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SUPREME COURT
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S. Ct. No. 96162-0
COA No. 34902-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIE C. ASHER, JR.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Willie C. Asher asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Asher seeks review of the decision of the Court of Appeals, Division III, filed on July 10, 2018, affirming his conviction. A copy of the unpublished opinion is in the Appendix at pages A-1 through A- 8.

C. ISSUES PRESENTED FOR REVIEW

1. Was the evidence insufficient to support the conviction for second degree assault with a firearm enhancement when the State failed to disprove self-defense beyond a reasonable doubt?

2. Did the court abuse its discretion by failing to consider the defense request for an exceptional sentence down?

D. STATEMENT OF THE CASE

Willie C. Asher, Jr., was charged by information with one count of second degree assault and one count of harassment. Both counts included a firearm enhancement. (CP 12).

The first trial ended with a hung jury and an order for mistrial

was entered on May 18, 2016. (CP 31). The case went to trial for a second time on 9/12/16. (9/12/16 RP 44).

William Manuel, a neighbor, knew both Mr. Asher and Tom Stephens, the purported victim. (9/12/16 RP 55). On November 11, 2011, he saw Mr. Asher pointing a gun at the ground near Mr. Stephens, who was about 15 feet away. (*Id.* at 59). Mr. Manuel was aware there was conflict between the two men. (*Id.* at 60).

Mr. Stephens said he had problems at his place with Mr. Asher involving guns and violence. (9/12/16 RP 73). Mr. Stephens had 30 acres of vacant land. (*Id.* at 75-76). He eventually divided the land into 10-acre parcels and Mr. Stephens moved onto the “north 10 acres” next to Mr. Asher’s house. (*Id.* at 81-82). At first, things were cordial. (*Id.* at 82-83).

Things went sour after Mr. Asher shot a horse he was having trouble with and then buried it next to Mr. Stephens’ fence by his roping arena. (9/12/16 RP 86-87). This incident occurred within a couple of years of Mr. Asher moving in. (*Id.* at 88). Mr. Stephens said ever since that summer, it was bad with Mr. Asher screaming, hollering, and cussing him out. (*Id.* at 89, 91). On the other hand, Mr. Stephens told Mr. Asher he would beat/kick his ass about 10, 12, or 15 times. (*Id.* at 92-93). He stopped when his

words quit working against Mr. Asher. (*Id.* at 94). Both men had called the police about the other. (*Id.*).

On September 7, 2015, Mr. Stephens was taking care of his calves in the morning. (9/12/16 RP 94). Mr. Asher had torn down a fence and built a wire dog fence on Mr. Stephens' property against his panel fence. (*Id.* at 97). Since Mr. Stephens' calves were getting their legs skinned up on his neighbor's wire fence, he told Mr. Asher to move the fence over 6 inches. Mr. Asher answered Mr. Stephens by saying he had a fucking problem and the argument started. (*Id.* at 97-98). Mr. Stephens told him the fence had to come down and he better get a surveyor before he moved any fences. (*Id.* at 98).

Mr. Asher got mad and swung a T-post across the fence at Mr. Stephens. (9/12/16 RP 102). Mr. Asher went back to his house after swinging the post at Mr. Stephens, who started toward his own house. (*Id.* at 106-08). Mr. Asher returned and called him back, whereupon Mr. Stephens got up on the second rung of his fence and pointed out the property line. (*Id.*). Mr. Asher was about 15 feet and 3 fences away when he took a gun out of the back of his pants, brought it up at an angle, and fired it. (*Id.* at 109). The bullet landed on Mr. Stephens' property. (*Id.* at 106). He said he

did not cross the line onto his neighbor's property. He stepped back after the shot, walked back to his house, and called the sheriff. (*Id.* at 106-07, 109). Mr. Stephens acknowledged there had been a long-standing dispute between the men. (*Id.* at 109).

