

No. 481120

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

SHAWN TILLERY, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Violated Mr. Tillery's Due Process Rights By Refusing To Instruct The Jury On The Law Of Self-Defense.
- B. The Trial Court Erred When It Entered Conclusion of Law 3: The defendant Shawn Michael Tillery, shall be incarcerated in the Department of Corrections for a period of 36 months plus 12 months deadly weapon enhancement on Count II, for a total of 48 months..."
CP 217.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. A trial court must provide to the jury, when requested by the defense, a self-defense instruction if there is some evidence, from whatever source, to support the instruction. Where there is evidence that Mr. Tillery was tackled and in pushing away, injured another, should a self-defense instruction have been given to the jury ?
- B. The total confinement imposed is the sum of the base sentence, and any enhancements or aggravators. Did the trial court err by ordering Mr. Tillery to serve 48 months, rather than 36?

II. STATEMENT OF FACTS

Shawn Tillery and Corrina Twisselman dated for over two years, and are parents to a toddler-aged child. (Vol. 2RP 78-80; Vol. 5 RP 599-600)¹. They shared an apartment together. (Vol. 1 RP 81; Vol. 5RP 600). In January 2014, a no contact order prohibited Mr. Tillery from having contact with Ms. Twisselman. (Vol. 3RP 291; Vol. 5RP 622). However, Ms. Twisselman said she allowed him to use one of her vehicles, have a key to the apartment until sometime between February and March, shower at the apartment, and spend the night once. (Vol. 2RP 100, 102, 105). Although disputed by Ms. Twisselman, Mr. Tillery and other witnesses testified that he continued to live at the apartment with the exception of the weekends he spent with his mother or brother. (Vol. 5 RP 579;588;601).

On March 16, 2014, Ms. Twisselman and Mr. Tillery exchanged text messages, arranging for her to pick up their child after dinner at his mother's home. (Vol. 2RP 83-85). She spent the afternoon with Christopher Martin and her older son. (Vol. 2RP 83-

¹ For purposes of this brief, the hearing date January 5, 2015 will be referenced as Vol. 1 RP; January 6, 7, 8, 2015 as Vol. 2 RP; January 12,13,14, 2015 as Vol. 3 RP; January 15, 2015 as Vol. 4 RP; January 20,2015 as Vol. 5 RP; January 21, 23, 2015 as Vol. 6 RP; March 16, 2015 as Vol. 7 RP; April 6, 2015 as Vol. 8 RP; September 3, 2015 as Vol. 9 RP; September 9, 2015 as Vol. 10 RP; October 30, 2015 as Vol. 11 RP.

85). She testified that Mr. Tillery sent her a text message to tell her that he was coming to the restaurant where she was dining with Martin and her son. (Vol. 2RP 86). She called the police. He left after exchanging words with her. (Vol. 2RP 87;189).

Later, she went to Mr. Tillery's mother's home to pick up her younger son. She drove back to the apartment with her boys and Martin. (Vol. 2RP 88-89). That night she and Martin went to bed, locking the bedroom door. (Vol. 2RP 90).

Mr. Tillery drove over to the apartment some time after 11 p.m. with the intention of removing his personal belongings. (Vol. 5 RP 604). He opened the back slider door and, without turning on the lights, grabbed what he believed was his laptop computer. He carried it out to his car. He went back in to get his clothing, TV and birthday gifts from the bedroom. (Vol. 5 RP 617). The bedroom door was locked so he retrieved a knife from the kitchen to pry it open. On the way to the bedroom, he saw an army uniform lying on the floor. (Vol. 5 RP 604-05).

Holding the knife, he turned on the light as he entered the room. (Vol. 5 RP 606). He saw an unclothed Martin lying in the bed with Ms. Twisselman and yelled, "What the hell is going on". (Vol. 5 RP 606). He reported that Ms. Twisselman hopped out of

bed and grabbed her phone. (Vol. 5 RP 606). Mr. Tillery testified that as he yelled at Ms. Twisselman, he held the knife in the same manner he used it to pick the lock. He never moved it. (Vol. 5 RP 607). He stated that Martin came at him with a football tackle and shoved him into the closet doors. (Id.) Mr. Tillery defended himself from Martin by pushing Martin's shoulders. (Vol. 5 RP 608;650).

