

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No. 81164-4

2000 DEC -1 A 10:58

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK *hjh*

STATE OF WASHINGTON,
Respondent,

~ vs. ~

KENNETH LEE KYLLO,
~~Appellant.~~ *PETITIONER.*

SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	FACTS	2
C.	ARGUMENT	4
1.	Trial Counsel Was Ineffective by Proposing a Jury Instruction Which Misstated the Law and Lowered the State's Burden of Disproving Self Defense.	4
2.	Kyllo is Entitled to a New Sentencing Hearing Because the Appearance of Fairness Doctrine was Violated by the Testimony of a Judge At Sentencing—a Judge Who Presided Over Preliminary Proceedings in this Case.	10
D.	CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Diimmel v. Campbell</i> , 68 Wn.2d 697, 414 P.2d 1022 (1966)	11
<i>Lankford v. Arave</i> , 468 F.3d 578 (9 th Cir. 2006)	9
<i>State v. Acosta</i> , 101 Wash.2d 612, 683 P.2d 1069 (1984)	5
<i>State v. Allery</i> , 101 Wash.2d 591, 682 P.2d 312 (1984)	5
<i>State v. Bailey</i> , 22 Wn. App. 646, 650, 591 P.2d 1212 (1979)	6
<i>State v. Caldwell</i> , 94 Wash.2d 614, 618 P.2d 508 (1980)	9
<i>State ex rel. Carroll v. Junker</i> , 79 Wash.2d 12, 482 P.2d 775 (1971)	11
<i>State v. Dominguez</i> , 81 Wn. App. 325, 914 P.2d 141 (1996)	11
<i>State v. Dugan</i> , 96 Wn. App. 346, 979 P.2d 885 (1999)	10
<i>State v. Freeburg</i> , 105 Wn. App. 492, 20 P.3d 984 (2001)	7
<i>State v. Golladay</i> , 78 Wash.2d 121, 470 P.2d 191 (1970)	10
<i>State v. Janes</i> , 121 Wash.2d 220, 850 P.2d 495 (1993)	5, 6
<i>State v. L.B.</i> , 132 Wn. App. 948, 135 P.3d 508 (2006)	6
<i>State v. LeFaber</i> , 128 Wash.2d 896, 913 P.2d 369 (1996)	4, 5
<i>State v. Painter</i> , 27 Wn. App. 708, 620 P.2d 1001 (1980)	5
<i>State v. Rodriguez</i> , 121 Wn. App. 180, 87 P.3d 1201 (2004)	7, 8
<i>State v. Walden</i> , 131 Wash.2d 469, 932 P.2d 1237 (1997)	<i>passim</i>

Statutes

RCW 9A.16.020 (3)	6
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Other Authority

WPIC 17.04

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13A Royce A. Ferguson, Jr. & Seth Aaron Fine, Washington Practice,
Criminal Law § 2604, at 351 (1990)

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A. INTRODUCTION

Kenneth Kylo was convicted by a jury of second degree assault and subsequently sentenced to life in prison after a judge concluded he was a persistent offender.

Kylo's jury was instructed on self defense. Jurors were properly instructed that use of force is lawful "when used by a person who reasonably believes that he is about to be injured," and when "the use of force is not more than is necessary." CP 97. However, jurors were improperly instructed a person (using non-homicidal force) is entitled to "act on appearances" only if that person reasonably believes he is in "actual danger of *great bodily harm*." CP 99. "Great bodily harm" was not defined. However, "substantial bodily harm" was defined as "bodily injury that involves a temporary but substantial disfigurement," or "temporary but substantial loss or impairment" of a bodily organ, or a "fracture" of a body part. In contrast to what jurors were told, the law requires only fear of injury.

Further compounding the error, both the prosecutor and defense counsel told the jury that Kylo's claim of self defense was available only if Kylo believed he was in danger of death or serious injury. Because there can be no conceivable reason for Kylo's counsel to reduce the State's burden of disproving self defense, counsel was ineffective.

In addition, permitting a fellow judge to testify to a crucial sentencing fact—a judge who presided over many of the preliminary proceedings in this case—violated the appearance of fairness doctrine.

As a result, this Court should reverse and remand either for a new trial or for a new sentencing hearing.

