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NO 32729-5-II.
Cowlitz County No 04-1-00819-8.

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH LEE KYLLO

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

Supplemental BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY PROPOSED THE “ACT ON APPEARANCES” INSTRUCTION.

C. STATEMENT OF THE CASE

Appellant’s original brief outlines the facts of this case and that statement of the facts is incorporated by reference herein. For purposes of this supplemental brief, the following facts are pertinent: The jury instruction in question, found at CP 98, was proposed by defense counsel. Further, defense counsel did not propose, nor did the court give, an additional instruction defining “great bodily harm” as that term is used in this so-called “act on appearances” instruction. Clerk’s Papers.

D. ARGUMENT

I. DID MR. KYLLO RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED THE “ACT ON APPEARANCES” INSTRUCTION?

Under the holding of *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004), the inquiry here is whether Mr. Kyлло received ineffective assistance of counsel because his attorney proposed this instruction, thereby inviting this error. Under the holding of *Rodriguez*, it

is clear that Mr. Kylo did receive ineffective assistance of counsel when his attorney proposed this instruction and that he was prejudiced by this instruction because self-defense was the only defense presented at trial.

The Supreme Court held in *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) that the use of this “act on appearances” instruction was error where the instruction required the actor to fear “great bodily injury” in order to act on appearances because such a fear is not required. *Walden* at 475-77. Rather, one can fear a simple battery when acting on appearances, even when that belief turns out to be mistaken. *Id* at 477. As such, use of this instruction was reversible error because it failed to make the relevant legal standard for self-defense manifestly apparent to the average juror. *Id.* at 473. As the *Walden* court held, self-defense instructions must be given higher scrutiny than other jury instructions. Specifically, the *Walden* Court held that “Jury instructions on self-defense must more than adequately convey the law...Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Walden* at 473, citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Although, as the *Rodriguez* Court noted, the rationale for this higher degree of certainty is unclear, it nevertheless demonstrates that Mr. Kylo suffered similar prejudice when the trial court gave this “act on appearances” instruction which required him to fear

“great bodily harm” in order to rely on his subjective belief of danger. Because such a fear was not required, and because “great bodily harm” was not defined for the jury, use of this instruction lowered the State’s burden of proof and caused obvious prejudice where self-defense was the only defense presented at trial. *Rodriguez* at 187.

While the *Walden* Court dealt with an earlier version of this instruction, the *Rodriguez* Court dealt with an instruction identical to the one given in this case. The holding in *Rodriguez* is simple and clear: Use of the “act on appearances” instruction must be accompanied by a separate instruction defining “great bodily harm.” In *Rodriguez*, the Court held that this definition is found at WPIC 2.04.01 which defines “Great Personal Injury” as injury that would produce severe pain and suffering. *Rodriguez* at 478. It appears that the holding in *Rodriguez*, which instructs us to use a separate instruction defining “Great Personal Injury” when the “act on appearances” instruction is used, contradicts the holding in *Walden* which holds that such a high level of fear is not required (fear of simple battery is enough). Nevertheless, under either holding, use of this instruction in Mr. Kylo’s case was error because the jury was left with the impression that Mr. Kylo was required to have a higher level of fear than the law requires before acting in self-defense. Thus, the State’s burden of

proof was lowered and the instructions failed to make the relevant legal standard on self-defense manifestly apparent to the jury.

The prejudice suffered by Mr. Kylo is self-evident: Self-defense was the only defense presented at trial, just like the defendants in *Walden* and *Rodriguez*. In *Rodriguez*, the Court noted that the erroneous instruction "...struck at the heart of Mr. Rodriguez's defense..." *Rodriguez* at 187. Such is the case for Mr. Kylo as well.

It is worth noting that this instruction is totally unnecessary and may be an incorrect statement of the law. The fact that one can act on appearances in deciding whether he is justified in defending himself is axiomatic and a concept that is adequately conveyed in other self-defense jury instructions. "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.*'" *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). In other words, the inquiry is both objective and subjective. *Id.* The standard instruction on the lawful use of force, found at CP 96 and WPIC 17.02, states that "The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is

not more than necessary.” This instruction therefore adequately conveys that a person is entitled to act on appearances.

This instruction also erroneously suggests that acting on a “mistaken belief” will only be excused when the harm feared was “great bodily harm,” (as defined in the context of this instruction), as opposed to any physical harm. This is incorrect. As the standard “Lawful Use of Force” instruction correctly states, one must only reasonably believe he is about to be injured in order to use self-defense, based on the conditions as they appeared to him at the time. WPIC 17.02.

To the extent the “act on appearances” instruction might be deemed necessary, perhaps some attorneys and jurists believe that it is necessary because it allows a defendant to rely on self-defense even when he used force that was “more than necessary.” In other words, perhaps it is felt that the “act on appearances” instruction will save a claim of self-defense when the actor used more force than, in hindsight, was actually needed, but that he felt he needed to use at the time based on the conditions as they appeared to him. If this is the rationale, then the “act on appearances” instruction appears to directly contradict the standard “lawful use of force instruction” because that instruction requires that the force used be not more than was necessary. If these instructions are

contradictory, then the “act on appearances” instruction should be abandoned.

If these instructions are not contradictory, and the “act on appearances” instruction simply restates the subjective component of our law of self-defense, then the instruction is superfluous and unnecessary and should, again, be abandoned. The most compelling reason to abandon the “act on appearances” instruction, however, is that it seems it is very difficult to use it without running afoul of a large body of self-defense case law.

In fairness to defense counsel, the “act on appearances” instruction is a WPIC instruction. (WPIC 17.04). As such it was drafted and, presumably, given the stamp of approval by the Washington Supreme Court Committee on Jury Instructions (Chair, Hon. Patricia H. Aitken). Why the committee would give its stamp of approval to an instruction which has been harshly criticized by both the Washington Supreme Court in *State v. Walden*, supra, and Division I of the Court of Appeals in *State v. Rodriguez*, supra, is not clear. What is even more troubling is that the comments to this WPIC, on which busy trial attorneys understandably rely to apprise them of potential pitfalls that may accompany the use of a particular instruction, make *no reference* to either of these cases and say nothing about the requirement, adopted by these two cases, that this

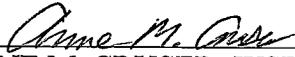
instruction *must* be accompanied by a separate instruction which defines “great bodily harm” in a manner specific to this instruction. Indeed, failure to separately define “great bodily harm” in a manner specific to this instruction is, under the holdings of *Walden* and *Rodriguez*, reversible error. As such, it is difficult to criticize the attorneys and the court in this case for using this instruction in light of its inexplicable endorsement by the WPIC committee and the committee’s failure to warn WPIC users that use of this instruction is fraught with peril.

That said, under the holdings of *Walden* and *Rodriguez*, Mr. Kylo was denied effective assistance of counsel where his attorney proposed an instruction that failed to make the relevant legal standard on self-defense manifestly apparent to the average juror and which lowered the State’s burden of disproving self-defense. Mr. Kylo was prejudiced by his attorney’s error because self-defense was the sole defense presented at trial. Further, when combined with defense counsel’s deficient performance in closing argument, where he suggested to the jury that Mr. Kylo must be in fear for his life before acting in self-defense (see Appellant’s Opening Brief), the prejudice could not be more apparent. Mr. Kylo is entitled to a new trial.

E. CONCLUSION

Mr. Kyllo is entitled to a new trial based upon ineffective assistance of counsel.

RESPECTFULLY SUBMITTED THIS 28th day of February, 2007.


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