

NO. 47804-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER POMA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The instructional errors undermined the jury's assessment of Mr. Poma's testimony that he had a lawful and constitutional right to act in self-defense

a. The prosecution implicitly agrees that the first aggressor instruction was improperly given.

Puzzlingly, the prosecution contends the first aggressor instruction cannot be challenged on appeal because it is not a manifest constitutional error. Resp. Brf. at 3. This argument is illogical because even the prosecution concedes that an improperly issued first aggressor instruction raises a constitutional error, subject to the constitutional harmless error test. Resp. Brf. at 6. And the response brief never explains how this error is not constitutional or not manifest. Instead, it focuses on arguing it was not error to give the instruction under the facts of the case, thereby demonstrating that the record is sufficient to resolve this issue on appeal. Accordingly, this constitutional error is manifest and properly before the Court on appeal under RAP 2.5(a).

On the merits of the issue, the decision to give a first aggressor instruction is based on a conclusion of law reviewed *de novo*. *State v. Bea*, 162 Wn.App. 570, 577, 254 P.3d 433 (2010).

An aggressor instruction is not proper where the defendant's provoking act is the assault itself. *State v. Wasson*, 54 Wn.App. 156, 159, 772 P.3d 1039 (1989). Instead, the evidence must show the defendant engaged in intentional conduct reasonably likely to provoke a belligerent response, beyond the assault itself. *Id.* And the intentional conduct must be more than words alone. *State v. Riley*, 137 Wn.2d 904, 919, 976 P.2d 624 (1999).

Here, the State portrays the facts in the light most favorable to its case, as it may do when justifying the giving of an instruction. But its portrayal of the facts contends Mr. Poma provoked the fight and this fight constituted the assault itself. Resp. Brf. at 6. Because the State's theory, and the evidence in the case, did not show Mr. Poma provoked Mr. Glover to act aggressively, the State was not entitled to a first aggressor instruction as a matter of law.

The State cursorily notes that Mr. Poma testified he was chest-bumped by Mr. Glover, but it fails to tie this testimony to the law defining when a first aggressor instruction may be given. Resp. Brf. at 6. Mr. Poma testified that he felt threatened by the physically imposing, verbally aggressive Mr. Glover, especially after Mr. Glover chest-bumped him. 3RP 319-20, 325. This information is relevant to

determining whether Mr. Poma acted in lawful self-defense. But it does not make it proper to give a first aggressor instruction because there was no intentional conduct of aggressive acts by Mr. Poma that preceded this chest-bump, as required for this instruction. *See Wasson*, 54 Wn.App. at 159.

Here, even the State concedes there was no evidence showing Mr. Poma physically instigated Mr. Glover's assaultive response, and thereby created the need to defend himself. Without such evidence, it is improper to give a first aggressor instruction and the State has not proven this error is harmless beyond a reasonable doubt.

Giving this instruction erroneously has the effect of nullifying the right to act in self-defense. *Riley*, 137 Wn.2d at 910 n.2. Mr. Glover was extremely large, drunken, and verbally abusive in an effort to provoke the much smaller Mr. Poma and his even more slightly built younger brother. 3RP 319-20, 401. Mr. Poma testified that he felt physically threatened, feared for his younger and smaller brother, and reacted to that threat. 3RP 319, 338-39. Mr. Poma was responding to threatening words and behavior by Mr. Glover as he perceived them, but the aggressor instruction would lead the jury to believe he lacked the right to act in self-defense. Given Mr. Poma's testimony about the

incident, the State cannot meet its heavy burden of proving the erroneously given instruction did not affect the jury in evaluating the central issue presented.

b. The incorrect instruction on the right to act in defense of others is not cured by defense counsel's closing argument.

The prosecution contends that even though the instruction defining self-defense omitted the essential element that a person may act in lawful defense if protecting another person, this error was harmless because Mr. Poma argued to the jury that he was lawfully defending another person. Resp. Brief at 8.

First, the prosecution understates the extent of the instructional error. The primary instruction defining the essential requirements for force to be lawful said only that force is lawful “when used by a person who reasonably believes that *he* is about to be injured.” CP 36 (Instruction 15, emphasis added). Likewise, Instruction 17 explained that a person may stand his ground who reasonably believes “*he* is being attacked.” CP 38 (emphasis added). It is only Instruction 16 stated that obliquely noted “a person is entitled to act on appearances in defending himself or another.” CP 37. No instruction explained that defense of another may constitute the lawful use of force.

Second, the prosecution is simply wrong when it claims instructional error is cured defense counsel's ability to argue a theory to the jury when that theory is not set forth in the court's instructions to the jury. The jury is instructed that arguments are not evidence, or legal instruction, and the court's instructions control. CP 21. The court's instructions tell the jury that it "must disregard" any lawyer's statement that is not supported by the court's instructions. *Id.* Closing arguments do not define the basis of the jury's verdict. *State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) ("we cannot consider the closing argument in isolation" and must discount its value in determining the basis of the verdict when the jury was instructed to base its verdict on the instructions and not arguments of counsel).

Jury instructions must clearly set forth the law of self-defense. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The jury is not expected to parse words; the instructions must make the law manifest apparent to an average lay person. *LeFaber*, 128 Wn.2d at 900. Defense counsel's argument that Mr. Poma was defending his brother fell flat because the jury was not told that the State's burden of disproving self-

defense required it to disprove that Mr. Poma feared for his brother's safety and reasonably responded to protect him.