Mr. Stephens said he made no threats of harm to Mr. Asher. (9/14/16 RP 272). Even before September 7, he had told Mr. Asher his fence was on his property. (*Id.* at 275). On September 7, 2015, Mr. Stephens did not go onto Mr. Asher's property. (*Id.* at 278). After the shot, he turned around and walked back to his house. (*Id.* at 287). Mr. Stephens testified he made no threats to bash Mr. Asher's head in, to kill him, or to kick his ass. (*Id.* at 285). He acknowledged Mr. Asher had not threatened to kill him that day. (*Id.* at 287). Mr. Stephens did say that he had in the past told Mr. Asher he would kick his ass – but only when Mr. Asher said he would shoot him or his horses. (*Id.* at 320-21). Mr. Stephens testified he did not know conflict would ensue if he told Mr. Asher about the fence. (*Id.* at 349).

Deputy Matthew Gould responded on September 7, 2015, to a call by Mr. Stephens about a dispute over a fence line where a gun was involved. (9/13/16 RP 120). Deputy Gould talked to Mr. Stephens, who was calm but upset. (*Id.* at 122-23). The deputy

contacted Mr. Asher, who was waiting for them. (*Id.* at 125). He was detained in cuffs and another deputy took his statement. (*Id.*).

Deputy Brandon Wilson also responded to the incident. (9/13/16 RP 149-50). Mr. Stephens initially called 911 and Mr. Asher made a second 911 call. (*Id.* at 151). After contacting Mr. Stephens first, Deputy Wilson contacted Mr. Asher, who was in the front of his house. (*Id.* at 156-57). He was very angry and getting irritated with what the deputies were telling him to do. (*Id.* at 160). Since Mr. Asher was not doing what the deputies asked, Deputy Wilson grabbed his left arm and put it behind his back to get control over him. (*Id.* at 162). Deputy Kravtsov did the same with his right arm. (*Id.*). Mr. Asher had a thousand-yard stare. (*Id.*). For safety, the deputies cuffed him. (*Id.* at 164). Deputy Wilson contacted Ms. Asher, who turned the firearm over to him. (*Id.* at 167). He transported Mr. Asher to jail. (*Id.* at 174). Deputy Wilson did not try to locate the fired bullet. (*Id.* at 191).

Deputy Stanislav Kravtsov also responded on September 7, 2015. (9/13/16 RP 197-99). He talked to a calm but upset Mr. Stephens and took a statement from him. (*Id.* at 205-06). The deputy decided to talk to Mr. Asher, who was in the driveway of his home. (*Id.* at 206). He was worked up and cursing. (*Id.* at 207-

10). Deputy Kravtsov described Mr. Asher as “verbally resistive.” (*Id.* at 214). The deputy interviewed Mr. Asher after reading him his rights and he agreed to talk. (*Id.* at 215). He said the argument was over the fence and Mr. Stephens told him he would tear the fence down and bash his head in. (*Id.* at 217). Mr. Stephens was trying to climb the fence. (*Id.*). Mr. Asher yelled at him and proceeded to draw his weapon and fired it. (*Id.* at 221). He wanted to scare Mr. Stephens. (*Id.* at 222).

The deputy testified Mr. Asher described the incident very similarly to what Mr. Stephens had described. Mr. Asher said Mr. Stephens threatened him so he fired the gun into the ground to scare him. (9/13/16 RP 240-42).

Lucy Tyson knew Mr. Asher and his wife. (9/14/16 RP 374). She recalled a church picnic at the Ashers in 2012 when Mr. Stephens plowed and kicked up dust that went toward the Asher home. (*Id.* at 378). In September or October 2012, she heard screaming and yelling where Mr. Stephens threatened to kill Mr. Asher, who was upset, concerned, and worried. (*Id.* at 381-91).

