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COURT OF APPEALS  
DIVISION TWO

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No. 36998-2-II

STATE OF WASHINGTON  
BY *cm*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SILVINO M. PEREZ,

Appellant.

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

The Honorable Gary R. Tabor, Judge  
Cause No. 07-1-00973-0

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BRIEF OF RESPONDENT

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A. ISSUE RELATING TO ASSIGNMENT OF ERROR.

1. Whether Instruction 26 misstated the law of self defense, and if so, whether such error is harmless or requires reversal of the appellant's conviction for Assault in the First Degree.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. Although Instruction 26 was an incorrect statement of the law of self-defense, any error was harmless beyond a reasonable doubt and the court correctly denied Perez's motion for mistrial.

Perez does not contest the accuracy of the law stated in Instruction 24. [CP 195-96] He does assign error to Instruction 26, which reads as follows:

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.

[CP 197]. He argues that the phrase "great bodily harm" is incorrect, and is particularly prejudicial in light of Instruction 18, which defines "great bodily harm":

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant

permanent loss or impairment of the function of any bodily part or organ.

[CP 193]. This instruction was included after the “to-convict” instruction for first degree assault, and was placed there to define “great bodily harm” as used in Instruction 15. [CP 192]

An appellate court reviews challenged jury instructions de novo, considering the instructions as a whole when examining the effect of any particular phrase. The challenged portion of an instruction is read in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient when both sides can argue their theories of the case, they are not misleading, and when read as a whole properly state the law to be applied. State v. Douglas, 128 Wn. App. 555, 562, 16 P.3d 1012 (2005) (citing to Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). “A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

Self-defense instructions must “more than adequately” inform the jury of the law of self-defense. Walden, *supra*, at 473. A defendant must have only a “subjective, reasonable belief of imminent harm from the victim.” There need not be actual imminent harm. LeFaber, *supra*, at 899. The standard is both objective and subjective:

Evidence of self –defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” . . . This standard incorporates both objective and subjective elements. The subjective portion required the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Walden, *supra*, at 473-74, (cites omitted).

Perez cites to State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007), which held that, under the facts of that case, an instruction based on WPIC 17.04, identical to Instruction 26 in this case, placed too high a burden on the defendant. In that case, Woods had used a knife against a victim who, he claimed, had hit his hand with a hammer. In the opinion of the court, the jury could have found that Woods reasonably believed the victim was going to injure him, even if he was not expecting great bodily harm. “In

cases not involving death, the use of force is justified if the defendant reasonably believed he was about to be injured. Instruction 13 wrongly instructed the jury that the type of injury Mr. Woods had to fear in order to defend himself was one involving great bodily harm.” Woods, *supra*, at 314.

In Walden, *supra*, the defendant brandished a knife at three teenagers who he said he believed were going to beat him up. The jury instructions given at his trial were different than those in this case and in Woods, but informed the jury that Walden could use deadly force only if he was in fear of death or great bodily harm. The instructions further defined “great bodily injury”. Walden, *supra*, at 472. The reviewing court there found that the instructions were internally inconsistent, the definition of “great bodily injury” misstated the law, and the error was not harmless.

An instructional error is harmless only if it “is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no other way affected the final outcome of the case.*”

Walden, *supra*, at 478 (emphasis in original).

State v. L.B., 132 Wn. App. 948, 135 P.3d 508 (2006), concerned a juvenile adjudication, in which there was no jury, but the trial court applied WPIC 17.04 in finding that the evidence did

not support the respondent's self-defense argument. Id., at 951-52.

Division One of the Court of Appeals found that:

The term "great bodily harm" places too high of a standard for one who tried to defend himself against a danger less than great bodily harm but that still threatens injury. Where the defendant raises a defense of self-defense for use of nondeadly force, WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

Id., at 953.

Even so, the court in L.B. found that the error was harmless.

[A] jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and affects the framework under which the trial proceeds. . . . An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. . . . It is the State's burden to prove the error was harmless beyond a reasonable doubt. . . . Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence. . .

Id., at 954.

In Walden and Woods, neither defendant claimed that the victim was using or threatening to use deadly force or that they possessed deadly weapons. In L.B., the respondent claimed he thought the victim was reaching for a gun, but there was no

evidence of one and the court did not believe his testimony, a credibility determination that is for the trier of fact and which cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In this case, however, Perez claimed that the victim was attacking him with a knife and a screwdriver, in addition to a “hand hammer”. [RP 571-73, 597, 600] A box knife and a screwdriver were found at the scene, and the victim admitted he had had the knife in his pocket, although he did not remove it until after Perez was gone. The victim testified that Perez stabbed him with a knife, and he had the knife wounds to prove it. [RP 3774] Deadly force was most definitely at issue. Therefore, Walden, L.B., and Woods are distinguishable. Based on the defense theory that the victim was armed with a knife and screwdriver, and attempting to inflict great bodily harm on Perez, there is no possibility that the jury could have reached a different conclusion, even if the jury instruction had been correct. Therefore, there was no prejudice to Perez and the error was harmless. “Had the trial court substituted the word ‘injury’ in place of ‘great bodily harm’ in its recitation of the standard for self-defense, it would have reached the same conclusion that the State had disproved L.B.’s self-defense claim.

Thus, the misstated standard of self-defense was harmless beyond a reasonable doubt.” L.B., *supra*, at 955.

The same reasoning applies to Perez’s case. Even if the jury had been correctly instructed, the evidence they heard was that Perez believed the victim was attempting to inflict great bodily harm, and even with the correct instruction would have reached the same result. The trial court correctly denied Perez’s motion for a new trial.

D. CONCLUSION.

Although Instruction 26 was incorrect, the error was harmless beyond a reasonable doubt. The State respectfully asks this court to affirm Perez’s conviction for first degree assault with a deadly weapon enhancement.

Respectfully submitted this 22<sup>d</sup> day of July, 2008.

  
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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36998-2-II,  
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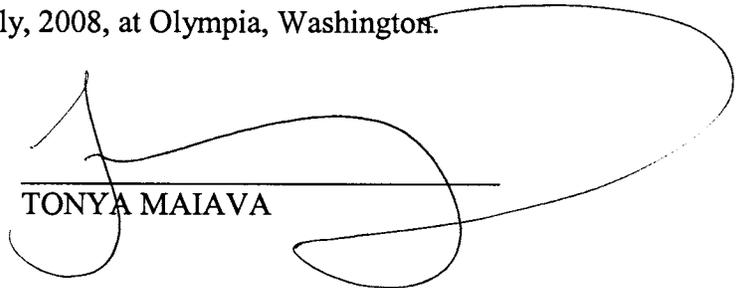
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I certify under penalty of perjury under laws of the State of  
Washington that the foregoing is true and correct.

Dated this 22<sup>nd</sup> day of July, 2008, at Olympia, Washington.

  
\_\_\_\_\_  
TONYA MAIAVA