The deficiency in inconsistent and incomplete self-defense instructions and the prejudice that results is amply supported in case law. For example, in *State v. Irons*, 101 Wn.App. 544, 547-48, 4 P.3d 174 (2000), the defendant was confronted by several people and shot one. The jury instructions spoke only to the defendant's fear of "the victim" and not multiple assailants. *Id.* at 550-51. This Court reversed because the instructions did not adequately convey the law that the jury could consider the defendant faced multiple assailants. *Id.* at 552-53.

Similarly, in *State v Harris*, 122 Wn.App. 547, 550-51, 90 P.3d 1133 (2004), the defendant said he was afraid of two assailants but defense counsel proposed an instruction that the defendant had to fear the "victim." This Court reversed, because the instruction defining self-defense conflicted with the act on appearances instruction that told the jury to consider all facts and circumstances. *Id.* at 555. This inconsistency in the instructions was proposed by defense counsel constituted ineffective assistance of counsel. *Id.*

The incorrectly narrowed instructions defining self-defense, omitting the element of defense of another, and defense counsel's

unreasonable failure to propose instructions critical to his theory of self-defense, are deficient performance. Because self-defense was the central issue at trial and Mr. Poma testified about his reasonable fear of harm to his brother, there is a reasonable probability that the error affected the outcome of the case.

2. The prosecutor’s improper direction to the jury just before they started deliberations was a flagrant effort at misleading the jury at a time when it could not be erased from the jurors’ minds and coupled with other errors, requires reversal.

The response brief obliquely concedes that the prosecutor “could have confused the jury about the burden of proof” in his closing argument. Resp. Brf. at 14. But it fails to discuss or acknowledge the words actually used by the prosecutor and why they were particularly dangerous in discouraging the jurors from fully and fairly considering the issues in the case, as discussed in Appellant’s Opening Brief at 26-29. The response brief also ignores the timing of these remarks, at the very end of the State’s rebuttal argument and as the court excused the jury to start deliberations.

The prosecutor did not only confuse the burden of proof. He did that by telling the jury that Mr. Poma “is responsible for all consequences of his actions” and only question to decide was whether

they believe “he did ”it. 3RP 414-15. But he also explained the deliberative process only meant they needed to come to a split second judgment without any discussion, and the prosecution ignores this fundamental improper argument. *Id.*

The prosecutor ended his closing argument by telling the jurors to make up their minds as they “leave here” and walk to the deliberations room before any discussion of the case. 3RP 414-15. The court immediately thanked the prosecutor, said to the jury “I’m going to go ahead and excuse you now” to start deliberations. 3RP 415. The prosecutor timed his remarks so defense counsel lacked a fair opportunity to object and where the impact of his remarks would be the greatest on the jurors as the last thing they heard from the State. The timing of these remarks indicate they were a pre-planned closing to the jury, given with the intent to diminish the jurors’ sense of obligation to fully evaluate the self-defense claim or engage in group decision-making.

Finally, the impact of these multiple errors must be assessed cumulatively, even if a single error is not enough to require a new trial in isolation. The State concedes that the prosecutor could have confused its burden of proof and the self-defense instructions did not clearly

explain the law. In addition, it makes no showing that Mr. Poma's act met the legal definition of a first aggressor necessary to allow a first aggressor instruction to the jury and making it more likely that the jurors did not fully and fairly evaluate his right to act in self-defense. These errors are compounded by defense counsel's proposal of inadequate instructions that did not include his theory of defense of others. The numerous errors in the instructions to the jury, some sought by the defense, coupled with the prosecution's claim that it merely needed to prove Mr. Poma did it and the jurors did not need to deliberate about that fact as a group, cumulatively require a new trial.

3. The legal financial obligations should be stricken and no appellate costs awarded in the event Mr. Poma does not substantially prevail on appeal.

The prosecution does not contest Mr. Poma's continued and presumed indigence, as set forth in Appellant's Opening Brief. It also does not claim it intends to seek appellate costs if it prevails on appeal.

Instead, it claims the discretionary legal financial obligations imposed by the court are permissible even if not actually proved to have been specifically incurred. RCW 10.01.160(2) only permits fees that are actually incurred and the State does not point to any evidence proving the incursion of these fees. The sheriff service fees were not

even mentioned during the sentencing hearing, giving Mr. Poma inadequate notice of their potential imposition.

The court expressly declined to impose incarceration fees pertaining to the sentence imposed and did not find Mr. Poma had the means to pay such a fee. CP 49. Accordingly, the \$150 fee the court imposed was for pretrial incarceration but it is unlawful when that fee was not actually incurred. CP 48.

Finally, in *State v. Duncan*, _Wn.2d _, 2016 WL 1696698, *2 (April 28, 2016), the Supreme Court reiterated the constitutional limitations on imposing fees upon an indigent criminal defendant. When no individualized inquiry has occurred, the significant burdens of legal financial obligations on impoverished people and their families favors the appellate court's use of its discretionary authority to strike fees imposed upon a person who lacks the ability to pay. *Id.* at *2-3. The State does not contest Mr. Poma's indigence and the court made no findings of his ability to pay. Accordingly, this Court should strike the all discretionary fees and rule that no appellate costs may be imposed.

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Mr. Poma's conviction should be reversed and his case remanded for further proceedings consistent with this Court's opinion.

DATED this 13th day of May 2016.

Respectfully submitted,

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