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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL MICHAEL PIERRE, Appellant.	No. 46008-4-II UNPUBLISHED OPINION

WORSWICK, J. — On remand from our Supreme Court, Daniel Pierre appeals his convictions of third degree assault, harassment, and bail jumping, asserting that (1) the trial court violated his public trial right by addressing for-cause challenges to potential jurors at sidebars, (2) the trial court erred by giving a harassment to-convict jury instruction that omitted an essential element of the offense, and (3) the trial court erred by giving a self-defense jury instruction that misstated the self-defense standard under the facts of the case and by refusing to give his proposed self-defense jury instruction.[1]

[1] In our opinion in *State v. Pierre*, noted at 188 Wn. App. 1005 (unpublished), *remanded*, 184 Wn.2d 1009, 359 P.3d 790 (2015), we reversed Pierre's convictions, holding that his public trial right had been violated by the exercise of for-cause challenges at sidebar. We also held in the alternative that the trial court erred by giving a harassment to-convict jury instruction that omitted an essential element of the offense and, thus, reversed Pierre's harassment conviction on that basis as well. In light of our reversal of all of Pierre's convictions based on the violation of his public trial right, we declined to address his challenge to the trial court's self-defense jury instruction.

Following our Supreme Court's decision in *State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016), we hold that the trial court did not violate Pierre's public trial right by addressing for-cause juror challenges at sidebars while in open court. We further hold that the trial court's self-defense jury instruction set forth the proper legal standard under the facts of the case. Finally, we confirm our prior holding that the trial court erred by giving a harassment to-convict jury instruction that omitted an essential element of the offense and that the error was not harmless beyond a reasonable doubt. Accordingly, we affirm Pierre's third degree assault and bail jumping convictions but reverse Pierre's harassment conviction and remand for a new trial on that charge.

FACTS

On July 24, 2012, Olympia police officers Jason Winner and Kimberly Seig went to an Olympia apartment complex in response to several calls that a man and woman were fighting in Daniel Pierre's apartment. When the officers arrived, they could hear people yelling inside of Pierre's apartment. The voices in the apartment went silent after the officers knocked on the door and announced their presence. The officers entered the apartment and secured two people inside the residence, Pierre's cousin, Joseph Musekamp, and Pierre's girlfriend, Roberta Hagoodhenry.

Officer Winner then approached Pierre, who was in his bathroom tending to an injury on his face. According to Winner, he ordered Pierre to show his hands several times, but Pierre did not comply with his orders. Winner attempted to physically restrain Pierre and a struggle ensued. During the struggle, Pierre pushed Winner's chest. Winner also felt a palm strike his

left shoulder before subduing Pierre. After he was restrained, Pierre told Winner that he would "[k]ick [his] ass." Report of Proceedings (RP) (Jan. 21, 2014) at 86. Pierre also told Winner, "You don't know who you're messing with," and made a comment that he would find Winner on the streets. RP (Jan. 21, 2014) at 87. The State charged Pierre with third degree assault, felony harassment, and bail jumping. The matter proceeded to jury trial.

During the jury selection process, the trial court addressed for-cause challenges to potential jurors at sidebar and later stated on the record:

> [Trial court]: . . . I want to go ahead and put the sidebars on the record. During jury selection, we had two sidebars. At the first sidebar, we all agreed that Juror No. 25 should be dismissed for cause based upon a health issue that Juror No. 25 described during the course of jury selection briefly.
>
> The defense made a motion to dismiss Number 1 for cause. [The State] indicated that [it] would leave it to the court and the court's recollection of what Juror No. 1 indicated. I dismissed Number 1 for cause based upon her statements of being a victim 20 years ago and that it was still affecting her. And then she talked about that and brought it up more than one time during the course of the jury selection process.
>
> There was a second sidebar after jury selection had started, and that was the defense requesting that Juror No. 10 be dismissed for cause based upon the fact that he had disclosed that he was good friends with Officer Winner's brother and that Officer Winner's brother was his supervisor. [The State] objected and indicated that he had not made an unequivocal statement that he could not be fair. I ultimately agreed with [the State's] argument. I too did not hear a definitive statement, so I denied the request for cause as to Juror No. 10.