John Koch knew both Mr. Asher and Mr. Stephens. (9/14/16 RP 405-06). He rode horses with Mr. Asher. (*Id.*). The first time he met Mr. Stephens, Mr. Koch testified he came out

yelling obscenities and a bunch of other stuff at Mr. Asher. (*Id.* at 407-10). Another time while riding horses, he heard Mr. Stephens threaten to stomp Mr. Asher's head in and to kill his puppy. (*Id.* at 411-12). Mr. Asher told him he needed to go home and backed off. (*Id.* at 412). On several other occasions, Mr. Stephens hurled vulgarities at Mr. Asher and threatened to kill him, stomp his head in, and kick his ass. (*Id.* at 413-14). About a dozen times this happened while Mr. Asher was on his own property. (*Id.* at 414). Mr. Koch said Mr. Stephens was always trying to pick a fight with Mr. Asher, who neither provoked his neighbor nor wanted to fight him. (*Id.* at 415-16). The last time Mr. Koch witnessed Mr. Stephens' conduct was in May 2015 when he came out calling him and Mr. Asher faggots and trying to spook his wife's horse. (*Id.* at 418). Mr. Koch did not return after that. (*Id.*).

Connie Asher testified that after they moved onto Garfield Road in February 2009, there had been no property line disputes or fences removed. (9/14/16 RP 431-33). Within the first year, relations with Mr. Stephens took a turn for the worse. (*Id.* at 440). Mr. Asher did not seek any contact with him. (*Id.* at 441). She said that while her husband was working in the yard, Mr. Stephens would come over to the fence at the property line and start arguing

with Mr. Asher. (*Id.*). Things worsened over time. (*Id.* at 443). Mr. Stephens got aggressive and threatened to stomp Mr. Asher's head in. (*Id.*). Arguments took place at the spot where Mr. Asher fed the horses. (*Id.* at 444). Ms. Asher took Mr. Stephens' threats seriously and was afraid of him. (*Id.* at 445). Mr. Asher got a temporary restraining order against Mr. Stephens in April 2011. (*Id.* at 446). Things got even worse after that with more threats by Mr. Stephens. (*Id.* at 447).

About 2011, Mr. Asher had put up a wire fence against the property line to prevent the dog from going through the panel fencing onto Mr. Stephens' property. (9/15/16 RP 450). Mr. Stephens had never said anything about the wire fence. (*Id.* at 463). On September 7, 2015, Ms. Asher was aware of the conflict between her husband and Mr. Stephens. (*Id.* at 465-66). Mr. Asher had not come back from his chores so she went looking for him. (*Id.* at 466). She heard Mr. Stephens say he was going to come over and stomp Mr. Asher's head in. (*Id.* at 468). She turned around and was walking back through the garage when she heard a gun fired. (*Id.* at 468). She saw Mr. Stephens standing up against the property line fence on the Ashers' property when he climbed back over the fence onto his own side. (*Id.* at 469). She

had a discussion with her husband about what took place and went back into their house. (*Id.* at 470). Mr. Asher was very afraid. (*Id.*). She said he did not have a volatile temper or communicate with people by yelling and cursing at them. (*Id.* at 484). Ms. Asher recalled an officer coming to their home in 2014 to discuss the threats her husband was getting from Mr. Stephens. (*Id.* at 495).

Mr. Asher testified in his own defense. After moving to the Garfield Road property, he had no disputes over property lines and did not remove any fences. (9/15/16 RP 513-14). He met Mr. Stephens and they got long for a while. (*Id.* at 514). Things changed when Mr. Stephens got bossy about telling him what to do to take care of his property. (*Id.* at 517). Mr. Asher told him to leave him alone since they were not getting along and to stay away. (*Id.*). Mr. Stephens got more aggressive and called Mr. Asher names and cussed him out. (*Id.* at 518). Mr. Stephens said he would kick his ass and stomp his brains and threatened to kill him. (*Id.* at 518-19).

Mr. Asher put down an old mare and buried her, causing more conflict with Mr. Stephens. (9/15/16 RP 519-20). When he buried the horse, Mr. Stephens came up cussing him out and calling him names. (*Id.* at 522). Every time Mr. Asher was out

mowing the lawn or the grass on his fields, Mr. Stephens came out hollering and cussing at him. (*Id.* at 523). Mr. Asher said Mr. Stephens knew he had medical problems and was not going to fight him. (*Id.* at 524-25). Mr. Stephens had come over to Mr. Asher's side of the property before and he told him to stay on his own side. (*Id.* at 526-28).

