State v. Ramirez

Court of Appeals of Washington, Division Three

March 15, 2011, Filed

No. 28738-6-III

Reporter
2011 Wash. App. LEXIS 630

THE STATE OF WASHINGTON, *RESPONDENT*, v. JOSE REYES RAMIREZ, *APPELLANT*.

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *State v. Reyes Ramirez, 2011 Wash. App. LEXIS 672 (Wash. Ct. App., Mar. 15, 2011)*

Prior History: [*1] Appeal from Grant Superior Court. Docket No: 09-1-00263-3. Judgment or order under review. Date filed: 01/04/2010. Judge signing: Honorable John Michael Antosz.

Counsel: Kenneth H. Kato, Attorney at Law, Spokane, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA, Karen Alexander Horowitz, Grant County Prosecuting Attys Office, Ephrata, WA, for Respondent(s).

Judges: AUTHOR: Teresa C. Kulik, C.J. WE CONCUR: Kevin M. Korsmo, J., Laurel H. Siddoway, J.

Opinion by: Teresa C. Kulik

Opinion

¶1 KULIK, C.J. — Jose Reyes Ramirez appeals his Grant County conviction for second degree assault. He contends that instructional error prevented him from adequately presenting his claim of self-defense, that the trial court erred by denying a mistrial, and that the State failed to prove absence of self-defense beyond a reasonable doubt. We affirm the conviction.

FACTS

¶2 Mr. Ramirez was charged with second degree assault with a deadly weapon enhancement and third degree malicious mischief stemming from a fight with co-worker, Humberto Ruvalcaba at the Wahluke Winery in Mattawa. After a trial, a jury found Mr. Ramirez guilty of second degree assault, acquitted him of malicious mischief, and rejected the deadly weapon enhancement.

¶3 Mr. [*2] Ramirez worked in the winery's maintenance department and Mr. Ruvalcaba was a barrel worker. The incident occurred outside the barrel room near the end of the workday on May 20, 2009. Mr. Ruvalcaba testified that Mr. Ramirez was playing around with a box cutter and showing it off. Mr. Ruvalcaba told him to stop. Mr. Ramirez taunted him and cut his shirt. Mr. Ruvalcaba grabbed the box cutter and broke the blade. Mr. Ramirez tried to cut him with the broken blade. Mr. Ruvalcaba pushed Mr. Ramirez “hard” because he felt he was in danger and “had to get him away.” Report of Proceedings (RP) (Nov. 13, 2009) at 64, 78. The push caused Mr. Ramirez to fall backwards against a stainless steel tank. Mr. Ramirez stood up, took a second box cutter from his pocket, and removed the wrapper. He appeared angry and came at Mr. Ruvalcaba, slashing at him with the box cutter. Mr.

Ruvalcaba said to stop, but Mr. Ramirez continued slashing at his neck and stomach about 15 times. Mr. Ruvalcaba tried to block the attack and sustained a three-inch cut on his left arm. The cut required eight stitches and left a permanent scar. He also received superficial cuts to his chest. Mr. Ruvalcaba testified he is right-handed [*3] and that he took no swings at Mr. Ramirez.

¶4 Co-workers Juan Barragan and Sergio Larios corroborated Mr. Ruvalcaba's testimony. Mr. Barragan testified he saw Mr. Ramirez rip Mr. Ruvalcaba's shirt with the box cutter and Mr. Ruvalcaba push Mr. Ramirez away. He said that after Mr. Ramirez hit the tank, he appeared angry and got up and started swinging at Mr. Ruvalcaba's neck with the box cutter. Mr. Ruvalcaba did not try to attack Mr. Ramirez and made no steps or gestures toward him. Mr. Larios, who was a rebuttal witness, heard Mr. Ruvalcaba tell Mr. Ramirez not to play with knives and saw Mr. Ramirez slice Mr. Ruvalcaba's shirt with the box cutter. Mr. Ramirez caught himself after being pushed against the steel tank and, within two seconds, ran at Mr. Ruvalcaba and slashed at him with the box cutter.

