NO. 43745-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,

Respondent,

v.

ROBERT CARCIONE,

Appellant.

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

The Honorable Julia L. Garratt, Judge Pro Tem

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF MOVING PARTY

Robert A. Carcione, by and through counsel of record, Nielsen, Broman & Associates, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION BELOW

Carcione requests review of the King County Superior Court's Decision and Order affirming his convictions in Seattle Municipal Court for assault, property destruction, reckless endangerment, and two counts of harassment. A copy of the RALJ Order is attached to this motion as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Carcione was charged with a number of offenses. In order to return its verdicts, the jury had to believe the prosecuting witnesses instead of Carcione. The question before the jury was largely one of credibility. Prior to allowing a critical prosecution witnesses to testify, the court made that witness personally promise the court that his testimony would be the truth. After agreeing to do so, the court permitted the witness to testify, thereby communicating to the jury the court's opinion on the truthfulness of his testimony. Did this comment on the evidence deny Carcione a fair trial and does it require reversal of his convictions?

2. In Washington, a defendant has no duty to retreat when he is assaulted in a place where he is lawfully entitled to be. Evidence at trial revealed that appellant had the opportunity to flee, but chose to stay and defend

himself. Nonetheless, defense counsel failed to request a "no duty to retreat" instruction and the jury was never informed of appellant's right to stand his ground. Was Carcione denied his constitutional right to effective assistance of counsel because his attorney failed to request this critical instruction?

3. Carcione was tried on two counts of harassment. According to the jury instructions, in order to satisfy the elements of these offenses, the City was required to prove that Carcione made threats while in Seattle and that his victims were placed in fear while in Seattle. Where the City proved neither, is reversal and dismissal required?

D. STATEMENT OF THE CASE

1. Procedural History.

The City of Seattle charged Robert Carcione with one count of assault, one count of property destruction, one count of reckless endangerment, and three counts of harassment. See Amended Criminal Complaint (attached as appendix B).

A jury trial was held before the Honorable Jean Rietschel on July 29-31, 1997. At the close of the City's case, the City dismissed one of the harassment charges for insufficient evidence. RP 192. The jury found Carcione guilty on the remaining charges. See Judgment and Sentence (attached as appendix C).

Carcione filed a RALJ appeal, which was heard by the Honorable Julia L. Garratt, King County Superior Court Judge, Pro Tem. Judge Garratt affirmed the judgment in its entirety. See Appendix A. This motion for

discretionary review timely followed.

2. Trial Testimony.

Robert Carcione and Sonya Basile were once romantically involved. For a three-year period ending in 1995, the two lived together. Even after the break-up, they remained on friendly terms. RP 2-4.

In April of 1997, Basile shared a Kirkland apartment with her boyfriend, Jerry Jenkinson, Basile's eight-year-old son, Andrew, and an individual named Mathew Apodaca. RP 100-01, 177. Apodaca and Basile were as close as siblings. They had known each other since 1993, when they both attended the same drug and alcohol treatment center. RP 140, 172-73.

By April 21, 1997, Basile had been missing for almost four days. She had told Jenkinson that she had an appointment in Seattle. She left for the appointment and never returned. RP 102. On the morning of the 21st, Basile attempted to contact Jenkinson, but he was at work. She then called Carcione from a Seattle restaurant. RP 4, 53-55.

Basile is a diabetic and had suffered a number of diabetic seizures the past few days. She decided that she did not want to be alone and had Carcione drive her to his Seattle home rather than her Kirkland apartment. RP 5, 57-58. Carcione allowed her to sleep on his futon couch. He left to take his son to school and drove to work. RP 198.

Carcione returned to the house briefly and left for work again around noon. When he returned around 4:30 p.m., Basile was still asleep. RP 199-200. Carcione attempted to wake her so that she could eat something. He

noted fresh needle marks on her arms, which indicated that she had been using drugs again. RP 200-01.

Basile indicated that she wanted Carcione to take her to the hospital. RP 5, 201. Carcione said that he would not and that she should call Jenkinson, which she did. RP 5, 201-02. Jenkinson drove his van to Carcione's house. With him were Apodaca and Basile's son, Andrew. RP 5-6, 202.

What happened next was disputed at trial. According to Carcione, Jenkinson and Apodaca let themselves into the house while Carcione and Basile retrieved Basile's bags from the bedroom. RP 203. All four then began to exit the house together. Apodaca was standing on the stairway giving Carcione a mean look, as if he wanted to fight. RP 205.

