

FILED

JUL 01, 2014
Court of Appeals
Division III
State of Washington

No. 31694-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JASEN LAINE BERTRAM, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction 21,

the aggressor 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 kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

2. The trial court erred by refusing to give the

defense's proposed aggressor instruction that added this sentence

to Instruction 21:

However, words alone are not sufficient provocation to cause another person to respond belligerently.

3. The evidence was insufficient to support Jasen Laine

Bertram's conviction for second degree murder because the State

failed to disprove self-defense beyond a reasonable doubt.

4. The State's evidence was insufficient to support the first

degree robbery and possession of a stolen firearm convictions.

Issues Pertaining to Assignments of Error

1. Did the trial court err by refusing to instruct the jury in

Instruction 21, the aggressor instruction, that “words alone are not sufficient provocation to cause another person to respond belligerently” because it is a correct statement of the law and applied to the particular facts of this case? (Assignments of Error 1 and 2).

2. Was the evidence insufficient to support the conviction for second degree murder because the State failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error 3).

3. Was the State’s evidence insufficient to support the first degree robbery and possession of a stolen firearm convictions? (Assignment of Error 4).

II. STATEMENT OF THE CASE

Mr. Bertram was charged with count 1, first degree murder; count 2, first degree robbery; and count 3, unlawful possession of a stolen firearm. (CP 1). The case proceeded to jury trial.

Just after midnight on June 4, 2012, Chelan County Deputies Mark Hegberg and Bryan Jones responded to a report about a possible shooting in Dryden. (4/11/13 RP 181, 224). In a small RV trailer, they found Cody Johnson lying dead on the floor.

(*Id.* at 182, 226-27). A couch cushion and black jacket covered his head. (*Id.* at 183). On a counter were a whiskey bottle and drug paraphernalia. (*Id.* at 183).

Detective Mitchell Matheson was at the scene and found a Glock .40 handgun underneath Mr. Johnson's body. (4/12/13 RP 461). He also discovered a wallet with ID belonging to Bridgett Bo Jack-Lee. (*Id.* at 466-67). Three shots had been fired. (*Id.* at 468). The detective learned the Glock .40 was stolen at the Gorge in Grant County and Mr. Bertram worked there at the time. (*Id.* at 475, 476). A pipe bomb was also in the trailer. (*Id.* at 481). The pipe bomb was operable when it was found. (4/12/13 RP 496).

Anthony Duffy knew Mr. Johnson and that he was a drug dealer. (4/15/13 RP 500, 505). Around 8 to 8:30 p.m. on June 3, 2012, he met up with Ms. Lee to head out to Mr. Johnson's trailer in Dryden so he could return a TV left at his house. (*Id.*). Mr. Johnson had asked him to bring her up since it was on the way. (*Id.* at 504). Ms. Lee had been involved with Mr. Johnson for about three months. (*Id.* at 563). The TV was returned. Mr. Duffy left the trailer about 10 to 10:30 p.m. (*Id.* at 502). He saw a Springfield .45 handgun and a .22 in plain sight there. (*Id.* at 505-06). Ms. Lee

stayed. (*Id.*).

Deputy Jeff Middleton assisted in the homicide investigation. (4/11/13 RP 232). He tried to locate a possible witness, Ms. Lee, and found her in the early morning hours of June 5, 2012, at the Moonlight Motel. (*Id.* at 233). On June 10, the deputy had contact with a Mr. Cleek, who had found a backpack at the edge of his backyard. (*Id.* at 236). In it were two firearms, miscellaneous clothes, drug paraphernalia, and hospital booties and gloves. (*Id.*). Mr. Cleek's house was at 1111 Brown Street in Wenatchee; Mr. Bertram lived at 1119 Brown Street. (*Id.* at 237).

On June 6, 2012, Sergeant Kent Sisson was called out to do an evidence search, specifically for a Springfield 1911 semiautomatic , around the area of the homicide. (4/11/13 RP 191-92). A volunteer searcher found a Maglite flashlight and Deputy Eugene Ellis found a handgun with its hammer back and safety on. (*Id.* at 204, 207, 211). The weapon was a Springfield .45 with four rounds in the magazine and one in the chamber. (*Id.* at 221-22). The gun belonged to Cody Johnson. (4/15/13 RP 567).

