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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34247-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
CLARK COUNTY CAUSE NO. 05-8-00938-7
DIVISION II, COURT OF APPEALS NO. 34247-2-II

STATE OF WASHINGTON,

RESPONDENT,

vs.

JOSHUA JAMES HOPKINS

APPELLANT.

BRIEF OF RESPONDENT

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A. RESPONSE TO ISSUES PRESENTED BY THE APPELLANT

- 1. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER ONE: The trial court properly entered findings of fact and conclusions of law that were supported by the evidence adduced at trial.**
- 2. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER TWO: The trial court properly considered the defenses as presented by Joshua Hopkins, and as a result, did not deny him a right to a fair trial under either the Washington Constitution, Article 1, section 3, or the United States Constitution.**

B. STATEMENT OF THE CASE

1. STATEMENT OF THE FACTS

On July 19, 2005, victim Jason Pumphrey entered the Schuck's parking lot in Camas, Washington. (RP 44, 86, 87) After Pumphrey arrived at the Schuck's parking lot a confrontation occurred involving Joshua Hopkins, Christopher Molash and Jacob Tyler Childreth. (RP 99, 112, 151) After the initial confrontation had ended, no one involved had sustained any injury. (RP 99, 143, 151) Christopher Molash re-ignited the altercation by throwing a bottle at Pumphrey. (RP 56, 107, 147, 148, 149) After Molash threw the bottle, fighting began again with Hopkins, Molash and Childreth surrounding Pumphrey and striking him. (RP 46, 52-53, 54, 71, 94, 102, 106-107,113) During this portion of the altercation, one of

the youth involved picked up Pumphrey and threw him to the ground. (RP 107-109).

After Pumphrey had been thrown to the ground by one of the youths, and laid there immobile, Christopher Molash walked up to him, and kicked him two times in the head and face. (RP 97, 98, 103, 109, 110).

Due to the force used by the youths, Pumphrey sustained substantial bodily injury which required him to spend multiple days in the hospital. (RP 48-49) Victim's injuries included: a fracture to his cheekbone (a fracture of the left zygomatic arch), a fracture to the T-11 vertebrae in his back, and fractures to two of his ribs. (RP 25, 26-27, 30, 35, 40) In addition, he suffered contusions and abrasions in areas including his elbows and knees. (RP 23, 25) The injuries sustained by Pumphrey required substantial force which likely was caused by separate types of force and/or impacts. (RP 28, 41)

As a result of this incident neither Jacob Tyler Childreth nor Christopher Molash sustained any serious injuries. (RP 111, 143, 152, 153) Joshua Hopkins may have received minor redness to his face or neck and a split lip. (RP 111,112, 150). Childreth, Molash, and Hopkins were all able to walk away from the incident and did not require or seek medical attention. (RP 111,112, 151, 152, 153). In addition, at no point during or

after this incident occurred, did Joshua Hopkins, Christopher Molash, or Jacob Childreth contact law enforcement. (RP 112, 154-155).

The Court, after hearing all of the evidence, and the argument of counsel, found Mr. Hopkins guilty of the crime of Assault in the Second Degree . (RP 172) In making this ruling, the Court provided a thorough and complete analysis for its decision, and thoroughly explained why the Court did not believe that self defense and defense of others was appropriate in this case. (RP 169-172)

2. PROCEDURAL HISTORY

On August 12, 2005, the State filed an information charging Jacob Childreth with one count of Assault in the Second Degree. On August 19, 2005, Christopher Molash was charged with Assault in the Second Degree and Tampering with a witness. On August 30, 2005, Joshua Hopkins was charged with one count of Assault in the Second Degree. (CP 1)

On October 7, 2005, Mr. Hopkins' matter was severed from his co-respondents Mr. Molash and Mr. Childreth's matters. (RP 5-7) On December 7th, 2005, Mr. Hopkins was tried to the bench before the Clark County Superior Court, and was convicted of Assault in the Second Degree. (See Verbatim Report) Based upon the conviction, the trial court

ordered a predisposition report, and the matter was set over for sentencing.
(RP 172, 173, 175, 176)

On December 21, 2005, Joshua Hopkins was sentenced on count one to 15-36 weeks for the Assault in the Second Degree. (CP 12) On December 31, 2005, Ms. Peterson filed a Notice of Appeal on behalf of her client, Joshua Hopkins. (CP 28)

C. ARGUMENT

1. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER ONE THROUGH NINE: The trial court did not err when it entered appropriate findings and conclusions of law that were supported by the evidence.

The purpose of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187(1998). Written findings and conclusions are necessary in order to insure “efficient and accurate” appellate review. State v. Commodore, 38 Wn. App. 244, 249-50, 684 P.2d 1364, review denied, 103 Wn. 2d 1005 (1984).

