

COLORADO COURT OF APPEALS

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Court of Appeals No.: 04CA2520  
Arapahoe County District Court No. 03CR606  
Honorable Gerald Rafferty, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Francisco Anthony Selman,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division VI

Opinion by: JUDGE LOEB  
Webb and Gabriel, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced: July 17, 2008

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General, Denver, Colorado, for Plaintiff-Appellee

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Defendant, Francisco Anthony Selman, appeals from the judgment of conviction entered upon a jury verdict finding him guilty of second degree murder. We reverse and remand for a new trial.

### I. Background

Defendant and several other guests went to Phillippe Toliver's apartment to watch a televised boxing match. According to several witnesses who testified at trial, defendant argued with Toliver and Toliver's friend, Pete Cook. Although the testimony varied as to the timing and extent of the arguments, the witnesses generally testified that the three men argued over a bet that defendant lost to Cook, money used to buy food, and defendant's use of racial slurs.

Two sisters, the Commander sisters, testified that while the men were arguing, Toliver, who is a paraplegic and was in a wheelchair, shoved defendant in an attempt to get him to leave the apartment. Defendant responded by shoving Toliver out of his wheelchair and onto the floor. Cook, who had also been arguing with defendant, physically forced defendant down to Toliver so that

Toliver could “embrace” defendant in what some witnesses characterized as a head-lock.

Defendant testified at trial. According to defendant, the three men had been arguing and insulting each other when Toliver punched defendant in the stomach in an attempt to get him to leave. He admitted to pushing Toliver out of his chair. Defendant testified that Cook then tackled him on top of Toliver; that Cook and Toliver strangled and threatened him; and that they talked about robbing him. When defendant got loose, he went to the door but it was locked, and Cook charged into him, knocking him into the wall. He testified that Cook stepped back for another attempt, and while Cook ran at him, defendant pulled out a gun and fatally shot Cook twice.

Other testimony at trial conflicted with defendant’s story. Some witnesses testified that the physical conflict was mild, and that it was essentially over when Toliver let defendant leave. Those witnesses testified that defendant opened the door to the apartment while Cook walked behind him to lock the door, and after defendant stepped outside, he turned and shot Cook out of apparent revenge.

Defendant testified that he ran and hid after the shooting. He eventually turned himself in and was charged with murdering Cook and assaulting Toliver. Defendant claimed self-defense at trial, and the jury was given the standard self-defense instruction and an instruction on deadly force. The jury was also given an instruction on the initial aggressor exception to the defense of self-defense. The jury found defendant guilty of second degree murder and acquitted him of the assault charges.

This appeal followed. Defendant raises four contentions, arguing that the trial court erred by (1) giving the jury an initial aggressor instruction; (2) refusing to canvass the jury concerning exposure to potentially prejudicial extrinsic information; (3) prohibiting him from cross-examining Toliver on certain prior acts; and (4) denying his *Batson* challenge to two of the prosecution's preemptory challenges.

## II. Self-Defense Instruction

Defendant contends the trial court erred by giving the jury an instruction on the initial aggressor exception to the defense of self-defense. Specifically, he argues the court erred by giving the

instruction because no evidence introduced at trial indicated that he was the initial aggressor. We agree.

#### A. Standard of Review

A trial court has a duty to instruct the jury correctly on the law applicable to the case. *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Defendants are entitled to have the jury instructed on the affirmative defense of self-defense whenever the record contains any credible evidence tending to establish the defense. *See Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004). “The trial court must tailor the self-defense instructions to the particular circumstances of the case . . . .” *Id.*

Where the defendant contemporaneously objects to a jury instruction, an appellate court reviews the instruction for harmless error. *Pahl*, 169 P.3d at 183; *People v. Silva*, 987 P.2d 909, 913-14 (Colo. App. 1999). Under the harmless error standard, reversible error occurs if the language of the jury instructions creates a reasonable possibility that the jury could have been misled in reaching a verdict. *Pahl*, 169 P.3d at 183.

