

28755-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALLAN L. TURNIPSEED, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred by overruling defense counsel's objection to the damaged recorded deposition of the State's expert witness.
- (2) The trial court erred in giving the initial aggressor instruction to the jury under the circumstances of this case.
- (3) The trial court erred in instructing the jury that unanimity was required to answer the special verdict interrogatory in the negative.

II.

ISSUES PRESENTED

- (1) Did the trial court violate the defendant's confrontation clause rights by overruling defense counsel's objection to the admissibility of the recorded deposition where portions of the recording were distorted?
- (2) Did the trial court err by instructing the jury regarding the issue of an initial aggressor in the context of the affirmative claim of acting in self-defense?

- (3) Did the trial court err in instructing the jury regarding the process by which it answered the special verdict interrogatory?

III.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for the purposes of this appeal only.

IV.

ARGUMENT

A THE TRIAL COURT PROPERLY ADMITTED THE DEPOSITION TESTIMONY OF AN EXPERT WITNESS.

Defendant contends that the trial court erred in admitting the sworn deposition of Ed Robinson, the State's forensic firearms expert because portions of the recording were distorted. Specifically, defendant argues that his constitutional right to confront the witnesses against him was violated because of the distorted recording. The trial court is imbued with significant discretion in this area. The trial court did not abuse that discretion by finding that the recorded deposition of Mr. Robinson did not violate defendant's

rights under the confrontation clause of the Sixth Amendment to the U.S. Constitution.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. McDonald*, 138 Wash.2d 680, 693, 981 P.2d 443 (1999). Discretion is abused when it is exercised on unreasonable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). A trial court's decision is manifestly unreasonable if it "adopts a view that 'no reasonable person would take.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id.*

Initially, there were certainly tenable grounds for finding the deposition of Mr. Robinson admissible. Additionally, there were ample tenable grounds for denying defendant's objection to the use of the deposition. The deposition was necessary due to Mr. Robinson being in Afghanistan and unavailable at the time of trial.

The Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. The confrontation clause provides that the State can present testimonial out-of-court statements of an absent witness only if the witness is unavailable and

the defendant has had a prior opportunity to cross-examine the witness. *State v. Crawford*, 541 U.S.36, 59, 124 S.Ct. 1354 (2004). Here, the deposition of Mr. Robinson demonstrates conclusively that the subject testimony was subject to extensive cross-examination by defense counsel while under oath. The trial court properly admitted the deposition and overruled defense counsel's objection thereto. There was no abuse of discretion and no error.

Additionally, defendant contends that the distorted portion of the recorded deposition violated his confrontation rights by diminishing the effectiveness of his cross-examination. Notably, defendant claimed that he acted in self-defense to explain what happened between he and Mr. Smith that day. The nature of a self-defense claim is that the defendant admits committing the crime, yet believes such an act was necessary as a matter of defense against being victimized. Accordingly, defendant's claim of self-defense effectively admitted that defendant's handgun was working properly, and that defendant fired it twice into Mr. Smith from pointblank range.

Mr. Robinson's testimony focused on the nature and characteristics (i.e. caliber, trigger-pull weight, ejection pattern, etc.) of defendant's firearm. Mr. Robinson's deposition also provided the jury with corroboration that the casings recovered on scene had been fired by defendant's weapon.

However, defendant readily admitted that he had fired his weapon twice intentionally into Mr. Smith. Mr. Robinson's testimony regarding the ejection pattern of the weapon was of limited usefulness to the jury when one of the spent casings was found inside Mr. Smith's car and the Medical Examiner concluded that the killing shot from defendant's weapon was fired at point-blank range into Mr. Smith's back.

The record reflects that the vast majority of Mr. Robinson's deposition, his sworn testimony, including the cross-examination by defense counsel was heard by the jury. Under the circumstances, defendant's confrontation clause rights were not violated because defense counsel was provided full access to Mr. Robinson and subjected his testimony to extensive cross-examination. Accordingly, there was no error.