¶5 Mr. Ramirez's theory was self-defense. He testified that Mr. Ruvalcaba had threatened him on three or four prior occasions, saying he was bigger and could beat him up any time. Mr. Ramirez admitted to talking and playing around with Mr. Ruvalcaba. He cut Mr. Ruvalcaba's shirt with the box cutter but said he would pay for it. He bent down to keep working when he felt someone punch him and "throw [*4] [him] on [his] chest." RP (Nov. 16, 2009) at 20. He fell back and hit his head on a tank, making him "kind of like still unconscious." RP (Nov. 16, 2009) at 20. He was on the floor trying to get up when he "saw this big old man coming after me" and swinging at him. RP (Nov. 16, 2009) at 21. He felt scared and put his arms in front of his face. He had the box cutter in his hand but did not know if the blade was open. He said he kept walking back and Mr. Ruvalcaba kept coming at him, swinging with both hands. He did not remember cutting Mr. Ruvalcaba. The incident ended, but Mr. Ruvalcaba said " 'You [are] still going to get it.' " RP (Nov. 16, 2009) at 22. Mr. Ramirez left work but feared Mr. Ruvalcaba would run over him in the parking lot.

¶6 Mr. Ramirez was 35 years old, five feet three inches tall, and weighed 137 pounds at the time of the incident. He was scared "of the huge person that was after [him]." RP (Nov. 16, 2009) at 25. Mr. Ruvalcaba was 22 years old, about five feet nine inches tall, and weighed 242 pounds on the date of the incident.

¶7 Defense witness Raymundo Lucio testified he saw Mr. Ramirez and Mr. Ruvalcaba "yelling at each other playfully, just clowning around." RP (Nov. [*5] 13, 2009) at 124. He saw Mr. Ruvalcaba shove Mr. Ramirez against a tank. He said he saw Mr. Ruvalcaba swinging, but thought it was "horseplay amongst youngsters." RP (Nov. 13, 2009) at 136. But Mr. Ruvalcaba, Mr. Barragan, and Mr. Larios all testified that Mr. Lucio was not present until after the incident ended. Mr. Lucio admitted he was later fired from the company for stealing.

¶8 The court instructed the jury on self-defense but declined to give Mr. Ramirez's proposed instruction defining "great personal injury" for self-defense purposes. The jury found Mr. Ramirez guilty of second degree assault but acquitted him of malicious mischief and rejected the deadly weapon enhancement. He appeals.

ANALYSIS

¶9 *Court's Self-Defense Instructions.* Instruction 14 stated:

> It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.
>
> 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 is necessary.
>
> The person using the force may employ such force and means [*6] as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

Clerk's Papers (CP) at 112 (emphasis added). Instruction 15 stated:

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

CP at 113. Instruction 16 stated:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to [*7] exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP at 114. Instruction 17 stated:

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of *injury*, 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.

CP at 115 (emphasis added). The court also gave a no duty to retreat instruction. Mr. Ramirez took exception to the self-defense instructions as a whole. He contended the law of self-defense was not manifestly clear without also including his proposed "great personal injury" instruction:

> "Great personal injury" means an injury that the defender reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defender or another person.

CP at 77. Mr. Ramirez deemed the instruction necessary for him to argue his theory that his use of potentially deadly force was justified because he reasonably feared great personal injury from Mr. Ruvalcaba. The court [*8] found the self-defense instructions sufficient for Mr. Ramirez to argue his theory of the case and rejected the proposed instruction as unnecessary.

¶10 We review jury instructions de novo for errors of law. *State v. O'Donnell, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007)*. The wording of jury instructions is within the trial court's discretion. *Id. at 324*. "?'Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.' " *State v. Rodriguez, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004)* (quoting *State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000)*). But " '[j]ury instructions on self-defense must more than adequately convey the law.' " *Id. at 185* (quoting *State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)*). The instructions read as a whole must make the relevant legal standard " 'manifestly apparent to the average juror.' " *State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)* (quoting *State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)*).

