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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38586-4-II

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

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER PAUL PARTRIDGE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-01687-2

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that there was ineffective assistance of counsel because of a purported incorrect self-defense instruction. Specifically, the defendant claims that the “act on appearances” instruction given by the court was inaccurate. (Court’s Instructions to the Jury, CP 7, No. 18).

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel’s representation was deficient and that counsel’s deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a

finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The State submits that there is no error in this record. The instruction that was given by the court modified the "great bodily injury" language and substituted "great personal injury". Further, the Instruction No. 18 went on to indicate a definition of great personal injury which was "an injury that would produce severe pain and suffering . . ." (CP 7, Court's Instructions to the Jury, No. 18). Because of these changes, the State submits that this was an accurate statement of the self-defense law.

As held in State v. L.B., 132 Wn. App. 948, 953, 135 P.3d 508 (2006):

WPIC 17.04 cmt. (emphasis added). In 1994, the Washington Supreme Court Committee on Jury Instructions changed WPIC 17.04 to state the law on apprehension of danger as set forth in State v. Miller, 141 Wn. 104, 105-106, 250 P. 645 (1926) and its progeny. See also State v. Dunning, 8 Wn. App. 340, 342-43 n.2, 506 P.2d 321 (1973). In doing so, the Committee lifted

language from the Miller opinion that referred to danger of great bodily harm (rather than danger of injury) and inserted it into WPIC 17.04. See WPIC 17.04 cmt. (quoting Miller, 141 Wn. at 105-06). In Miller, the State charged the defendants with second degree assault. Miller, 141 Wn. at 104. The instructions to the jury in that case did not elaborate on the subjective element of self-defense. Miller, 141 Wn. at 105. In correcting the instruction, the Washington Supreme Court established the subjective apprehension of danger test using the language “great bodily harm.” Miller, 141 Wn. at 105.

According to the plain language of RCW 9A.16.020(3), a person has a right to use force to defend himself against danger of injury, “in case the force is not more than is necessary.” The term “great bodily harm” places too high of a standard for one who tries 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, WPCI 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. Cf. Walder, 131 Wn.2d at 477 (instruction impermissibly restricted jury from considering “the defendant’s subjective impressions of all the facts and circumstances”).

In State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007), this court held that in the case of a nondeadly assault with a deadly weapon, the defendant is not required to show that he reasonably believed he faced actual danger of great bodily harm. Woods, 138 Wn. App. at 201.

In our case, the Court gave the following instruction:

A person is entitled to act on appearances in defending herself, if that person believes in good faith and on reasonable grounds that she is in actual danger of great personal injury which is an injury that would produce severe pain and suffering, 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.

- CP 7, Court’s Instructions to the Jury, #18

The variation is that WPIC 17.04 refers to a person being in actual danger of “great bodily harm” instead of “great personal injury.” 11 WASHINGTON Pattern Jury Instructions: Criminal 1.00-55.06, at 203 (1994) (WPIC). Defense counsel proposed the modification to comply with State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). Walden was an assault case in which the Supreme Court advocated in dictum the use of the phrase “great personal injury” instead of “great bodily harm” in a different self-defense instruction. Walden, 131 Wn.2d at 475.

When confronted by a claim of constitutional error asserted for the first time, the Appellate Court must first “satisfy itself that the error is truly of constitutional magnitude.” RAP 2.5(a). If the alleged error is not a constitutional error, the court may refuse to review the claim. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). For instructional errors, “the constitutional requirement is only that the jury be instructed as to each element of the offense charged.” State v. Pawling, 23 Wn. App. 226, 232, 597 P.2d 1367 (1979); see also, State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988); Scott, 110 Wn.2d at 689.

The State submits that there has been no showing of error by the defense. Because of that, there is no ineffective assistance of counsel in this record.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error deals with a claim of double jeopardy. The claim is that the defendant was convicted of two counts of first degree assault where the jury made separate findings that he was armed with a firearm at the time of both offenses. The claim is because of these enhancements he was punished twice for the same conduct.

The rule appears to be quite clear on this point. As stated in State v. Kelley, 146 Wn. App. 370, 374, 189 P.3d 853 (2008):

...that “it is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime.” State v. Nguyen, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008).

Washington courts have repeatedly rejected arguments that weapon enhancements violate double jeopardy.” State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (citing State v. Claborn, 95 Wn.2d 629, 636-38, 638 P.2d 467 (1981)); see also, State v. Nguyen, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006) review denied 163 Wn.2d 1053, 187 P.3d 752 (2008). The “statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” Husted, 118 Wn. App. at 95 (evaluating the deadly weapon enhancement section of chapter 9.94A RCW, which contains the same language as the firearm

enhancement section). However, the defendant urges a double jeopardy “same elements” analysis in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Appellate Courts recently addressed and rejected this argument in Nguyen, 134 Wn. App. at 869, 871 (finding that “nothing in Blakely gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime.”). Nguyen, at 869.

The State submits that there is no double jeopardy issue in this case and that this particular issue raised by the appellant is without merit.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 26 day of August, 2009.

Respectfully submitted:

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