Carcione asked Apodaca what the problem was and said that if he wanted to fight, they could go to the bottom of the stairs. At that point, Apodaca quickly began to take off his coat and walked down the stairs. RP 205. Apodaca is considerably larger than Carcione. RP 117.

The two men began to scuffle in the front yard. Jenkinson and Basile were yelling at them to stop. Carcione and Apodaca separated, Carcione backed up, and then told Apodaca to get off his property. Initially, Apodaca refused and simply stood there looking as though he still wanted to fight with Carcione. Carcione repeatedly told him to leave and Apodaca eventually walked away. RP 205.

Carcione watched the three enter Jenkinson's van. As Carcione stood near the van, he saw that Andrew was a passenger in the back. Carcione

peaked into the front passenger window and said, "Andrew, I love you no matter what." RP 206. Carcione heard someone say, "Matt, don't" and Apodaca then hit Carcione twice in the back with a very hard object. RP 208-09, 211. As a result of being struck from behind, Carcione felt his head hit something. He was not sure what he hit, but his head was bleeding and it hurt. RP 209.

According to Carcione, he fled to the driver's side of the van, where Jerry Jenkinson was now standing. He heard someone say, "Jerry, here" and saw that Jenkinson was now armed with a large yellow stick, which looked like a shovel handle. RP 210. In an attempt to protect himself from Jenkinson, Carcione picked up a large rock. RP 211. Carcione attempted to throw the rock at Jenkinson, but it slipped out of his hands and hit the van's windshield. RP 212.

Carcione then went inside his house to call the police. He was aware that Basile had already called the police, but he made the additional call to ensure that they were on their way. The 911 operator told him to stay put, which he did. RP 212-13.

At trial, Basile, Jenkinson, and Apodaca gave a different version of events. Basile testified that she did not see what preceded the altercation between Carcione and Apodaca. As she exited Carcione's home, she simply noticed that the two men were "entangled." RP 8.

According to Basile, Apodaca broke free and got into the van. While Jenkinson was loading her bags into the van, Carcione was gesturing and

yelling. RP 10. Basile was sitting in the front passenger seat. Carcione came to the front passenger door. According to Basile, she opened the door in an attempt to push him away and Carcione grabbed her by the neck and punched her in the face. RP 12-16.

Basile testified that Jenkinson restrained Carcione and she went inside the house to call police. RP 18-19. Basile walked back out to the van and passed Carcione on the way. According to Basile, Carcione came to the front passenger door again, Apodaca exited the van, and then hit Carcione with a stick. Basile saw that as a result of being hit, Carcione's eyes were temporarily crossed. She was worried and got out of the van in an attempt to stop the altercation. RP 19-20.

According to Basile, Carcione grabbed a rock from his rockery and threw it into the front windshield of the van, breaking the glass and coming to rest on the dashboard. RP 21-22. Jenkinson got into the van and drove it away. RP 67-69. They pulled over in a Safeway parking lot when they saw and stopped a police car heading to Carcione's house. They spoke with officers, who took reports of the incident. RP 35.

Basile testified that when she, Jenkinson, Apodaca, and Andrew returned to their Kirkland apartment, there was a voice mail message from Carcione. According to Basile, Carcione said, "I will get you, Matthew, I will get, you Jerry" and he also threatened to contact CPS regarding Basile's parenting of Andrew. RP 46. By the time of trial, Basile had moved. Prior to moving, she had saved the message for a period of time. And although she told

a police detective that she had the message, no one bothered to preserve it for trial. RP 48-52.

Jenkinson's version of the incident differed from both Carcione's and Basile's. According to Jenkins, Carcione was being belligerent from the time Basile was gathering her belongings in the house. RP 78-79. Jenkinson testified that while leaving the house, Carcione referred to an expression on Apodaca's face and said, "I know that look." RP 79. Carcione then approached Apodaca and grabbed his collar. Apodaca broke free but Carcione hit him in the eye. The two then scuffled in the front yard. RP 80-81.

According to Jenkinson, Apodaca returned to the van. Carcione followed and was being loud and aggressive. RP 82. Carcione reached his right forearm through the open front passenger window and Apodaca exited through the side sliding door. RP 87. Apodaca then hit Carcione in the shoulder with a pick handle that was about 2 inches thick and two feet long. RP 88-89.

According to Jenkinson, and contrary to Basile's version, it was at this point that Carcione grabbed and punched Basile. Jenkinson pulled Carcione away from the van, punched him in the jaw, and kneed him in the stomach. Like Apodaca, Jenkinson is also considerably larger than Carcione. RP 89, 110, 116.