As to the 2011 incident witnessed by Mr. Manuel, Mr. Asher was on a walk when Mr. Stephens came running out, yelling he was going to stomp and kill him since he finally got him off his property. (9/15/16 RP 531). Mr. Asher told him he was not going to whip his ass, but Mr. Stephens kept it up. (*Id.* at 532). Mr. Asher had a gun on him and he turned so Mr. Stephens could see it just to let him know he had it. (*Id.* at 533). His neighbor ran back home. (*Id.*).

Mr. Asher had put up a wire fence because Mr. Stephens told him if he did not, he would kill his dog. (9/15/16 RP 538). But he never had a problem with his dog getting off his property. (*Id.*). Mr. Asher did put a fence up. It was there for at least 5 years or longer and Mr. Stephens never said anything about it being on his property until September 7, 2015. (*Id.* at 539). But Mr. Asher had put the fence on his side of the property. (*Id.* at 540).

On September 7, 2015, Mr. Asher went to feed the horses when he heard a voice calling him. (9/15/16 RP 540-42). It was Mr. Stephens, who proceeded to call him an SOB and add he was going to come over, kill him, and tear his fence out. (*Id.* at 543). Mr. Asher told him to go back to his house; he would not. (*Id.*). Mr. Stephens started climbing the fence and was on top of it getting ready to jump off onto Mr. Asher's side. (*Id.* at 544). Mr. Asher took his gun out and warned him to stop, but he did not. (*Id.*).

Mr. Asher pretty much had a gun on him most days as he was afraid of Mr. Stephens' threats. (9/15/16 RP 544). He came over the fence onto Mr. Asher's side of the property. (*Id.* at 545). Wondering what to do next, Mr. Asher took the gun out and held it. (*Id.*). He was 15 feet away from Mr. Stephens and had to do something to stop him. (*Id.* at 546). After the shot, Mr. Stephens froze up. He was still on Mr. Asher's property then, but left and did not say another word. (*Id.* at 547). Mr. Asher was concerned for his safety and was scared to death. (*Id.*).

Ms. Asher was also there and they both went back into their house. (9/15/16 RP 549). Mr. Asher put the gun away and later called law enforcement. (*Id.*). They eventually arrived while he was out front. (*Id.* at 550). Deputy Kravtsov had a gun drawn on

him. (*Id.* at 554). Mr. Asher was cuffed and taken to a patrol car. (*Id.* at 556). He told the deputy what happened. He did not tell him he went back into the house to get his gun and came back out with it. (*Id.* at 560).

Mr. Stephens had no permission to be on Mr. Asher's property. (9/15/16 RP 562-63). Mr. Asher did not point the gun at him and just wanted to scare him back across the fence. (*Id.* at 598). He did not initiate contact with Mr. Stephens. (*Id.* at 608).

The defense had no exceptions to the court's instructions. (9/19/16 RP 695). The jury convicted Mr. Asher of second degree assault with a firearm enhancement, but acquitted him of harassment. (CP 93-95). Although the defense asked for an exceptional sentence down because Mr. Stephens was an initiator and provoker of the incident to a significant degree, the court did not consider this request. It sentenced him to a standard range of 39 months, including the 36-month firearm enhancement. (CP 174, 178). The Court of Appeals affirmed. (App.).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Asher contends this Court should accept review because the decision of the Court of Appeals conflicts with other appellate decisions. RAP 13.4(b)(1), (2).

The Court of Appeals gave short shrift to the self-defense issue:

The claim of insufficient evidence due to the failure to disprove self-defense fails for a very simple reason. Since the jury was not required to believe that evidence, the remaining evidence amply supports its verdict. (App. at 4).

