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SEP 01 2011

King County Prosecutor
Appellate Unit

NO. 66331-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD COBB,

Appellant.

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

The Honorable James D. Cayce, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE AGGRESSOR INSTRUCTION WAS IN ERROR BECAUSE THERE WAS NO EVIDENCE OF PROVOKING CONDUCT SEPARATE FROM THE SHOOTING ITSELF.

a. Cobb Did Not Become an Aggressor Via Words, Intent, or Lawful Conduct Such As Following Bacchus to Arby's.

An aggressor instruction is not warranted without some evidence of a provoking act separate from the charged crime itself. See State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). The State argues Cobb engaged in the following provoking conduct: the confrontation at the Kent station, Cobb's words that "Chez had to get it," the fact that Cobb followed Bacchus to Arby's, and Cobb's intent to arrange a fistfight. Brief of Respondent at 19. This argument must be rejected because none of this conduct would have permitted Bacchus to use force to defend himself and thus did not warrant an aggressor instruction.

In order to warrant the disfavored aggressor instruction, the provoking act must be more than merely irritating or likely to provoke a violent response. See State v. Riley, 137 Wn.2d 904, 911-12, 976 P.2d 624 (1999). For example, gang insults may be likely to provoke a violent response by a gang member. But courts have specifically held that such

insults are insufficient to warrant an aggressor instruction. Id. The reason for this rule stems from the origin of the aggressor instruction.

The aggressor instruction tells the jury a first aggressor cannot claim self-defense. CP 65. This is because, “the aggressor’s victim, defending himself against the aggressor, is using lawful, not unlawful force.” Riley, 137 Wn.2d at 911 (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 657-58 (1986)). On the other hand, if the victim’s use of force would not be lawful, no aggressor instruction is warranted. Riley, 137 Wn.2d at 911-12. Thus, to qualify as a first aggressor, a person must commit some act that is not merely irritating or provoking. The provoking act must be one that, under the law, would justify the victim in using force to defend him or herself. Here, the instruction was error because the State has pointed to no evidence that Cobb did anything, other than the shooting itself, that would have justified Bacchus in using force to defend himself.

For example, the State argues Cobb was an aggressor in seeking out Bacchus because Bacchus “had to get it.” Brief of Respondent at 17. First, it must be noted that Cobb did not utter these words at the time. He attributed them, months later, to Leonard Warren. 9RP 47-48. No witness testified Cobb said any such thing. However, even if Cobb had said this, words alone do not constitute sufficient provocation as a matter of law.

Riley, 137 Wn.2d at 911. Words alone cannot deprive a person of the right to act in self-defense. Riley, 137 Wn.2d at 911-12.

The State also attempts to rely on the prior confrontation at the Kent bus station, arguing Cobb continued that confrontation by following Bacchus to Arby's. Brief of Respondent at 18-19. But the State agrees there was no evidence this confrontation involved anything more than words. Brief of Respondent at 4 ("There was no physical fight at the Kent Station."). The gang insults or taunting that occurred at the Kent Station do not warrant an aggressor instruction. Riley, 137 Wn.2d at 912.

The State also appears to argue the instruction was warranted because Bacchus was likely to feel threatened and respond violently when Cobb followed him to the Arby's. Brief of Respondent at 17, 19. But like gang insults, merely being in a public place where one has a right to be cannot warrant giving an aggressor instruction. See Riley, 137 Wn.2d at 911-12. Bacchus would not have been justified in using force to defend himself merely because Cobb followed him to Arby's. Therefore, an aggressor instruction was not justified by evidence Cobb followed Bacchus to Arby's, even though Bacchus may have perceived it as provoking. See id.

The State also appears to imply that because there was sufficient evidence for a jury to find premeditation, there must also be sufficient evidence warranting an aggressor instruction. Brief of Respondent at 17.

But evidence of premeditation is irrelevant to the question of whether the aggressor instruction was in error. Premeditation is a mental state; it is not provoking conduct that could justify the use of force by the victim. See Riley, 137 Wn.2d at 911-12. Cobb's mental state cannot justify undercutting his defense with an aggressor instruction. The only conduct in evidence that could have justified Bacchus in using force to defend himself, and thus the only conduct that could have justified the aggressor instruction, was the shooting itself.

b. Evidence Cobb Shot Bacchus Is Not Evidence of Separate Provoking Conduct.

The State instead argues the aggressor instruction was warranted because Cobb fired first. Brief of Respondent at 17-18. Essentially, the State suggests this Court should separate the shooting into two separate events and decree that the first shot warrants an aggressor instruction regarding the second. Brief of Respondent at 18. But the evidence does not warrant such a separation because the two shots occurred just seconds apart and the first shot was almost certainly fatal to Bacchus. 4RP 43-48, 70, 88, 94; 5RP 23, 103; 9RP 75-76.

The State's attempt to analogize this case to State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986), fails. In Hughes, plainclothes police pursued Hughes, who was suspected of a murder. Id. at 178. When they

caught up with him, the police drew their weapons and announced they were police. Id. A seven-minute gun battle ensued. Id. at 178-79. During that gun battle, one law enforcement officer was killed and another wounded. Id. at 178-79.

The court held that because the police used only lawful force in drawing their weapons, the first-aggressor was whoever fired first. Id. at 192. Because there was sufficient evidence to conclude Hughes provoked the gun battle by firing first, the aggressor instruction was warranted. Id.

This case is utterly unlike Hughes. Here, there was no gun battle. There were only two shots, fired in quick succession. 4RP 43-48, 70, 88, 94; 5RP 23, 103. The court's holding in Hughes also rested on its conclusion that the police had authority to draw their weapons against Hughes. 106 Wn.2d at 192. Here, by contrast, Bacchus' alleged use of force was not lawful because prior to the shooting, Cobb had engaged in no separate conduct that would have provoked it. Hughes does not support the State's argument.

2. THE ERRONEOUS INSTRUCTION UNDERCUTTING COBB'S RIGHT TO ACT IN SELF-DEFENSE CANNOT BE HARMLESS BECAUSE THE COURT FOUND SUFFICIENT EVIDENCE OF SELF-DEFENSE.

When a defendant wishes to raise an issue of self-defense or justifiable homicide, the burden is on the defense to present sufficient evidence from which a reasonable juror could find he acted in self-defense. State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011). Only once this burden is met, is the court obliged to instruct the jury regarding self-defense. Id. Here, the trial court obviously found there was sufficient evidence from which a juror could have concluded Cobb acted in self-defense. CP 60. Otherwise, it would not have given a self-defense instruction.

Nevertheless, the State argues the aggressor instruction was harmless because no reasonable juror could have found self-defense. Brief of Respondent at 20. This argument directly conflicts with the trial court's decision to instruct the jury on justifiable homicide. This Court should reject the State's harmless error argument and defer to the trial court's assessment of the evidence. See George, 161 Wn. App. at 94 (trial court's decision on factual basis for self-defense instruction is reviewed only for abuse of discretion).

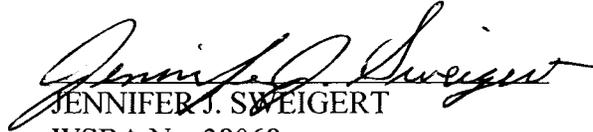
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Cobb requests this Court reverse his conviction.

DATED this 1st day of September, 2011.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Jennifer J. Sweigert", is written over the printed name.

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