

65029-7

65029-7

NO. 65029-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAY DEE MILLER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the jury properly instructed on the elements for first degree assault and the elements for the lesser included offense of second degree assault?

2. Was the jury properly instructed that the State had to prove beyond a reasonable doubt that the defendant intended to inflict great bodily harm on the victim to return a guilty verdict on the charge of first degree assault?

3. Was the jury properly instructed regarding self-defense?

4. Was the jury properly instructed when self-defense was given separately and not included in the "to convict" instruction?

II. STATEMENT OF THE CASE

Defendant, Jay Dee Miller, was charged by information with first degree assault, pursuant to RCW 9A.36.011(1)(a), and that he was armed with a firearm at the time of the commission of the crime, pursuant to RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602. CP 71-72.

Spring Kopp introduced Miller and James Engle in July or August 2009, approximately one month prior to the assault. Kopp

and Engle needed a place to stay and Miller allowed Kopp and Engle to stay at his house in Everett, WA. Kopp and Engle usually slept in a trailer on the property, but also spent time in the house; there was no water and no bathroom in the trailer. Engle did not pay rent. Engle told Miller that he had spent time in prison. Miller and Engle got along well. Miller gave Engle some work to do helping with Miller's landscaping business. RP 70-73; 112; 183; 244-247; 303.

On August 6, 2009, not long after Kopp and Engle arrived at Miller's place, Engle got into a fight near the Wal-Mart store in Everett. Miller joined in the fight helping Engle. RP 248-251; 351-353.

Around the 11th of August, 2009, Engle was arrested on a warrant and spent 15 days in jail. After he got out of jail, Engle contacted Miller on August 28, 2009. Miller gave Engle a hug and \$50 he owed him. Miller again let Kopp and Engle stay at his house. Engle told Miller that he had found a place to stay and would be moving on September 3, 2009. RP 74; 78-79; 111; 116-117; 245; 184; 303-305.

Around the 1st of September, 2009, Kopp and Engle had a fight and broke up. Kopp left and Miller said that he wanted

everyone out of the house. Miller told Engle to sleep in the trailer and that he did not want Engle to come back in the house again. RP 78; 301; 306.

The night of September 1st, Engle stayed in the trailer and Miller took down the thirty marijuana plants he was growing in the house. The next morning, September 2nd, Engle got up and without putting on a shirt or shoes went to Miller's house to use the bathroom. The doors were locked. Engle banged on the front door and back sliding door and yelled, "Open the god-dam door." Miller opened the door and Engle entered saying he had to use the bathroom. Miller told Engle not to use the front door because the neighbors have cameras and are watching his house. Miller told Engle that he did not want him in the house anymore. Miller went to his bedroom and put a handgun in his pocket because he was afraid Engle might hurt him. When Engle was leaving Miller told him, "You don't have anything else in the house. I don't want you back in the house again." RP 80-82; 125-126; 184-185; 194; 269; 272-275.

According to Engle, Miller locked the slider door when Engle left the house. Miller was mad because Engle was there and he had work to do and did not want Engle in the house. Engle went

back to the trailer and about fifteen minutes later returned to the house to get his laundry and see if he could take a shower. Miller opened the slider door and said, "I told you I don't want you in the house." Engle replied, "I have to get my stuff." Miller said, "You don't have anything in here." Engle replied, "You don't have to be an asshole." Miller said, "Go to McDonalds and take a shower" and slammed the door shut. Engle walked back towards the trailer pushing things out of his way. Miller opened the door and said, "Come on." RP 82-84; 129-130; 157.

According to Miller, as Engle was leaving Miller said, "Get the fuck out of my house." Engle replied, "I need to get my shirt." Miller said, "Too bad," because he had all ready told him to get everything out of the house. Engle came back in the house and pushed Miller. Miller said, "I didn't take it as anything serious. It's nothing that I would pull a gun over." Miller told Detective Zeka that he did not feel threatened. Miller shoved Engle back and Engle pushes Miller again. Miller slipped and fell down and Engle pushed him under the counter. Miller put his hand in his pocket and Engle said, "What are you going to do shoot me?" Miller replied, "I just want you to leave and never come back." Engle stormed out of the house and slammed the door. Engle started throwing things

around the yard. Miller opened the door and said, "If you don't knock it off I'm going to call the cops." Engle replied, "If you call the cops on me, I'll break your head." RP 186-189; 220; 275-281.

According to Engle, after Miller opened the door and said, "Come on" Engle walked a couple of feet in to the house, heard Miller close the door and say, "Now you're dead fucker." Engle heard a shot and was hit in the back of the head. Engle grabbed his head and turned around and saw Miller aiming the gun at him. Engle raised his shoulder and heard the second shot. The second shot struck Engle in the arm and the side of his head. Engle opened the sliding door and ran across the street for help. Engle said that he did not threaten or strike Miller prior to the shooting. RP 86-91; 102; 131-132; 159.

