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NO. 62696-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RELFE,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable George T. Mattson

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. *O'HARA* DOES NOT APPLY TO THE CIRCUMSTANCE OF AN ERROR IN THE "TO CONVICT" INSTRUCTION.

Citing the recent decision of the Washington Supreme Court in State v. O'Hara, __ Wn.2d __, __ P.3d __, No. 81062-1, 2009 WL 315261 (2009), the State claims that because Relfe did not object to the "to convict" instruction, his assertion that the jury should have been instructed on the absence of self-defense in the "to convict" instruction is waived. The State misreads that case.¹

O'Hara clarified that an instructional error may, but will not always be a "manifest constitutional error." O'Hara, 2009 WL 315261 at 6.² The Court held that where a party has not requested a jury instruction, appellate courts should make such a determination on a case-by-case basis. Id. The Court noted, however, that some errors always will be manifest constitutional errors, including, "omitting an element of the crime charged." Id. at 4 (citing State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145

¹ The State also misstates Relfe's argument. See Br. Resp. at 12 (arguing, "Relfe cannot show that giving a separate self-defense instruction that accurately states the law and correctly allocates the burden of proof is a "manifest" constitutional error that resulted in practical and identifiable consequences.").

² Because the case does not yet have a Washington or Pacific Reporter citation, citations herein are to the Westlaw pagination.

(1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985)). Because the error in O'Hara merely pertained to a definitional instruction regarding the statutory definition of "malice," the trial court's instruction did not amount to a manifest error affecting a constitutional right. 2009 WL 3152161 at 6. By contrast – in an opinion issued just one month before its opinion in O'Hara – the Washington Supreme Court reaffirmed that a jury instruction on self-defense that misstates the law is an error of constitutional magnitude. State v. Kylo, 166 Wn.2d 856, 215 P.3d 177, 180 (2009).³

The absence of self-defense is an essential element that the State must prove whenever a self-defense claim is raised. Id; State v. Acosta, 101 Wn.2d 612, 621-23, 683 P.2d 1069 (1983). Thus, where a reasonable juror could have believed from the instructions that were given that the defendant bears some burden of proving self-defense, the jury instructions prejudicially relieve the State of its burden and reversal is required unless the State can prove beyond a reasonable doubt that the error was harmless. Acosta, 101 Wn.2d at 623-24. As argued in the Brief of Appellant, in this case the deficient "to convict" instruction, read in conjunction with

³ Washington Reporter pin citations for Kylo were not available on Westlaw at the time of this writing.

Instruction 20, defining lawful force, could have confused the jurors into believing that it was their duty to convict regardless of whether they found the State had proved the absence of self-defense beyond a reasonable doubt. Br. App. at 12-14. The instructions thus relieved the State of its burden of proof and require reversal of the conviction.

Relfe has argued that recent decisions of the Washington Supreme Court regarding the “essential elements rule” call into question State v. Hoffman, 116 Wn.2d 51, 804 P.2d 477 (1991), in which the Court held the absence of self-defense did not have to appear in the “to convict” instruction. Br. App. at 10 (citing, inter alia, State v. DeRyke, 149 Wn.2d 906, 73 P.2d 1000 (2003); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); and State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996)). Br. App. at 9-11. The State believes O’Hara settles this claim, Br. Resp. at 14, but as established, the State reads O’Hara far too expansively. This Court should hold that under the “essential elements” rule, the jury had to be instructed in the “to convict” instruction that the absence of self-defense was an element the State had to prove beyond a reasonable doubt.

2. THE INVITED ERROR DOCTRINE DOES NOT BAR REVIEW WHERE THE TRIAL COURT DID NOT ISSUE THE JURY INSTRUCTION PROPOSED BY THE DEFENSE.

The State alternatively argues that Relfe invited any error, but the State misapplies the invited error doctrine. The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). With respect to the application of the doctrine to jury instructions, the Supreme Court has held that “[a] party may not request an instruction and later claim on appeal that the requested instruction was given.” State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)); see also, State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979) (“The instruction given is one which the defendant himself proposed[.]”).

Here, defense counsel did not propose a “to convict” instruction on assault in the first degree. The State has not cited any authority for the proposition that where defense counsel has not proposed a jury instruction, the court may find an error invited by looking to other instructions proposed, but not given, by the trial court. Cf., State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319

(1998) (“Meggyesy did not invite the particular error that he raises on appeal.”). The invited error doctrine does not bar Relfe from challenging the “to convict” instruction on the assault in the first degree charge.