In this case the findings of fact and conclusions of law were supported by the evidence produced at trial. Obviously since Mr. Hopkins was a co-respondent with Mr. Molash and Mr. Childreth, the findings of

fact and conclusions of law would in fact be similar to those entered in the Molash and Childreth cases. Obviously since all three boys were charged with the same crime, Assault in the Second degree, that the issues presented and the facts testified to at trial would in fact be consistent, and would lead to similar findings of fact and conclusions of law.

As to finding of fact number one, three, and four, each were in fact, supported by the evidence presented at trial. As to finding of fact number one, the evidence was clear that Jason Pumphrey entered the Schuck's parking lot. (RP 44, 86, 87) Appellant then indicates that the finding is not appropriate because it omits some details. The problem with this claim, is that during the trial, the testimony of the witnesses differed as to how the initial contact came to occur. Mr. Pumphrey testified that he was initially pulled out of his vehicle. (RP 72) Ms. Fich testified that when they were walking along the road, Mr. Pumphrey passed them in his vehicle, and yelled for them to get out of the road. (RP 87) Based upon this initial contact, Jake Childreth then flipped off the driver of the car. (RP 87) In response to this, per Ms. Fich, the car did a u-turn and pulled in the Schuck's parking lot where Mr. Pumphrey got out of his car, and approached Childreth. (RP 87) Based upon the controversy, and the minimization of the events by Ms. Fich, the court was not precisely sure

how the initial events unfolded. The court only indicated that Mr. Pumphrey may have precipitated the events by swerving at the kids, yelling at them, and/ or maybe shoving one of the parties. (RP 169) However, regardless of how the initial incident began, even if Mr. Pumphrey had possibly approached Childreth and/or pushed Hopkins initially, it has no impact on what occurred after this initial contact had ended. As a result, since there existed controversy with what actually occurred, and that it has no bearing on the outcome of the case, it was not required to be included in the findings.

Finding of fact number three and four are also supported by the evidence presented at trial. Based upon the evidence at trial, there did exist two separate incidents. The first being the initial contact which occurred between Jason Pumphrey, and Mr. Hopkins and Mr. Childreth. During this first portion of the incident, there existed only yelling and maybe a push. Ms. Fich indicated that Pumphrey first got in Childreth's face and then Hopkins' face and was simply yelling. (87, 99) Fich indicated that Pumphrey did not strike or touch Childreth, he simply yelled at him. (RP 87) Fich then reported that Pumphrey got into Jake's face, but wasn't sure if Pumphrey touched Hopkins, but indicated that Hopkins hit back. (RP 87-88, 99). No true injuries had occurred at the conclusion of

this portion of the incident, Fich reported that Hopkins was just mad. (RP 87, 99, 143) The altercation was then re-ignited when the Dr. Pepper bottle was thrown. (RP 56) Hopkins indicated that while he was walking away from the initial incident, he observed Molash throw the bottle. (RP 149) Pumphrey indicated that after the bottle was thrown, “they were all walking towards me in a group”. (RP 56) At this point, Childreth, Molash and Hopkins surrounded Mr. Pumphrey, and the second portion of the conflict occurred.

Likewise, finding of fact number five was also supported by the evidence. Evidence was clear that Childreth, Hopkins, and Molash did in fact surround the victim, and assaulted him by continuously striking him in the head and body. (RP 46, 52, 53, 54, 70, 94, 102) In addition, as indicated in finding of fact number five, the evidence supported the finding because the testimony indicated that during the altercation, Mr. Hopkins picked up Pumphrey, and threw him to the ground. (109, 110) Furthermore, the evidence supported the finding, because Fich testified that while Pumphrey lay on the ground, basically immobile, Molash walked up to him and kicked him two times in the head and face. (RP 110) With regards to the portion of the finding that indicates that Mr. Pumphrey was kicked in the ribs, the state concurs that the testimony did not support

this aspect of the finding number five. Regardless of this fact, this aspect of the finding can be struck, but in examining the totality of this finding, and the evidence presented at trial, this error does not undermine the court's decision.

With regards to finding of fact number seven, again the facts identified were supported by the record. The record illustrates that neither Molash, Hopkins, nor Childreth sustained any substantial injury. When asked about injuries, Fich indicated that all three boys were able to either ride their bikes away (Molash and Childreth) or walk away (Hopkins). (RP 111) Fich also testified that Childreth may have had a split lip, but wasn't sure. (RP 111) As to Hopkins, Fich testified that she believed he too may have a split lip, and may have suffered redness to his face and neck. (RP 111, 125) When Hopkins was asked about injuries to him and his accomplices, he admitted that they were all able to walk away from the incident, and that Hopkins did not see a doctor as a result of this incident. (RP 151, 152, 153) Hopkins also indicated that he never saw Pumphrey touch Mr. Molash, or saw any injury to Molash. (RP 153) As to Mr. Childreth, the only injury he claimed occurred was a split lip. (RP 152) However, also Hopkins testified that he never actually saw Pumphrey

strike Childreth. (RP 152) As a result, finding of fact number seven was supported by the evidence at trial.

