IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EDWARD EARL COBB, Appellant.	)	DIVISION ONE No. 66331-3-I UNPUBLISHED OPINION FILED: May 29, 2012

Dwyer, J. — Edward Cobb appeals from his conviction of murder in the first degree arising from an incident in which he shot and killed a member of a rival gang. Cobb contends that the trial court erred by instructing the jury that self-defense was not an available defense if the jury determined beyond a reasonable doubt that Cobb's own acts provoked the altercation that resulted in the shooting. He asserts that, because this purported error impinged upon his claim of self-defense, reversal of his conviction is required. However, because no reasonable jury could have determined that this killing resulted from acts of lawful self-defense, the first aggressor instruction given by the trial court could not have affected the outcome of Cobb's trial and, thus, Cobb has not established an entitlement to appellate relief. Because Cobb's other contentions are plainly without merit, we affirm.

I

On July 12, 2008, Cobb, along with several other members of the "Low Profile" or "LP" gang, traveled by bus to Kent in order to attend the Kent Cornucopia Days festival. Chezaray Bacchus—a member of the "Little Thuggin' Savages" or "LTS" gang—also traveled with friends to Kent to attend the festival. Both groups arrived by bus at the Kent transit station.

Shortly after the two groups arrived at the station, a confrontation began between members of the rival gangs. A circle formed around some of the LP members and LTS members. Bacchus argued with LP member Leonard Warren, a close friend of Cobb. Bacchus either flashed a gun at Warren or lifted his shirt as though flashing a gun at him. Warren displayed his own gun, and Bacchus announced that the LP's were "gonna get it." Warren responded by saying, "I got mine."

Police at the Kent transit station observed several young people in gang colors flashing gang signs in the crowd. Concerned that a physical altercation might commence, the police began to clear the transit station. Cobb pulled Warren away from the confrontation with Bacchus, and both groups left the transit station.

Thereafter, Bacchus and his friends walked to an Arby's restaurant located several blocks away. Mahogany Lee, a friend of Bacchus, observed Cobb and Devontea Roseman—another LP member—walking behind them. Upon arriving at the restaurant, Bacchus and his friends stood outside talking.

Bacchus was talking on a cell phone.

Moments later, Cobb emerged from behind the restaurant, appearing suddenly in front of Bacchus. Cobb drew his gun and fired at Bacchus from a distance of approximately 10 feet. The bullet entered Bacchus's right shoulder, crossed through his chest, and severed an artery near his heart. Bacchus then turned and stumbled inside the restaurant.

Cobb followed him. Bacchus had moved toward the rear of the restaurant and had collapsed onto his back. Bacchus's eyes were open and he was continuing to move his hands. Cobb approached Bacchus and fired a second shot, this time at close range. The second bullet entered the right side of Bacchus's face, pierced the frontal lobe of his brain, and lodged in his left eye orbit. Lee heard Cobb say "LP" as he fired the second shot. Bacchus died as a result of these multiple gunshot wounds.[1]

Cobb was charged with murder in the first degree with a firearm enhancement and unlawful possession of a firearm in the first degree. Cobb pleaded guilty to the unlawful possession of a firearm charge and proceeded to trial on the murder charge.

Cobb chose to testify in his own defense. He acknowledged that he shot Bacchus but claimed that he acted in self-defense. Cobb told the jury that, upon arriving at the Arby's, he and Bacchus "connected eyes at the same time." He

[1] At trial, a medical examiner testified that both shots were lethal and contributed to Bacchus's death.

testified that "I see [Bacchus] make a move, and not necessarily he didn't pull the gun, but I seen him make a move toward what I thought was the gun that he had." Cobb told the jury that he then drew his own gun and fired at Bacchus. Cobb testified that, after observing Bacchus turn and stumble through the door of the Arby's, Cobb entered the restaurant and saw Bacchus lying on the ground.[2] He explained that he shot Bacchus a second time because Bacchus was still "moving," and "in my mind I was still thinking that he could still shoot me. He could still reach for a gun."[3] He further explained that "if I didn't stop now, it would just keep on going, a circle with problems. He would probably try to get back at me or something like that."

Cobb testified that he had initially followed Bacchus to the Arby's restaurant merely to set up a fistfight between Warren and Bacchus. However, Cobb's explanation for his presence at the restaurant was contradicted by a letter, written by Cobb from jail, in which he described the shooting of Bacchus:

> [M]y brother Leonard and Chez[4] were beefing. Chez flashed the burner [gun]. We all were supposed to fight the police broke us up. Like half an hour later my brother Leonard said that *Chez had to get it*. And since I was the oldest and I was hella drunk me and

[2] Cobb's description of the second shot was corroborated by several witnesses. The cashier at Arby's, Juan Gudino-Ibarra, testified that, following the first shot, he observed Bacchus enter the restaurant and then fall to the ground. He then watched as Cobb followed Bacchus into the restaurant with a gun. Gudino-Ibarra told the jury that Cobb came in "not caring, not looking around, just focusing on one goal . . . the person laying on the ground."