Jenkinson watched as Carcione went back inside his house. Jenkinson got into the van and saw Carcione approach with the rock in his hands. Jenkinson stepped back because it appeared that Carcione was coming towards

him with the rock. Carcione then threw the rock, which hit the windshield. RP 90-93, 111.

Jenkinson told Carcione he was going to jail and then drove the van to the Safeway, where they flagged down the officers. RP 94-95. Consistent with Basile's testimony, Jenkinson testified that when they arrived some two and a half to three hours later at the Kirkland apartment, they listened to the message from Carcione. RP 96-97, 113.

Apodaca's trial testimony was, for the most part, similar to Jenkinson's, although he provided more detail concerning his attack on Carcione with the pick handle. RP 143-49. According to Apodaca, Carcione was calling Basile names and reaching into the van when Apodaca decided to grab the pick handle, exit, and hit Carcione. RP 151-52. Apodaca described how he swung the pick handle like a baseball bat and struck Carcione between the back and shoulder. RP 153. He testified that he hit Carcione "to beat off an attack."[1] RP 153.

Basile's eight-year-old son, Andrew, also testified at trial. His testimony supported Jenkinson's and Apodaca's version of events. Andrew testified that he stayed in the van while Jenkinson and Apodaca went inside Carcione's house. He saw and heard Carcione telling Apodaca to get out of his house and on the pathway. He also saw Apodaca taking off his coat. RP 180-81.

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[1] Apodaca was impeached with prior convictions for first-degree robbery, second-degree burglary, a possession offense, and attempt to elude. RP 160.

Andrew saw Apodaca get in the van and Carcione reach in the window. Andrew watched Apodaca jumped out and hit Carcione in the back with the pick handle. According to Andrew, Carcione looked at Apodaca and then punched Basile. Carcione and Jenkinson struggled and Carcione threw the rock at the windshield. RP 182-83.

The City's final witness was Seattle Police Officer Michael Meder. Meder spoke to the occupants of the van in the Safeway parking lot and then spoke to Carcione. RP 118-19, 122. Although Basile, Jenkinson, and Apodaca had used such descriptions as "drunk," "slurring his words," and "obviously intoxicated and drunk" when referring to Carcione, Meder, who has advanced training in the detection of intoxication, testified that Carcione was only mildly under the influence of alcohol and was not slurring his words. RP 11, 76-77, 123, 128-29, 144.

Carcione was cooperative and upset about what had happened. RP 132. He explained that he and Apodaca had argued and Apodaca hit him in the back with a stick. Meder could see more than one welt mark across Carcione's back. There was also blood on his left ear and back. Consistent with his trial testimony, when speaking with Meder, Carcione denied hitting Basile and admitted throwing the rock that went through the windshield. RP 125-26.

3. The trial court's comment on the evidence and the absence of a "no duty to retreat" instruction.

Two events had a significant impact at Carcione's trial. The first involves the court's decision to question Andrew in the jury's presence on his competency as a witness. The second involves defense counsel's failure to

ensure that Carcione's jury was provided with a complete statement on the law of self-defense.

Comment on the evidence

Although neither the City nor defense counsel raised a question regarding Andrew's competency to testify based on his age, the trial court nonetheless began asking Andrew questions pertaining to this subject in front of the jury:

COURT:	I'm going to ask you a couple of questions. First of all, what's your name?
ANDREW:	Andrew.
COURT:	And what's your last name, Andrew?
ANDREW:	Esklin.
COURT:	How old are you?
ANDREW:	Eight.
COURT:	And what grade in school are you when you go back in September?
ANDREW:	I'm going into third.
COURT:	You're going into third. And do you know what telling the truth means?
ANDREW:	Yes.
COURT:	And you know what telling a lie means?
ANDREW:	Yes.

RP 177.

The trial court then asked one final question of Andrew-- again, still in the jury's presence.

> COURT: Do you promise me that you're going to tell the truth?
>
> ANDREW: Yes.

RP 177 (emphasis added). Only after this personal promise did the court permit the City to question Andrew regarding the incident. RP 178.

Self-defense instructions

Defense counsel submitted proposed instructions. Included among those instructions was a "no duty to retreat" instruction. Consistent with Washington law, that instruction reads:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

See Defendant's Proposed Instruction (attached as appendix D).