Detective Randy Grant obtained a search warrant for the trailer. (4/11/13 RP 247-48). He observed a blood trailer indicating

the body was moved and Mr. Johnson's head had been only 3' to 4' off the floor. (*Id.* at 253, 254). The detective found a camouflage mask on the bed with a Glock .40 handgun underneath it. (*Id.* at 255).

Detective Jerry Moore learned that Ms. Lee had been with Mr. Bertram earlier in the day on June 3, 2012. (4/15/13 RP 517). She had also contacted him after Mr. Johnson was shot. (*Id.*). The detective got in touch with Mr. Bertram, who voluntarily drove down to the station on June 5. (*Id.* at 519, 524). He knew Ms. Lee and her father. Mr. Bertram was going to get her off drugs as she was badly addicted. (*Id.* at 520). She moved in with him for several days and left on June 3. (*Id.*). Ms. Lee was supposed to enter detox on June 5. (*Id.* at 527). Detective Moore later arrested Mr. Bertram at Tree Top, where he worked. (*Id.* at 522).

Bill Jack, Ms. Lee's father, was Mr. Bertram's friend. (4/15/13 RP 539). His daughter had drug problems. (*Id.* at 540). Parent-to-parent, Mr. Jack had talked to Mr. Bertram, whose daughter was around the same age, about Ms. Lee's drug problems and talked about getting her help about 4-5 years ago.

Ms. Lee, however, never followed through. (*Id.* at 540-41). Mr. Jack did not know his daughter had been at Mr. Bertram's until after the shooting. (*Id.* at 541).

In early June, Ms. Lee told Mr. Bertram she needed help with her drug problems. (4/15/13 RP 563). They met down by the river, where he agreed to let her stay with him until she could get into detox. (*Id.* at 564). Ms. Lee left after Mr. Johnson texted her that he needed her out in Dryden. (*Id.* at 565). She was picked up by one of his friends. (*Id.*). Ms. Lee got high on meth at the trailer. (*Id.* at 566). Mr. Bertram knew where the trailer was because he helped her pick up her belongings when she asked for help and one of the stops was Mr. Johnson's trailer, but no one was there. (*Id.* at 567). She knew Mr. Johnson had drugs and had more than one gun, including the Springfield .45 that was chrome. (*Id.*). The people who had been at the trailer earlier left after a while. (*Id.* at 568). She was extremely high that night. (*Id.* at 580).

The trailer's bathroom was not hooked up to water so Ms. Lee headed across the street to the community bathroom that had a shower, toilet, and sink. (4/15/13 RP 569). She took a shower and went back to the trailer where she heard yelling and saw it

shaking. (*Id.* at 570). When Ms. Lee heard someone in the trailer yell “get the fuck on the ground,” she took off running back to the community bathroom. (*Id.* at 571). Mr. Bertram appeared and picked her up along the side of the road. (*Id.* at 572). He threw something out of the vehicle. (*Id.*). They drove back to town and went back to his house around 1 or 1:30 a.m. (*Id.* at 573). Ms. Lee testified Mr. Bertram told her he had gone into the trailer, hit Mr. Johnson in the back of the head with a flashlight, and shot him. (*Id.* at 574).

Ms. Lee acknowledged she had changed her story, lied, and withheld information in the investigation. (4/15/13 RP 664). She testified Jason Hansch, Mr. Johnson’s friend and neighbor in Dryden, took the meth off his body. (*Id.* at 677). Ms. Lee knew about the pipe bomb Mr. Hansch had made for another drug dealer. (*Id.* at 681). But he tried to convince Mr. Johnson to get rid of her with the pipe bomb. (*Id.* at 682). A few days before the shooting, Ms. Lee ran scared from the trailer and called Mr. Bertram the next day. (*Id.*). She told him about Mr. Johnson and the guns, bomb, drugs, and sex. (*Id.* at 683-84).

Mr. Bertram testified in his own defense. (4/15/13 RP 706).

He moved to the Wenatchee area around 2003 and became friends with Ms. Lee's father. (*Id.*) He met her through Mr. Jack. (*Id.* at 407). Mr. Bertram talked with Ms. Lee after she took off from Mr. Johnson's trailer and learned about him, including the drugs, guns, sex videos, and using the pipe bomb on her. (*Id.* at 710-12). Ms. Lee told Mr. Bertram the .45 was Mr. Johnson's baby and he always had it on or near him. (*Id.* at 713). She was willing to go to his house for help and she spent Thursday and Friday night there before the June 4 incident. (4/16/13 RP 723). On Saturday, they met up at a barbecue. (*Id.* at 726-27). Mr. Bertram went to sleep around midnight or 1 a.m. (*Id.* at 732). Ms. Lee told him she was going down the street to a friend's. (*Id.*). She came back around noon the next day and Mr. Bertram was to keep her company before detox the next day. (*Id.* at 734).