B. FACTS

On June 12, 2004, Kenneth Kylo and Robert Mickens were inmates in the Cowlitz County Jail. RP 178-9. According to Mickens, he set out to provoke a fight with Kylo, baiting Kylo for about twenty minutes. RP 198. When words failed, Mickens physically confronted Kylo. RP 199. According to Kenny Stevens, who testified for the State, “Mickens kept pushing him [Kylo], wanting to fight, pushing him, wanting to fight, and Kylo told him at least a half dozen times he didn’t want to fight.” RP 148.

Eventually, Mickens got what he wanted—a fight started. RP 149, 202-12; 231. Mickens threw punches. According to Stevens, Mickens was “giving him groin shots. Kylo didn’t do anything. He didn’t punch him once. He didn’t want to fight. The only thing he did was bite Mickens’ ear to get him off.” RP 149. Stevens testified that at the time of the bite, Mickens had Kylo against the wall—punching him in the groin. RP 152.

Kylo testified that Mickens charged him, forced him up against the wall, and was punching him in the groin. RP 323-6. Kylo stated that he bit Mickens’ ear to stop the fight. RP 327. Kylo testified:

And, he's throwing punches at me. He's throwing them at my head...and my crotch, as he said. He was trying to bite me....He's pushing his head into mine, and he's head-butting me in my head. He's knocking me into the wall. He's doing everything he can. And I'm trying to—I'm panicking. I'm thinking he was going to bite me on the neck.

RP 327. Kylo explained he then bit Mickens “just to get him off and keep from being hurt.” RP 328. Once bit, Mickens stopped fighting, calling Kylo several derogatory names. RP 328.

Kylo's jury was instructed:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm...”

CP 98.

During closing argument, the prosecutor argued that Kylo did not act in self defense: “The defendant had absolutely no reason to believe he was going to killed or severely, brutally injured in this attack.” RP 373.

See also RP 370 (“It's not a vicious bite [by Mickens] that would put defendant in fear for his life.”).¹

Defense counsel further emphasized “act on appearances” instruction by arguing that Kylo acted in self defense by using force necessary to “save his life, to save himself from either from death or grievous bodily harm...he did what he needed to do to save himself from

¹ In addition, the prosecutor improperly argued (without objection), “if you find” that Kylo “took the first swing,” then Kylo “cannot claim self-defense.” RP 366, 390.

serious injury or death.” RP 385. *See also* RP 386 ([Kyllo] did only what he thought was necessary to protect himself from serious injury or death.”).

In rebuttal, the prosecutor argued that Kyllo did not fear sufficient injury to “rip someone’s ear off with your teeth in a fist fight.” RP 394.

Kyllo’s jury convicted him as charged.

During the sentencing hearing, the judge found that the State had not sufficiently proved that Kyllo was previously convicted of Assault in the Second Degree, a necessary predicate to a persistent offender finding. RP (11/16/04) 30-31. The court continued the sentencing hearing. On December 16, 2004, the Hon. Stephen Warning, Kyllo’s former attorney, a sitting judge in Cowlitz County Superior Court, and the judge who presided over most of preliminary proceedings in this case, testified that he represented Mr. Kyllo in the questioned assault case. RP (12/6/04) 5. Based on this testimony, the sentencing judge concluded that Kyllo was a persistent offender. RP 17, 22; CP 116.

C. ARGUMENT

1. Trial Counsel Was Ineffective by Proposing a Jury Instruction Which Misstated the Law and Lowered the State’s Burden of Disproving Self Defense.

Introduction

Kyllo’s defense was self-defense. Jury instructions on self-defense must “more than adequately” convey the law. *State v. LeFaber*, 128 Wash.2d 896, 900, 913 P.2d 369 (1996). Read as a whole, the jury

instructions must make the relevant legal standard “manifestly” apparent to the average juror. *LeFaber*, 128 Wash.2d at 900, 913 P.2d 369; *State v. Allery*, 101 Wash.2d 591, 595, 682 P.2d 312 (1984); *State v. Painter*, 27 Wash.App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wash.2d 1008 (1981). “A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” *LeFaber*, 128 Wash.2d at 900, 913 P.2d 369.

Elements of Self Defense

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *See State v. Janes*, 121 Wash.2d 220, 237, 850 P.2d 495 (1993) (defendant bears initial burden of producing evidence killing occurred in circumstances amounting to self-defense); *State v. Acosta*, 101 Wash.2d 612, 619, 683 P.2d 1069 (1984) (State bears burden of disproving self-defense in second degree assault prosecution).

