No. 44211-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kasey Fenton,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-00516-7

The Honorable Judge Marilyn K. Haan

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The court commented on the evidence and violated Mr. Fenton's right to due process by including Instruction No. 23 in its charge to the jury. 1

A. Mr. Fenton preserved the error for review by objecting to the entire nonstandard instruction and by specifically arguing against the first and last sentences. 1

B. The error may be reviewed as a manifest error affecting Mr. Fenton's Fourteenth Amendment right to due process..... 2

C. The court's instructions failed to make the self-defense standard manifestly apparent to the average juror, included a comment on the evidence, and unfairly emphasized the prosecution's theory of the case. 3

II. The trial court should not have allowed police officers to provide narration explaining what was depicted in photographic and video evidence. 4

CONCLUSION 4

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009) 2

State v. Nguyen, 165 Wn.2d 428, 197 P.3d 673 (2008) 3

State v. Russell, 171 Wn.2d 118, 249 P.3d 604 (2011) 2

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 2

OTHER AUTHORITIES

RAP 2.5 ..... 2, 3

ARGUMENT

I. THE COURT COMMENTED ON THE EVIDENCE AND VIOLATED MR. FENTON'S RIGHT TO DUE PROCESS BY INCLUDING INSTRUCTION NO. 23 IN ITS CHARGE TO THE JURY.

A. Mr. Fenton preserved the error for review by objecting to the entire nonstandard instruction and by specifically arguing against the first and last sentences.

Mr. Fenton objected to the inclusion of Instruction No. 23 in the court's instructions. RP 804-805. Contrary to Respondent's claim,[1] Mr. Fenton did not limit his objection to the last sentence of the instruction. Instead, he objected to (1) the instruction as a whole, (2) the "slightly non-standard" language, and (3) "the language that the State has added in reliance on case law." RP 804-805.

Mr. Fenton's objection to the instruction as a whole came at the end of counsel's initial speech: "I think adding the 'necessary' definition instruction is confusing to the actual statement of law regarding self-defense." RP 805. In addition, counsel suggested that the defense would be asking for an additional instruction "if the Court gives this." RP 805.

Mr. Fenton also made clear his objections to the first and last sentences in the instruction. First, defense counsel noted that the standard

[1] Brief of Respondent, pp. 8-9.

instruction "does not relate specifically to self-defense." RP 805. Counsel went on to expressly object to those portions of the instruction relating specifically to self-defense: "Given that that's not a part of it, we'd object to that portion of the instruction." RP 805. Counsel reiterated this point (as to the first sentence) by pointing out that the instruction "is confusing in that it does appear contradictory to the fact that… self-defense is not to consider retreat as a reasonable alternative." RP 805.

Counsel *also* made a specific objection to the last sentence: "[a]nd we strongly object, obviously, to the last statement…" RP 806. In making this objection, counsel did not retract Mr. Fenton's objection to the instruction as a whole. Nor did counsel repudiate the argument that the first sentence was "confusing" and "contradictory." RP 805.

B. The error may be reviewed as a manifest error affecting Mr. Fenton's Fourteenth Amendment right to due process.[2]

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the

[2] In the alternative, if unpreserved error is not manifest, the court has discretion to accept review under RAP 2.5(a). S*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

The errors in Instruction No. 23 qualify for review under RAP 2.5(a)(3). The errors affected Mr. Fenton's due process right to have the jury consider self-defense. In addition, they had practical and identifiable consequences at trial: the errors stripped Mr. Fenton of his self-defense claim by undermining the subjective standard and by suggesting that the court believed he acted in retaliation.

Even if Mr. Fenton's objections failed to preserve the error, the issue may be raised for the first time on review. RAP 2.5(a)(3).

C. The court's instructions failed to make the self-defense standard manifestly apparent to the average juror, included a comment on the evidence, and unfairly emphasized the prosecution's theory of the case.

Mr. Fenton rests on the argument set forth in Appellant's Opening Brief.

II. THE TRIAL COURT SHOULD NOT HAVE ALLOWED POLICE OFFICERS TO PROVIDE NARRATION EXPLAINING WHAT WAS DEPICTED IN PHOTOGRAPHIC AND VIDEO EVIDENCE.

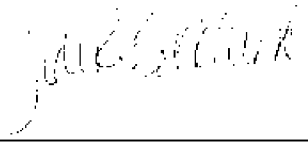
Mr. Fenton rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

Mr. Fenton's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on September 26, 2013,

BACKLUND AND MISTRY



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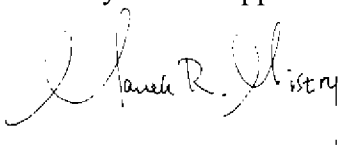

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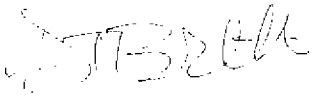

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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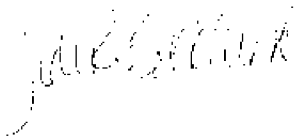
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 26, 2013.



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