He left to take his youngest son home and she was gone when he came back around 8. (*Id.* at 735). About 10 p.m., Mr. Bertram decided to try to find her. He went first to a motor home, but nobody was there so he went home to go to Dryden. (*Id.* at 735-36). He had the Glock .40 on him because he did not know

what to expect after Ms. Lee told him about Mr. Johnson. (*Id.* at 736). Mr. Bertram knew where he was going because he had been there before with Ms. Lee. (*Id.* at 740).

He arrived about 11 p.m., parked, and walked to the trailer. (4/16/13 RP 741-42). Mr. Bertram saw Ms. Lee puking at the back of the trailer. (*Id.* at 742). He talked to her in an effort to convince her to leave with him. But she had to go to the bathroom across the way. (*Id.*). Mr. Bertram told her he was going to get her stuff and she said good. (*Id.* at 743). He did not call the police as he figured it would be no problem getting her stuff and did not want to get Ms. Lee in trouble for being high. (*Id.*).

Mr. Bertram knocked on the trailer door and did not kick it in as it would be hard to do since the door opened out. (4/16/13 RP 743). When Mr. Johnson came to the door, Mr. Bertram said he was a friend of Ms. Lee's family and wanted to get her stuff and take her home. (*Id.* at 744). Mr. Johnson told him she was not there. (*Id.*). Having just seen her, Mr. Bertram did not believe him and asked for her clothes as she did not need to be there. (*Id.*). Mr. Johnson told him to take the stuff and he did not need any trouble from the bitch. (*Id.*). He then stepped back from the door

and went to the back of the trailer. (*Id.* at 745).

He stepped up when Mr. Johnson went a bit more to the left and could not be seen. Mr. Bertram wanted to keep an eye on him as he was unsure what Mr. Johnson was going to do. (4/16/13 RP 745). Mr. Bertram figured he could go into the trailer since Mr. Johnson told him to get the stuff and the door was open. (*Id.* at 746). When he walked in, Mr. Johnson charged and took a swing at Mr. Bertram, hitting him right behind the left ear. (*Id.*). Flashlight in hand, Mr. Bertram swung and hit Mr. Johnson as he turned to the left in the back of the head. (*Id.* at 747). He hit Mr. Johnson with the flashlight to fend him off. (*Id.*). Mr. Bertram told him this was not necessary and he would just get the stuff and go. (*Id.*). Mr. Johnson took two steps to the back of the trailer and Mr. Bertram stepped sideways through the door so his back would not be turned. (4/16/13 RP 747).

At that moment, Mr. Johnson immediately turned around and Mr. Bertram saw something shiny in his hand. (*Id.* at 748). After hearing the description from Ms. Lee of Mr. Johnson's silver .45, Mr. Bertram was pretty sure it was the gun he was fond of. (*Id.*). In response, he "pulled the gun out of my pocket and I yell at him to

put it down.” (*Id.*). Mr. Bertram said he shot Mr. Johnson three times. (*Id.*). He was going down, crouching or squatting, before Mr. Bertram pulled the trigger. (*Id.* at 749). Mr. Johnson pointed his gun at him before he fired. (*Id.*). The .45 dropped out of his hand after he was shot. (*Id.* at 780). Mr. Bertram neither shot Mr. Johnson from the back nor hit him in the head from the back. (*Id.* at 783). He was not wearing a mask when he went inside. (*Id.*).

Mind racing, Mr. Bertram grabbed a bag and coat hanging next to the door and put them over Mr. Johnson. (*Id.*). He got some of Ms. Lee’s stuff and put her clothes in a reusable canvas bag. (*Id.* at 7490-50). Mr. Bertram stepped out of the trailer and looked for Ms. Lee. (*Id.* at 750). He then knew he left his gun in the trailer. (*Id.*). It was not until later, however, that he realized he had taken Mr. Johnson’s gun. (*Id.* at 750-51). Mr. Bertram walked out toward the road down the driveway, saw lights, and jumped over a guardrail as he did not want to be seen. (*Id.* at 751-52). He went back to his truck, drove down to the park, and saw Ms. Lee running down the middle of the road. (*Id.* at 753). He told her to get in the truck. (*Id.*). At this time, Mr. Bertram did not have the gun and did not know what happened to it. (*Id.* at 754). She got in

and they drove back to Wenatchee. (*Id.*). Ms. Lee said Mr. Johnson was dead; Mr. Bertram told her he got into a fight with Mr. Johnson, who pulled a gun, and he shot him. (*Id.*).