According to Miller, after Engle threatened to break his head if he called the cops, Engle came back in to the house. Miller told Officer Parker that he told Engle to come back inside. Miller backed-up to the couch and pulled out the gun, cocked the hammer, closed his eyes and fired. Miller told Officer Parker that he pointed the gun at Engle's head and fired. Miller said his intent was to scare Engle out of the house. Miller said, "I was sure that he was going to do me bodily harm." After the first shot Miller

focused on Engle, who was now crouched down and looking around. Engle looked back at Miller, stood up, said, "You cock sucker, you mother-fucker." Miller saw the bullet hole in the wall. Engle took a step towards Miller. Miller cocked the hammer and fired again at Engle's head. Miller has a fair amount of shooting experience. Miller said that when he pointed the gun at Engle he intended to shoot him in the head. After the second shot Engle ran out the sliding door. RP 158-160; 188-193; 282-287; 320-321; 332.

Dr. Paul Kim, Providence Hospital emergency physician, testified regarding Engle's injuries from the incident. Engle had two superficial wounds and two gunshot wounds to the back of his head. One of the superficial wounds was caused by a bullet grazing Engle's shoulder. The other superficial wound was a similar grazing to the right side of Engle's head. The two wounds to the back of Engle's head were a through-and-through bullet wound, caused when a single bullet enters causing one wound and exits causing the other wound. RP 222-227.

The jury found Miller guilty of first degree assault with a special verdict that Miller was armed with a firearm. CP 29, 56. Miller was sentenced to 180 months; 120 months on the assault, and 60 months enhancement on the firearm. CP 7-17.

III. ARGUMENT

1. **The Court's Jury Instructions Accurately Defined The Elements Of The Crime Of First Degree Assault.**

Jury instructions as a whole must provide an accurate statement of the law and must allow each party to argue its theory of the case to the extent supported by the evidence. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction are reviewed *de novo*. In re Hegney, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007).

To convict Miller of first degree assault, the jury was instructed that they had to find that Miller intended to inflict great bodily harm when he assaulted Engle with a firearm or by force or means likely to produce great bodily harm or death. Jury instruction 8 reads:

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of September, 2009, the defendant assaulted James Engle;
- (2) That the assault was committed with a firearm or by force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict if not guilty.

WPIC 35.02; CP 41.

Miller argues that the court should consider only at the first element of instructions 8 and the third definition of assault from instruction 9 in determining whether the jury instructions provided an accurate statement of the law. Appellant's Brief 5-7; CP 41, 42.

Miller's argument disregards the requirement that jury instructions are evaluated in the context of the instructions as a whole. In re Hegney, 138 Wn. App. at 521. Additionally, Miller's argument ignores the fact that at Miller's request the jury was instructed to consider the lesser included offense of second degree assault if they were not satisfied beyond a reasonable doubt that Miller was guilty of first degree assault. Instruction 13; CP 46; CP 65.

If the jury found that Miller assaulted Engle without intent to inflict great bodily harm, they were instructed to find him not guilty

of first degree assault and to consider the lesser charge of second degree assault. CP 41; CP 46. To convict Miller of second degree assault, the jury was instructed they had to find that Miller intentionally assaulted Engle and thereby recklessly inflicted substantial bodily harm, or that Miller assaulted Engle with a deadly weapon. Instruction 14; CP 47. All three definitions of assault in Instruction 9 are correct statement of the law regarding second degree assault. WPIC 35.50; CP 42.

Jurors are presumed to follow the court's instructions absent evidence proving the contrary. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984); State v. Elmore, 154 Wn. App. 885, 898, 228 P.3d 760 (2010). Miller alludes to some unspecified "act" the jury might have considered, but offers no evidence that the jury's verdict was contrary to the court's instructions. Appellant Brief 6-7.

Miller challenges the jury instructions for the first time on appeal. Miller did not propose a to-convict instruction for first degree assault, nor did he propose an instruction regarding the definitions for assault. A party must have proposed an instruction at trial to preserve any claimed error on appeal. Brown v. Dahl, 41 Wn. App. 565, 579, 705 P.2d 781 (1985). Additionally, Miller made

no objections or exceptions to the trial court's instructions. Generally, the failure to object precludes appellate review of jury instructions. RAP 2.5(a); CrR 6.15(c); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Scott, 110 Wn.2d at 685. Miller's challenge squarely confronts these procedural barriers.

2. The Jury Instructions Accurately Required Proof Beyond A Reasonable Doubt That Miller Intended To Inflict Great Bodily Harm To Support The Conviction For First Degree Assault.

Miller was charged with First Degree Assault with a Firearm under RCW 9A.36.011(1)(a). CP 71-72. Jury instruction 8 accurately required proof beyond a reasonable doubt that Miller intended to inflict great bodily harm to support a finding of guilty for first degree assault. CP 41. Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

Miller argues that because assault with a deadly weapon also constitutes second degree assault, under the circumstances of

this case the jury should have been instructed that infliction of great bodily harm was an element of first degree assault. Appellant's Brief 7-8. Miller's argument disregards the fact the Miller was charged under RCW 9A.36.011(1)(a), not under RCW 9A.36.011(1)(c). RCW 9A.36.011 provides in pertinent parts:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

* * *

(c) Assaults another and inflicts great bodily harm.

