

NO. 39108-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

FLOYD TEO,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 FEB 19 AM 11:45
STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Frederick Fleming, Judge

REPLY BRIEF OF APPELLANT

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WASHINGTON STATUTES

RCW 9A.16.020(3)2

A. ARGUMENT IN REPLY

1. TEO DID NOT ENGAGE IN PROVOKING CONDUCT THAT WOULD JUSTIFY USE OF AN AGGRESSOR INSTRUCTION.

Teo's defense was that he used necessary force protecting his friend. The aggressor instruction would only be appropriate if there were evidence he engaged in intentional provoking conduct that initiated the fight in which his friend was being beaten. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). There was not. Since the fight between Dillon and Yim (and a disputed number of others) was already going on when Teo returned to his car to get his gun, reaching for the gun cannot logically have provoked the fight. RP 371-73, 597.

The State appears to agree that insults also cannot serve as the necessary provoking conduct. Brief of Respondent at 21. Thus even if taken in the light most favorable to the State, the fact that Teo was "use[d] gang insults to pick a fistfight," can not justify an aggressor instruction. Brief of Respondent at 21.

The State also argues that the aggressor instruction was justified because Teo should have expected his companions would escalate his fistfight with Manny Duncan, leading to the fight involving Dillon. Brief of Respondent at 22. But the State cites no authority for the idea that conduct by others justifies a disfavored aggressor instruction. On the contrary, one

who acts in defense of another, reasonably believing that person to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the party whom he is defending was, in fact, the aggressor. State v. Bernardy, 25 Wn. App. 146, 148, 605 P.2d 791 (1980) (citing State v. Penn, 89 Wn.2d 63, 568 P.2d 797 (1977); State v. Fischer, 23 Wn. App. 756, 598 P.2d 742 (1979); RCW 9A.16.020(3)).

2. WHEN EVIDENCE OF PRIOR MISCONDUCT IS ADMITTED UNDER ONE OF THE EXCEPTIONS TO ER 404(b), THE TRIAL COURT MUST GIVE A LIMITING INSTRUCTION.

The State argues it is not error to fail to give a limiting instruction where none is requested, citing State v. Hess, 86 Wn.2d 51,52, 541 P.2d 1222 (1975). Brief of Respondent at 46. However, more recently, Washington courts have placed the duty on the trial court to ensure that a limiting instruction is given. For example, in State v. Foxhoven, the court stated the limiting instruction, “must be given to the jury.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

This Court applied explained that the cases from which the Foxhoven rule is derived, “place the burden of giving such instruction on the trial court.” State v. Russell, ____ Wn. App. ____, ____ P.3d ____, slip op. at 9 (No. 38233-4-II, filed Feb. 9, 2010). Harkening back to State v. Murphy, 44 Wn. App. 290, 295, 721 P.2d 30 (1986), the court stated, “we have

acknowledged the trial court's obligation to give a cautionary instruction.”
Russell, ____ Wn. App. at ____, slip op. at 10. Applying the Foxhoven rule,
the court rejected the State's argument that it was not error to give an
instruction where none was requested. Slip op. at 10. Although the
admission of the evidence itself was not error and no limiting instruction was
requested, the court reversed Russell's conviction because the trial court
failed to give a limiting instruction. Id. at 11.

As in Russell, because the court in this case admitted evidence of
past misconduct under ER 404(b), the trial court was required to instruct the
jury as to the limited purpose. This Court should, as it did in Russell, hold
that the limiting instruction is required even in the absence of a request by
the defendant.

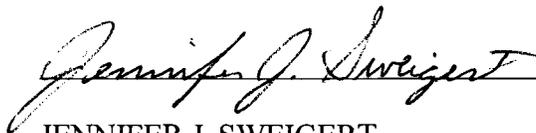
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Teo requests this Court reverse his convictions and remand for a new trial.

DATED this 18th day of February 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script that reads "Jennifer J. Sweigert". The signature is written in black ink and is positioned above the printed name.

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Attorney for Appellant

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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 18TH DAY OF FEBRUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KAREN WATSON
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- [X] FLYOD TEO
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY 2010.

x *Patrick Mayovsky*