B. THE EVIDENCE SUPPORTED THE AGGRESSOR INSTRUCTION WHICH WAS PARTICULARLY APPROPRIATE UNDER THE FACTS OF THIS CASE.

Defendant contends that the trial court erred in giving instruction #25, the aggressor instruction. There was a factual basis for the instruction and it was appropriate to give it under the facts of this case, so the trial court did not commit error.

The evidence, viewed under the State's theory, permitted jurors to find that defendant blocked Mr. Smith from leaving the scene despite his

repeated declarations that he was leaving. Witnesses confirmed that Mr. Smith was attempting to extricate himself from his confrontation, but defendant blocked Mr. Smith's means of egress. In fact, defendant affirmatively testified that:

When he came to a stop, somebody yelled, 'Don't let him leave.' And I took off running. I ran *past* him...to where I got in front of his car...

RP 924.

When Mr. Smith reacted by trying to drive away, defendant's actions placed him next to Mr. Smith's car to facilitate stopping the car and the shooting occurred. Defendant admitted to the jury that he fired the two shots to make Mr. Smith stop his car. RP 929. Common sense would dictate in such a situation, that Mr. Smith continue to try to escape because defendant has pulled a gun on him, not once, but twice.

When defendant aggressively placed himself in front of Mr. Smith's car to prevent him from leaving the scene, defendant trapped Mr. Smith in a circumstance from which the perpetrator should expect a belligerent response. It is reasonable to expect anyone to try to escape when they are trapped and threatened with a gun. It was defendant's decision to trap Mr. Smith that necessitated Mr. Smith using his car to effect his escape; hence there would have been no corresponding need for defendant to use his handgun to allegedly defend himself. Under these facts, it was important for

the jury to determine whether defendant was truly acting in self-defense. The aggressor instruction explained that situation.

Contrary to defendant's suggestion that aggressor instructions are "disfavored," Washington has a long history of using such instructions. In an early case, our Supreme Court approved the following instruction:

An accused person who is an aggressor in an affray, or by acts or words provokes or brings on an affray, cannot invoke the doctrine of self-defense or be justified in shooting to prevent injury, unless before such shooting, such aggressor in good faith sought and endeavored to withdraw from and abandon the conflict.

State v. McConaghy, 84 Wash. 168, 170-171, 146 Pac. 396 (1915); *Accord State v. Currie*, 74 Wn.2d 197, 199, 443 P.2d 808 (1968).

A simple rule can be distilled from several cases: one who starts a fight, either by throwing the first punch or provoking a victim to do so, can not rely on self-defense. *See, e.g., State v. Currie, supra* (defendant who cut off car and approached it was subject to aggressor instruction); *State v. McConaghy, supra* (argument which developed into assault with weapon subjected defendant to aggressor instruction); *State v. Hawkins*, 89 Wash. 449, 154 Pac. 827 (1916) (defendant who called victim a thief and liar and was then slapped by victim still was aggressor); *State v. Heath*, 35 Wn. App. 269, 271, 666 P.2d 922 (1983) (defendant who blocked doorway and used "very coarse words" to victim was aggressor); *State v. Hoyer*, 105 Wash.

160, 177 Pac. 683 (1919) (where State's theory was that defendant provoked quarrel which led to assault and shooting, it was proper to instruct that a person acting in self-defense "must not provoke an attack").

In *State v. Cyrus*, 66 Wn. App. 502, 508-510, 832 P.2d 142 (1992), *review denied* 120 Wn.2d 103 (1993), officers were talking to an assault suspect in the doorway of his house. One officer stepped in to arrest him in response to the defendant's invitation to enter the home. When the officer touched him, the suspect pulled away and displayed a gun. A fight ensued. Cyrus claimed to be acting in self-defense. The trial court in *Cyrus*, as did the trial court in this case, gave the standard aggressor instruction. On appeal Cyrus challenged the giving of the instruction. *Id.* at 504-505.