[3] There was scant evidence that Bacchus was armed at the time of the shooting. Gudino-Ibarra, the Arby's cashier, never saw a gun in the victim's possession. Dana Bahe, a patron at the Arby's who attempted to provide aid to Bacchus immediately after the shooting, testified that he did not observe a firearm in the vicinity of Bacchus. Officer Ian Warmington, the first police officer to arrive at the scene, also did not find a gun in Bacchus's possession. However, there was testimony that Bacchus had previously possessed a gun at the Kent transit station. No gun was found at the scene.

[4] "Chez" was the nickname of Bacchus.

Dirty D[5] went looking for Salt and Chez.

(Emphasis added.)[6]

At the conclusion of Cobb's case in chief, the State requested that the trial court give a first aggressor instruction. Cobb agreed that the State was entitled to the instruction. The trial court instructed the jury:

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

The jury thereafter found Cobb guilty as charged. The trial court imposed a standard range sentence.

Cobb appeals.

II

Cobb asserts that there was no credible evidence adduced at trial establishing that his own conduct provoked the need to act in self-defense. Thus, he claims, the trial court erred by giving a first aggressor instruction to the jury. As a result, Cobb avers, reversal of his conviction is required. We disagree.

"[T]he right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation." State v. Riley, 137 Wn.2d 904,

[5] "Dirty D" was the nickname of Devontea Roseman.

[6] At trial, Cobb admitted to writing this letter. In the letter, Cobb also referenced seeing Bacchus reaching for what "could have been a cell phone." However, Cobb explained, he "wasn't going to take that chance."

909, 976 P.2d 624 (1999); see also State v. Wingate, 155 Wn.2d 817, 822, 122 P.3d 908 (2005). A trial court does not err by giving a first aggressor instruction where "there is conflicting evidence as to whether the defendant's conduct precipitated a fight." Riley, 137 Wn.2d at 910. In determining whether there was sufficient evidence presented to support giving this instruction, we view the evidence in the light most favorable to the State, the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

As an initial matter, we note that Cobb did not object to the first aggressor instruction at trial.[7] Although we generally will not entertain a claim of error not raised in the trial court, an exception exists for a claim of manifest error affecting a constitutional right. RAP 2.5(a)(3). The appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). Moreover, as our Supreme Court has repeatedly explained, the appellant must "'show how the alleged error actually affected the [appellant]'s rights at trial.'" O'Hara, 167 Wn.2d at 98 (alternation in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)); see also Gordon, 172 Wn.2d at 676.

[7] Indeed, defense counsel affirmatively agreed that the State was entitled to a first aggressor instruction based on Cobb's admissions in the letter that he composed while in jail.

Accordingly, a constitutional error is manifest only where the appellant can show "actual prejudice"—the appellant must make a "'plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" Kirkman, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Here, Cobb makes no attempt to demonstrate how the trial court's instruction—issued in the absence of an objection—constitutes a manifest error that affected Cobb's rights at trial. "[A]ppellate courts should analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is manifest constitutional error." O'Hara, 167 Wn.2d at 104. In this case, however, the State has not contested Cobb's ability to raise this issue for the first time on appeal. Rather, the State affirmatively concedes Cobb's ability to raise this issue, citing two decisions in which we stated that, where a trial court errs by improperly giving a first aggressor instruction, such error is subject to constitutional harmless error analysis. State v. Stark, 158 Wn. App. 952, 960-61, 244 P.3d 433 (2010), review denied, 171 Wn.2d 1017 (2011); State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). However, in each of those cases, the defendant objected to the first aggressor instruction at trial, thus preserving the issue for appeal. Stark, 158 Wn. App. at 958; Birnel, 89 Wn. App. at 472. Neither decision stands for the proposition that an erroneously issued first aggressor instruction

necessarily constitutes manifest constitutional error. Nevertheless, in the absence of adequate briefing, we will not resolve Cobb's challenge to the trial court's instruction on this basis.

However, we determine that a distinct, but related, doctrine controls the outcome of this case. As our Supreme Court has recently explained, even where "an error of constitutional magnitude is manifest, it may nevertheless be harmless."[8] Gordon, 172 Wn.2d at 676. Because a first aggressor instruction impinges upon a defendant's claim of self-defense, Riley, 137 Wn.2d at 910 n.2, such instructional error is "constitutional in nature" and "cannot be deemed harmless unless it is harmless beyond a reasonable doubt." State v. Kidd, 57 Wn. App. 95, 101 n.5, 786 P.2d 847 (1990) (citing State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983)). Accordingly, the issuance of an erroneous first aggressor instruction is harmless where no reasonable jury could have determined that the defendant's acts constituted lawful self-defense.[9] Kidd, 57

[8] Whether a party is entitled to appellate relief is a distinct question from whether review of an unpreserved error is warranted. O'Hara, 167 Wn.2d at 99-100 ("The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal.").

