

NO. 35697-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SIMMONS,

Appellant.

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable Paula Casey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel when standby counsel provided appellant with a pattern jury instruction misstating the law of self-defense and, as a consequence, the trial court improperly instructed the jury on that law. CP 175 (Instruction 22).

Issue Pertaining to Assignment of Error

The trial court appointed standby counsel to assist appellant, who represented himself at trial, in various aspects of his trial preparation. When appellant asked for access to Washington pattern jury instructions (WPICs), the trial court directed standby counsel to provide those. Appellant and standby counsel worked together to submit the instructions. Appellant subsequently proposed an instruction that misstated the law of self-defense. The trial court gave this erroneous instruction to the jury. Did standby counsel provide ineffective assistance?

B. STATEMENT OF THE CASE

On July 25, 2005, Simmons was living with his girlfriend Kristi Dillon¹ and her daughter K.D. RP 88, 394.² K.D. considered Simmons

¹ After the charges were filed, Kristi Dillon changed her name to Kristi Lewis. Since the charges refer to her as Dillon, appellant will use that name herein.

her stepfather. RP 88. That night, Simmons stayed home with K.D while Dillon worked her shift at the Landmark Tavern. RP 89, 987. Dillon drove their Honda to work, despite the fact that the car's clutch was going out and had begun slipping out of gear. RP 397, 986.

Dillon arrived at work at 6:00 p.m. RP 397. Dillon called Simmons later that night to say she was not feeling well and would be leaving work early. RP 397, 494. Dillon left the tavern at approximately midnight. RP 397. Instead of going home, however, she stopped to see her friend Perry Vickers.³ RP 398. While visiting, she learned their friend, Forrest Knutz, was stranded due to car trouble, so she decided to take Vickers to pick him up. RP 398-400.

Meanwhile, Simmons -- who was expecting Dillon to return around 10:30 p.m. -- awoke at midnight to find she had not yet come home. RP 989. He was concerned. RP 990. Simmons called the tavern but Dillon was not there. RP 990.

Trying to locate Dillon, Simmons went to the caller ID log and called a phone number that appeared. RP 991. Knutz answered on the

²(...continued)

² Unless otherwise specified, all RPs refer to the sequentially paginated, multi-volume trial transcript dated November 27, 2006 to December 7, 2006.

³ Apparently, the State misspelled this man's name as Vicars in the information and to-convict instruction. CP 8-9, 132; RP 776.

other end of the line, but hung up quickly. RP 991. Simmons did not care for Knutz, whom he previously employed. RP 991. When Simmons called back, Knutz tried to hide the fact that Dillon and Vickers were coming together to pick him up, but he eventually confirmed this. RP 207-09. Simmons explained that Dillon had called in sick, and he was concerned. RP 211. He asked Knutz to find someone else to give him a ride. RP 994. Knutz thought Simmons was angry because Dillon and Vickers were driving together. RP 210. Dillon purportedly became frightened upon arrival when Knutz told her about the call. RP 214, RP 401.

Based on his conversation with Knutz, Simmons decided to drive his van toward Vickers' house to make sure the Honda had not broken down, leaving Dillon stranded. RP 992-93. He woke K.D. and took her with him. RP 89. When Simmons could not locate Dillon at Vickers' house, he decided to check one more location before returning home. RP 994. As he was driving, Simmons spotted the Honda and sped up to catch it. RP 995. Upon seeing the van, however, Dillon began to drive evasively. RP 402-403.

Unsure what was happening in the car, Simmons sped up to catch up with Dillon. RP 996. The van Simmons was driving had no horn and

the lights had been rewired such that he could not flash them on and off while driving. RP 996. Simmons followed the Honda closely, hoping Dillon would notice him and pull over. RP 996.

After making a sudden turn onto a side street, Dillon tapped the brakes hard as if trying to signal a tailgater to stop. RP 996-97. Simmons was concerned and angry that Dillon was driving around side streets in a car with a bad clutch, with two young men he believed to be unscrupulous, while also stomping on the brakes. RP 996, 1020. Then it occurred to him Dillon still might not know it was him behind her, so he decided he should try to get along side of the Honda. RP 997. As he was doing so, Dillon hit the brakes again. RP 997. Simmons came to a quick stop but was not able to react quickly enough and bumped the Honda.⁴ RP 118, 997-98. Fortunately, there was little, if any, damage to the vehicles as a result of this impact. RP 502, 867.