Here, the People argue that defendant failed to object to the initial aggressor instruction on the specific grounds supporting his

contention on appeal, and, thus, defendant's contention must be reviewed under the plain error standard. See *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)(alleged instructional error reviewed under plain error standard of review in absence of contemporaneous objection); *People v. Roadcap*, 78 P.3d 1108, 1113 (Colo. App. 2003).

We conclude defendant preserved his assignment of instructional error. The record shows that the trial court held a series of informal jury instruction conferences off the record. Prior to closing argument, the trial court held a formal jury instruction conference on the record, where the court addressed each jury instruction not agreed to by the parties. With regard to Jury Instruction 20, the initial aggressor instruction at issue here, the court stated as follows:

Number 20 – this was raised by [defendant]. I do want to note this is the question of retreat. This was raised by [defendant] in Instruction Number Three as tendered by [defendant]. The prosecution at the informal Jury Instruction Conference argued that – oh, and by the way, I do want to make the record I agree that the question of retreat should be submitted to the Jury. And I particularly . . . relied on [*Cassels v. People*, 92 P.3d 951 (Colo. 2004)].

Defendant's tendered Jury Instruction Number Three stated that "[a]n innocent victim of assault need not retreat before using deadly force if the victim believes the use of such force is necessary for self-protection and the belief is based on reasonable grounds." The trial court rejected defendant's tendered instruction and, in its place, gave the following instruction:

Where the defendant is the initial aggressor, he must, in order to rely on self-defense, have withdrawn from the affray and have communicated the desire to withdraw to his opponent. However, if the defendant was not the initial aggressor he was not required to retreat to a position of no escape in order to claim the right to employ force in his own defense.

The record thus demonstrates that defendant raised the issue of retreat with the trial court, and initially sought an unequivocal no duty to retreat instruction. This tendered instruction put the court on notice that defendant took the position that the law and evidence here entitled him to nothing less than an unequivocal no-retreat instruction. The instruction given in its place differed only in that it imposed upon defendant a qualified duty to retreat if he was the initial aggressor. The record also shows that the parties argued over the issue of retreat during the informal jury instruction

conference, and the court memorialized the disagreement during the formal conference.

Because he raised the issue of retreat with the trial court and tendered an alternative instruction, we are persuaded that defendant fulfilled his obligation to put the court on notice of his position that the proposed instruction was inadequate because it imposed a qualified duty to retreat where there should be no qualification. We thus conclude the error was preserved for harmless error analysis. *See Pahl*, 169 P.3d at 183; *Silva*, 987 P.2d at 913.

#### B. Initial Aggressor Instruction

The defense of self-defense is unavailable to initial aggressors who do not withdraw from the conflict initiated by the aggressor. To warrant an instruction on the initial aggressor exception to the defense of self-defense, there must be some evidence that the defendant initiated the physical conflict. *People v. Beasley*, 778 P.2d 304, 306 (Colo. App. 1989); *see Silva*, 987 P.2d at 916. That the defendant uttered insults or engaged in arguments does not warrant an initial aggressor instruction. *Silva*, 987 P.2d at 916;

*People v. Manzanares*, 942 P.2d 1235, 1241 (Colo. App. 1996);  
*Beasley*, 778 P.2d at 306.

The People contend the testimony of four eyewitnesses, including the testimony of Toliver, was sufficient to warrant an instruction on the initial aggressor exception. To the contrary, after reviewing the record and the totality of the circumstances, we conclude that no evidence suggested that defendant was the initial aggressor.

The record shows that each of the Commander sisters testified that defendant argued with both Cook and Toliver. They also testified that Toliver was the first person to initiate physical contact when he either pushed or punched defendant in the stomach area, and that defendant responded by pushing Toliver out of his wheelchair. They testified that Cook then responded by physically forcing defendant into a position where Toliver could “embrace” defendant; that defendant walked to the door to leave after Toliver let him go; and that Cook walked behind him in a nonthreatening manner. They testified that defendant opened the door, stepped outside, turned around, and shot Cook twice.