Also finding of fact number nine, as well as the conclusions of law entered by the trial court, were supported and properly entered by the court. The evidence presented at trial displayed that after the initial contact by Pumphrey had ended, all three boys then proceeded to surround Pumphrey and to strike and beat him. This was supported by both Pumphrey and Fich's testimony. ((Pumphrey) RP 46, 52-53, 54, 70-71, (Fich) RP 94, 102, 113). Furthermore, during this same timeframe, Hopkins picked up and threw Pumphrey to the ground. (RP 107-109). While Pumphrey laid on the ground, basically immobile, Molash walked over and kicked him at least two times in the face and head. (RP 97, 98, 103, 110)

The law allows one to use reasonable force when done for the purpose of self-defense or defense of another. RCW 9A.16.020(3). However, based upon the testimony, the actions taken by Molash, Childreth, and Hopkins was not done in self-defense or defense of others, and was in and of itself, excessive. Hopkins indicated in his own testimony, that after the initial contact by Pumphrey, neither he nor Childreth were injured, and at that point he did not believe there was even

going to be a fight. (RP 151) But it is after this point, that Molash threw the bottle and the boys surrounded Pumphrey and began to assault him. (RP 46, 52, 53, 54, 56, 70-71, 102, 149) As a result, it is clear that the three boys at that point, were not acting in self defense or defense of others. Furthermore, Hopkins also admitted that he never observed Pumphrey touch or strike either Molash or Childreth. (RP 152,153) In addition, he admitted too during his testimony that the only time he was fearful of harm was when he had been placed in a headlock by Pumphrey. (RP 154) But again, Pumphrey was only able to put him in a headlock for “like” thirty seconds, and this headlock was after the three boys had surrounded Pumphrey and had been striking his body. (RP 71-72,121) As a result, it is clear that finding of fact number nine was also supported by the evidence presented at trial.

As to the conclusion of law two through five that were entered by the court, these as well were supported by the record. As is indicated above, and incorporated by reference, the testimony at trial clearly indicated that the three boys surrounded Mr. Pumphrey and did inflict substantial bodily harm upon him. (RP 25, 26-27,30, 35, 40, 46, 52-53,54, 71, 94,102, 106-107,113) Furthermore, based upon the conduct of the

three boys in surrounding and all participating in the assault, is it clear that they were all acting as accomplices in their conduct.

As a result, the court did properly enter appropriate findings of fact and conclusions of law based upon the testimony adduced at trial.

2. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER TWO: The trial court properly considered the defenses presented by Joshua Hopkins, and as a result, did not deny him a right to a fair trial under either the Washington Constitution, Article 1, section 3, or the United States Constitution.

The State must prove every element of the crime charged beyond a reasonable doubt. State v. Aver, 109 Wn. 2d 303, 310, 745 P.2d 479 (1987). When a defendant raises an issue of self-defense or defense of another, the absence of such becomes another element of the offense the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn. 2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. State v. Walden, 131 Wn. 2d 469, 473, 932 P.2d 1237 (1997). However, a defendant bears the initial burden of providing some evidence that their actions were in response to circumstances amounting to self-defense or defense of another. State v. Janes, 121 Wn. 2d 220, 237 850 P.2d 495 (1993). To establish self-defense or defense of another, a defendant must produce

evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable. State v. Dyson, 90 Wn. App. 433, 438-439, 952 P.2d 1097 (1997).

Pursuant to Washington law, a person has a right to use force to defend himself or another against danger of injury, but such force cannot be more than is necessary. RCW 9A.16.020(3). "Necessary" in this context requires that a) no reasonably effective alternative to the use of force appeared to exist, AND b) the amount of force used was reasonable to the effect the lawful purpose intended. RCW 9A.16.010(1) with EMPHASIS added.