After the impact, Vickers told Dillon to stop the car and let him out. RP 780. Dillon stopped the car. Vickers jumped out, ripped his shirt off, and yelled "Do you want a piece of me?" RP 114, 813, 998. Then he ran

⁴ Testimony varied as to whether there were one, two, or three impacts. RP 93, 224, 293, 404, 778, 997.

toward Simmons who was still in the van.⁵ RP 792, 999. Simmons put the van in reverse and attempted to leave, but he was boxed in the back and would have run over Vickers if he drove forward.⁶ RP 228, 999.

Simmons began to panic because K.D. was in the car and the door closest to her was unlocked. RP 999. He did not want a fight to break out in front of K.D. RP 999. Concerned by the fact that there were two men -- one of who (Vickers) was substantially bigger than he -- Simmons grabbed an axe and machete. RP 998-1000. These are tools of his trade that happened to be in the van. RP 863, 1042. Simmons intended to use the tools to scare Vickers away from the van.

After Simmons chased Vickers about 100 feet away from the van, Vickers tripped over his pants, which had fallen to his knees and subsequently to the ground. RP 783, 1000. Vickers got up and began taunting Simmons, saying: "You want to mess with the best?" RP 1000. Simmons thought he heard footsteps behind him and began to turn to assess the situation when Vickers rushed toward him, trying to close the distance

⁵ Vickers initially claimed he could not recall what happened after he exited the car. RP 789. Later, he testified he moved toward the van. RP 792.

⁶ Dillon and Knutz were also outside the car at this point but were preoccupied with trying to determine K.D.'s whereabouts. RP 94-96, 225, 231-32, 408.

between them. RP 783, 1000. Vickers claimed this was when he was struck with the machete. RP 797. Simmons testified he never hit Vickers with a machete.⁷ RP 1028.

Simmons dropped his tools, and he and Vickers went to the ground fighting. RP 1000. At one point, Vickers gained control of the axe and struck Simmons on the back of the head with the hammer side, injuring Simmons. Eventually, Simmons gained control of the tools, ordered Vickers to stay down, retreated to the van, and left. RP 1001-03. Bystanders reported that even after Simmons retreated, Vickers still wanted to fight and walked toward the van with clenched fists. RP 566, 607. An officer who observed Vickers that night testified he suspected Vickers was under the influence of drugs.⁸ RP 960, 964.

⁷ Other eyewitness accounts presented at trial were extremely inconsistent. Donald Freelove first testified he saw Simmons hit Vickers with an axe, but admitted during cross-examination he could not honestly say that he saw Simmons hit Vickers. RP 551-52, 560-61. Jaqueline Rochester testified she saw Simmons hit Vickers several times with the axe after the fist-fight. RP 297. Nicholas Theiss testified that when he arrived, Vickers was lying on his side and Simmons was pacing around with the axe and machete saying he was going to kill Vickers. RP 587-89. Cy Woodward testified Simmons hit Vickers with an axe and told him to stay down. RP 357. Elizabeth Horton told police she saw men fighting but never mentioned seeing any weapons. RP 663-64.

⁸ When asked directly whether he was under the influence of meth-amphetamines that night, Vickers claimed he could not recall. RP 831.

As a result of this incident, the Thurston County Prosecutor's Office charged appellant Robert Simmons with second degree assault, felony harassment and four counts of reckless endangerment. CP 6-7. The charges were amended several times until Simmons was finally charged with one count of attempted murder in the first degree while armed with a deadly weapon (or alternatively first degree assault)⁹, three counts of assault in the second degree while armed with a deadly weapon, one count of reckless endangerment, and one count of witness tampering. CP 10-11, 15-16, 131-33.

Prior to trial, Simmons moved to discharge his attorney, stating he did not want the case to be continued any longer due to his assigned counsel's extended caseload. RP (8-25-06) 7-8. The trial court granted Simmons' request to represent himself, but appointed assigned counsel to remain on the case as standby counsel. RP (8-25-06) 22-23.