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *Janes*, 121 Wash.2d at 238, 850 P.2d 495 (citing *Allery*, 101 Wash.2d at 594, 682 P.2d 312). This standard incorporates both objective and subjective elements. The subjective portion requires the jury

to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wash.2d at 238, 850 P.2d 495.

Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions *as they appeared to the defendant*. See *State v. Bailey*, 22 Wash.App. 646, 650, 591 P.2d 1212 (1979); 13A Royce A. Ferguson, Jr. & Seth Aaron Fine, Washington Practice, *Criminal Law* § 2604, at 351 (1990).

Degree of Feared Harm

A defendant who utilizes non-homicidal force does not need to fear great bodily harm. Instead, he need only reasonably fear injury. *State v. L.B.*, 132 Wn. App. 948, 135 P.3d 508 (2006). See also WPIC 17.04; RCW 9A.16.020 (3) (use of force is not unlawful when “used by a party about to be injured,” where amount of force used is reasonable).

Where a defendant raises a claim of self defense involving non-deadly force, telling a jury that it must first find a defendant feared “great bodily harm” sets the bar too high and impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at injury

would result in mere injury. *L.B.*, 132 Wn. App. at 953; *State v. Walden*, 131 Wash.2d 469, 473, 477, 932 P.2d 1237 (1997).

Even in homicide cases, the defendant does not have to establish that he reasonably feared great bodily harm. *See, e.g., Walden*, 131 Wash.2d at 475 n. 3 (the instruction defining justifiable homicide as well as the “act on appearances instruction” must use the term “great personal injury” and not “great bodily harm”).

The applicable feared degree of harm is a crucial element of a self defense claim. For example, “great personal injury is an injury that would produce severe pain and suffering:” whereas “great bodily harm is injury creating probability of death or causing significant serious permanent disfigurement, or creating significant permanent loss or impairment of the function of a bodily part or organ.” *State v. Freeburg*, 105 Wash.App. 492, 504, 20 P.3d 984 (2001). Because great bodily harm is an injury far more severe than great personal injury, the *Freeburg* court held it “imperative” that trial courts use the correct language. *Id.* at 507.

However, even “great personal injury” sets the bar too high in this case. As set forth above, in cases not involving death, the use of force is justified if the defendant reasonably believed he was about to be injured.

In contrast, Instruction 13 wrongly instructed the jury that the type of injury Mr. Kylo had to fear in order to defend was “great bodily harm.” And, while the instructions did not further define “great bodily harm,” the

instructions defined “substantial bodily harm” as “bodily injury” that involves a temporary but substantial disfigurement,” or “temporary but substantial loss or impairment” of a bodily organ or function, or a “fracture” of a body part.

It is likely that the jurors viewed the “great bodily harm” as equal to, if not a more significant injury than “substantial bodily harm,” especially since both the defense and prosecutor argued that Kylo needed to reasonably fear death or, at a minimum, “severe,” “serious,” or “grievous” bodily injury in order for the right of self defense to apply. However, even using the definition of “substantial bodily harm” found in the instructions impermissibly reduces the State’s burden of proof.

This is precisely the problem this Court warned against in *Walden, supra*. Like the instructions the court found objectionable in *Walden*, a reasonable juror could read Instruction 13 in this case to prohibit any consideration of self defense unless Kylo feared a greater injury than the law actually required. *Walden*, 131 Wash.2d at 477.

Ineffective Assistance of Counsel

Kylo’s own attorney set the bar too high for him. Kylo was denied his Sixth Amendment right to effective assistance of counsel both by counsel’s decision to propose this instruction and by counsel’s act of affirmatively arguing that Kylo needed to fear a more significant injury than the law actually required. *See State v. Rodriguez*, 121 Wn. App. 180,

87 P.3d 1201 (2004). The *Rodriguez* court concluded: “If we can conceive of some reason why Mr. Rodriguez's lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez's position at trial, then we would conclude that the lawyer's performance was not deficient. But we can conceive of none here. The net effect was to decrease the State's burden to disprove self-defense.” 121 Wn. App. at 187. There can be no possible strategic advantage to propose an instruction that makes it easier for the State to convict Kylo. Counsel's failure was not the product of choosing one reasonable course of action over another. They were instead the result of failing to accurately understand the law. *See e.g., Lankford v. Arave*, 468 F.3d 578, 584 (9th Cir. 2006) (by proposing an incorrect instruction, even after conducting legal research and believing the instruction to be correct, counsel unwittingly undermined the “very adversarial process” he was supposed to preserve).