¶11 Self-defense requires only a "subjective, reasonable belief of imminent harm from the victim." [*9] *State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)*, *abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)*. The jury need not find actual imminent harm, but the instructions should allow the jurors to place themselves in the defendant's shoes and, from that perspective, determine the " 'reasonableness from all

the surrounding facts and circumstances as they appeared to the defendant.' " Rodriguez, 121 Wn. App. at 185 (quoting LeFaber, 128 Wn.2d at 900). "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." Walden, 131 Wn.2d at 474.

¶12 Here, the court's self-defense instructions adequately reflected these principles. Mr. Ramirez makes no argument on appeal that any of the particular instructions given should have included or omitted any language. His argument for an additional definition of "great personal injury" stems from the well-settled principle repeated in *Walden* that deadly force can only be used in self-defense if the defendant reasonably believed he was threatened with death or "great personal injury." *Id.*

¶13 In *Walden*—a second [*10] degree assault case—the first paragraph of instruction 18 correctly told the jury that when there is no reasonable ground for the defendant to believe he is in imminent danger of death or great bodily harm and it appears that only an ordinary battery was intended, he had no right to repel the threatened assault by use of a deadly weapon in a deadly manner. Id. at 475. The problem was with the second paragraph of instruction 18, which stated: " '*Great bodily injury* as used in this instruction means injury of a graver and more serious nature than an ordinary battery with a fist or pounding with the hand; it is an injury of such nature as to produce severe pain, suffering and injury.' " Id. at 472.

¶14 The *Walden* court held that paragraph two of instruction 18 was a misstatement of the law on the reasonable use of force in self-defense, resulting in reversible error. The court reasoned that "[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could read [the instruction] to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great [*11] personal injury." Id. at 477 (some alterations in original).

¶15 A similar problem occurred in *Rodriguez* where the "act on appearances" self-defense instruction required a reasonable belief of actual danger of "great bodily harm." Rodriguez, 121 Wn. App. at 185-86. But the instructions defined "great bodily harm" only as to the requirements of first degree assault, i.e., " 'bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.' " Id. at 186. Thus, when reading the "great bodily harm" definition into the self-defense instructions, the jury could have believed that in order for the defendant to act in self-defense, he had to fear he was in actual danger of death or serious permanent disfigurement or loss of a body part or function. *Id.* Following *Walden*, the *Rodriguez* court reasoned that " '[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could read [the instruction] to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably [*12] believed the battery at issue would result in great personal injury.' " *Id.* (quoting Walden, 131 Wn.2d at 477). Since the net effect was to reduce the State's burden of disproving self-defense, the assault conviction was reversed and the matter remanded for a new trial. Id. at 187-88.

¶16 Another case pointed out by the State, *State v. Marquez*, is of the same effect. State v. Marquez, 131 Wn. App. 566, 576-77, 127 P.3d 786 (2006) (reversible error when "great bodily harm" defined only in context of first degree assault without redefining it in context of defense of another).

¶17 But here, unlike in Walden, Rodriguez, and Marquez, the self-defense instructions allowed the jury to believe Mr. Ramirez could raise self-defense for any feared *injury.* The instructions in no way prohibited the jury from considering Mr. Ramirez's subjective impressions of all the facts and circumstances and whether he reasonably believed an ordinary battery posed imminent great personal injury. The instructions also clearly told the jury to place itself in Mr. Ramirez's shoes to determine if the force that he used was reasonable under the circumstances.

¶18 Moreover, the instructions gave Mr. Ramirez ample latitude to argue [*13] his theory that he needed potentially deadly force to repel what he perceived as imminent serious bodily harm from the much-larger Mr. Ruvalcaba, who Mr. Ramirez claimed had previously made physical threats. Indeed, defense counsel argued in closing that Mr. Ruvalcaba was "swinging at Mr. Ramirez, he was going in for the kill. He made his initial attack and he was going

in for the kill" [1] and that the jury must stand in Mr. Ramirez's shoes to determine if he was reasonably defending himself.