Mr. Asher acted in self-defense. The State must prove beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Since a claim of self-defense negates the essential element of intent for second degree assault, the burden is on the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984); *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552, *review denied*, 124 Wn.2d 1012 (1994). The court gave a self-defense instruction here. (Instruction 16, CP 86).

For self-defense, the defendant must have subjectively feared he was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Evidence of self-defense must be viewed

“from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury then is to stand in the shoes of the defendant, consider all the facts and circumstances known to him, and determine what a reasonable person in the same situation would have done. *Id.*

Confronting Mr. Asher at the property line, Mr. Stephens initiated the incident by telling him his fence had to come down. (9/13/16 RP 98). Mr. Stephens was going to come over, tear the fence out, kill his dog, and kill him. (9/15/16 RP 538, 543). Mr. Asher was concerned for his safety and scared to death of Mr. Stephens’ coming over the fence to stomp his head in. (*Id.* at 544-46). Mr. Asher shot his gun into the ground to scare and stop him. (*Id.* at 547). Even viewed in a light most favorable to the State, its evidence failed to disprove beyond a reasonable doubt that Mr. Asher acted in self-defense. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Indeed, on this same evidence, the jury was unable to reach a verdict in the first trial. (CP 31).

The Court of Appeals nonetheless concluded:

In short, the evidence allowed the jury to conclude that one or more elements of self-defense were not present during this incident. Accordingly, the State

disproved self-defense beyond a reasonable doubt. Although there was evidence supporting the defense, there was also contrary evidence that reasonably allowed the jury to conclude, as it did, that Mr. Asher was not acting in self-defense. (App. at 6).

This reasoning is contradictory and does not support the court's conclusion. As to the element of fear of harm, the testimony relied on by the court came from a deputy sheriff, not the defendant himself. That direct testimony from Mr. Asher conflicted with the deputy's version.

The jury decides credibility, but it cannot find facts through guess, speculation, and conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In order to find Mr. Asher did not act in self-defense beyond a reasonable doubt, the jury necessarily had to guess as to whether the deputy or Mr. Asher was telling the truth at trial. Even so, the deputy's credibility as to Mr. Asher's fear of harm and "disproof" of that element did not rise to the requisite level of establishing Mr. Asher did not act in self-defense beyond a reasonable doubt. *Callahan*, 87 Wn. App. at 929.

The court's focus on the deputy's testimony ignores the jury's charge to stand in the shoes of the defendant, considering all the facts and circumstances known to him, and determine what a

reasonable person in the same situation would have done. Its decision conflicts with *Janes*. 121 Wn.2d at 238.

The court then speculates it was not objectively reasonable for Mr. Asher to believe he was in danger of physical harm from Mr. Stephens because there had been no physical altercations before. This reasoning harkens to propensity evidence banned by ER 404(b) evidence, *i.e.*, if it happened before, it must have happened this time. Here, the court improperly relied on the variation that if it did not happen before, it did not happen now. This is not a reasonable inference from the evidence and the decision conflicts with *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

As for the failure of the trial court to consider Mr. Asher's request for an exceptional sentence, the Court of Appeals determined he was unable to establish an abuse of discretion. (App. at 6). To the contrary, he can and did.

Mr. Asher asked for an exceptional sentence down based on the mitigating circumstance that willing participation by a victim is a factor for consideration. RCW 9.94A.535(1)(a); *State v. Clemens*, 78 Wn. App. 458, 464, 898 P.2d 324 (1995). The SRA provides that certain failed defenses may constitute mitigating factors

supporting an exceptional sentence below the standard range.

State v. Jeannotte, 133 Wn.2d 847, 947 P.2d 1192 (1997).

State v. Whitfield, 99 Wn. App. 331, 994 P.2d 222 (1999), supports the imposition of an exceptional sentence down for Mr. Asher. *Whitfield* involved a guilty plea to third degree assault where the trial court imposed a sentence below the standard range based on the mitigating factor that, to a significant degree, the victim was the provoker of the incident. The victim's "insistent verbal confrontation and provocation" justified distinguishing the defendant's conduct from the typical third degree assault. *Id.* at 336. This is Mr. Asher's situation where his self-defense claim failed, but Mr. Stephens' conduct as the provoker could properly be considered as a mitigating circumstance. *State v. Smith*, 124 Wn. App. 417, 436-37, 102 P.3d 158 (2004).