Kylo easily satisfies the prejudice prong. Instruction 13 is a misstatement of the law and, therefore, is presumed prejudicial to the defendant. Thus, Kylo is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt. *Walden, supra; State v. Caldwell*, 94 Wash.2d 614, 618, 618 P.2d 508 (1980). An instructional error is harmless only if it “is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” *Wanrow*,

88 Wash.2d at 237, 559 P.2d 548 (quoting *State v. Golladay*, 78 Wash.2d 121, 139, 470 P.2d 191 (1970)).

This was a close case of self defense. In addition to arguing over the credibility of the various witnesses, both counsel focused their arguments on whether Kylo feared sufficient injury to defend. While counsel disagreed on this point, both counsel misstated the legal standard. However, based on the jury instructions counsel's arguments were a reasonable statement of that (incorrect) statement of law—vividly demonstrating the likelihood that Kylo's juror employed the same, mistaken standard of law.

This Court should reverse and remand this case for a new trial.

2. Kylo is Entitled to a New Sentencing Hearing Because the Appearance of Fairness Doctrine was Violated by the Testimony of a Judge At Sentencing—a Judge Who Presided Over Preliminary Proceedings in this Case.

The sole supporting evidence of Kylo's identity as the person previously convicted for this strike offense was provided by his former defense counsel, now a Cowlitz County Superior Court judge. And the sole determiner of the evidence was another Cowlitz County Superior Court judge.

Public confidence in the administration of justice requires the appearance of fairness, as well as actual fairness. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999). Under the appearance of fairness

doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *See also Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) (“It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties”).

Applying this doctrine, the Court of Appeals held:

Although we do not doubt the integrity of either the witness or the sentencing trier of fact, we agree with *Kyllo* that this procedure violates the appearance of fairness doctrine.

Here, a disinterested observer could question the neutrality of a proceeding in which a judge who presided over preliminary matters later provided the sole evidence of the defendant's identity as the perpetrator of a previous strike offense for purposes of sentencing the defendant as a persistent offender to a term of life without possibility of parole.

The Court of Appeals decision is consistent with long-standing caselaw. “Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity, and these occasions, we think, should be limited to instances in which there is no other reasonably available way to prove the facts sought to be established.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 20, 482 P.2d 775 (1971). Likewise, Canon 3(D)(1) of the Code of Judicial Conduct requires a judge to disqualify himself if he is biased against a party or his

impartiality *may reasonably be questioned*. *State v. Dominguez*, 81 Wn.App. 325, 328, 914 P.2d 141 (1996).

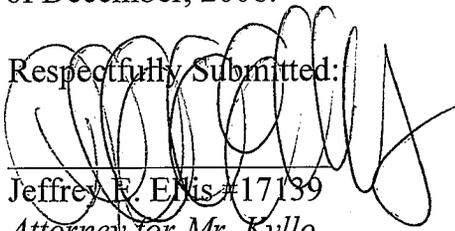
Here, it would have been relatively simple to ask a judge from a different county to conduct the sentencing hearing. Or, the State may have been able to call another witness involved in the earlier assault prosecution. However, what is clear is a disinterested witness would reasonably question the fairness of a proceeding where one judge is asked to weigh the credibility of another sitting judge in the same courthouse, especially where that judge had presided over several hearings in the case.

D. CONCLUSION

Based on the above, this Court should reverse Kylo's conviction and remand this case for a new trial. Alternatively, this Court should reverse Kylo's sentence and remand for a new sentencing hearing.

DATED this 1st day of December, 2008.

Respectfully Submitted:


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Appendix A ~
Jury Instruction No. 13

Instruction No. 13

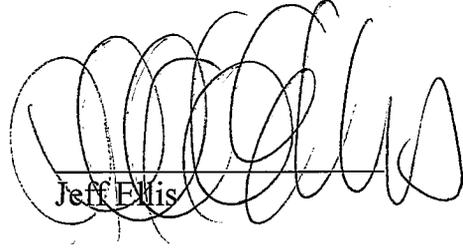
A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on December 1, 2008, I served the party listed below with a copy of the attached *Supplemental Brief* by mailing a copy, postage pre-paid, to:

Michelle L. Shaffer
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12/1/08 Seattle, WA
Date and Place



Jeff Ellis