

FILED

MARCH 13, 2015

Court of Appeals
Division III
State of Washington

NO. 32546-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIMEON J. JIM,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error. This can be summarized as follows;

1. The State violated due process by misrepresenting the law as to the specific intent required to prove second degree assault.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no error and even if there was error the evidence was overwhelming, the alleged error was not objected to therefore it was not preserved and defendant's theory of the case was that an assault had occurred but it was not a criminal based on self-defense/defense of others.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law. The statements made in closing by the State were not objected to, were argument and the jury was so instructed, the evidence was overwhelming and the defense theory was

that an assault had occurred however it was done as self-defense or in the defense of others.

RESPONSE TO ALLEGATION ONE

Appellant claims that the closing argument by the State was a violation of due process. However he fails to address RAP 2.5 and how he can now raise this issue even though this alleged error was not raised in the trial court. At no time during the State's closing or after closing argument did the defendant object to the alleged errors. This allegation is therefore not properly before this court. Appellant does not address in his brief how he is able to raise this issue for the first time on appeal.

Commonly known as "raise it or waive it" this court has been strict on compliance with this rule. As was eloquently stated over thirty years ago in State v. Wicke, 91 Wn.2d 638, 642-3, 591 P.2d 452 (1979):

In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975). Ideally, this will be done during the course of trial, but the error may be raised in a motion for a new trial. Seattle v. Harclaon, 56 Wn.2d 596, 354 P.2d 928 (1960). Under most circumstances, we are simply unwilling to permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result, claim error for the first time on appeal which, assuming it exists, could have been cured or otherwise ameliorated by the trial court. State v. Perry, 24 Wn.2d 764, 167 P.2d 173 (1946). Even an alleged violation of such an important policy rule as CrR 3.3, our speedy

trial rule, is subject to waiver if not raised timely. State v. Williams, 85 Wn.2d 29, 530 P.2d 225 (1975).

The Washington Supreme Court adopted RAP 2.5(a), the Rules of Appellate Procedure replaced that common law practice with RAP 2.5(a). State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). As a result, simply identifying a constitutional issue is no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). Review is inappropriate if either the record from the trial court is insufficient to determine the merits of the constitutional claim, or if the defendant does not establish practical and identifiable consequences from the alleged error. WWJ, 138 Wn.2d at 602-03. RAP 2.5(a) precludes review of Jim's claim because he has not established any practical and identifiable consequence from the closing arguments of counsel.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman,

159 Wn.2d 918, 935, 155 P.3d 125 (2007). Jim must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

Harmless error analysis is appropriate if the error affects the trial process but not its fundamental structure or framework. See State v. Frost, 160 Wn.2d 765, 779- 831, 161 P.3d 361 (2007) (discussing when a harmless error analysis is appropriate).

State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008)

In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. Kirkman, 159 Wash.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wash.2d 682, 687, 757 P.2d 492 (1988)). A "manifest" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wash.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wash.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wash.2d at 603, 980 P.2d 1257).

Jim does not explain how the issue raised is of constitutional magnitude. He waived his challenge to this alleged error by not objecting to it in the trial court.

The alleged actions were not prosecutorial misconduct. A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). "The court reviews a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions." State v. Calvin, 176 Wn.App. 1, 516, 302 P.3d 509 (2013)

There was no misconduct on the part of the deputy prosecutor in his closing argument. The fact that he set out a more colloquial means of describing the standards does not mean that they are incorrect. As all who have done jury trials know the fact is most jurors are stunned by the jury instructions in the first place. To believe the benign statement made verbally in closing argument would so influence the jury so as to taint the decision making process of the jury is ludicrous.

To establish that the deputy prosecuting attorney here committed misconduct during closing argument, Jim must prove that the prosecuting attorney's remarks were both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43(2011). To prevail on a prosecutorial misconduct claim, a defendant must show that the prosecutor's conduct was both improper and prejudicial "**in the context of**

the record and all of the circumstances of the trial." In re Pers.

Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)

(Emphasis mine.) To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict."

Glasmann, 175 Wn.2d at 704. A defendant who failed to object at trial must also establish "that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice." Glasmann, 175 Wn.2d at 704.

The facts presented in this case were received from the home owners, one of whom was the victim, their daughter who was asleep in the home at 5:00 AM when this altercation started and, the responding officers. The others who testified were the defendant and the person who actually initiated the contact with the house, both who were intoxicated. Mr. Yazzie, the co-participant was an individual whom the defense labeled "toxic." (RP 550-7) The victim's wife, who is a relative of both Mr. Yazzie and the Appellant testified as follows;

A. I was yelling at Jordan to look at what he is doing.

We are trying to get ready for work. Why -- why do you want to fight Lupe, you know he can't fight.

He's on medicine. He can barely move around, what are you doing?

Q. And when you said that Lupe was on -- was -- was not right or on medicine, what was your tone of voice?

A. I was yelling.

Q. Were you yelling at a particular person?

A. At Jordan.

Q. And where was Simeon at that particular time when you were yelling -- when you were yelling at Jordan?

A. He was behind me.

Q. Okay. And what -- was he near you -- behind you or far behind you, to your knowledge?

A. About four feet on the other side of me.

Q. Okay. And what happened next?

A. Jordan just kept saying I can't believe you won't let me see you, that's all I wanted to do was see you and I said that's okay Jordan but I already told you before not to be coming here drinking. Where's your ride? And there was no answer.