The Court of Appeals stated the trial court did consider Mr. Asher's request for an exceptional sentence. (App. at 7). But the record speaks for itself and the trial court clearly did not. In its imposition of a standard range sentence, the court completely failed to consider at all the request for an exceptional sentence downward even though the defense argued the victim was the initiator and provoker of the incident to a significant degree, a

mitigating factor justifying an exceptional sentence. (10/17/16 RP 885, 892-96).

The Court of Appeals erroneously states:

The trial court considered his request for an exceptional sentence and even determined that one of the mitigating factors he urged the court to consider was present. (App. at 7).

The record shows the trial court did not even address, much less consider, his request for an exceptional sentence. Rather, the “mitigating factor” the trial court mentioned had nothing to do with whether to impose an exceptional sentence. The Court of Appeals completely ignored the context of the court’s observation:

In juvenile, we look at mitigating factors and aggravating factors. The one mitigating factor is you don’t have any criminal history at all. To be 69 years old and not have any criminal charges or criminal history is a huge mitigating factor. (10/16/17 RP 893-94).

This comment had nothing whatsoever to do with Mr. Asher’s request for an exceptional sentence. The record shows the court failed to consider the defense request.

Contrary to the Court of Appeals’ observation, the trial court did not find one of the mitigating factors Mr. Asher urged it to consider. The “mitigating factor” mentioned by the trial court had to do with his lack of a criminal history in the context of what happens

in juvenile court. But Mr. Asher was 69 years old and obviously not a juvenile. It is plain as day the court was not looking at this “mitigating factor” in considering whether to impose an exceptional sentence. The lack of criminal history does not justify a downward departure in any event. *State v. Freitag*, 127 Wn.2d 141, 144, 896 P.2d 1254 (1995).

The trial court’s explanation of how it was applying the mitigating factor was lost to the Court of Appeals in its misreading of the record:

So I am going to, though, take that mitigating factor. I’m going to sentence you to the low end of three months, but you do have 36 months to do on the firearms enhancement. (10/16/17 RP 896).

The only factor raised for an exceptional sentence down was Mr. Stephens was to a significant degree the initiator and provoker of the incident. (10/16/17 RP 885). The trial court simply did not address that factor and did not even consider the exceptional sentence request at sentencing. (*Id.* at 893-98). The Court of Appeals’ finding to the contrary is neither supported by the record nor by the law.

Discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

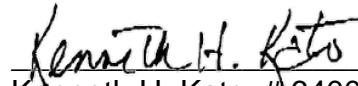
As shown by its remarks at sentencing, the court failed to consider Mr. Asher's request for an exceptional sentence down and therefore abused its discretion by refusing to exercise it. *Id.* The Court of Appeals' decision conflicts with other appellate decisions so review is warranted. RAP 13.4(b)(1), (2).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Asher respectfully urges this Court to grant his Petition for Review.

DATED this 7th day of August, 2018.

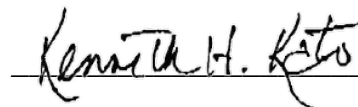
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 7, 2018, I served a copy of the petition for review by USPS on Willie C. Asher, # 394428, PO Box 2049, Airway Heights, WA 99001; and through the eFiling portal on Brian O'Brien at his email address.



APPENDIX

FILED
JULY 10, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 34902-1-III
Respondent,)	
)	
v.)	
)	
WILLIE C. ASHER,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — William Asher appeals from his conviction at trial for second degree assault while armed with a firearm, taking issue with the rejection of his self-defense claim and with the court’s refusal to grant him an exceptional sentence. Since the jury and the trial court were within their rights to reject the defense and his proposed mitigating factors, we affirm.