When it came time to discuss jury instructions, however, defense counsel did not renew his request for the instruction. RP 243-45. It was not given to the jury as part of the law on self-defense. See Court's instructions on self-defense (attached as appendix E).

E. ARGUMENT

1. THE TRIAL COURT COMMENTED ON THE EVIDENCE IN THE PRESENCE OF THE JURY, THEREBY VIOLATING CARCIONE'S CONSTITUTIONAL RIGHTS UNDER ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

A trial judge violates this constitutional provision when he or she conveys a personal opinion regarding the truth or falsity of a witness' testimony. State v. Bogner, 62 Wn.2d 247, 250, 382 P.2d 254 (1963). "The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury." State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977). The court's personal feelings need not be expressly conveyed to the jury to constitute a violation. Mere implication will suffice. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); Lampshire, 74 Wn.2d at 892.

A comment in violation of article 4, § 16 is presumed to be prejudicial because it operates to deprive the defendant of a fair trial. The City bears the burden to show that no prejudice resulted to Carcione from the comment. "[R]eversal is required even where the evidence is undisputed or overwhelming unless it is apparent the remark could not have influenced the jury." State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974); see also Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a prohibition to appellate review. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

This Court has made it clear that it is always the better practice for a trial court to conduct a competency evaluation outside the presence of the jury. The reason is obvious. It obviates any risk that the jury will hear inadmissible evidence or testimony. State v. Tuffree, 35 Wn. App. 243, 246-47, 666 P.2d 912, review denied, 100 Wn.2d 1015 (1983).

Carcione's case is a good example of why this is the better practice. While the trial court was not prohibited from examining Andrew in the presence of the jury, by choosing this procedure, the jury heard the court

comment on the evidence. More specifically, the jury heard the court communicate its belief that Andrew was able to tell the truth and, most importantly, that he made a personal promise to the judge that he would in fact tell the truth.

For every witness but Andrew, the court administered the traditional oath -- "Do your swear or affirm that your testimony will be the truth, the whole truth, and nothing but the truth?" RP 2, 71, 117, 196. In stark contrast, however, the judge specifically asked Andrew is he knew the difference between a lie and the truth and if he promised the judge, personally, that his testimony would be the truth. He promised and the judge then allowed him to testify. RP 177-78.

The standard for a violation of article 4, § 16 is worth repeating here: "The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury." Trickel, 16 Wn. App. at 25. The answer in Carcione's case is an unequivocal "yes."

By conducting the competency evaluation in front of the jury, it was clear to the jurors that before the court would allow Andrew to testify, the court had to be convinced that Andrew knew what it meant to tell the truth. The court's decision to allow Andrew to testify came only after Andrew made a personal promise to the court that his testimony would be the truth. Clearly, the message communicated to the jury was that the court was convinced of the truth-value of Andrew's testimony and was allowing him to testify for that reason. That the court asked for and received a personal promise of truthfulness told the jury this was a witness in which the court now believed.

As noted above, prejudice is presumed. Reversal is required unless the court's comment could not have influenced the jury's verdict. The City cannot make this showing. The issue for the jury was largely one of credibility. It was Carcione's version of events against the various versions presented by Basile, Jenkinson, and Apodaca. Jenkinson and Apodaca had a motive to fabricate their testimony -- if Carcione's version of events was true, both individuals were themselves guilty of criminal offenses. Basile also had a motive -- she was dating Jenkinson and she and Apodaca were like siblings.

Consequently, Andrew's testimony became particularly important to the jury in making a credibility determination. The prosecutor apparently recognized this fact. During closing argument, he focused on Andrew's credibility on the stand and told the jurors that he was indeed "telling the truth." RP 256. This argument only exacerbated the prejudice stemming from the court's comment on Andrew's credibility. Reversal is required.

The Superior Court's decision that the trial court did not comment on the evidence is incorrect. Because the Superior Court's decision conflicts with

prior decisions from this Court and the Supreme Court and because Carcione's case presents a significant state constitutional question, review is appropriate under RAP 2.3(d)(1)-(2).