As Mr. Tillery pushed Martin back, he saw that Martin's neck had been cut. Mr. Tillery tried to run away, but Martin continued to tackle and hold him. They wrestled and Mr. Martin was injured 3 more times by the knife. (Vol. 4RP 393). Mr. Tillery testified that he dropped the knife in the hallway, Martin tripped on a pile of clothing, and Mr. Tillery ran out the back door. (Vol. 5RP 607).

Ms. Twisselman testified that when the bedroom light went on, she saw Mr. Tillery "just standing". (Vol. 2RP 155). She said she saw Martin "in a motion to defend himself" "In the middle of standing and sitting because like there is a motion to make it so you defend yourself." (Vol. 2RP 156).

Officer Wolfe testified that Martin told him he saw Mr. Tillery in the bedroom and tackled him. It was only after tackling Mr. Tillery that he was injured. (Vol. 5 RP 550-51).

Mr. Martin testified that he woke to a sound and saw Mr. Tillery standing in the bedroom. (Vol. 2RP 198). He said he heard Ms. Twisselman yell “He has a knife”, so he lunged for the knife hand and “as he was bringing the hand up, I grabbed at the arm, just trying to control the strike of it.” (Vol. 2RP 198).

Officers arrested Mr. Tillery and later searched his car. They found the laptop, and other items. (Vol. 2 RP 246). Pierce County Prosecutors charged Shawn Tillery by amended information with burglary first degree, assault second degree, violation of a no contact order, and theft second degree. The information also alleged that Mr. Tillery was armed with a deadly weapon, some counts involved domestic violence, and the current offenses were committed shortly after release from confinement. (CP 20-21).

The defense requested a jury instruction on self-defense, pointing out that Martin tackled Mr. Tillery and was injured in the process of a fight. (Vol. 5RP 677). Over defense objection, the court denied the instruction². (Vol. 5 RP 678).

After a jury trial, Mr. Tillery was found guilty of second degree assault, with a deadly weapon enhancement, and rapid

² The defense filed a motion for discretionary review on the issue of the self-defense instruction with this Court which was denied on 8/21/2015 under Court of Appeals No. 472431.

recidivism aggravator. He was also found guilty of the misdemeanors of violation of a no contact order domestic violence, and third degree theft. (CP 106-113). The jury did not reach a unanimous verdict on the burglary first -degree charge and Mr. Tillery later entered a plea of guilty to residential burglary. (CP 102; 161-170).

Mr. Tillery was sentenced on September 3, 2015 on all counts except the residential burglary. (CP 140). The offender score was calculated as a "1". (CP 141). The standard range, not including enhancements, was 6-12 months, and with the weapon enhancement, the total standard range was 18-24 months. (CP 180). The court added a second 12 months for the aggravating factor of rapid recidivism. (CP 216-217; 180-181). The remaining two counts were gross misdemeanors and separately sentenced, to be served concurrently. (CP 217).

At the sentencing hearing, the court stated:

The standard range within an offender score of one, which is not disputed, based on prior history, is 6 to 12 months. But there is an aggravating factor of rapid recidivism or having recently been released from custody that allows the Court to go outside the standard range.

In addition, there's a deadly weapon sentencing enhancement of 12 months flat time, which is added onto whatever sentence the Court finds to be reasonable with that aggravating factor.

The Court will impose 36 months plus the 12 months flat for a total of 48 months in the Department of Corrections. No good time credit for the flat time.

Vol. 9RP 17.

The judgment and sentence added the high end of the standard range of 12 months, plus the weapon enhancement for a total of 24 months and then a second 12 months for rapid recidivism. However, the court added the second 12 months to “36 months” for a total of 48 months. (CP 144-145).

The residential burglary charge was sentenced on a different date from the other convictions. (CP 203-215). The court imposed a 20-month sentence, to run concurrent with the earlier imposed sentence. (CP 207). Mr. Tillery makes this timely appeal. (CP 176-196).

III. ARGUMENT

A. The Trial Court Violated Mr. Tillery’s Due Process Rights By Refusing To Instruct The Jury On The Law Of Self-Defense.

A criminal defendant is entitled to an instruction on his theory of the case if the evidence supports the instruction. *State v. Werner*, 170 Wn.2d 333, 336, 241 P.2d 333 (2010). A court

determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act. *State v. Callahan*, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). A factual determination by the trial court for evidence to support a self-defense instruction is reviewed for abuse of discretion. *State v. Werner*, 170 Wn2d. at 337. If there is *some* evidence demonstrating self-defense, a defendant is entitled to a self-defense jury instruction. *State v. Werner*, 170 Wn.2d at 337. (emphasis added).