3. RELFE WAS PREJUDICED BY THE COURT’S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE THIRD DEGREE.

The State contends the trial court correctly refused to issue Relfe’s proposed instructions on assault in the third degree. The State asserts, “it is simply not possible to characterize pointing a loaded gun at another person and pulling the trigger as only a criminally negligent act.” Br. Resp. at 20. The State does not respond to Relfe’s argument that in the context of self-defense, the appellate courts have in fact concluded that an accused person is entitled to a jury instruction on a lesser crime with a mens rea of negligence where the argument is that the defense is imperfect – i.e., the use of force was lawful, but excessive. See Br. App. at 18-19 (discussing the analogous circumstance of a manslaughter lesser for intentional or premeditated murder). In fact, in State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998), the Washington Supreme Court held that in such a circumstance, the failure to give

the lesser-included offense instruction was reversible error. 135 Wn.2d at 358-59.

The State alternatively claims that the failure to give the lesser-included offense instruction was harmless. Br. Resp. at 21-25. The State relies on Schad v. Arizona, 501 U.S 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), but that case is not controlling here. In Washington, the test is whether “the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.” State v. Hansen, 46 Wn. App. 292, 297, 730 P.2d 706 (1986) (emphasis added), opinion modified by 737 P.2d 670 (1987). As argued at length in the brief of appellant, that standard is not established here. This Court should hold Relfe was entitled to have the jury instructed on assault in the third degree.

4. THE IMPOSITION OF A FIREARM
ENHANCEMENT WHERE USE OF A FIREARM
WAS AN ELEMENT OF THE UNDERLYING
CRIME VIOLATED DOUBLE JEOPARDY.

In a Statement of Additional Grounds for Review, Relfe has argued that the imposition of a firearm enhancement, where the fact that Relfe assaulted Lee with a firearm was an element of the underlying offense, violated double jeopardy prohibitions. SAGR at

14-20. Although this issue is currently pending in the Washington Supreme Court,⁴ the State has not responded to Relfe's arguments.

The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. 5. The Washington Constitution also provides that no individual shall "be twice put in jeopardy for the same offense." Const. art 1, § 9. The double jeopardy prohibition protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Certainly the prosecution may charge and the jury may consider multiple charges arising from the same criminal conduct, however, the court may not enter multiple convictions, nor in turn impose multiple punishments, for the same criminal offense. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

While several antiquated Court of Appeals cases held that a "sentence enhancement" for an offense committed with a weapon does not violate double jeopardy even where the use of the weapon

⁴ State v. Aguirre, No. 82226-3 (argued 10/29/09), and State v. Kelley, No. 82111-9.

was an element of the crime,⁵ Apprendi and Blakely have reoriented our understanding of what constitutes an “element.”⁶ Because the United States Supreme Court has contemporaneously noted that there is “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and Fifth Amendment,⁷ these standards must alter the calculus of how the Court conceives of “sentencing facts” in the double jeopardy context, where the identical facts were already found by the jury in reaching its underlying verdict.

The Court has made it clear that the relevant determination of what is an “element” does not turn on what label a particular fact has been given by the Legislature or its placement in the criminal or sentencing code. Instead, it is the effect the proof of that fact has on the maximum sentence to which the accused is exposed.⁸

Apprendi, 530 U.S. at 494.

⁵ See State v. Pentland, 43 Wn.App. 808, 811-12, 719 P.2d 605 (1986); State v. Caldwell, 47 Wn.App. 317, 320, 734 P.2d 542 (1987); State v. Horton, 59 Wn.App. 412, 418, 798 P.2d 813 (1990).

⁶ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

⁷ Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

⁸ This was most succinctly stated by Justice Scalia:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor

With regard to double jeopardy, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not. United States v. Dixon, 509 U.S. 688, 696-97, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Under this test, Relfe's conviction for assault in the first degree with a firearm is the same in fact and law as the accompanying "enhancement."

together constitute an aggravated crime. *The aggravated fact is an element of the aggravated crime.*

Ring v. Arizona, 536 U.S. 584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002) (emphasis added).

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant and Relfe's statement of additional grounds for review, this Court should reverse Relfe's conviction. In the alternative, this Court should reverse Relfe's sentence and remand with direction that the firearm enhancement be stricken.

DATED this 5th day of November, 2009.

Respectfully submitted:



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DIVISION ONE**

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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