

64631-1

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NO. 64631-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN THOMPSON,

Appellant.

2010 MAY 28 PM 4:46
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court err in permitting the prosecutor to introduce evidence that on the day of the incident, appellant had stated to others he was a “cage fighter”?

2. Did the prosecutor engage in flagrant misconduct during his closing argument?

B. STATEMENT OF THE CASE

1. FACTS

During the Spring of 2009, a young woman named Niki Macheta started communicating with appellant via text messages. Report of Proceedings, November 16, 2009, hereinafter cited as 2RP, 17. On Saturday, May 16, 2009, after several months of this type of communication, Macheta and appellant met and spent the day in a park. 2RP 18. Appellant had his daughter, Alyssa, age 10, along with him. 2RP 18.

At this time, Macheta was renting a room in a house owned by Carol Knigge. 2RP 16. Macheta had been long-time friends with Carol and her son Michael. 2RP 15. For several months, Macheta and Michael Knigge were involved in a sexual relationship they described as a “friendship with benefits,” but this relationship

had ended prior to Macheta moving into the house. 2RP 15. In order to eliminate any jealousy or bad feelings between Macheta and Michael Knigge, Carol Knigge had instituted a rule that Macheta could not bring men over and Michael could not bring women over when they both were in the house. 2RP 35.

Because it was getting late, and because appellant had a three and a half hour drive back to his residence in Kelso, WA, Macheta called Carol Knigge to ask if they could stay over at her house. 2RP 19. Carol Knigge was having a wedding reception for some friends, and she allowed them to come over. 2RP 20. During the wedding reception, Macheta got extremely intoxicated. 2RP 21. Although appellant was drinking as well, Macheta did not know if he was intoxicated. 2RP 21-22. At approximately 10:30 pm, Macheta and appellant went up to her room to sleep. 2RP 22. Alyssa was allowed to sleep on a couch in the living room. 2RP 22.

Sometime later, Michael Knigge, who does not drive, was picked up at a friend's house where a party was going on and given a ride back to his house. 2RP 61. Michael Knigge is a very slight individual; on the day of the incident, he weighed between 115 and 120 pounds. 2RP 64. The appellant, on the other hand, weighs

170 pounds and is very muscular. Report of Proceedings, November 17, 2009, hereinafter referred to as 3RP, 51.

Furthermore, earlier on the day of the incident, Michael Knigge had sprained his ankle and it was painful for him to walk. 2RP 98.

Michael Knigge had been drinking at the party and he described his condition as not being fully intoxicated, but feeling "buzzed." 2RP 68.

While eating dinner downstairs, Michael Knigge saw appellant walk by a couple of times. When he learned that Macheta was spending the night with appellant at the house, he became angry that Macheta had violated their agreement. 2RP 62. According to Macheta, appellant was aware that Michael Knigge might have jealousy issues over appellant staying there. 2RP 38.

At this point in the evening, with the wedding reception having been concluded, Carol Knigge and her partner decided to go to a nearby casino. 2RP 23. Michael Knigge went up to his room, which was across the hall from the room Macheta and appellant were staying in, and started playing rap music very loudly on his stereo. 2RP 23. Macheta went into his room and attempted to persuade Michael Knigge to turn his stereo down, but he refused. 2RP 24. According to Michael Knigge, appellant then

came into his room and told him to turn the music down. 2RP 64. Michael Knigge refused and told appellant he had no authority in that house to tell him to do anything. 2RP 64. Appellant then invited Michael Knigge to go outside and fight him. 2RP 64. Michael Knigge ordered appellant to leave his residence. 2RP 64. He testified that there is no violence permitted in his house because they don't deal with things that way. 2RP 64. Michael Knigge testified he had no intention of fighting appellant because he is "not a fighter." 2RP 65.

While the confrontation between appellant and Michael Knigge was going on, Macheta called Carol Knigge to advise her of these circumstances. 2RP 24. Carol Knigge asked Macheta and appellant to leave the residence. 2RP 25. Macheta agreed that was the best option; she then told appellant they had to leave. 2RP 25. Appellant agreed and went out to his car to warm it up. 2RP 25. According to Macheta, appellant told her that Michael Knigge was pissing him off and threatening the well-being of his daughter. 2RP 55.