In preparation for trial, the trial court ordered standby counsel to provide Simmons with copies of the relevant WPICS. RP (9-29-06) 15. Standby counsel provided these and worked with Simmons in preparing the

⁹ Regarding this charge, the jury was also instructed as to the lesser included offense of second degree assault with a deadly weapon -- of which Simmons was convicted. CP 140-41, 172.

instructions they submitted to the court. RP (11-22-06) 10, 21; RP (11-27-06) 11.

Both the State and Simmons proposed self-defense instructions, which included WPIC 17.04. CP 90; CP __ (sub no. 152). WPIC 17.04 states:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The trial court instructed the jury accordingly. CP 175.

Following a jury trial, Simmons was acquitted of all charges except one count of second degree assault with a deadly weapon and. CP 138-50. On December 9, 2006, the trial court ordered Simmons to serve 29 months. CP 213-21. This appeal timely follows. CP 203-12.

C. ARGUMENT

SIMMONS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN STANDBY COUNSEL PROVIDED HIM WITH WPIC 17.04, WHICH MISSTATES THE LAW REGARDING SELF-DEFENSE.

Simmons presented a factually supported defense showing he acted in self-defense when he assaulted Vickers. As shown below, the jury was wrongly instructed as to that defense, constituting reversible error. See,

State v. Walden, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997). Because Simmons submitted the instruction himself, the State will likely argue the error was invited. This argument should be rejected, however, because Simmons was provided the erroneous instruction by standby counsel. See, State v. Woods, 138 Wn. App. 191, 197-202, 156 P.3d 309 (2007) (finding counsel ineffective for submitting WPIC 17.04).

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. Const. amend. 6; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An appellant prevails on an ineffective assistance claim where counsel's representation was deficient and prejudiced the defense. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland). Although a defendant who represents himself at trial generally cannot claim ineffective assistance of counsel on appeal, "this does not mean standby counsel has no obligations or duties to the defendant when standby counsel has been appointed by the court." State v. McDonald, 143 Wn.2d 506, 512, 22 P.3d 791 (2001).

When a defendant, with the trial court's benediction, receives the assistance of an attorney acting in a standby role, that attorney must provide effective assistance. Jelinek v. Costello, 247 F.Supp.2d 212, 265-66 (E.D.N.Y. 2003). Counsel's competency may reasonably be challenged

within the limited scope of the duties assigned to counsel. Downey v. People, 25 P.3d 1200, 1204 (Colo. 2001); M.S. Ali v. United States, 581 A.2d 368, 380 (D.C. 1990); People v. Bloom, 48 Cal.3d 1194, 259 Cal.Rptr. 669, 774 P.2d 698, 718 (1989). Thus, where the trial court has ordered counsel to act as an advisor for the defendant and has encouraged the defendant to rely upon the legal advice proffered by his standby counsel, a petitioner is entitled to claim that he received constitutionally ineffective assistance from his standby counsel with respect to such court-sanctioned representation. Jelinek, 247 F.Supp.2d at 266 (citing generally Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L.Rev. 676, 726 (2000)).¹⁰

In the instant case, the trial court specifically assigned standby counsel the task of providing Simmons with WPICs and helping him prepare the jury instructions. Consequently, standby counsel had a duty to perform that task effectively. Simmons may, therefore, challenge standby counsel's performance as it pertains to the proposal of defense instructions.

¹⁰ Although McDonald addresses standby counsel's duty to remain conflict free, the issue presented here -- whether an appellant may challenge standby counsel's performance in a limited, assigned role -- appears to be an issue of first impression in Washington.

Standby counsel's performance was deficient when he provided Simmons with WPIC 17.04. Counsel has a duty to investigate the relevant law and to propose instructions correctly stating the law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, at 690-91. Proposing a detrimental instruction, even when it is a WPIC, has been found to constitute ineffective assistance of counsel. Woods, 138 Wn. App. at 198 (citation omitted).

It is well established in Washington case law that WPIC 17.04 -- which instructs a jury that the defendant must believe he is in actual danger of great bodily harm before he is justified in using force to defend himself -- is a misstatement of the law. Walden, 131 Wn.2d at 475, Woods, 138 Wn. App. at 199-202; State v. L.B., 132 Wn. App. 948, 952-54, 135 P.3d 508 (2006); State v. Freeburg, 105 Wn. App. 492, 504, 20 P.3d 984 (2001).