Q. Okay. What happened next?

A. My husband got mad at me, told me to go in the house and call the cops, they're not leaving. And then right when he said that -- that -- I -- I just kind of -- I was between my husband and Jordan and then Simeon punched my husband in the mouth.

Q. Okay. Now, has -- when your husband told you to go inside had -- had Simeon been in the same location or had he already moved?

A. He moved a little bit around me, you know, towards the driveway.

Q. Was he heading towards where Jordan and Simeon were - - I mean, sorry, within -- where Jordan and -- and Guadalupe were?

A. Yes.

Q. Okay. And what happened next?

A. I -- my husband looked down and he seen blood coming out of his lip and I asked Simeon what are you doing? I already told you guys he can't fight. He's on medication and I was yelling. And then my husband just kind of looked around because he was in shock. The next thing that I do -- Simeon's backing up so I thought they were going to leave. Jordan said I'm out of here, he picked up his bag and he was gone, left Simeon there and then -- he backed up and took one last charge and jumped up and punched my husband in the head and then Lupe went backwards and I'm just seeing all of this happen. I hear him when he hits because we have a gravel driveway.

His back cracked, he was already knocked out.
He fell back and he hit the back of his head and then
he started shaking and then his eyes were rolling
back and foam was coming out of his mouth and he was
bleeding already and -- I just said what is going on?
And then Simeon circled us and he seen Lupe shaking
and he said I don't give a fuck what happens to you.
Q. Now, when he said I don't give a fuck what happens to
you was he referring to you or --
A. No, he was talking about my husband.
RP 87-90

The victim testified as follows;

Q. Okay. Would it be fair to say that -- you were in
and out after you were hit that time, is that correct?
A. Well, when I was -- when I was hit I was out.
Q. Alright. Thank you. Now, during that time or that
incident on that day, on April 10, 2013, did you push
-- either Jordan or Simeon at all?
A. I did not push anybody.
Q. Okay. Did you shove either Jordan or Simeon at all?
A. I did not shove anybody.
Q. Okay. Did you strike either Jordan or Simeon at all?
A. I didn't strike anybody.
Q. Okay. Now, earlier with regards to Jordan you had
your hands in this fashion. Were you able to -- how
was your mobility on that day? Were you able to move
your hands higher on April 10, 2013 -- enough to push
Jordan at all?
A. Well, I could -- in the mornings I have to -- it
takes me awhile to -- to be able to -- have to --
when I go to work it takes me a while to get -- have
to like start working for a while before I can function good,
you know?
Q. I know. But Mr. Capetillo, on April 10, 2013 when
this incident occurred --
A. Mmm hmm. [Affirmative].
Q. -- were you able to raise your arm enough to push
Jordan Yazzie?
A. No. Because I -- could -- you know, I was -- I was

still what I consider I had a disability from the operation.

Q. Okay. So that -- that whole thing regarding the tumor, the operation, the radiation treatment; all of that affected you, is that correct?

A. Yes.

Q. Okay. And it still affects you to -- to this day, that and also what happened on April 10th of 2013, is that correct?

A. Yes. Because now it's even worse because of the -- when I hit my head, you know, the doctors told me that I had bleeding on my brain from that incident.

Q. Alright.

A. And if it wouldn't have stopped they would have had to operate.

Q. So Mr. Capetillo, on -- on April 10th you were hit or assaulted twice by Simeon Jim, is that correct?

A. Yes.

Q. Okay. And that person that we were talking about -- as Simeon Jim, the one that hit you twice, is he in this courtroom this afternoon?

A. I believe that's him. He had longer hair at the time.

RP 157-9

The testimony from the Mr. Yazzie and the Appellant was not believable and attempted to place the blame on the victim. Mr. Yazzie's story changed constantly. His initial statement was that the only contact by Appellant was a "slap" his next interview indicated that Appellant had struck the victim three times and finally on the stand he stated that there had only been one strike, interestingly the last version comported with that of the defendant.

There is nothing in this record that would support a verdict for Jim based on self-defense or defense of others nor is there any evidence that

any of the proposed lesser included offenses were proven over the charge Jim was convicted of.

The State's recitation of the degrees of culpability came about because the trial court agreed to allow the jury to consider two "lesser included" offenses even though from the record there was no evidence of proof of either charge over or to the exclusion of the charged offense. Not only that but Jim did not argue that these other offenses had occurred, he argued self-defense and/or defense of others. State v. Kruger, 60 Wash. 542, 543-4, 111 P. 769 (Wash. 1910) addressed this issue;

There is no evidence whatever of an assault in the third degree. Appellant was guilty as charged, or he was not guilty. The evidence leaves no zone of speculation, or room for compromise. But it is contended that assault in the second degree includes assault in the third degree, and that the court was warranted in submitting that crime to the jury, and that the verdict was sustained. It is true that the greater includes the less, but the defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime because included in law. It must be included in fact, and by the facts of the particular case.