[9] Cobb asserts that, by instructing the jury regarding self-defense, the trial court necessarily determined that sufficient evidence had been adduced at trial from which a reasonable jury could find that Cobb acted in self-defense. However, in order for a defendant to be entitled to instructions on self-defense, there need only have been presented "some evidence" that the defendant acted in self-defense. State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002); State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The defendant's burden to point to "some evidence" is a low burden. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Indeed, "there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue." McCullum, 98 Wn.2d at 488. Hence, only where there is *no* credible evidence to support a defendant's claim of self-defense is a trial court justified in declining the defendant's request for jury instructions on the claim. State v. Roberts, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977). Thus, the fact that the trial court instructed the jury regarding justifiable homicide does not establish that the court determined that there was sufficient evidence for a reasonable jury to acquit Cobb on the basis of self-defense.

Wn. App. at 101.

In order to successfully argue self-defense, a defendant must demonstrate a reasonable apprehension of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). In a murder prosecution, the defendant must prove both a subjective, good faith belief that he or she was in imminent danger of great bodily harm and that this belief, viewed objectively, was reasonable. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). Thus, even if the trial court erred by giving the first aggressor instruction, the error is harmless if, given the evidence at trial, no reasonable jury could have determined that Cobb possessed a subjective, good faith apprehension of great bodily injury that was reasonable at the time that he killed Bacchus.

Here, the evidence adduced at trial demonstrates that no reasonable jury could have determined that the shooting of Bacchus was an act of lawful self-defense. The undisputed evidence indicates that Cobb and Bacchus were members of rival gangs and that a confrontation between these two gangs had occurred just prior to the shooting. Both Cobb and Bacchus were involved in this confrontation, which involved a display of firearms. When Bacchus and his friends left the scene of the confrontation, Cobb followed them. Cobb's letter, written in jail, indicates that his intent in following Bacchus was to cause Bacchus harm. Upon arriving at the Arby's restaurant, Cobb approached Bacchus, who was standing outside the restaurant. Cobb testified that he saw

Bacchus reach toward his pocket for what Cobb believed to be a weapon. Cobb then drew his own gun and fired it at Bacchus. When Bacchus stumbled inside the restaurant, Cobb pursued him. Cobb stood over Bacchus, who was lying on his back with his hands visible, and fired a second shot, sending a bullet into Bacchus's brain. Although Bacchus would likely have died from the first gunshot wound, this second gunshot wound was also lethal.

It is the second shot that is the focus of our harmless error analysis. Cobb argued at trial that he fired his gun at Bacchus a second time because Cobb believed that Bacchus continued to pose an imminent danger of serious bodily injury or death even after Bacchus retreated inside the Arby's restaurant. This was so, Cobb contended, because, even after observing that Bacchus had collapsed onto his back, Cobb continued to reasonably believe that Bacchus might reach for a weapon and return fire. Accordingly, Cobb asserted that this second shot was also a justified act of self-defense.

No reasonable jury could have so found. Indeed, Cobb's own testimony belies this claim. Cobb told the jury that, because he could see Bacchus moving his hands, he feared that Bacchus might reach for a gun. He testified that Bacchus was "on his back" with his eyes open. However, Cobb admitted that he never observed a weapon in Bacchus's possession. Nor did Cobb testify that he ever saw Bacchus make an aggressive move following his collapse in the restaurant. In fact, at trial, Cobb agreed that Bacchus posed no imminent threat

as he lay defenseless on the floor of the restaurant, and that firing the second shot may have constituted "excessive force." Given these undisputed facts, no reasonable jury could have determined that Cobb's asserted apprehension of great bodily harm at the time he fired the second shot was reasonable. Because we determine that no reasonable jury could have found that this killing was an act of lawful self-defense, the error alleged by Cobb is necessarily harmless and a

grant of appellate relief is unwarranted.[1] Kidd, 57 Wn. App. at 101.

Affirmed.

We concur:

[1] For a related reason, we determine that Cobb's attorney was not constitutionally ineffective by agreeing that the State was entitled to a first aggressor instruction. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Here, because we determine that any error in giving the first aggressor instruction was harmless, Cobb cannot show that the outcome of his trial would have been different had his counsel objected to the instruction. Accordingly, Cobb's ineffective assistance of counsel claim fails.

Cobb also contends that the trial court erred because findings of fact and conclusions of law were not timely filed following a pretrial CrR 3.5 hearing in which the trial court determined that Cobb's statements to the police were admissible. However, because the necessary findings and conclusions have since been filed, and Cobb has made no attempt to demonstrate any prejudice resulting from the delay, no grant of relief on appeal is warranted.