The Court of Appeals affirmed, ruling:

In light of the self-defense instruction given at Cyrus's request, the State was entitled to an instruction stating that if his intentional actions created the necessity for the officers to use the force they did, he could not assert self-defense as an excuse for his actions. In the absence of an "aggressor" instruction the defendant could argue his resistance was self-defense and the State would have no instruction supporting its theory. Clearly, the facts support an "aggressor" instruction and it was necessary to allow the State to argue its theory of the case. **The aggressor instruction is particularly appropriate where there is conflicting testimony as to whether the defendant or victim provoked the altercation.**

Id. at 508-509 (footnote omitted; emphasis added). The circumstances of this case dictate the same result herein. There were conflicting perspectives

in the testimony, and the defense theory of the case in closing argument certainly was a contention that defendant was responding to an unprovoked action by Mr. Smith. The jury could properly consider the theory of the case only if they were correctly instructed on when self-defense was available.

Mr. Smith was entitled to act on appearances and defend himself against defendant's use of force to unlawfully imprison him by attempting to escape the situation. It is uncontroverted that Mr. Smith had manifested his intent to end the confrontation with the defendant, and leave. Absent defendant's actions to imprison him, Mr. Smith would still be alive. Defendant having provoked Mr. Smith's lawful response, the aggressor instruction was appropriate.

The defendant's reliance on this court's decision in *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039, *review denied* 113 Wn.2d 1014 (1989), is misplaced because the decision is not to the contrary. In *Wasson*, the defendant and his cousin, Bartlett, fought which attracted the attention of neighbors, including the ultimate victim, Reed. *Id.* at 157. Reed told the two men to "quiet down" and ultimately fought with Bartlett. He then went after Reed and was shot. *Id.* This court determined that it was not appropriate to give the aggressor instruction because there was not a sufficient connection between defendant's altercation with Bartlett and the ultimate shooting of

Reed. *Id.* at 159-160. Nothing in *Wasson* precludes consideration of the aggressor instruction in the circumstances present in this case.

As long as there is a direct relationship between the aggressive act and the action which gives rise to the self-defense claim, it is proper to give an aggressor instruction. *State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963). It is only when there is no direct connection, such as in the *Wasson* case, that it is error. Here, there was no error. Defendant's actions to prevent Mr. Smith from leaving despite his affirmative indication that he was breaking off the encounter precipitated his attempt to drive away. Defendant having purposefully placed himself in a position to prevent Mr. Smith from leaving could not claim self-defense against Mr. Smith's actions attempting to extricate himself from the defendant's aggressive actions.

There was no error by the trial court in giving the aggressor instruction because the factual basis for such an instruction existed. *See State v. Davis*, 119 Wn.2d 657, 665-666, 835 P.2d 1039 (1992); *State v. Cyrus, supra*. The conflicting theories based upon the evidence that this case presented to the trial court is precisely the situation in which the aggressor instruction should be given. *State v. Cyrus, supra*. The jury could find, and the evidence permitted the State to argue, that if any need for self-defense existed, it existed because defendant had provoked a confrontation.

The trial court did not err in giving the aggressor instruction.

C. ASSUMING, ARGUENDO, THAT THE WORDING OF THE SPECIAL VERDICT CONCLUDING INSTRUCTION WAS ERRONEOUS, THE ERROR WAS HARMLESS UNDER THE FACTS OF THIS CASE.

The defendant cites *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) to support the claim that the trial court committed an error of constitutional magnitude by mischaracterizing the jury's task in answering the special interrogatory concerning whether defendant was armed with a firearm during the commission of the charged offense. The defendant contends that the jury was misled by the trial court's special verdict instruction that advised that the jury had to unanimously agree that the answer was "no" in order to find that defendant was not armed with a firearm during the commission of the charged offense. The defendant correctly notes that the trial court's subject instruction misstated the law to the extent that it advised the jury that it must unanimously agree that the answer is "no" in order to so respond to the special interrogatory. CP 420. Assuming, arguendo, that the trial court's mischaracterization of the process the jury is to implement when there was a reasonable doubt that the defendant was armed with a firearm during the commission of the charged offense, vacation of the sentencing enhancement is not necessarily the proper remedy.

Due process requires that the jury be instructed on all the essential elements of the charged crime. Instructions that omit essential elements thereby relieve the State of its burden of proving each element beyond a reasonable doubt. Herein is not the circumstance.

