

COURT OF APPEALS
DIVISION II

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40366-8-II

STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

JOHN A. GALDAMEZ
Appellant

40366-8-II

On Appeal from the Superior Court of Pierce County

Cause No. 09-1-00905-0

The Honorable RONALD E. CULPEPPER

REPLY BRIEF

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II. STATEMENT OF THE CASE

Please refer to the Opening and Responding briefs for the procedural and substantive facts. (The State did a better job of identifying the cast of characters when they first appear.)

III. ARGUMENTS IN REPLY

1. **The jury was not instructed that intent to kill is an essential element of attempted murder (Count I).**

The State thinks jury instructions are reviewed for abuse of discretion. Brief of Respondent (BR) 3. This is wrong. The Court reviews factual decisions for abuse of discretion, but matters of law are always reviewed de novo. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). (The State's authority, *State v. Fernandez-Medina*, was reversed by 141 Wn.2d 448, 6 P.3d 1150 (2000). Alleged errors in a trial court's jury instructions are reviewed de novo. *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). An instruction that fails to inform the jury of the law and relieves the State of its burden of proof is constitutionally deficient. *State v. Roggenkamp*, 153 Wn.2d 614, 620, 106 P.3d 196 (2005).

The State also wrongly asserts that a contemporaneous objection is required. BR 13.

Failure to object to jury instructions at trial usually constitutes waiver of any error, precluding review for the first time on appeal. RAP 2.5(a). But due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that relieve the State of its burden to prove every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Thus, such errors affect a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). The State's contrary authorities are not persuasive; they address a court rule, not due process. BR at 13-14.

All of the elements of the crime must be in the to-convict instruction because it is the yardstick the jury uses to measure the evidence and determine guilt. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133

(2004). The elements of a crime are the actus reus, mens rea, and causation. These are the constituent parts of the crime that the prosecution must prove to convict. *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009).

Omitting the intent element was reversible error.

2. The “first aggressor” instruction deprived Galdamez of his right to have a jury decide his self-defense claim and constituted a comment on the evidence in violation of Const. art 4, § 16.

The State again argues the court rule in response to Galdamez’s claim he was denied fundamental due process. BR 14-15. And the State is incorrect that Galdamez did not complain about the first aggressor instruction below. BR 14. Galdamez did challenge the instruction. RP 478-87, 592. The propriety of giving the instruction was squarely before the trial court. Moreover, Galdamez may claim for the first time on appeal that the erroneous instruction relieved the State of its burden to disprove his self-defense claim. *See, State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); Appellant’s Brief (AB) at 19. Again, the State’s contrary authorities are distinguishable. *State v. Riley*, 137 Wn.2d 904 (1999) (BR 15) addressed solely a First Amendment issue. *Riley* at 908-09.

The instruction constituted a comment on the evidence by suggesting that the jury could ignore the alleged victim's belligerent and hostile conduct. Moreover, the judge even commented at sentencing that Galdamez's self-defense claim involved more than just the final sequence of events. 2/19RP 12-13, BA 21.

The State argues that the evidence was conflicting as to whether Galdamez initiated hostilities. BR 15. But this argument can be sustained solely by ignoring the extensive video evidence showing the entire sequence of events that led up to the punch. Galdamez was entitled to have the jury evaluate his self defense claim based on all the evidence. *McCullum*, 98 Wn.2d at 488. Instead, the State's argument, bolstered by the court's first-aggressor instruction, encouraged the jury to ignore the bulk of the evidence and consider only the climax where Galdamez threw a punch. This was wrong. In *State v. Sampson*, 40 Wn. App. 594, 699 P.2d 1253 (1985), cited at BR 19, the court evaluated the aggressor instruction in light of all the evidence. *Id.* at 600.

The State has not met its burden to show this error was harmless. BR 17-18. instruction. The State cites *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902, 911 (1986), and *State*

v. Thompson, 47 Wn. App. 1, 733 P.2d 584, 588 (1987), in arguing harmless error. BR 19. But those cases hold merely that the aggressor instruction was not reversible error on the particular facts at issue. *Hughes*, 106 Wn.2d at 193; *Thompson*, 47 Wn. App. at 8.

The error was not harmless here, and the State has made no showing that it was.

3. The prosecutor's examination of the State's witnesses constituted reversible misconduct.

(a) The prosecutor asked Kila, out of nowhere: "Did you hear anybody say, "I'm going to shoot you?" and then hammered on this theme for two pages. RP 71-73. The State denies this unfairly prejudiced Galdamez. BR 24-25. That is clearly wrong.

Prosecutors may not introduce prejudicial statements that are not supported by the evidence. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). Specifically, it is misconduct to use a question to insinuate an alleged incriminating statement so as to mislead the jury into thinking the imaginary statement is evidence. *State v. Babich*, 68 Wn. App. 438, 443-44, 842 P.2d 1053 (1993), citing 5A K. Tegland, § 258(2), at 315. Comments that encourage

the jury to base a verdict on facts not in evidence are improper.