FACTS

This case involves two neighbors in rural Spokane County whose relationship deteriorated over time. The tipping point came in 2011 after Mr. Asher buried a dead horse near his property line with neighbor Tom Stephens. Mr. Stephens believed that the carcass was buried too shallow, resulting in dogs and coyotes exposing the grave and leading to stench and flies on his property. Mr. Asher disagreed with these claims.

After that incident, the two men seldom conversed without insults and vulgarities being exchanged. The incident leading to the current charge occurred September 7, 2015. That day Stephens noted that several of his calves had suffered injuries to their legs. He believed the cause was a wire fence of Asher's that Stephens believed was six inches on to his property.

Seeing Asher outside, Stephens stood on the second rail of a different fence¹ and pointed out the post marking the property line and told Asher he needed to move the wire fence because of the injuries it was causing. An argument began. According to Stephens, Asher pulled out a gun and fired it into the ground in front of him. He then raised the gun toward Stephens. Stephens then left to call 911.

Asher testified that Stephens cursed at him and threatened to kill him, and then began climbing the fence. Asher warned him to stay back and told him to go home in order to call 911. When Stephens refused to stop climbing the fence, Asher fired the gun into the ground.

Several sheriff's deputies responded. Asher told one of them that he intentionally fired into the ground in order to scare Stephens. He also told the deputy that he did not fear for his own safety, but fired the gun to prevent Stephens from moving the wire fence.

¹ The area in question is a small triangular plot where several fences come together.

The prosecutor filed charges of harassment and second degree assault while armed with a firearm. The matter proceeded to jury trial twice, with the first jury unable to return a verdict. The second jury acquitted on the harassment count, but convicted Mr. Asher of second degree assault while also finding that he was armed with a firearm at the time of the offense.

The defense sought an exceptional sentence, arguing that two mitigating factors existed—Mr. Asher was 69 years of age and had no prior criminal history, and that Mr. Stephens was the initiator of the conflict. The trial court agreed that Mr. Asher’s lack of criminal history was “a huge mitigating factor,” but rejected the argument that Stephens initiated the conflict. The court found Mr. Asher’s contentions unpersuasive, noting that he had returned to the scene with his gun, and that he could have called 911 instead of urging Stephens to do so. In response to a written statement that he feared for his life, the judge also told Asher that if he truly had been afraid for his life, firing the gun into the ground would not have protected him. The court also was concerned that Asher did not understand how he had agitated the situation and had never done anything to calm matters.

The court declined to impose an exceptional sentence, but did impose a bottom end term of three months plus a 36 month enhancement. Mr. Asher promptly appealed to this court. A panel considered the matter without hearing argument.

ANALYSIS

Mr. Asher raises two arguments in this appeal. First, he contends the evidence was insufficient to convict him because the State failed to disprove his claim of self-defense. He also argues that the court erred in rejecting his request for an exceptional sentence. We review the two claims in the order presented.

Sufficiency of the Evidence

The claim of insufficient evidence due to the failure to disprove self-defense fails for a very simple reason. Since the jury was not required to believe that evidence, the remaining evidence amply supports its verdict.

Sufficiency of the evidence review is subject to very well settled standards. Appellate courts review such challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* This court also must defer to the finder of fact in resolving conflicting evidence and determining credibility. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

When a jury is instructed on self-defense, the State is required to disprove the defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984). Self-defense is evaluated “from the standpoint of a reasonably prudent

person who knows all the defendant knows and sees all the defendant sees.” *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). This analysis involves both subjective and objective components. *Id.* at 242-243. For the subjective component, the jury must “place itself in the defendant’s shoes and view the defendant’s acts in light of all the facts and circumstances the defendant knew when the act occurred.” *Id.* at 243. For the objective component, the jury must “determine what a reasonable person would have done if placed in the defendant’s situation.” *Id.*

These two components of self-defense break down into four elements: “(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable”; “(3) the defendant exercised no greater force than was reasonably necessary”; and “(4) the defendant was not the aggressor.” *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Disproof of any one of these elements negates the self-defense claim. *Id.*