2. CARCIONE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE REPRESENTATION WHEN DEFENSE COUNSEL FAILED TO REQUEST A "NO DUTY TO RETREAT" INSTRUCTION.[1]

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

Failing to request an instruction that is supported by the evidence and would have aided the defense may constitute ineffective assistance of counsel. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where defendant charged with felony flight and defense was intoxication). Here, trial counsel was ineffective for failing to offer a "no duty to retreat" instruction.

a. Counsel was Deficient

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[2] Issues 2 and 3 are being raised for the first time in this motion. Although they were not raised in the Superior Court, they are properly before this Court. See State v. Mendez, ___ Wn.2d ___, ___ P.2d ___ (Slip op., filed January 28, 1999, at 8)(state constitutional issue properly raised for the first time as part of the Petition for Review); State v. Brennan, 76 Wn. App. 347, 349, 884 P.2d 1343 (1994)(motion for discretionary review denied; issue not previously raised decided as part of motion to modify denial of discretionary review); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986)(alleged due process violation may be raised for the first time in the Court of Appeals as part of motion for reconsideration).

It has long been the law in Washington that a person bears no duty to retreat where he is assaulted in any place where he has a right to be. State v. Allery, 101 Wn.2d 591, 598, 692 P.2d 312 (1984). And a defendant is entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Allery, 101 Wn.2d at 598 (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)).

In State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996), this Court reaffirmed both of these principles and clarified under what circumstances such an instruction is required. Williams involved an appeal by codefendants Charles and Nalen Williams of their convictions for felony murder. Williams , 81 Wn. App. at 739.

At trial, Charles testified that while he was standing in the street, the decedent, Joseph Wade, threatened him with a knife. Charles responded by grabbing a shovel, advancing on Wade, and then backing away. Charles' brother, Nalen, then arrived on the scene and took the shovel. Now disarmed, Charles left and grabbed a pitchfork. When he returned, Nalen was trying to disarm Wade by knocking the knife from his hands. Charles testified that Nalen killed Wade when he hit him in the back of the head with the shovel. Nalen claimed that Charles had inflicted the lethal blow with the pitchfork. Williams , 81 Wn. App. at 740.

The trial court instructed the jury that self defense is justified only when the force used "is not more than necessary." Williams , 81 Wn. App. at 741. The court also instructed the jury that force was "necessary" only where no

"reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended . . . ." Williams , 81 Wn. App. at 741. The court denied the defendants' request for a "no duty to retreat" instruction. Williams , 81 Wn. App. at 741.

This Court reversed. In doing so, it repeated the long-standing rule that "[f]light, however reasonable an alternative to violence, is not required" in Washington. Williams , 81 Wn. App. 743-44. Citing to Allery, this Court emphasized that a defendant is entitled to a "no duty to retreat" instruction whenever the "evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to be." Williams , 81 Wn. App. at 742; see also State v. Wooten, 87 Wn. App. 821, 945 P.2d 1144 (1997) (defendant entitled to "no duty to retreat" instruction; in its absence, reversal required), review denied, 134 Wn.2d 1021 (1998).

Carcione was entitled to such an instruction because it was critical to his defense on the charge of property destruction. According to Carcione's testimony, immediately after Apodaca assaulted him with the pick handle, Jenkinson armed himself with a yellow stick. Fearing that he was about to be assaulted again, Carcione picked up a large rock, tossed it in Jenkinson's direction, and smashed the van's windshield.

In a nutshell, Carcione's defense on this charge was that he was acting in self-defense when he threw the rock. Moreover, Carcione was lawfully entitled to be on or near the edge of his property -- he had every right to stand his ground rather than flee. Therefore, had defense counsel requested a "no

duty to retreat" instruction for count II, the court would have been required to give it.

b. Carcione Suffered Prejudice

To establish prejudice, Carcione need only show a "reasonable probability" that but for counsel's error, the result of the trial on count II would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

There is certainly a reasonable probability here. Williams is also instructive regarding the question of prejudice resulting from the absence of a "no duty to retreat" instruction. The Williams court recognized that the failure to instruct the jury regarding the absence of a duty to retreat raised the possibility in that case that the jury had rejected the Williams' claims on improper grounds:

> In the absence of the "no duty to retreat" instruction, a reasonable juror could have believed Charles, or Nalen, or both, but could have erroneously concluded that the brothers used more force than was necessary because they did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.

Williams, 81 Wn. App. at 744 (emphasis added). Because there was a possibility that the jury had erroneously concluded that the Williams' failure to retreat resulted in excessive force, this Court refused to find the error harmless. Williams, 81 Wn. App. at 744.

Williams is soundly reasoned and demonstrates the degree of prejudice to Carcione. As in Williams, the jury here was instructed that self-defense is justified only when the force used "is not more than necessary ." Appendix F (instruction 10). As in Williams, the jury here was instructed that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended . . . ." Appendix F (instruction 11). And, as in Williams, the absence here of a "no duty to retreat" instruction raised the possibility that a reasonable juror may have found that Carcione otherwise acted reasonably, but nonetheless used excessive force because he never used the obvious and reasonably effective alternative of retreat.

