court imposed an exceptional sentence of zero months for Sullivan's second degree assault based on RCW 9.94A.535(1)(a), which provides a mitigating circumstance in failed self defense cases where "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." CP 98, 111-14; RP 619-20. Pursuant to the jury's finding, the trial court also imposed a required 12-month deadly weapon enhancement. CP 98; RP 620. The court credited Sullivan's CCAP

time against her 12-month weapon enhancement and ordered her remaining weapon enhancement time to be served in CCAP. CP 98; RP 620-21.

The trial court indicated it had discretion to impose an alternative sentence in the form of a CCAP-based deadly weapon enhancement, relying on RCW 9.94A.680, the former version of which was discussed at length in Medina, 180 Wn.2d at 289-92. RP 620. RCW 9.94A.680 states,

> Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:
>
> (1) One day of partial confinement may be substituted for one day of total confinement;
>
> (2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and
>
> (3) For offenders convicted of nonviolent and nonsex offenses, the court may credit time served by the offender before the sentencing in an available county supervised community option and may authorize county jails to convert jail confinement to an available county supervised community option, may authorize the time spent in the community option to be reduced by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

> For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

The trial court acknowledged the uncertainty with regard to its sentence and thus expressly asked the Court of Appeals to determine the extent of its discretion:

> The Court will impose the 12 month[deadly weapon enhancement]. I'm required to do that. I'm imposing no time on the underlying charge. I am imposing the 12 months and I will give her credit for the 12 months of the enhanced CCAP. Until the Medina case, they thought that that was considered credit. A 12-month sentence is not technically a prison sentence. 12 months is still a jail sentence as opposed to 12 months and a day. So I think the Court does have some discretion where this is concerned.
>
> But, again, the Court of Appeals will have a chance to take a careful look at the statute and determine when -- if the -- if the sentence is precisely 12 months, which is what I'm ordering, whether the enhanced CCAP is sufficient or whether, again, total confinement is the only way that such a sentence can be served.
>
> So, I am continuing to give Ms. Sullivan some uncertainty, but I will hope that she can continue to make progress herself. I think that's, of course, the best in terms of making for herself, safety in the community obviously conserves resources, poses the best alternative to the community that she remain connected with her mental health services. It sounds like she has housing at the current time, but she may be able to get stable housing of her own, which is good.

RP 620-21.

Sullivan asks this court to address the trial court's concerns and, assuming this case falls outside Medina, affirm the sentence imposed. The trial court clearly felt it was unjust to sentence Sullivan to a 12-month prison term and believed it would better benefit Sullivan, her health, and the larger community to keep Sullivan in CCAP programming. In addition, there is an inherent inconsistency in imposing a 12-month prison term while at the same time imposing no prison term for the underlying offense because the victim was "[t]o a significant degree . . . an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). Since it concluded Bohannon was partially to blame for the assault incident, the trial court imposed a non-prison alternative sentence because it determined such a sentence best served the interests of fairness and justice. And, given that Medina did not address the precise circumstances at issue in this case, the trial court asked this court to carefully look at the pertinent statutes and determine the extent of its discretion. Thus, at the trial court's express request, this court should address whether there is any alternative to a total confinement prison term in Sullivan's circumstances.

C. CONCLUSION

This court should reverse Sullivan's second degree assault conviction and remand for a fair trial.

DATED this 6th day of April, 2016.

Respectfully submitted,

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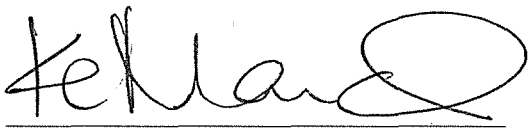

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