

FILED
OCT 18 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

28540-5-III

COURT OF APPEALS

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL BEA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The court erred in giving the first aggressor jury instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

(CP 106)

2. The court erred in instructing the jury that the special verdict required unanimity:

You will also be given a special verdict form. If you find the defendant not guilty of any crime, do not use the special verdict form. If you find the defendant guilty of any crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

(CP 111)

3. The prosecutor's closing arguments violated due process.
(RP 125-26, 143)

B. ISSUES

1. The evidence showed that the victim struck the first blow in a fight that eventually led to a stabbing. The defendant claimed he acted in self-defense. Was giving the aggressor instruction reversible error?
2. The jury was asked to determine whether the defendant was armed with a deadly weapon at the time of the alleged offense. Did an instruction instructing the jury that it must be unanimous in order to answer "no" require reversal?
3. The victim was stabbed five times. The defendant was charged with assault. The prosecutor told the jury that, as a matter of law, a person intends the natural consequences of his actions. Did this argument irreparably violate the defendant's right to a fair trial?

C. STATEMENT OF THE CASE

Mr. Cruz gave a party and all the guests were drinking. (RP 8)
One of Mr. Cruz's friends knew Daniel Bea's girlfriend Shakira and invited Daniel and Shakira to the party. (RP 9, 89) About 3:00

in the morning, Mr. Bea was in the bathroom arguing with Shakira. (RP 9, 64, 77) By this time, Mr. Cruz and his guests were drunk. (RP 10)

Mr. Cruz told Mr. Bea it was time to leave. (RP 64) Mr. Cruz and his friend Eric Bernal tried to get into the bathroom, but someone was leaning against the door so it wouldn't open. (RP 9, 109) Mr. Cruz and his friends kicked in the bathroom door. (RP 65, 82) Fighting ensued. (RP 65, 72)

According to Mr. Cruz, he hit Mr. Bea and Mr. Bea hit him. (RP 4) According to Mr. Bea, as he came out of the bathroom Mr. Cruz hit him in the face and they began fighting. (RP 109) According to Mr. Cruz's friend Ricardo DeJesus, Mr. Bea jumped, or jumped into, Mr. Cruz. (RP 64-65) There was a lot of pushing and wrestling. (RP 4, 69, 75, 78, 82-83)

Mr. Cruz's friends broke up the fight. (RP 4-5, 66, 72, 84) Another guest, Carla Brancatto, testified that she was holding Mr. Cruz back as Mr. Bea approached them from the kitchen, and Mr. Cruz pushed her away and resumed fighting with Mr. Bea. (RP 72) Mr. Bea recalled that he was trying to leave the house but he believed the others were coming at him so, as he passed the kitchen area, he grabbed a knife. (RP 110) As he turned to leave Mr. Cruz tackled him and the others joined in. (RP 110) Mr. Bernal saw Mr. Bea stab Mr. Cruz while they

were between the kitchen and the living room. (RP 84) They ended up on the couch, and when Ms. Brancatta saw blood on the couch she realized Mr. Bea had a knife in his hand. (RP 72-73) The other guests separated them and took Mr. Cruz to the hospital. (RP 5, 67, 73, 85)

Dr. Leandro Cabanilla examined Mr. Cruz and found five stab wounds, two of which were more than an inch deep, and a broken rib. (RP 45) He treated the injuries, which involved irrigating and closing the wounds and administering antibiotics and pain medication. (RP 45-46)

Investigating Officer Keith Noble confirmed that the door to the bathroom had been forced open inwards from the hallway and was damaged. (RP 15, 17)

In addition to the standard self-defense instruction, the court gave the “first aggressor” jury instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

(CP 106)

The court also instructed the jury on the deadly weapon special verdict:

You will also be given a special verdict form. If you find the defendant not guilty of any crime, do not use the special verdict form. If you find the defendant guilty of any crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict for “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

(CP 111)

The prosecutor’s theory of the case was that since Mr. Bea had stabbed Mr. Cruz, and a person is presumed to intend the consequences of his act, the State had proved that Mr. Bea acted with intent to cause great bodily harm. (RP 125-26, 143)

During closing argument the prosecutor told the jury: “We intend the results that are reasonable from our actions. *That’s the legal standard.* We intend the results, the natural results of our acts.” (RP 125) (emphasis added) He went on to explain: “[I]f you take a knife, that big of a knife that we’ve shown you over and over, jab it into somebody with enough force to break it off, enough force to fracture a rib, doesn’t matter what you say your intent is the natural obvious consequences, you’re intended

results in stabbing somebody with a knife is to cause huge significant injuries.” (CP 126)

The defense theory of the case was that the State had failed to prove that Mr. Bea had inflicted great bodily harm, or if he had then he did so in self-defense. (RP 134, 139) In response, the prosecutor argued:

You are responsible for what the normal consequences of your actions. That’s what *legally that is what intent is*. You intend to do what the normal results of your act would be. Likewise, you know, if you come up and stab a person in the chest your intent is not just to scare them, your intent the natural result of your acts are to cause great bodily harm.

(CP 143) (emphasis added).

D. ARGUMENT

1. THE EVIDENCE DID NOT JUSTIFY INSTRUCTING THE JURY ON THE FIRST AGGRESSOR IN A CASE OF SELF-DEFENSE.

An initial aggressor instruction is disfavored and should not be given absent evidence to support it. *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014 (1989). *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.”

State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). “It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.” *Clausing*, 147 Wn.2d at 627. Prejudicial instructional error requires reversal. *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001).