While appellant was standing by his car, Michael Knigge came out onto the front porch to smoke a cigarette. 2RP 26. According to the rules of the house, he was not permitted to smoke

inside the house. 2RP 26. He was talking with his mother on a cell phone, and his mother kept telling him to go to her car and lock himself inside, because it was a “safe place.” 2RP 106.

According to Macheta, appellant started to walk toward Michael Knigge, and as he got closer, appellant began to move “fairly quickly.” 2RP 27. Fearful that appellant was going to attack Michael Knigge, Macheta tried to grab appellant around the waist and pull him back. 2RP 27. Macheta responded too late, and appellant punched Michael Knigge twice in the face. 2RP 27. According to Macheta, Michael Knigge had made no gestures toward appellant and did nothing of a physical nature with his hands prior to the attack. 2RP 28.

Michael Knigge testified that he was standing on the porch talking to his mother on the cell phone and lighting a cigarette. 2RP 66. He doesn’t remember anything after that. 2RP 66. He never saw appellant come up to him. 2RP 66. According to Carol Knigge, she was talking on the phone with Michael when she heard Macheta scream, and the phone went dead. 2RP 106.

As a result of this assault, Michael Knigge suffered a crushed orbital socket, a cut on his face that required eight stitches, and the cracking of one of his front teeth. 2RP 67. Michael Knigge

eventually lost the tooth and has not been able to replace it.

2RP 67. Carol Knigge testified she was so traumatized by these events that it took over four days before she could look at her son's face. 2RP 109.

According to Macheta, appellant was in a hurry to leave the residence after the attack. 2RP 29. He told Macheta he was a cage fighter and his hands are considered lethal weapons.

2RP 56. Appellant stated if the police arrived, they would put him away for a long time. 2RP 56. Appellant drove away from the residence at a high rate of speed, 3RP 41, and passed Carol Knigge as she pulled up to the house. 3RP 42.

Appellant took the stand in his own defense and stated he struck Michael Knigge because he was scared of him. 3RP 36, 51. Appellant stated he hit Michael Knigge in the face twice, and that Michael "fell like a sack of potatoes." 3RP 38. According to appellant, his blows landed "milliseconds" apart. 3RP 41.

Appellant also admitted the following during cross-examination:

1. He did not provide Michael Knigge with any first aid;
2. He did not tend to any of Michael Knigge's wounds;

3. He did not wait to ensure Michael Knigge was not severely injured;
4. He did not wait to talk with Carol Knigge; and
5. He did not wait to speak with the police.

3RP 55.

Appellant also acknowledged on cross-examination that he had been a cage fighter and had participated in four separate cage fights. 3RP 49. He admitted he told guests at the reception he was a cage fighter. 3RP 47. He described cage fighting as a form of sport combat where different martial arts such as wrestling, boxing, karate, and jujitsu are employed. 3RP 48. Appellant also admitted during redirect that he was a wrestler in high school. 3RP 60.

C. ARGUMENT

1. THE TRIAL JUDGE DID NOT ERR WHEN SHE PERMITTED THE STATE TO INTRODUCE TESTIMONY THAT APPELLANT HAD TOLD OTHERS HE WAS A CAGE FIGHTER.

Evidence Rule 404(b) states the following:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

In its case-in-chief, the State sought permission from the trial judge to introduce testimony that appellant had stated to Macheta and others at the reception that he was a cage fighter. The purpose of this evidence was not an attempt to prove any aspect of appellant's character, but rather to show his motive, intent, and plan in rapidly departing from the scene before the police arrived. Appellant's manner of leaving the Knigge residence before the arrival of the authorities was a form of flight. Flight constitutes circumstantial evidence of guilt. State v. Baxter, 68 Wn.2d 416, 421, 413 P.2d 638 (1966). The introduction of this testimony was to prove appellant's flight from the scene was intentional and purposeful, and not the result of mistake, accident or ignorance. The introduction of this evidence was proper under ER 404(b), and the trial judge engaged in a proper balancing of the relevance of this evidence against its potential prejudice. 2RP 69.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). Discretion is abused if it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Grant, 83 Wn. App. 98, 105,

920 P.2d 609 (1996). A trial court abuses its discretion when a reviewing court finds that no reasonable person would have taken the view that was adopted by the trial court. In re Marriage of Nicholson, 17 Wn. App. 110, 114, 561 P.2d 1116 (1977).

