IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL WARD, Appellant.	No. 39858-3-II UNPUBLISHED OPINION

Worswick, J. — Daniel Ward appeals from his conviction for second degree assault with a deadly weapon. He argues that the trial court erred in failing to give a self-defense instruction and alternatively, that he received ineffective assistance of counsel because his attorney failed to properly request it. He also argues that his right to a public trial was violated when the trial court held a conference to discuss jury instructions outside of the public's view. We affirm.

FACTS

On February 13, 2009, several people, including a number of Rochester High School students, were attending an outdoor nighttime party on an old logging road in Lewis County. A.M., the victim in this case, arrived at the party with others, including L.H., Ward's ex-girlfriend. Soon thereafter, Ward approached A.M. and said, "Hey nigger, what are you doing with [L.H.]? What's your relationship with [L.H.]?" Verbatim Report of Proceedings (VRP) at 70. A.M. replied that he was not in a relationship with L.H. and that nothing was going on. Ward then started "slapping his head and getting angry," apparently to "psych himself up." VRP at 71.

Ward then started to chase after A.M. A.M. tried to flee. He got in a truck and tried to lock the doors, but Ward entered the truck and punched A.M. in the head, then ultimately pulled A.M. out of the truck. Ward then pushed A.M. to the ground and started punching and hitting him. After this, according to Ward, he eventually stood up and walked five feet away to withdraw from the fight. Also according to Ward, A.M. wanted to continue fighting and came after Ward, after which the fighting continued. According to other witnesses, A.M. got up off of the ground, but Ward tackled him and continued to hit A.M.'s face and head with a closed fist. A.M. was on his back and Ward was on top of him, straddling his chest. A.M. then pulled out a pocketknife and stabbed Ward three times. After that, Ward and A.M. stood up. According to Ward, he wanted to withdraw and did not want to continue to fight A.M. after the stabbing, but A.M. came after him again.[1] Ward then described what happened next:

> So basically what I did was I grabbed a rock when we were coming up together and I had my arm on his back neck and I was holding him down, his face down,

[1] Ward's testimony is the only evidence to support this assertion, however.

> because he kept—he wasn't backing off or nothing, he was coming with me. And basically what I did was I had the rock in my hand and hit him over the back of the head and that was it.

VRP at 378. Ward then said that friends of A.M. held A.M. back and the fighting stopped. But according to other witnesses, including Johnny Singletary and Kyle Tullis, A.M. was injured, bleeding badly, and unable to walk without assistance. A.M. and Ward were both treated at the hospital later that evening.

The State charged Ward with second degree assault with a deadly weapon.[2] At trial, several witnesses testified, including Ward. Before the trial court issued its instructions to the jury, it apparently held an "instruction conference" off the record to discuss them with counsel.[3] VRP at 400-02. The trial court then gave counsel the opportunity to put any objections or exceptions to the jury instructions on the record. The jury found Ward guilty of the assault with a deadly weapon charge. Ward now appeals.

ANALYSIS

Self Defense Instruction

Ward contends that the trial court erred by failing to give a self-defense instruction to the jury. As an initial matter, the record does not demonstrate that Ward actually requested a self-

[2] The state also charged Ward with malicious harassment. The jury found Ward not guilty of this charge, and it is not an issue on appeal.

[3] The record is unclear as to the specific circumstances of this conference, including the place or manner in which it occurred.

defense instruction at trial as required under CrR 6.15(a).[4] Nor did Ward object to the failure to give this instruction. Generally, a party claiming that the trial court's instructions were erroneous must have objected on the same ground below or the party has waived its right to raise the issue on appeal. CrR 6.15(c); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Because Ward neither proposed the instruction nor objected to the trial court's failure to give it, we consider this issue in the ineffective assistance of counsel context.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *Powell*, 150 Wn. App. at 153 (quoting *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 930, 158 P.3d 1282 (2007)).