Jeffrey Casady's Glock .40 was stolen at the Gorge during an altercation. (4/15/13 RP 599). Mr. Bertram said he found the gun by a garbage can in summer 2010 at the Gorge and just picked it up and put it in his trunk. (*Id.* at 737-40). He did not know the pistol was stolen, but figured it was just lost. (*Id.* at 768).

Dr. Gina Fino, a forensic pathologist, performed the autopsy on Mr. Johnson. (4/11/13 RP 260). He suffered three gunshot wounds. (*Id.* at 268, 271). Dr. Fino opined Mr. Johnson was shot in the head from behind. (*Id.* at 282). He also had an abrasion on the left side of his head consistent with being hit with a heavy flashlight. (*Id.* at 283, 285). On the other hand, defense expert Dr. James Butt opined Mr. Johnson was not shot from behind. (4/15/13 RP 628). Chelan County coroner Wayne Harris testified the cause of Mr. Johnson's death was multiple gunshots, two to the head and one to the chest. (4/12/13 RP 442).

WSP forensic scientist Kristine Hoffman testified DNA on the Glock .40 was from at least three contributors with Jasen Laine

Bertram being the significant male contributor. (4/12/13 RP 415, 417). The camouflage mask had DNA from at least two contributors with Mr. Bertram being the significant male contributor. (*Id.* at 420). The flashlight had DNA from at least two contributors with Mr. Johnson being the major male contributor. (*Id.* at 421). The Springfield .45 handgun had DNA from at least three contributors with Mr. Johnson being the major male contributor. (*Id.* at 422). WSP forensic scientist Kathy Geil, a firearm and tool mark examiner, testified the shells casings recovered at the trailer were fired by the Glock .40. (*Id.* at 405, 409). WSP forensic scientist Brianne O'Reilly did a qualitative drug screen and Mr. Johnson tested positive for methamphetamine. (4/15/13 RP 536).

The State had no exceptions to the court's instructions. (4/16/13 RP 809). Among others, the defense took exception to Instruction 21:

. . . I would call it the aggressor instruction, which the Court basically took the State's and left out the sentence that I added in under *State v. Riley* which says – which tells the jury that words alone are not sufficient provocation to cause another person to respond belligerently. So, in other words, my client talking with him does not give the deceased the provocation and I think that should be within the instruction. I understand it's not in the WPIC. It's

a sentence that I added in accordance with *State v. Riley*, which I think is the law. (4/16/13 RP at 812-13).

The defense argued that Instruction 21, without the language “words alone are not sufficient provocation,” misstated the law because in this particular case, the only evidence of provocation was words and that was insufficient to make Mr. Bertram an aggressor. (4/16/13 RP at 816-18). The court disagreed. (*Id.* at 818).

The jury found Mr. Bertram guilty of (1) the lesser included offense of second degree murder with a firearm enhancement, (2) first degree robbery, and (3) possession of a stolen firearm. (CP 210-14). The court sentenced him to a standard range sentence, including consecutive enhancements, of 324 months total confinement. (CP 221). This appeal follows.

III. ARGUMENT

A. The court erred by refusing to instruct the jury in Instruction 21, the aggressor instruction, that “words alone are not sufficient provocation to cause another person to respond belligerently” because it is a correct statement of the law and applied to the particular facts in this case.

The court gave Instruction 21 over defense objection:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. (CP 186).

The defense had offered an instruction adding this sentence to

Instruction 21:

However, words alone are not sufficient provocation to cause another person to respond belligerently. (CP 155).

The court determined this addition was an incorrect statement of the law and refused to include it in Instruction 21. (4/16/13 RP 816, 818).

Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law. *State v. Rice*, 110 Wn.2d 577, 703, 757 P.2d 889 (1988). In self-defense cases, *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999), stated the rule of law as to the aggressor instruction and provocation:

Although language in some older cases suggest

that words alone may justify the conclusion that the speaker is the aggressor, we hold that words alone do not constitute sufficient provocation. Therefore, the giving of an aggressor instruction where words alone are the asserted provocation would be error. . .