Under ER 404(b), when a defendant takes the stand and testifies in his own behalf, the State may use prior acts to rebut any material assertion made on direct. State v. Hernandez, 99 Wn. App. 312, 321, 997 P.2d 923 (1999). Prior bad acts are admissible if they are logically relevant to a material issue before the jury. State v. Thompson, 47 Wn. App. 1, 12, 733 P.2d 584 (1987). The test for logical relevance is whether the evidence is necessary to prove an essential element of the crime charged. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

In this trial, the burden was upon the State to prove beyond a reasonable doubt that appellant was not entitled to the defense of self-defense or defense of another. When appellant took the stand in his own defense, he testified on several occasions he was “absolutely scared” of Michael Knigge. 3RP 36, 51. A prosecutor is entitled to introduce evidence of acts inconsistent with a defendant’s portrayal of himself. State v. McFadden, 63 Wn. App. 441, 450, 820 P.2d 53 (1991). Evidence that appellant was a cage

fighter was of primary importance in the jury's determination of appellant's credibility and whether his claim of self-defense was justified.

The trial court did not abuse its discretion in allowing this evidence to be introduced at trial.

2. THE PROSECUTOR DID NOT ENGAGE IN FLAGRANT MISCONDUCT DURING HIS CLOSING ARGUMENT.

Appellant next argues that the prosecutor engaged in misconduct that was both "flagrant" and "ill-intentioned" during his closing argument. Appellant is incorrect in this assertion.

To begin with, the trial court never put any such limitations upon the use of the cage fighter evidence. 2RP 69-71. She found the evidence properly admissible in the State's case-in-chief regarding appellant's flight from the scene. When appellant took the stand and contended he was "absolutely scared" of Michael Knigge, the trial court properly granted the State's request to cross examine him about his experience as a cage fighter.

A prosecutor has “wide latitude” in closing argument to draw and express reasonable inferences from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Furthermore, allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). The State’s closing argument in this case did not constitute misconduct.

It is important to note that defense counsel, a very experienced and proficient trial attorney, did not object to the remarks by the prosecutor in closing argument. A defendant’s failure to object to a prosecuting attorney’s improper remark constitutes a waiver of such error unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132 Wn.2d at 668.

The failure to request a curative instruction or move for a mistrial “strongly suggests” to a reviewing court that the argument or event in question did not appear critically prejudicial to appellant

in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Furthermore, reversal is not required if the error could have been avoided by a curative instruction but the defense failed to request one. State v. Martin, 41 Wn. App. 133, 140, 703 P.2d 309 (1985).

The State contends there was no error in making this argument to the jury, and had defense counsel been concerned about the impact of such an argument, she should have asked the trial court to instruct the jury to disregard these comments. By failing to object at trial, appellant has waived any claim of error on appeal.

Finally, a defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. Luvane, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). There has been no showing by appellant that it was erroneous for the prosecutor to make these statements to the jury, much less that the remarks were “flagrant” and “ill intentioned.”

D. CONCLUSION

For the foregoing reasons, this Court should affirm appellant's conviction for Assault in the Second Degree.

DATED this 28th day of May, 2010.

Respectfully submitted,

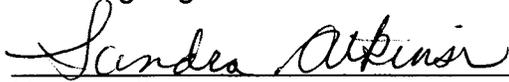
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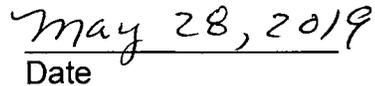
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Notice of Appearance and Brief of Respondent, in STATE V. JOHN THOMPSON, Cause No. 64631-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Sandra Atkinson
Done in Seattle, Washington



Date