¶19 In *State v. Kyllo, 166 Wn.2d 856, 860, 215 P.3d 177 (2009)*, a second degree assault case involving nondeadly force, the "act on appearances" instruction 13 incorrectly stated that the defendant was entitled to act in self-defense only if he believed in good faith and on reasonable grounds that he was " 'in actual danger of great bodily harm.' " The jurors were not given a definition of "great bodily harm." *Id.* The court stated that "[b]ecause nondeadly force is at issue in this case, the jury should have been informed, as *RCW 9A.16.020(3)* provides, that a person is entitled to act in self-defense when he reasonably apprehends that he is about to be *injured.*" *Id. at 863*. The [*14] court, therefore, determined that the instructions excluded ordinary batteries and prohibited the jury from considering Mr. Kyllo's subjective impressions of all the facts and circumstances because the term "great bodily harm" in instruction 13 told the jury that to justify using force in self-defense, apprehension of a greater degree of harm was required than mere "injury." *Id. at 863-64*.

¶20 The court in *Kyllo* concluded:

> Giving an "act on appearances" instruction based on the apprehension of "great bodily harm" is improper in a case involving use of nondeadly force and a defense of self-defense. Instead, the instruction should have described apprehension of *injury.* Instruction 13 was erroneous and lowered the State's burden of proof.

Id. at 864.

¶21 Here, the "act on appearances" instruction (instruction 17) was consistent with the reasoning in *Kyllo* because it did not include a "great bodily harm" requirement. Thus, no additional instruction defining that term for self-defense purposes was warranted. The court did not err by refusing Mr. Ramirez's proposed instruction.

¶22 Mr. Ramirez nevertheless further contends that the jury showed confusion from differing definitions of ?deadly weapon" in the [*15] second degree assault instruction 12 and the deadly weapon enhancement instruction 19, when it asked during deliberations which definition applied for the special verdict on the deadly weapon enhancement. Mr. Ramirez bootstraps this "confusion" onto the court's failure to give the "great personal injury" instruction justifying the use of deadly force to claim a cumulative misstatement of the law that must be presumed to have misled the jury in a manner that prejudiced him. Br. of Appellant at 10. The argument fails.

¶23 Separate definitions for "deadly weapon" were given because the term is defined differently for purposes of second degree assault and the sentence enhancement. The prosecutor explained the distinction in closing argument. For purposes of second degree assault, a deadly weapon is an item readily capable of causing death or substantial bodily harm, whereas for purposes of the sentence enhancement, a deadly weapon is an implement or instrument that is used in a manner likely to produce or may easily and readily produce death.

¶24 There is no inconsistency in the jury's rejection of the deadly weapon enhancement, apparently finding Mr. Ramirez's use of the box cutter was unlikely [*16] to produce death, and its guilty verdict of second degree assault, thus finding that substantial evidence of the victim's cut requiring stitches and leaving a scar met the second degree assault element of substantial bodily harm. And the jury could readily reject the self-defense theory, either for unreasonable use of force or finding Mr. Ramirez the aggressor, without finding likelihood of death for sentence enhancement purposes. There were no misstatements of the law causing jury confusion.

¶25 Unlike in *Walden*, *Rodriguez*, *Kyllo*, and *Marquez*, there was no error in any instruction, or omission from the instructions, that reduced the State's burden of disproving self-defense.

¶26 *Denial of Mistrial.* This issue arises, first, from the direct examination of Mr. Ruvalcaba, when the prosecutor asked, "Do you recall being a victim of an assault there?" RP (Nov. 13, 2009) at 55. The court sustained a defense

---

[1] RP (Nov. 16, 2009) at 82.

objection to the form of the question. The prosecutor then rephrased the question: “Were you involved in an incident there on May 20th of this year?” RP (Nov. 13, 2009) at 55.