Here, Mr. Tillery presented credible evidence describing conflicting and overlapping accounts of events surrounding the assault charge. What all parties agreed on was that the events unfolded in split seconds.

Ms. Twisselman and Mr. Tillery testified that Mr. Tillery opened the bedroom door simultaneously with turning on the light. Ms. Twisselman said she woke Martin “and Shawn (Tillery) started to lunge on him.” (Vol. 2RP 92). Officer Wolfe testified that Mr. Martin said that he saw Mr. Tillery standing in the room and the first thing he did was tackle him. He did not say that Mr. Tillery was

lunging toward him or attacking him. Mr. Martin testified that he heard Ms. Twisselman say, "He has a knife" so *he* lunged for the knife and tried to control it as Mr. Tillery raised his arm. (Vol. 2RP 198). (Vol. 2RP 203). Mr. Tillery testified he did not move the knife, but rather, was confronting Ms. Twisselman and was immediately tackled by Mr. Martin. It was when he pushed Mr. Martin away that Mr. Martin was injured.

The threshold burden of production for a self-defense instruction is low. A defendant is not required to produce evidence beyond a reasonable doubt, but rather, "some evidence." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

Whether the defendant has produced some evidence of self-defense is a matter of law for the trial court. *State v. Walker*, 40 Wn.App. 658, 662, 700 P.2d 1168, *rev. denied*, 104 Wn.2d 1012 (1985). To make that determination, the trial court must assess that evidence from both a subjective and objective viewpoint: from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d at 238. (internal citations omitted).

Mr. Tillery met his burden to produce evidence that he believed he was about to be injured when he fought Mr. Martin off

of him. The jury should have been given the self-defense instruction to make a determination of whether Mr. Tillery acted reasonably in fighting off Mr. Martin and did not use more force than was necessary to defend himself. RCW 9A.16.020(3); *State v. L.B.*, 132 Wn.App. 948, 952, 135 P.3d 508 (2006).

The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *State v. Werner*, 170 Wn.2d. at 337. Where the outcome of this case, as here, depends on which version of events a jury believes, the failure to give a self-defense instruction is prejudicial. *State v. Werner*, 170 Wn.2d at 338. Here, whether Mr. Tillery was attacked by Mr. Martin and reasonably fought back, or whether Mr. Tillery attacked Mr. Martin was for the jury to determine. Failure to give the instruction resulted in prejudice to Mr. Tillery. The remedy is to reverse the conviction.

B. The Trial Court Incorrectly Calculated The Time of Confinement Requiring Remand For Correction.

An appellate court reviews calculations of statutory standard ranges de novo. A sentencing court must first correctly determine the standard range prior to imposing an exceptional sentence.

Failure to do so is legal error subject to review de novo. *State v. Parker*, 132 Wn.2d 182, 189, 937P.2d 575 (1997)

Here, at sentencing, the court imposed the top of the standard range sentence of 12 months (count 2). Under RCW 9.94A.533(4)(b), the deadly weapon enhancement statute, the court was required to add, for a class B felony, an additional 12 months to the standard sentence range. The court correctly added the 12 months for the deadly weapon enhancement to the base sentence, totaling 24 months. (CP 141). The court entered a correction to the judgment and sentence, indicating it had neglected to check the box in section 2.4, indicating it was imposing an exceptional sentence, based on the aggravating factor found by the jury (rapid recidivism). (CP 213-214).

Section 4.5 lists a 12 month addition for the rapid recidivism aggravator found by the jury. (CP 144). The court checked the preprinted box "Sentence Enhancements in Count II shall run consecutive to each other." (CP 144). However, rather than beginning with the number '24' the court erred in setting the confinement to 36 months and then adding an additional 12 months for the rapid recidivism aggravator. The confinement actually added up to 24 months (offense plus deadly weapon enhancement)

plus 12 months for the special verdict, totaling 36 months not 48 months. (12 + 12 +12 months). The matter should be remanded for correction.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Tillery respectfully asks this Court to vacate the assault second-degree conviction. In the alternative, Mr. Tillery asks this Court to vacate and remand for resentencing with a correction to the sentence.

Respectfully submitted this 16th day of May 2016.

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