State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992).

Here, the questions cited by the State at BR 24-25 sound like cross examination by the defense to refute the testimony of a State's witness who claimed to have heard such statements. It was reversible error for the State to ask questions that infected the jury with utterly unsubstantiated and inflammatory allegations. This was reversible error despite defense counsel's failure to object, because no curative instruction could have obviated the prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Improper conduct caused reversible prejudice if there is a substantial likelihood the misconduct affected the jury's verdict in light of the strength of the State's case. *State v. Thomas*, 142 Wn. App. 589, 593, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008); *State v. Avendano-Lopez*, 79 Wn. App. 706, 712, 904 P.2d 324 (1995). The error is not harmless unless the Court is confident that the jury would have convicted even without the misconduct. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

The weak link in the State's case against Galdamez was the lack of evidence that he intended to kill anybody. And the note sent out by the jurors during deliberations showed they were

struggling with the intent issue. CP 36-37. Therefore, the Court can have no confidence that putting words into the mouth of a key eye-witness which the jury could regard — wrongly — as unambiguous evidence of intent did not tip the verdict in favor of conviction. The remedy is a new trial.

(b) The State also defends the prosecutor's having elicited testimony that several witnesses were reluctant to testify. BR 26-27. First, few people relish appearing in court to bear witness against someone they know. Emphasizing the reluctance of these witnesses suggested something more sinister. The prosecutor could have treated these witnesses as hostile, from which the jury could have inferred that they were supporters of Galdamez. As it was, the jury could have inferred that these witnesses were in fear. Moreover, these people's feelings about being in court had absolutely no relevance to any legitimate issue before the jury.

All this evidence could possibly have accomplished was to imply without actually saying so that Galdamez was a person who habitually went around threatening and frightening people. This was yet more pseudo evidence of intent in the form of false implication.

The Court may infer that this did not escape the attention of the expert prosecutor, and that he elicited this testimony to accomplish precisely that — the definition of flagrant and intentional misconduct.

(c) The State also defends the prosecutor’s comments during closing argument that Galdamez did not produce evidence of innocence. BR 29. But it is reversible misconduct to mislead the jury about the presumption of innocence and to invite them to infer guilt from the defendant’s failure to produce exculpatory evidence. *Winship*, 397 U.S. at 364 (State’s burden to prove beyond a reasonable doubt every fact necessary to establish guilt); *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (State may not make closing arguments relating to a defendant’s silence to infer guilt from such silence.”)

If the unlawful comment was merely an indirect reference, the Court applies the nonconstitutional harmless error standard to determine whether the error probably affected the outcome of the trial. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007). The error is reversible if the prosecutor intended the comment to create an impermissible inference. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). Again, no other purpose for

these comments can be conceived, and the Court may presume the prosecutor made the argument with the specific intent of producing the inevitable effect.

4. Defense counsel was ineffective in failing to allow the State to ignore the rules of evidence.

The State asks this Court to presume that defense counsel had a legitimate trial strategy for allowing yards of incriminating evidence to come before the jury instead of invoking the evidentiary rules enacted by our Supreme Court to ensure fair trials and verdicts based on reliable evidence. BR 37.

The State resorts to the straw man argument that the defenses of alibi, mistaken identity, etc. were not available. BR 37. Galdamez does not contend otherwise. But no legitimate trial strategy can explain counsel's passively allowing the prosecutor to do and say pretty much whatever he wanted without regard to the rules of evidence and the strictures of Const. art 1, § 22.

The State suggests that it is a legitimate defense strategy to sit idly by while the prosecutor regales the jury with manifestly inadmissible incriminating evidence, because this creates the opportunity for counsel to argue later that the evidence is unpersuasive. BR 38. This makes no sense. The only legitimate

strategy of effective counsel is to keep inadmissible evidence from the ears of the jury in the first place by interposing an objection when the evidence is offered and challenging its relevance and reliability outside the presence of the jury.

5. The State failed to establish that this John A. Galdamez, rather than some other John A. Galdamez, had a prior conviction rendering his possession of a firearm unlawful.

The State's burden of proof on every element constituting a charged offense is beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009).

The State makes a hand-waving argument that it can prove the prior conviction element of unlawful possession of a firearm by showing that some person or other with the same name as the accused incurred a prior felony conviction.

This does not merit consideration. The record speaks for itself on this issue, and Galdamez stands by the brief.

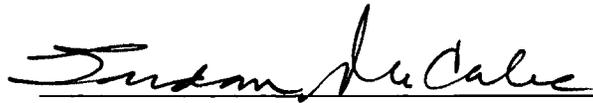
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STATE OF WASHINGTON
DEPUTY

IV. CONCLUSION

For the reasons stated, the Court should reverse Mr. Galdamez's convictions and vacate the judgment and sentence and remand with instructions to dismiss the gun possession charge with prejudice.

Respectfully submitted,



January 20, 2011

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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