Here, the prosecutor argues that the evidence allowed the jury to conclude that none of these elements were satisfied. We need not go that far in our analysis. A couple of examples seen in the record show that the jury had evidentiary reasons for rejecting self-defense. As noted previously, a deputy sheriff recited for the jury his conversation with Mr. Asher following the incident. In that conversation, Mr. Asher told the deputy that he did not fear for his own safety. Although that statement conflicted with Mr. Asher’s trial testimony, the jury was free to credit the original statement and conclude

that Mr. Asher did not subjectively believe there was need to shoot the gun. This evidence disproved the first element of self-defense.

Another example involves the second element. Given the detailed history of the previous confrontations between Asher and Stephens that was put before the jury, none of which developed into a physical altercation, the jury might also have concluded that it was not objectively reasonable for Mr. Asher to believe he was in danger of physical harm from Mr. Stephens. This evidence disproved the second element of self-defense.

In short, the evidence allowed the jury to conclude that one or more elements of self-defense were not present during this incident. Accordingly, the State disproved self-defense beyond a reasonable doubt. Although there was evidence supporting the defense, there was also contrary evidence that reasonably allowed the jury to conclude, as it did, that Mr. Asher was not acting in self-defense.

The evidence supported the jury's verdict that Mr. Asher assaulted his neighbor with a firearm. The evidence was sufficient.

Sentencing

Mr. Asher also contends that the trial court erred in failing to impose an exceptional sentence. He is unable to establish that the trial court abused its discretion.

The court imposed a standard range sentence. By statute, reaffirmed by our case law, Mr. Asher cannot challenge that sentence. RCW 9.94A.585(1); *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005); *State v. Friederich-Tibbets*, 123 Wn.2d 250,

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252, 866 P.2d 1257 (1994) (refusal to grant exceptional sentence). Instead, all he can challenge is the trial court's failure to follow a *mandatory* procedure at sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Process-based challenges must point to a failure of the trial court to follow a specific process required by the Sentencing Reform Act. *Id.* The refusal to consider a statutorily authorized procedure is an abuse of discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Asher cannot establish error. The trial court considered his request for an exceptional sentence and even determined that one of the mitigating factors he urged the judge to consider was present. However, the court was not required to grant the requested sentence. An exceptional sentence is available for those instances where the facts and circumstances of the case present "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535.

The standard ranges reflect the legislative balancing of the purposes of the Sentencing Reform Act of 1981, ch. 9.94A RCW. *State v. Pascal*, 108 Wn.2d 125, 137-138, 736 P.2d 1065 (1987). Since criminal history is one of the factors considered in establishing the standard range, the absence of criminal history is not a basis for an exceptional sentence. *Id.* at 137. Although the trial judge was impressed with Mr. Asher's lack of criminal history, it simply was not a compelling reason to vary from the

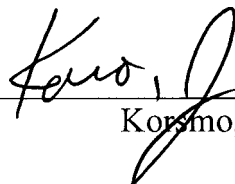
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legislature's determination of an appropriate sentence range. The trial court did not find that Mr. Stephens was the initiator of this incident and, thus, that potential mitigating circumstance was not present in this case. The request for an exceptional sentence failed.

As it was required to do, the trial court considered the exceptional sentence request. There was no abuse of the trial court's sentencing discretion.

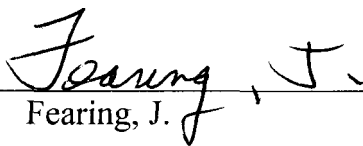
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

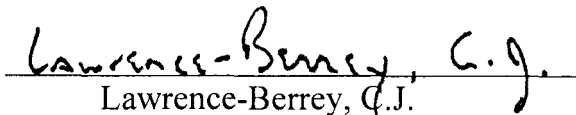


Koro, J.

WE CONCUR:



Fearing, J.



Lawrence-Berrey, C.J.

August 07, 2018 - 8:45 AM

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