The People also rely on the testimony of Kelli Jones. She testified that she was cooking in the kitchen area of Toliver's apartment while the three men were arguing. She testified that she looked up and saw Toliver on the floor, but she did not see how he fell from his chair.

The People further argue that portions of Toliver's testimony support the initial aggressor instruction. Specifically, they point to Toliver's testimony suggesting that his "embrace" of defendant was not applied with pressure, and that he allowed defendant to leave the apartment.

According to all testimony, defendant shot Cook within one of two contexts: (1) in the midst of an ongoing physical conflict that was initiated by Toliver and Cook, and not defendant; or (2) subsequent to a physical conflict that had ended when Toliver and Cook let defendant leave. Thus, even when viewed in the light most favorable to the prosecution, no evidence suggests that defendant initiated a physical conflict with either Toliver or Cook during which defendant shot Cook. By all accounts, Toliver was the first person to physically contact anyone. No testimony suggests defendant physically touched or threatened Toliver prior to being shoved or

punched by him. Also, no testimony suggests defendant physically touched or threatened Cook prior to being physically forced by Cook into a submissive position. In short, no testimony indicates defendant did anything more than argue and utter insults prior to being physically contacted by Toliver. Such conduct cannot support an initial aggressor instruction. *See Silva*, 987 P.2d at 916 (“That [the defendant] may have uttered some insult or engaged in an argument . . . would not justify indentifying defendant as the initial aggressor.”); *Beasley*, 778 P.2d at 306.

Although not entirely clear, the People appear to argue that the prosecution was entitled to an initial aggressor instruction because some testimony suggests the physical conflict initiated by Cook and Toliver both was minimally threatening to defendant and, in any event, was over by the time of the shooting. To the extent the People make such a contention, we disagree because the mildness of the physical conflict goes to the reasonableness of the use and degree of force used by defendant in what he claims was self-defense, not to whether defendant initiated a physical conflict in the first instance. In addition, the evidence suggesting a break in the conflict supports a conclusion that defendant was not in danger

of bodily harm at the time of the shooting, but does not, however, support a conclusion that he initiated a physical conflict that escalated to the shooting. *See Manzanares*, 942 P.2d at 1241 (“A finding by the jury that [the defendant] was at that point the ‘initial aggressor’ would be no more than a rejection of the claim of self-defense.”).

In sum, we conclude there is no evidence suggesting defendant initiated a physical conflict during which he eventually shot Cook. He either shot Cook during a physical conflict he did not initiate, or he shot Cook in the absence of a conflict, in which case, the initial aggressor concept is simply inapplicable. Accordingly, we conclude the court erred by giving the jury the initial aggressor instruction. *See id.*; *Beasley*, 778 P.2d at 306.

### C. Reversible Error

We now turn our analysis to whether the error of giving the initial aggressor instruction constitutes harmless error. Under the facts here, the confusion caused by the instructional error, in our view, created a reasonable possibility that the jury could have been misled in reaching its verdict. Accordingly, we conclude the error was not harmless, and was, therefore, reversible.

“A defendant is entitled to a jury instruction on the doctrine of no-retreat when the facts of the case raise the issue of retreat and the evidence supports a jury finding that the defendant was not the initial aggressor.” *Cassels*, 92 P.3d at 956. The nuances of Colorado’s no-retreat doctrine are not self evident, and are not evident from the standard self-defense instruction. *See id.*

Under the circumstances of this case, the prejudice here is the possibility that a juror did not vote to acquit on the murder charge because defendant did not withdraw from the conflict prior to using deadly force, even though the juror was otherwise not convinced beyond a reasonable doubt that defendant was not justified in using deadly force. This danger was initially made possible when the court asked the jury to resolve an issue -- whether defendant was the initial aggressor -- that legally did not exist. *See Silva*, 987 P.2d at 915. Notwithstanding our view that no evidence at trial supported a legally valid conclusion that defendant was the initial aggressor, the jury was nevertheless instructed to decide whether he was the initial aggressor and was not given any guidance or instruction as to what constitutes an initial aggressor in the context of the no-retreat doctrine. Because the court

instructed the jury that defendant could possibly be an “initial aggressor” without defining that term, and no evidence suggested that defendant initiated a physical conflict in which the shooting occurred, the jury could have assumed that some conduct other than physical violence or threats of violence could support a conclusion that defendant was the initial aggressor.