It is well settled law that the jury decides whom to believe, what weight and credibility to give the witnesses. State v. Buss, 76 Wn. App. 780, 788, 887 P.2d 920 (1995) "The issues of credibility and the weight to be given to evidence of McWhirt's bias was for the jury to decide, not the court." "Determinations of credibility are for the fact finder and are not

reviewable on appeal.” State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). The story that was told by the defense witnesses was not credible. The story changed with each telling. The facts presented by all witnesses overwhelming proved that the assault occurred as described by the State’s witnesses. The defense agreed that there was in fact an assault. There was no discussion by Appellant that his actions were consistent with third degree or fourth degree assault. The discussion was whether Appellant’s actions were justified under self-defense or defense of others. As was stated by the defendant in closing argument;

What’s on trial? We agreed in voir dire the State’s case against Mr. Jim, that’s what’s on trial. Did they prove that he did not act in self-defense? That’s the only issue you really have in front of you. (RP 544) ...

So what’s at issue is self-defense. What is it you’re supposed to look at in deciding whether or not the State has eliminated the possibility that Simeon Jim acted in self-defense? Well, let’s talk about that and what is it that they have to -- what is it that they have to prove to you? They have to prove to you that Mr. Jim did not act in a fashion to protect another person because if he was protecting another person his use of force was lawful. Why do we do that? We don’t do that to punish Mr. Capetillo, that’s not the law and it has nothing to do with the issue. We do that because as a society we have decided that we want to allow people who make the best decision they can with the information available to them to step forward and prevent harm. (RP 546)

...

And what this instruction is saying is how might you have reacted given this situation, given what was

going on, given what was happening? If there is a possibility that you would have acted in a similar fashion no crime has been committed. You used -- that person used lawful force. And that's why the image of striking a person who is down on the ground is so critical to the State's argument. Because without that the force was lawful. Simeon Jim goes home when you return with your not guilty verdict.

Taking into consideration all of the facts and circumstances known to the person at the time and prior to the incident. Now, the State hasn't established that Simeon knew any of the stuff that Jordan was talking about, not a bit of it; not one bit of it.

We also know that he has a particular -- that he has been trained and he's -- he was trained by the best we have in this country to represent his country in a situation where fighting is going to happen. And he responded using that training, that's what he knows, we know that about him.

(RP 551-2)

The jury is presumed to follow the instructions given. One of the instructions given to the jury at the initial charge, at the close of the factual portion of the case, as well as an admonishment during closing, instructed the jury that the statements of counsel were not evidence. (RP 50-1, 493, 548) These instructions then went back to the jury room with the jurors. During closing the court reminded the jury, "The jury is to recall -- is to base your -- your verdict on the evidence and recall that what the attorneys say is not evidence." (RP 548) This Court should hold that Appellant has failed to preserve this alleged misconduct issue and accordingly decline to reach the merits of the claim. State v. York, 50 Wn. App. 446,

451, 749 P.2d 683 (1987) “The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983).” See also State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)).

The totality of the evidence presented to the jury was ultimately overwhelming. Mr. Jim even stipulated as follows;

Sometimes during trials attorneys reach agreements as to certain pieces of evidence so that they don't need to take up any more of their time and your time putting on testimony when there really isn't any dispute about a particular item of evidence.

In this case the parties have agreed that Mr. Guadalupe Capetillo did suffer substantial bod -- bodily harm, as that term is defined. The agreement is based on the medical records indicating that Mr. Capetillo received medical treatment at Yakima Regional Hospital between April 10 and April 15 of 2013 from Dr. Tran and others. So this is part of the evidence that you consider along with the testimony and the -- whatever exhibits may be admitted. (RP 179)

Under the constitutional harmless error standard, this court will not vacate the jury's finding if it appears beyond a reasonable doubt that the alleged error did not affect the verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). Regardless, any error, even assuming error, would be harmless. There was ample other, indeed overwhelming, evidence in this record to support these convictions. State v. Watt, 160

Wn.2d 626, 635-36, 160 P.3d 640 (2007). See also State v. Thompson, 151 Wn.2d 793, 808, 92 P.3d 228 (2004);

Thompson's conviction was based, at least in part, on evidence found within the trailer--evidence we here conclude is inadmissible. This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. State v. Brown, 140 Wash.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, we utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

This was recently restated in State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (Wash. 2005);

To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." Smith, 148 Wash.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing State v. Guloy, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985)).

Based on the overwhelming evidence that had been presented and the complete lack of an objection which would have, if there was error, allowed the trial court to instruct the jury or strike the argument Jim has not and cannot establish that any alleged error had any effect what so ever on the decision of the jury.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

The actions of the trial court should be upheld, this appeal should be dismissed.

Respectfully submitted this 12th day of March 2015,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on March 12, 2015, I emailed a copy, by agreement of the parties, of the Respondent's Brief to Ms. Jan Gemberling admin@gemberlaw.com and deposited a copy in the United States mail on this date to

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of March, 2015 at Spokane, Washington,

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