The trial court errs if it gives an aggressor instruction when there is no evidence that the defendant’s conduct precipitated the need for self-defense. *State v. Wasson*, 54 Wn. App. at 158-59. *State v. Riley*, 137 Wn.2d at 909. “[C]ourts should use care in giving an aggressor instruction” because the State has the burden of disproving the defendant’s self-defense claim beyond a reasonable doubt. *Riley*, 137 Wn.2d at 910 n. 2. “[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.” *Riley*, 137 Wn.2d at 910 n. 2, quoting *State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985).

“[W]ords alone do not constitute sufficient provocation” to warrant an aggressor instruction because a victim faced with only words is not entitled to respond with force. *Riley*, 137 Wn.2d at 911. An aggressor instruction is properly given if there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act

in self-defense. *Riley*, 137 Wn.2d at 909-10. “The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim.” *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). “[T]he provoking act must [] be related to the eventual assault as to which self-defense is claimed,” *Wasson*, 54 Wn. App. at 159, and it must be “intentional.” *Kidd*, 57 Wn. App. at 100. Further, the provoking act cannot “be the actual assault.” *Kidd*, 57 Wn. App. at 100 (citations omitted).

Mr. Bea did not intentionally provoke an altercation with Mr. Cruz by arguing with his girlfriend in the bathroom. Some witnesses testified that Mr. Cruz kicked in the bathroom door. The investigating officer confirmed that the bathroom door had been kicked in from the hallway. Mr. Cruz and Mr. Bea agreed that Mr. Cruz hit Mr. Bea before Mr. Bea hit Mr. Cruz. Everyone else who saw the fight merely described general pushing and wrestling. No rational jury could find Mr. Bea intentionally provoked a fight with Mr. Cruz.

The court erred in giving the aggressor instruction. The error was prejudicial and requires reversal of the conviction.

2. INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS IN ANSWERING THE SPECIAL VERDICT WAS IMPERMISSIBLY COERCIVE.

A jury must be unanimous in order to answer “yes” to a special verdict question about the grounds for a sentence enhancement, but need not be unanimous to answer “No.” *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003). *Bashaw* expressly disapproved a jury instruction that required unanimity in order to answer “no” to the special verdict question. The instruction in *Bashaw* stated: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The instruction to Mr. Bea’s jury similarly required unanimity to answer “no:”

. . . Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict for “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

(CP 111)

In *Bashaw*, as here, the jury answered yes to the special verdict questions. 169 Wn.2d at 147. But there is no way to determine whether the jury instruction may have had a coercive effect; thus the erroneous

instruction cannot be found harmless beyond a reasonable doubt. *Id* at 147-48.

The jury instruction on answering the special verdict question as to the firearm enhancement in this case was erroneous and the sentence enhancement must be vacated. *Id.* at 148.

3. THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS REQUIRE REVERSAL.

The prosecutor's statements in closing argument constituted improper, prejudicial misconduct. *See State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Prosecutorial misconduct, in the absence of an objection, is reversible error if it is material to the trial's outcome and could not have been remedied. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

The appellate court "review[s] a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *Boehning*, 127 Wn. App. at 519. Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996)).

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969); *State v. Boehning*, 127 Wn. App. at 518. In order to establish prosecutorial misconduct, an appellant must show that the State's conduct was improper and prejudiced his right to a fair trial. *Boehning*, 127 Wn. App. at 518.

When, "during closing argument, the prosecutor purports to instruct the jury on a point of law, such statements must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). The court's instruction defined intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

(CP 91)

But the prosecutor repeatedly told the jury that, as a matter of law, "We intend the results, the natural results of our acts." The State did not request an instruction to this effect, and none was given. The prosecutor's argument circumvented the exclusive power of the court to instruct the jury on the law to be applied by the jury. "The prosecuting attorney

misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” 100 Wn.2d at 763.

“A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). But a prosecutor commits misconduct by making an argument during closing arguments that shifts the burden of proof to the defendant. *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Such misconduct affects a constitutional right and requires reversal unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006).

A mandatory presumption that a person intends the consequences of his acts violates Due Process because it relieves the State of its burden of proving an element of the offense. *State v. Schloredt*, 97 Wn. App. 789, 799-800, 987 P.2d 647 (1999).

In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) the defendant had been charged with “deliberate homicide” and under Montana law, an element of this offense is intent to kill. The trial court instructed the jury that: “(t)he law presumes that a person intends the ordinary consequences of his voluntary acts.”

Sandstrom, 442 U.S. at 513. The Supreme Court found this instruction erroneous. 442 U.S at 515.

The intent to inflict great bodily harm is the definitive element of first degree assault. Given the intoxication of the participants and witnesses, and the conflicting and inarticulate description of the central events, Mr. Bea's intent was a central issue in the case. The prosecutor usurped the role of the court by taking it upon himself to instruct the jury on a point of law that was not included in the court's instructions and that had the effect of shifting the burden of proving the essential element of first degree assault: he told the jury that the act of stabbing the victim established an essential element of the crime, the intent to inflict great bodily harm, as a matter of law.

Although the defense did not object, it is difficult to conceive of a curative instruction that could have been given. *See Davenport, supra*. As a statement of the law, the prosecutor's argument was not inaccurate; the court could not instruct the jury that as a matter of law an actor is not presumed to intend the consequences of his voluntary acts. If the court had undertaken to explain to the jury that this presumption is merely permissive, the State would have had the benefit of instructing the jury on a legal theory that was neither requested nor permissible.

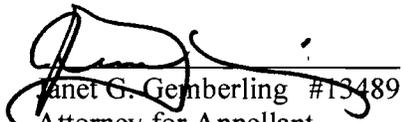
The misconduct in this case requires reversal.

E. CONCLUSION

Mr. Bea's conviction was the product of improper jury instructions and prosecutorial misconduct. It should be reversed. The enhanced sentence was the product of a coercive jury instruction and should be reversed.

Dated this 14th day of October, 2010.

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