Miller's argument also ignores the fact that first degree assault with a firearm requires proof of intent to inflict great bodily harm, while second degree assault with a deadly weapon does not require proof of intent to inflict bodily harm. RCW 9A.36.011(1)(a) and RCW 9A.36.021(1)(c).

3. The Jury Was Properly Instructed Of The Issue Of Self-Defense.

The court gave four instructions on self-defense. CP 50, 51, 52, 53. Instruction 17 is the standard WPIC 17.02 regarding use of lawful force for charges other than homicide. Instruction 17A is the WPIC 16.05 definition of necessary. Instruction 18, WPIC 17.04, describes that actual danger is not necessary for use of lawful

force. Instruction 19 is the standard WPIC 17.05 explaining that the law does not impose a duty to retreat. Viewed as a whole, the court's instructions provided an accurate statement of the law regarding self-defense.

The only self-defense instructions proposed by Miller were Instructions 17, 18 and 19. CP 61, 62, and 63. Miller now argues that the jury should have been instructed according to the standard for justifiable homicide under RCW 9A.16.050(2). "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). Miller has not show how an instruction under the standard for justifiable homicide would have aided him in defending the charge that he committed first degree assault on Engle.

The court's instructions were sufficient; they were readily understandable and not misleading to the ordinary mind. Viewed as a whole, the instructions provided an accurate statement of the law and allowed Miller to argue his theory of the case in the context of the evidence.

Miller cites State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) for the proposition: "A jury instruction misstating the law

of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” However, the court in State v. O’Hara, 167 Wn.2d 91, 104, 271 P.3d 756 (2009), held that the *per se* rule in LeFaber was not justified.

In O’Hara, the Court held that appellate courts should analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is a manifest constitutional error.

Miller has not shown actual prejudice to establish a manifest error. An appellant must show actual prejudice in order to establish that the error is “manifest.” State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Even if not instructing the jury according to the standard for justifiable homicide is considered an omission or misstatement, the error is subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Both the United States Supreme Court and the Washington Supreme Court have incorporated harmless error analyses

regarding jury instructions. The United States Supreme Court held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In State v. Brown, the Washington Supreme Court found no compelling reason why it should not follow the United States Supreme Court's holding in Neder. Brown, 147 Wn.2d at 340.

[A]n erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Brown, 147 Wn.2d at 343. The question is whether the conviction can stand because the error was harmless.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court set forth the test for determining whether a constitutional error is harmless. That test is whether it

appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 24. “[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Neder*, 527 U.S. at 15-16, *citing Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In the present case, the jury was instructed that Miller was entitled to act on appearance in defending himself if he believed in good faith and on reasonable grounds that he was in actual danger of injury, even if he was mistaken as to the extent of the danger; that actual danger was not necessary for the use of force to be lawful. CP 52. The jury was also instructed that it was lawful for Miller to stand his ground and defend himself if he had reasonable grounds to believe that he was being attacked; that he had no duty to retreat. CP 53. Additionally, the jury was instructed that the State had the burden of proving beyond a reasonable doubt both “that the force used by the defendant was not lawful” and the absence of self-defense. CP 50. The instructions accurately defined self-defense and the use of lawful force. The instructions did not relieve the State of its burden of proof on the issues of

lawful force and self-defense, nor did the instructions lower the State's burden of proof for those issues.

Viewed as a whole, the instructions provided an accurate statement of the law and allowed Miller to argue his theory of the case in the context of the evidence. The court's instructions were sufficient; they were readily understandable and not misleading to the ordinary mind. In the present case not instructing the jury according to the standard for justifiable homicide was at most harmless error.

4. The Absence Of Self-Defense Is Not Required To Be Included In The To-Convict Instruction.

Miller argues that the self-defense instructions must be part of the "to convict" instruction which set forth the elements of the crime of first degree assault. (Miller acknowledges that case law does not require the absence of self-defense be included as an element in the to-convict instruction. Appellant's Brief 10.) The jury was instructed to consider the instructions as a whole. Instruction 1 CP 34. No prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. State v. Mak, 105 Wn.2d 692, 733, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). The self-defense instructions

properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

“In giving a separate instruction on self-defense, which included the State's burden of proof on self-defense, the trial court followed the method for instructing juries recommended by the Washington Supreme Court Committee on Jury Instructions, 11 Wash. Prac., Washington Pattern Jury Instructions 58-63 (Supp.1986); WPIC 26.02 comment, at 111 (Supp.1986); WPIC 35.02 comment, at 119 (Supp.1986).”

State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). There was no error in the instructional mode used in the present case.

IV. CONCLUSION

For the foregoing reasons, Miller's appeal should be denied.

Respectfully submitted on October 4, 2010.

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