RP (Jan. 21, 2014) at 37-38. The trial judge then asked the parties if they had anything to add to the record, and the parties stated they did not.

At trial, Winner testified consistently with the facts as stated above. Pierre testified that he was unaware that police were at his apartment until Winner approached him in the bathroom. Pierre further testified that he had complied with Winner's order to turn around and show his

hands, but that Winner then tried to grab his shoulders. Pierre admitted that he tried to pull away from Winner's grasp and that he told Winner, "What the [expletive] are you doing," and asked, "What are you doing in my house?" RP (Jan. 22, 2014) at 385. Pierre stated that Winner grabbed his throat and pushed him against a wall and then brought him down to the floor by grabbing his hair. Pierre stated that during the scuffle he had tried to knock Winner's hands away, but that he didn't make contact because Winner had let go of him at that point. Pierre also denied that he had pushed Winner or that he took a swing at him. Although Pierre denied pushing Winner, he admitted that when Winner was behind him, he had pushed against the wall "to keep from going down." RP (Jan. 22, 2014) at 393. Pierre testified that he did not intend to cause any bodily harm to Winner when threatening him, explaining that he made threats because he was irate about being assaulted by the officer in his home.

Defense counsel proposed the following self-defense jury instruction based on 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 17.02, at 253 (3d ed. 2008).

> It is a defense to a charge of assault 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 a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than is necessary.
>
> The person using the force may employ such force and means 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 and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be 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.

Clerk's Papers (CP) at 23. Defense counsel also proposed a self-defense instruction based on WPIC 17.04 that stated:

> 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.

CP at 24. The State opposed defense counsel's proposed self-defense jury instructions, arguing that the actual danger standard for evaluating a self-defense claim applied where a defendant is accused of assaulting a law enforcement officer. Defense counsel argued that the self-defense jury instruction for assaults on law enforcement officers did not apply under the facts of the case because Winner was not attempting to arrest Pierre when Pierre allegedly assaulted Winner. The trial court declined to give defense counsel's proposed self-defense jury instructions, but instead the trial court provided a jury instruction based on WPIC 17.02.01 that stated:

> It is a defense to a charge of Assault in the Third Degree that the force used was lawful as defined in this instruction.
>
> A person may use force to resist a physical direction by a known police officer only if the person receiving the physical direction is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.
>
> 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.

CP at 78. Defense counsel agreed that the language of the trial court's self-defense jury instruction was appropriate. The jury returned verdicts finding Pierre guilty of third degree assault, harassment, and bail jumping. Pierre appeals from his convictions.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Pierre first contends that the trial court violated his public trial right by addressing for-cause challenges to potential jurors at sidebars without first considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Following our Supreme Court's decision in *Love*, we disagree that a closure took place here and, thus, hold that the trial court did not violate Pierre's public trial rights.

In *Love*, our Supreme Court held that the defendant's public trial right was not violated by the exercise of for-cause challenges at the bench because no courtroom closure had occurred. 183 Wn.2d at 606. In so holding, our Supreme Court reasoned:

> [T]he public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Love, 183 Wn.2d at 607.

Here, as in *Love*, the public was able to (1) view the questioning of jurors, (2) listen to the juror's answers, (3) visually observe counsel exercise their for-cause challenges at the bench, and (4) evaluate the composition of the empaneled jury. 183 Wn.2d at 607. Although, on this record we cannot determine whether the arguments regarding for-cause challenges were transcribed by a court reporter, the trial court adequately summarized these arguments on the record, and allowed both parties the opportunity to add to its summary. The trial court's summary of the for-cause challenges explained that (1) juror 25 had been dismissed for cause upon agreement of the parties based upon a health concern that was expressed during jury voir dire, (2) defense counsel challenged juror 1 for cause based on her status as a victim, with which the trial court agreed, and (3) defense counsel challenged juror 10 for cause based on his friendship with Officer Winner's brother, which the trial court denied because it did not hear a definitive statement that the juror could not be fair.