¶27 Later, on direct examination of Mr. Barragan, the prosecutor asked, “Do you recall witnessing an assault occurring there [*17] on May 20th?” RP (Nov. 13, 2009) at 97. The court again sustained a defense objection to the form of the question. The prosecutor rephrased the question: “Mr. Barragan, do you recall witnessing an incident that happen[ed] at the winery on May 20th this year?” RP (Nov. 13, 2009) at 97.

¶28 At the close of the State's case, defense counsel moved to dismiss or for a mistrial based upon the prosecutor's repeated use of the term “assault.” The court denied the motion, reasoning that the objections were sustained and “that that term was not so unduly prejudicial so that the jury can't decide the case base[d] upon the facts produced in court from the testimony of the witnesses and be so prejudiced that they wouldn't be able to follow the instructions.” RP (Nov. 13, 2009) at 115. The court further explained that counsel had been compliant with the court's rulings and there was no “flavor” of prejudicial misconduct in the proceedings. RP (Nov. 13, 2009) at 116.

¶29 A defendant alleging prosecutorial misconduct must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006)*; *State v. Borboa, 157 Wn.2d 108, 122, 135 P.3d 469 (2006)*. [*18] Prejudice is shown if there is a substantial likelihood the misconduct affected the verdict. *Borboa, 157 Wn.2d at 122*. Since the trial court is in the best position to determine whether misconduct prejudiced a defendant's right to a fair trial, we review the court's ruling for an abuse of discretion. *State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)*.

¶30 Given that the charge against Mr. Ramirez was second degree assault, the prosecutor's two questions that included the term “assault” were improper. But the court sustained the defense objections and the questions were immediately rephrased to use the term “incident.” The prosecutor otherwise consistently used the term “incident” during witness questioning, thus suggesting the improper references were perhaps inadvertent. In fact, the prosecutor corrected himself and apologized on a third occasion when he used the term “assault.” In denying the motion for a mistrial, the trial court perceived no prejudice. And none is apparent on the record, particularly when the State's evidence was overwhelming that Mr. Ramirez committed an assault, subject to a jury determination that the State also disproved self-defense beyond a reasonable [*19] doubt. Consistent with the trial court's ruling, we presume the jury followed the court's instructions and decided the assault and self-defense questions based solely upon the evidence presented and not on any attorney remarks. *State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997)*. Mr. Ramirez has not shown prejudice from any impropriety in the prosecutor's questions. The court did not abuse its discretion by denying the motion for a mistrial. *Stenson, 132 Wn.2d at 718-19*.

¶31 *Self-Defense.* The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)*. Once the defendant raises some evidence tending to demonstrate self-defense, as Mr. Ramirez did here, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *Walden, 131 Wn.2d at 473*; *Acosta, 101 Wn.2d at 621* (quoting *State v. Savage, 94 Wn.2d 569, 582, 618 P.2d 82 (1980))*.

¶32 The State's witnesses testified that Mr. Ramirez was the aggressor. After being pushed away by Mr. Ruvalcaba, he attacked Mr. Ruvalcaba [*20] by repeatedly slashing at him with the box cutter and cut his arm, while Mr. Ruvalcaba merely put one arm up to defend himself. Mr. Ruvalcaba did not move toward Mr. Ramirez and took no swings at him. From this evidence, the jury could find beyond a reasonable doubt that Mr. Ramirez used excessive force and did not act in self-defense. The jury apparently believed the State's witnesses and rejected the contrary defense testimony as not credible. We defer to that determination on appeal. *State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)*. A rational trier of fact could reject Mr. Ramirez's self-defense theory beyond a reasonable doubt and find guilt for second degree assault based upon the testimony.

¶33 We affirm the conviction for second degree assault.

¶34 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

Korsmo and Siddoway, JJ., concur.