As explained in the above cited cases, RCW 9A.16.020(3) provides a person has a right to use force to defend himself against danger of injury. Given this language, the term "great bodily harm" as used in WPIC 17.04 places too high of a standard for one who tries to defend himself against some danger that is less than great bodily harm but still threatens injury. Id.

Where the defendant raises a defense of self-defense for use of non-deadly force, WPIC 17.04 is simply not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the suspected battery would result in mere injury.¹¹ Id. Standby counsel should have been aware of this and provided Simmons with a legally accurate instruction.

Standby counsel's failure to provide Simmons with an accurate statement of the law prejudiced the defense because it relieved the State of its full burden to disprove self-defense. The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

¹¹ The fact that the jury was instructed on the definition of "great bodily harm" as an element of first degree assault amplified the problem. CP 165 (Instruction 12). Jurors would have necessarily deduced that "great bodily harm" involves an injury creating a probability of death, which is of course the wrong standard. See, State v. Marquez, 131 Wn. App. 566, 575-77, 127 P.3d 786 (2006); State v. Rodriguez, 121 Wn. App. 180, 186, 87 P.3d 1201 (2004) (prejudicial error to instruct with WPIC 17.04's "great bodily harm" language where jurors are aware of the term's greater requirements).

Here, when the trial court instructed the jury according to WPIC 17.04, the State was relieved of its full burden of proving the absence of self-defense and a higher burden was placed on the defense. CP 175; see, Woods, 138 Wn. App. at 314 ("Woods was prejudiced because the jury may have applied the more stringent 'actual danger of bodily harm' language rather than the accurate 'reasonably believes he is about to be injured' language"); accord, L.B., at 953.

The instructional error was not harmless. The State bears the burden of showing it is harmless beyond a reasonable doubt, or that the error was "trivial, or formal, or merely academic and in no way affected the final outcome of the case." Woods, at 314 (citing State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980); and quoting Walden, 131 Wn.2d at 478 (internal quotations omitted)).

It is entirely possible, if not probable, the instructional error affected the outcome of this case. Simmons presented evidence showing Vickers was acting aggressively toward him throughout the incident and was possibly under the influence of drugs. Vickers got out of the car, ripped off his shirt, and yelled: "Do you want a piece of me?" Even after falling, Vickers maintained an aggressive posture. As Vickers testified, it was only after he had gotten up off the ground and was attempting to close the gap

between himself and Simmons that Simmons struck him. Vickers still sought to fight even after Simmons retreated to his van.

Given Vickers' relentless aggressiveness, the jury reasonably could have concluded that at the time Simmons struck Vickers, Simmons believed the advancing Vickers was about to injure him, although he may not have believed Vickers' actions posed a probability of death. In that scenario, a properly instructed jury would have found Simmons not guilty.

Standby counsel failed in his duty to provide Simmons with a correct statement of the law. There was no legitimate tactical reason to propose the erroneous instruction. WPIC 17.04 had been condemned in several published decisions before this trial. Thus, this error is manifest. Because standby counsel's deficient performance prejudiced the defense, Simmons' conviction should be reversed and the case remanded for a new trial.

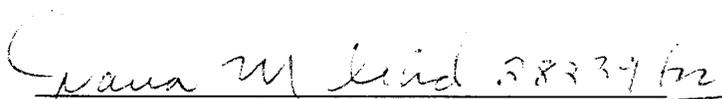
D. CONCLUSION

For the reasons stated above, this Court should reverse Simmons' conviction and remand for a new trial.

DATED this 9th day of August, 2007.

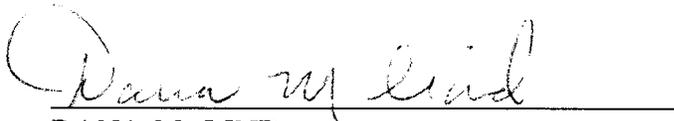
Respectfully submitted,

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STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 35697-0-II
)	
ROBERT SIMMONS,)	
)	
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 9TH DAY OF AUGUST 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF AUGUST 2007.

x *Patrick Mayovsky*