Here, words alone were the only provocation that could possibly have been asserted as there was no evidence of any other provoking act or conduct and the State made no argument to the contrary. (4/16/13 RP 743-45; 860). Other than his words, the State produced no evidence showing Mr. Bertram was the aggressor. He did not provoke the fight; there is no conflicting evidence; and he did not make the first move by drawing his weapon. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010), *review denied*, 171 Wn.2d 1017 (2011). The court erred by giving the aggressor instruction. *Riley*, 137 Wn.2d at 911. Moreover, by mistakenly deciding the language sought to be added by the defense was an incorrect statement of the law, the court exacerbated the error because it was indeed a correct statement of the law and clearly applied to the facts in this case. *Id.*

Mr. Bertram's words alone were not sufficient provocation to even give the aggressor instruction. The court further erred by not

adding the language offered by the defense that was a correct and applicable statement of the law, notwithstanding the erroneous giving of the aggressor instruction in the first place. He also could not argue his defense that “words alone are not sufficient provocation.” As noted in *Riley*, 137 Wn.2d at 910 n. 2, an aggressor instruction has an impact on a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt.

The court’s error is not harmless because it prevented Mr. Bertram from fully presenting his self-defense theory. *Riley*, 137 Wn.2d at 910, n.2. The error is constitutional and cannot be deemed harmless beyond a reasonable doubt in light of all the circumstances. *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). Mr. Bertram is therefore entitled to a new trial. *Stark*, 158 Wn. App. at 961.

B. The evidence was insufficient to support the conviction for second degree murder because the State failed to disprove self-defense beyond a reasonable doubt.

Self-defense is defined by statute in RCW 9A.16.050, as homicide is justifiable when committed:

In the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished.

Evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury is to consider the defendant's actions in light of all the facts and circumstances known to him, even those substantially predating the killing. *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

The evidence must establish a confrontation, not instigated or provoked by the defendant, which would induce a reasonable person, considering all the fact and circumstances known to him, to believe there was imminent danger of great bodily harm about to be inflicted. *Janes*, 121 Wn.2d at 241. Just trying to get Ms. Lee's stuff from the trailer, Mr. Bertram was hit in the head by Mr. Johnson, who, after getting hit by Mr. Bertram with a flashlight in trying to fend him off, turned around and drew down on him with his

.45. (4/16/13 RP 745-49). Mr. Bertram shot and killed Mr. Johnson. (*Id.*). Even viewed in a light most favorable to the State, the evidence still fell short of showing by the requisite quantum of proof that Mr. Bertram did not act in self-defense. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). This conclusion is further compelled by the court's error in giving the aggressor instruction, thereby preventing Mr. Bertram from fully presenting his self-defense theory. *Riley*, 137 Wn.2d at 910, n. 2. The second degree murder conviction must be reversed.

C. The State's evidence was insufficient to support the first degree robbery and possession of a stolen firearm convictions beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the question is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 220-21. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

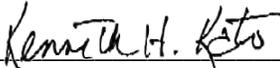
Although questions of credibility are determined by the trier of fact, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Even when the evidence is viewed in a light most favorable to the State, the defense showed Mr. Bertram did not even know he had Mr. Johnson's .45 until later and had no intent to commit a theft as required by the to-convict instruction for first degree robbery. Without proving the intent element, the State could not establish guilty beyond a reasonable doubt. (CP 189). The jury had to resort to guess, speculation, or conjecture and that will not support the first degree robbery conviction, which must be reversed.

By the same token, the defense established Mr. Bertram did not know the Glock was stolen and figured it was just lost when he picked it up by the garbage can at the Gorge. (4/16/13 RP 768). Without proving the knowledge element, the State could not show guilt beyond a reasonable doubt. (CP 194). To find guilt, the trier of fact again improperly had to resort to guess, speculation, or conjecture. The conviction cannot stand.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bertram respectfully urges this court to reverse his convictions and dismiss all charges or, in the alternative, remand for new trial.

DATED this 26th day of June, 2014.



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CERTIFICATE OF SERVICE

I certify that on June 26, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Jasen Laine Bertram, # 355412, 1313 N. 13th Ave., Walla Walla, WA 993621; and by email, as agreed by counsel, on Douglas J. Shae at prosecuting.attorney@co.chelan.wa.us.