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[4] CrR 6.15(a) provides in relevant part:

> **Proposed Instructions.** Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

"To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). "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.'" *Walden*, 131 Wn.2d at 473 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). "This standard incorporates both objective and subjective elements." *Walden*, 131 Wn.2d at 474. "The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done." *Walden*, 131 Wn.2d at 474. And despite the usual restriction for aggressors, a self-defense instruction may be successfully invoked by an aggressor or one who provokes an altercation when he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

In order to demonstrate self-defense and his attempt to withdraw from the fight, Ward directs us to his own testimony and the testimony of a witness, Kyle Tullis. Ward first testified that after he and A.M. fought for a while, he stood up and walked five feet away in order to stop fighting. Ward then said that A.M. wanted to continue fighting and came after him. Ward also

testified that he ultimately got on top of A.M. and as he was hitting him, he eventually felt a pain. After that, Ward said that he again got off A.M. in order to withdraw and stop fighting because he was worried A.M. might do something else to him. Despite this, A.M. still came after Ward, at which point Ward grabbed a rock and hit A.M. over the back of the head. Friends of A.M. then held A.M. back and the fight stopped. But A.M. was still making statements suggesting he wanted to fight with Ward. Kyle Tullis testified that after Ward and A.M. stood up, A.M. came at Ward with a knife and Ward hit A.M. in the head with a rock.

In addition to A.M. and Ward, six eyewitnesses testified at trial. Their testimony does not support Ward's description of events with regard to his attempts to withdraw. For example, there is no corroborating evidence that he clearly communicated an intent to withdraw from the fight in some way. In fact, all of the witnesses testified in detail that Ward provoked and continued to fight A.M., even when A.M. was defending himself and trying to get away from Ward.

Because Ward did present some evidence of self-defense through his own testimony of his supposed withdrawal from the fight, he likely would have been entitled to the instruction had he requested it. But after considering all of the evidence in the record, it is clear that the State would have met its burden to show an absence of self-defense beyond a reasonable doubt. This is bolstered by the overwhelming evidence that Ward failed to adequately communicate any intent to withdraw and by the circumstances surrounding the fight itself. For these reasons, Ward has failed to demonstrate with reasonable probability that the jury's verdict would have changed had the self-defense instruction been given. Thus, Ward cannot show prejudice and his argument fails.

Right to a Public Trial

Ward also contends that he was denied his right to a public trial when the trial court held an off the record conference to decide how the jury would be instructed. The State counters that there was no public trial right violation because the trial court allowed objections or exceptions to the jury instructions to be placed on the record in open court.

The Sixth Amendment to the federal constitution and article I, section 22 of the state constitution guarantee a defendant the right to a public trial. Before closing a criminal hearing or trial, the trial court must weigh the five *Bone-Club* factors and enter findings.[5] *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); *State v. Bone-Club*, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.3d 212 (2010), *review granted*, *Paumier*, 169 Wn.2d 1017, 236 P.3d 206 (2010). If the proceeding is subject to the right to a public trial, the trial court's failure to conduct a *Bone-Club* inquiry before excluding the public violates the defendant's public trial rights. *Brightman*, 155 Wn.2d at 515-16. Whether a defendant's right to a public trial has been violated is a question of law that we review de novo.

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[5] The *Bone-Club* analysis provides:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)) (alteration in original).

Brightman, 155 Wn.2d at 514.

"'The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings.'" *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (quoting *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001)), (internal quotation marks omitted) (emphasis omitted). The defendant's right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial. *Sadler*, 147 Wn. App. at 114. Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, during voir dire, and during the jury selection process. *Sadler*, 147 Wn. App. at 114. A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues. *Sadler*, 147 Wn. App. at 114.

Ward's argument relates to an "instruction conference" that was apparently conducted off the record. On the record, however, is a discussion regarding objections and concerns each party had regarding the instructions. Ward analogizes this situation to voir dire and circumstances where the trial court asked jurors questions privately. But Ward provides no authority for his proposition that conducting such an "instruction conference" is improper.[6] Such a conference is more appropriately characterized as purely ministerial or legal in nature. *See In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (no right to be present at "in-chambers conferences between court and counsel" involving "legal matters, such as the wording of jury instructions, or ministerial matters, such as jury sequestration"). Thus, Ward's argument

[6] Nor does the record affirmatively demonstrate the place or circumstances of the conference. *See State. v Momah*, 167 Wn.2d 140, 148-49, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct 160 (2010) (a public trial right violation requires a closure of the courtroom to the public).

here fails.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Armstrong, J.

Penoyar, C.J.