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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 41687-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRUCE D. PRICE, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Price was deprived of effective assistance of counsel when his trial counsel failed to request a jury instruction on the defendant's right to resist excessive use of force where he is about to be seriously injured.
2. The trial court erred by imposing a sentence enhancement for endangering bystanders in an attempt to elude where there is insufficient evidence to show anyone other than the defendant and the police were at risk.
3. The trial court erred by denying the defendant's motion to dismiss the special instruction on endangerment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Price was deprived of effective assistance of counsel when his trial counsel failed to request a jury instruction on the defendant's right to resist the excessive use of force by police where he is about to be seriously injured.
2. Whether there is insufficient evidence to support the jury's finding that Mr. Price endangered anyone other than himself and the

pursuing officers and therefore the court erred in imposing the sentencing enhancement under RCW 9.94A.834.

III. STATEMENT OF THE CASE

On January 28, 2010, in the early hours of the morning, Officer Ryan Moody ran a routine check on a vehicle passing by, and, noting the owner had a suspended license, elected to pull the car over. 1RP 49, 52, 2RP 160-62. The car failed to pull over and Moody elected to initiate a chase. 2RP 162, 167. After a short chase (four to five minutes) through the nearly-deserted streets, Officer Moody lost control of his car and crashed into parked cars. 2RP 175, 187, 175. He lost sight of the vehicle.

Deputy Christopher Todd saw Mr. Price, the registered owner of the suspect vehicle, walking down the street and decided to detain him.¹ 1RP 56. He stopped his car in front of Price, ordered him to come over, and asked his name. 1RP 57. Price asked, "Why," then turned and ran away. 1RP 57. Todd and another deputy gave chase and took Price to the ground 100 yards away. 1RP 67, 70, 106. As he was running, Price was struck at least once by a metal baton in the shoulder. 1RP 107, 124. After

¹ Officer Moody testified that Bruce Price was the registered owner of the vehicle, but did not identify him as the driver he saw. 2RP 178, 186. He was never less than two car lengths from the suspect and the driver never looked at him. 2RP 185.

Price was on the ground, a German shepherd police dog was deployed and bit Todd at least twice. 1RP 72, 88, 89-90, 2RP 243, 244-45, 252. In addition, three to five deputies were on top of Price. 1RP 106, 108, 109. Todd tasered Price twice during the two minute struggle. 1RP 67, 70. The struggle came to an abrupt end when Deputy Shaw used a neck restraint that choked Price to unconsciousness. 1RP 71-2, 122.

Todd testified that he used force because Price would not comply with orders to show his hands and was struggling. 1RP 70. Shaw said Price was trying to pull away. 1RP 109. Officer Syler testified that Price was struggling to get away, “flailing” and “jerking away,” 2RP 244. Price did not have a weapon. 1RP 124.

No deputies were injured in the struggle, but Price was badly bitten and had to be taken to the hospital for treatment. 1RP 89, 94, 72, 120.

Price was convicted of attempting to elude a pursuing police vehicle, driving while in suspended or revoked status in the first degree, obstructing a law enforcement officer, and resisting arrest. 3RP 333-34. In addition, the jury returned a special verdict finding that while eluding, persons other than the defendant or the police were endangered. 3RP 334. Price was sentenced to a standard range sentence of 38 months on count one with the other sentences to run concurrently. CP 62. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: MR. PRICE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON THE DEFENDANT'S RIGHT TO RESIST THE EXCESSIVE USE OF FORCE BY POLICE WHERE HE IS ABOUT TO BE SERIOUSLY INJURED.

Washington courts have held that a person being legally arrested by the use of excessive force has the right to resist if he was actually about to be seriously injured. *State v. Westlund*, 13 Wn. App. 460, 466, 536 P.2d 20 (1975); *State v. Ross*, 71 Wn. App. 837, 840, 863 P.2d 102 (1993). Washington Pattern Jury Instruction 17.02.01 sets forth this standard. 11 WAPRAC WPIC 17.02.01.