Because this recitation of the for-cause challenge arguments adequately set forth (1) the jurors who were challenged for cause, (2) the party lodging the challenge, (3) the party's reasons for lodging the challenge, (4) oppositions to the challenge, if any, and (5) the trial court's reasons for granting or denying the challenge, it permitted the public to scrutinize the process in the same manner as a verbatim transcription of the arguments. Accordingly, we hold that no closure occurred here and, thus, Pierre's public trial right was not violated.

II. SELF-DEFENSE JURY INSTRUCTION

Next, Pierre contends that the trial court erred by refusing to give defense counsel's proposed self-defense jury instructions and by instructing the jury on self-defense based on

WPIC 17.02.01.[2] Specifically, Pierre contends that, because he was not being placed under arrest when allegedly assaulting Winner, the jury did not have to find that he was in actual danger of serious injury to be justified in his use of force against Winner and, thus, the trial court erred by refusing to give his proposed self-defense instruction and by instructing the jury under WPIC 17.02.01. We disagree.

Jury instructions are sufficient when they allow the parties to argue their theories of the case, they are not misleading, and they properly inform the jury of the applicable law when read as a whole. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). Jury instructions on self-defense must do more than adequately convey the law; they "'must make the relevant legal standard manifestly apparent to the average juror.'" *McCreven*, 170 Wn. App. at 462 (internal quotation marks omitted) (quoting *State v. LeFaber,* 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). We review a trial court's ruling on a proposed jury instruction for an abuse of discretion if based on a factual dispute and de novo if based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Here, the parties did not dispute that Pierre was not being placed under arrest

[2] Pierre raises an ineffective assistance of counsel claim to preserve his contention with the trial court's refusal to give his proposed self-defense jury instructions and the trial court's giving of the self-defense instruction in this case should we determine that defense counsel failed to preserve the issue for appeal. Because the record clearly establishes that defense counsel objected to the trial court's self-defense instruction and with the trial court's refusal to give his proposed instructions, the issue is preserved for appeal, and we need not address Pierre's ineffective assistance of counsel claim.

when allegedly assaulting Winner in self-defense, rather, the issue before the trial court was what self-defense standard applied under those facts. Accordingly, our review is de novo.

At issue here is the appropriate legal standard when evaluating a claim of self-defense to assault against a law enforcement officer performing official duties, where the officer was detaining, but not arresting, the defendant. We hold that the actual danger standard of WPIC 17.02.01 applies and, thus, the trial court did not err by so instructing the jury.

An arrestee is not justified in the use of force against an arresting officer unless the arrestee was in actual danger of serious injury from the officer's excessive use of force. *State v. Holeman*, 103 Wn.2d 426, 430-31, 693 P.2d 89 (1985). The actual danger standard of WPIC 17.02.01 also applies to the use of force against law enforcement officers that are merely detaining, and not arresting, the defendant. *State v. Bradley*, 141 Wn.2d 731, 743, 10 P.3d 358 (2000); *State v. Ross*, 71 Wn. App. 837, 842-43, 863 P.2d 102 (1993). It is the fact of a law enforcement officer's performance of official duties, and not the officer's specific act of arresting the defendant, that triggers the actual danger standard for evaluating self-defense claims. Therefore, the trial court properly rejected Pierre's proposed self-defense instructions, which instructions relied on the reasonable belief standard, and properly instructed the jury under WPIC 17.02.01.

III. TO-CONVICT JURY INSTRUCTION

In our original opinion in *Pierre*, noted at 188 Wn. App. 1005 (unpublished), *remanded*, 184 Wn.2d 1009, we held that the trial court erred by giving a harassment to-convict jury instruction that omitted an essential element of the offense. Our Supreme Court's order remanding this matter for reconsideration in light of *Love* does not affect this analysis. Accordingly, we reverse Pierre's harassment conviction and remand for a new trial on that charge. We affirm his remaining convictions for the reasons set forth above.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Maxa, A.C.J.

Lee, J.