Hopkins use of force was not undertaken in self-defense or defense of others. The testimony was clear that after the initial contact among the parties had ended, Mr. Hopkins did not believe that a fight would ensue and was walking away from Mr. Pumphrey when Mr. Molash threw the bottle. (RP 149, 151) After the bottle was thrown, the three boys then approached Mr. Pumphrey, surrounded him and then began striking and hitting him. (PR 46, 52-53, 54, 70-71, 94, 102, 113) Pumphrey indicated, that the boys were hitting him from all sides. (RP 46, 52, 53, 54) Ms. Fich also testified to this fact that the boys were surrounding the victim and hitting him. (RP 94, 102, 106-107) Due to the fact that all three boys

surrounded him and were hitting him, Pumphrey testified that he got down in a clenched position, trying to protect himself. (RP 53, 71) In addition, at one point, thinking he might be able to stop the pummeling of his body by the three boys, he attempted to put Mr. Hopkins in a headlock, believing this might stop the assault. (RP 55, 67, 70) Unfortunately, the “headlock” of Mr. Hopkins lasted only about thirty seconds. (RP 121) At one point during the altercation, Hopkins walked over, picked up Mr. Pumphrey and was able to throw him to the ground. (RP 107-109) As he laid there, Molash then finished off the assault by kicking Pumphrey at least two times in the head and face while Pumphrey laid on the ground. (RP 97, 98, 103, 109, 110)

Clearly, the conduct of these three boys and their assault on Pumphrey was not in self-defense or defense of another. Again, this was further supported by the appellant’s own statement that he did not see Pumphrey ever strike either Molash or Childreth after the initial contact. (RP 152, 153) Furthermore, Hopkins also indicated that the only time he feared harm was when he was in a headlock. (RP 154) This as indicated throughout the trial, occurred after the boys had surrounded and began punching Mr. Pumphrey.

As a result, the trial court did appropriately review the appellant's claim of lawful use of force, and found that it did not apply. The court appropriately examined the facts of this case, and found that this was not a mutual combat situation or a defense or self or others when the three boys surrounded the victim and beat up on him. (RP 170-171)

However, even if the court had found that he was justified to defend himself or one of the others, his conduct and that of the other boys, exceeded what is allowed by law. As identified above, necessary force requires no reasonable effective alternative to the use of force AND the amount of force used must be reasonable. RCW 9A.16.010(1)

As indicated above, the evidence supports that the conduct by Mr. Hopkins and the other two young men was not lawful. In this case, the evidence is clear that there were other alternatives to the use of force. As appellant counsel correctly notes, one does not have a duty to retreat. However, it is important to note that none of the three boys were under attack when Mr. Molash threw the bottle and re-ignited the situation. Per the testimony, after the bottle was thrown, the three boys surrounded Mr. Pumphrey and began to beat him up. Their combined efforts did not end until Mr. Pumphrey was laying on the ground immobile with substantial

bodily injury. As a result, the force used by the three boys was not lawful.

Furthermore, “necessary” force also mandates that any response of force be reasonable. Obviously the force used by the three boys was not reasonable. The evidence indicated that if Pumphrey did in fact make the first contact in the parking lot, that his actions were more of yelling. If anything, all he did was a simple push which resulted in no injuries to any of the three boys, and was basically over. Instead, in response to that conduct that was basically over, the THREE boys surrounded Pumphrey, and all participated in striking him in the body. Furthermore, to finish off the assault, Mr. Molash kicked the victim multiple times in the face/head when Pumphrey simply laid on the ground not moving.

In addition, what further clearly shows the force used was excessive was the final result. Mr. Pumphrey was left laying on the ground. He sustained substantial bodily injury which required him to spend multiple days in the hospital. His injuries included fractures to his cheekbone, a vertebrae and ribs. Furthermore, Dr. Jackson testified that the injuries sustained by Pumphrey required substantial force and were likely caused by separate types of force and/ or impacts.

In opposition to this, the injuries the Hopkins, Molash, and Childreth were basically non-existent. All three boys were able to walk or ride their bikes away from the incident, and the only injuries were minor: maybe redness to the neck on Mr. Hopkins, and maybe split-lip to Hopkins and Childreth.

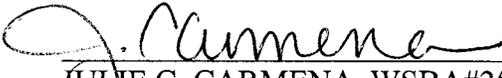
As a result the trial court did properly examine all of the evidence, and did consider all arguments of counsel, and as a result properly considered and dismissed the claim of the lawful use of force.

D. CONCLUSION

The state respectfully requests that the Court find that the trial court's rulings should be upheld in all respects because the court did not err when it entered its findings. In addition, the state respectfully requests that the Court deny the respondents request to reverse the conviction of the respondent, because the trial court did in fact properly consider all defenses presented, including the defense of lawful use of force.

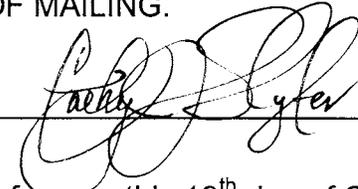
Respectfully submitted this 19th day of September, 2006.

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JULIE C. CARMENA, WSBA#25796
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Said envelopes containing a copy of this affidavit and the original and/or a copy of BRIEF OF RESPONDENT and AFFIDAVIT OF MAILING.



SUBSCRIBED AND SWORN to before me this 19th day of September, 2006.



NOTARY PUBLIC in and for the
State of Washington residing
at Clark Co, WA

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