Price was charged with resisting arrest. RCW 9A.76.040 provides that: "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." All of the officers who testified agreed that Price did not assault them, but was rather merely focused on getting away. 1RP 70, 109, 2RP 244. Despite that reality, Price was subjected to: the aggressive assault of a police dog, resulting in at least two deep bites (2RP 243-45, 252); a baton strike to his shoulder (2RP 107, 124); two applications of a taser (1RP 67, 70); and, eventually, a neck hold that cut off his blood supply, causing him to lose consciousness (1RP 71-2, 122). Price's only defense to the charge of resisting arrest was that he was merely trying to get away from officers

using excessive force. In view of his injuries, he was in imminent danger of serious injury. Yet, despite eliciting these facts during cross-examination, Price's counsel did not request a jury instruction stating the law.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

In order to find that a defendant received ineffective assistance of counsel based on the failure of trial counsel to request a jury instruction, this court must find that the defendant was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced him. *See State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *see also In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A defendant in a criminal case is entitled to fully

instruct the jury on the law as to the theory of defense. *State v. Montague*, 10 Wn.App. 911, 917, 521 P.2d 64, *review denied*, 84 Wn.2d 1004 (1974).

In addition to the charge of resisting arrest, Price was also convicted for attempting to elude and obstructing a law enforcement officer. These charges covered his actions in fleeing from the officers. Thus, the charge of resisting arrest relates to Price allegedly struggling to get away while he was struck repeatedly, bitten by a trained dog, tasered and set upon by five deputies. The evidence produced at trial certainly supported giving the jury an instruction on the lawful resistance of excessive force. Without that instruction, Price could not argue that he was innocent of resisting arrest. There was no legitimate stratagem that would have justified failing to request this instruction. To the contrary, in view of the fact that most of the cross examination focused on eliciting the facts relating to the use of excessive force, trial counsel was attempting to show the jury that Price had reasonably resisted excessive force. Therefore, his counsel was ineffective for failing to request that instruction.

Furthermore, the lack of this instruction could well have changed the result in the verdict on resisting arrest because it would have given the jury a legal reason to find that Price was legally entitled to resist when

threatened with such excessive force. Therefore, the 6th amendment requires that Price's conviction for resisting arrest must be reversed.

ISSUE 2: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT MR. PRICE ENDANGERED ANYONE OTHER THAN HIMSELF AND THE PURSUING OFFICERS AND THEREFORE THE COURT ERRED IN IMPOSING THE SENTENCING ENHANCEMENT UNDER RCW 9.94A.834.

Price was charged by information with attempting to elude a pursuing police vehicle and the State also alleged that an additional twelve months plus one day should be added for violating RCW 9.94A.834, which provides:

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement were endangered during the commission of the crime.

CP 1, RCW 9.94A.834. The defense moved for the dismissal of the special allegation for lack of evidence, but the court ruled it could be submitted to the jury. 2RP 262. The jury answered the special verdict in the affirmative, 3RP 334, and the additional time was added to Price's sentence, CP 62. There was insufficient evidence submitted to show that anyone other than Price and the pursuing police officers were endangered and therefore the court erred by imposing the enhancement.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, all of the pursuing officers testified that at the time of night in which the pursuit occurred, the streets were nearly deserted and could not remember a single pedestrian being present. 2RP 189, 193-94, 198. The visibility was good that night. 2RP 196. No one testified that Price had any close calls or swerves to avoid other vehicles. Price never lost control of his car or caused any property damage.

The prosecutor argued in closing that Price had endangered a passenger, but there is insufficient evidence to show there was a passenger in Price's vehicle. Of all the officers testifying, only Officer Moody testified that he saw a passenger in the vehicle, and he was uncertain, not even able to say for certain if it was a man or woman. 2RP 162, 185. Officer Moody never got a good look because he was never closer than two car lengths behind the vehicle. 2RP 185. Officer Hamilton got a good look inside the vehicle and never saw anyone but the driver. 2RP 204. Likewise, Officer Syler did not see a passenger in the vehicle. 2RP 237.

In total, only Officer Moody's very inconclusive impression that there may have been a passenger, of undetermined gender, of undetermined race, was offered to establish beyond a reasonable doubt that anyone other than Price and the officers was endangered. This evidence is insufficient to have convinced a fair-minded juror and therefore cannot support the imposition of the enhancement. This court should reverse the enhancement and remand for resentencing.

V. CONCLUSION

Price was deprived of effective assistance of counsel when his trial counsel failed to request a jury instruction on the legal use of force to resist a legal arrest where serious injury is imminent. Because this