It is impossible to know whether one or more of the jurors fell prey to this inviting error. There is as strong a possibility here as in Williams. Carcione certainly had the opportunity to flee. He could have fled after he and Apodaca were no longer entangled in the initial scuffle. He could have fled immediately after Apodaca hit him with the pick handle. He could have fled once he realized that Jenkinson was now armed with a weapon of his own. Instead, however, Carcione chose to defend himself by picking up and throwing the rock.

The jury may have believed Carcione's testimony that Jenkinson was coming after him with the stick, believed that Carcione otherwise acted reasonably in picking up the rock, but erroneously concluded that Carcione was required to retreat.

Thus, there is a reasonable probability that absent trial counsel's failure to request the "no duty to retreat" instruction, the result on count II would have been different. This probability undermines confidence in the outcome of Carcione's trial on that count. Carcione should be retried on count II by a jury that is properly and fully instructed on the law.

This issue presents a significant question of constitutional law under the state and federal constitutions; whether Carcione received the benefit of his constitutional right to effective representation. Review is appropriate under RAP 2.3(d)(2).

3. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS FOR HARRASSMENT.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The City charged Carcione with two counts of harassment. On count V, the "to convict" instruction sets forth the elements the State was required to prove. It reads:

> As to Count V to convict the defendant of the crime of harassment, each of the following elements must be proved beyond a reasonable doubt:
>
> 1. That on April 2, 1997, he without lawful authority knowingly threatened to cause bodily injury in the future to Jerry Jenkinson or to any other person; and

> 2. By the defendant's words or conduct placed Jerry Jenkinson in reasonable fear that the threat would be carried out; and
>
> 3. That these acts took place in the City of Seattle.

The instruction for count VI is identical except for the fact that it refers to Matthew Apodaca. See Court's instructions on counts V and VI (attached as appendix F).

Element number 3 is the critical element for purposes of this motion. Under the clear requirements of the "to convict" instructions, the City was required to prove that two things -- the threat to cause bodily injury and the fear from the threat -- occurred in Seattle. The City proved neither.

First, assuming Carcione even made the phone call (an act he denied), there is no evidence in the record from which a reasonable trier of fact could conclude that he made the call from Seattle. Although his house was in Seattle, there is no evidence indicating when the call was made. All we know is that the message was left sometime during a two and a half to three hour time span, the length of time between the van's departure from Carcione's house and the playing of the message. RP 113.

Second, even if a reasonable juror could conclude that the call was made from Seattle, the undisputed trial evidence indicates that Jenkinson and Apodaca were not placed in fear until they heard the message. At that time, they were in the Kirkland apartment, not Seattle. RP 46, 96-97, 113, 159.

The Washington Supreme Court's decision in State v. Hickman, 135

Wn.2d 97, 954 P.2d 900 (1998), supports this conclusion. Hickman was charged with insurance fraud for "presenting, or causing to be presented, in Snohomish County, a false or fraudulent insurance claim" regarding the theft of his car. Hickman, 135 Wn.2d at 100. Consistent with this charge, the "to convict" instruction required the State to prove:

> (1) That the defendant, James Hickman, on or about the 1st day of July, 1992, . . . did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such a claim, for the payment of a loss under a contract of insurance; and
>
> (2) That the false or fraudulent claim was made in the excess of . . . ($1,500); and
>
> (3) That the act occurred in Snohomish County Washington.

Hickman, 135 Wn.2d at 101.

Hickman was convicted and, on appeal, challenged the sufficiency of the evidence pertaining to the third element -- that the fraudulent act occurred in Snohomish County. Hickman had been in Hawaii when he phoned in the claim and the insurer was located in King County. Based on this evidence, the Supreme Court reversed and dismissed Hickman's conviction. Hickman, 135 Wn.2d at 105.

The result should be the same here. The City failed to prove either that Carcione made the alleged call from Seattle or that the alleged victims were placed in fear while in Seattle. Reversal and dismissal are required.

As with the first two issues above, this issue presents a significant

question of law under the state and federal constitutions -- whether Carcione stands convicted of two offenses for which there is insufficient evidence, thereby violating his due process rights. Review is appropriate under RAP 2.3(d)(2).

F. CONCLUSION

For the reasons discussed above, Carcione asks this Court to grant discretionary review.

DATED this _____ day of March, 1998.

Respectfully submitted,

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_____
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