There is a limited class of fundamental constitutional errors that are so intrinsically harmful that they necessitate automatic reversal without consideration of the effect on the outcome of the trial. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). When such errors are involved, the entire trial process is rendered fundamentally unfair. *Id.* Such errors are “structural” in nature and include: total denial of counsel, proceeding before a biased trial judge, racial discrimination in jury selection, denial of self-representation, and denial of a public trial. *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005). These “structural errors” defy review because each deprives the defendant of the basic protections without which a criminal trial cannot reliably serve its function as a means for determination of guilt or innocence. *Neder*, 527 at 8. When a structural error is involved, the resulting criminal punishment cannot be regarded as fundamentally fair. *Id.*, at 8-9.

The Supreme Court held that the omission of an essential element from the jury instructions is not a structural error. *Id.* Nevertheless, it is

an error of constitutional magnitude which necessitates review. The court reasoned that such cases are to be reviewed under the harmless error doctrine. *Id.* An instruction that omits an element does not necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Omitting an element can be analogized to improperly instructing the jury on the element itself, an error that is subject to harmless error analysis. *Id.*

An error of constitutional magnitude does not require reversal if the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Wall*, 52 Wn. App. 665, 763 P.2d 462 (1988); *State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). The United States Supreme Court has made it clear that the failure to fully instruct a jury on all elements of an offense "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *United States v. Neder*, 527 U.S. at 9. Under *Neder*, a defendant's Sixth Amendment right to a jury is violated when a jury is not fully instructed on all the elements of the offense, but such an error can be deemed harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 9-10.

The Washington Supreme Court adopted the holding in *Neder* in *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). In *Brown*, a

jury instruction misstated the law of accomplice liability. *Id.* at 338. The court in *Brown* followed *Neder* in reasoning that "not every omission or misstatement in a jury instruction relieves the State of its burden" so as to require reversal. *Id.* at 339. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Brown*, 147 Wn.2d at 340 (citing *Neder* 527 U.S. at 9). Under *Brown* and *Neder*, a "jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has relieved the State of its burden to prove each element of the case." *Id.* at 344.

The test to determine whether such constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 341 (quoting *Neder*, 527 U.S. at 15). In performing this analysis, the court must determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. "If, at the end of the examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." *Neder*, 527 U.S. at 19. On the other hand, "[w]hen applied to an element omitted from, or misstated in, a jury instruction, the error is

harmless if that element is supported by uncontroverted evidence."

Brown, 147 Wn.2d at 341 (citing *Neder*, 527 U.S. at 18).

The *Neder* harmless error analysis applies here because the uncontroverted evidence before the jury was that defendant was armed with a firearm during the commission of the charged offense. In fact, defendant affirmatively testified that he was so armed because he claimed that his use of the firearm was absolutely necessary to defend himself against the actions of Mr. Smith. Here, there was no question that defendant committed the charged homicide by being armed with a firearm. There was no question that Mr. Smith died as a direct result of having been shot by defendant. There was no question that defendant used the firearm to stop Mr. Smith's car from leaving the area until law enforcement could arrive. As noted, to hold that a jury instruction was harmless, the court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *State v. Brown*, 147 Wn.2d at 341; (quoting *Neder v. United State*, 527 U.S. at 19).

The defendant even argued that his use of his personal firearm, for which he possesses a concealed weapons permit, was necessary because he felt threatened by Mr. Smith. There was no question that the evidence supported only one answer to the special interrogatory, that the first degree

manslaughter was committed by the defendant while he was armed with a firearm. Hence, it was uncontroverted that the jury accepted defendant's multiple admissions to committing the homicide with a firearm. Accordingly, any error in instructing the jury was harmless beyond a reasonable doubt.

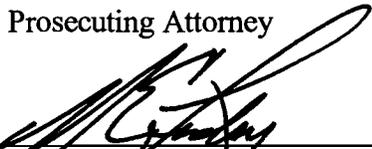
V.

CONCLUSION

For the reasons stated, the conviction and sentencing enhancement should be affirmed.

Respectfully submitted this 10TH day of November, 2010.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorneys for Respondent