Additionally, the prosecution’s theory of the case, as reflected in its closing argument, provided the jury with instances of defendant’s conduct from which it could understandably, although erroneously, conclude that defendant was the initial aggressor. For example, the prosecution chastised defendant for being disrespectful in Toliver’s home to the extent that Toliver eventually made defendant leave, and for pushing Toliver out of his wheelchair, and it commended Cook for coming to Toliver’s aid. During closing argument, the prosecution characterized Toliver’s and Cook’s conduct during the physical conflict as justified and reasonable. Specifically, the prosecution argued that Toliver was justified in kicking a rude person out his home, and that Cook was justified in coming to the aid of a paraplegic.

With no legal definition of “initial aggressor,” and no evidence that defendant initiated the conflict with physical force or threats of physical force, the jury could have confused moral blameworthiness for the conflict, shown by defendant’s insults and argument directed at Toliver and Cook, with evidence sufficient to support a finding that defendant was the initial aggressor. Given the prosecution’s closing argument, the jury could have concluded that Toliver was not the initial aggressor by dismissing Toliver’s initial physical contact with defendant because Toliver was in a wheelchair and in his own home, or that defendant “initiated” the conflict by being insulting and argumentative.

Moreover, the prosecution argued that a less than deadly alternative to shooting Cook was available to defendant, namely, to simply leave Toliver’s apartment. Because the only circumstance where defendant would be required to retreat to claim self-defense under the instructions given was if he were the initial aggressor, the prosecution essentially argued that that defendant was the initial aggressor by suggesting that he retreat instead of using deadly force. If the court had properly given defendant’s tendered jury instruction on the no-retreat doctrine, the prosecution could not

have argued that defendant should have retreated. That tendered instruction was rejected, however, in favor of the erroneous initial aggressor instruction that allowed the prosecution to argue that defendant should have retreated instead of using deadly force.

Because the no-retreat doctrine is somewhat counterintuitive where a defendant uses deadly force in self-defense although he had an opportunity to retreat, *see Cassels*, 92 P.3d at 956, the erroneous jury instruction here created a reasonable possibility that the jury was misled. Specifically, without evidence that could validly support a conclusion that defendant was the initial aggressor, we perceive the jury could have been misled into imposing upon defendant a duty to retreat because he may have instigated the conflict by being insulting and argumentative and because he pushed a paraplegic out of his wheelchair.

We thus conclude the facts here are more like those in *Beasley* and *Silva*, where instructional error was held reversible because of possible confusion, *Silva*, 987 P.2d at 915; *Beasley*, 778 P.2d at 306, than those in *Manzanares*, where instructional error was held harmless because there was no possibility the jury was misled. *See Manzanares*, 942 P.2d at 1238 (defendant not involved in initial

fight). Because the error in the jury instructions here created a reasonable possibility that the jury could have been misled in reaching its verdict on the murder charge, we conclude the error was not harmless, and is thus reversible. *See Pahl*, 169 P.3d at 183; *Silva*, 987 P.2d at 915.

### III. Other Contentions

In light of our resolution of defendant's instructional error contention, we decline to address his remaining contentions because the jury and *Batson* issues cannot arise on remand and we cannot predict how, if at all, the cross-examination issue will arise.

The judgment is reversed, and the case is remanded for a new trial.

JUDGE WEBB and JUDGE GABRIEL concur.