

COURT OF APPEALS
DIVISION II

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No. 37407-2-II

STATE OF WASHINGTON
BY  _____
DEPUTY

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH LAMAR RILEY.

Appellant.

Lewis County Superior Court

RESPONDENT'S BRIEF

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by:


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STATEMENT OF THE CASE

Riley's recitation of the facts of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT THE JURY ON SELF-DEFENSE.

Riley argues that the trial court erred when it refused to instruct the jury on self-defense. Riley claims that the record does not support the trial court's reasons for denying the self-defense claim. This is not correct.

A trial court's decision not give a self-defense jury instruction is reviewed for an abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A defendant is entitled to a self-defense instruction only if he has raised some credible evidence, from whatever source, that he feared death or great personal injury at the hands of the victim." State v. Ra, 142 Wn.App. 868, 706, 175 P.3d 609, 617 (2008), citing RCW 9A.16.050 and State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). According to the Ra case, "[t]he test has a subjective component: whether the defendant actually feared death or great personal injury; and an objective component: whether the

defendant's fear of great harm was reasonable under the circumstances." Id., citing Read, supra (citing State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). To instruct the jury on self-defense, there must be evidence that: "(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)(citations omitted). On the issue of a self-defense instruction in the present case, the trial court ruled as follows:

[T]he reason I'm denying the self defense [sic] is I believe all the evidence shows that, for lack of a better name since we don't have any names, the rednecks had withdrawn. Mr. Riley then went back to his tent area, maybe into his tent, armed himself, and then went to the bonfire a ways away. To my mind, that constitutes a withdrawal and a significant break in there such that he was no longer able to claim self defense as there was no imminent danger to himself or others.

2RP 102. Contrary to Riley's argument, the Court's ruling is supported by the evidence in this case. The evidence shows that the initial fight had died down, the initial aggressors had withdrawn, and the immediate threat to Riley had ended before Riley decided

to arm himself. 1RP 31-35; 2 RP 5. Thus, the trial court's decision to deny Riley's self-defense instructions was proper.

Here, the only time that Riley would have been able to claim self defense is during the initial fight with the two rednecks. Yet the testimony shows that after this initial scuffle, the rednecks withdrew and Riley headed back to his tent. 2RP 5. But even after the rednecks left, according to the testimony, Riley then picked up a knife and a hammer and went back out to rile things up again. 2RP 16-19. Witness Daniel McCorkendale testified that the two men who had initially been in the altercation with Riley (the rednecks) "had left the campsite at" the point where Riley went to his tent to get a knife and when Riley picked up the hammer. 1RP 34. McCorkendale agreed that Riley had been fighting with the two individuals but then left the fight and went to arm himself. Id. According to McCorkendale, at this point the fight had died down, and "the immediate violence had ended." 1RP 34; 51. Witness Christina Sledg said the same thing, "[w]hen they'd first gotten into the fight he [Riley] didn't have them [the weapons], and then when he went back to the campsite when everybody started to *die* down a little bit, then he came back with a hammer and knife up his sleeve." 1RP 69, 70. And when the prosecutor asked Ms. Sledg,

"[you] said things died down and then it came into your campsite?"

Ms. Sledg answered, "yes." 1RP 69. Sledg also said that it seemed like the "rednecks" were more threatened by Riley and that the rednecks seemed afraid of Riley. 1RP 79-81. Sledg also noted that Riley was bigger than the rednecks. 1RP 87. Andrew Spears also testified that things calmed down and then the fighting broke out again and that Riley was still being a bit aggressive even after the original two people and his cousin Jesse had left the area. 1RP 105, 106. According to Nile Adamson, the main fight ended when the two original persons involved in the fight with Riley left and Riley went back to his camp site and came back with the fishing knife and a hammer. 2RP 5, 6. Adamson did not see anyone follow Riley back to his tent. 2RP 6. After the original fight had died down, Riley went back to his tent to get the knife, he returned and started swinging the knife towards everyone at Adamson's camp. 2RP 6,7. Adamson agreed that after the two persons who had first been fighting with Riley left his area and Riley went back to his tent, the fight seemed to be over. 2RP 23. Adamson reiterated that when the first two guys (the rednecks) headed back towards their campsite, Riley went back to his campsite and returned with something in his hands. 2RP 16-19. Both Adamson and Andrew

Spears also thought that Riley was the aggressor when he came back with the knife and hammer. 1RP 95; 2RP 9. No one followed Riley to his tent and no one tried to attack Riley after he returned from his tent with the knife. 1RP 39; 2RP 6. These facts show that when Riley headed back to his tent, the two rednecks had already withdrawn, and Riley was not then in any manner still being threatened by them. 1RP 105; 2RP 5; see e.g., State v. Brown, 3 Wn.App. 401, 403-404, 476 P.2d 124 (1970)(both parties had withdrawn from fight but defendant returned later as aggressor). In short, the confrontation between Riley and the rednecks had ended. Yet Riley nonetheless returned with a knife and a hammer and began threatening people.

Additionally, Riley did not tell anyone to call 911, nor did he tell police that he feared bodily injury that night. All of this evidence shows that the first two persons involved in the fight with Riley had retreated, but Riley nonetheless went to his tent after the fight had died down and he returned with weapons and proceeded to get angry and aggressive. So, once the initial fight between the rednecks and Riley had died down and the rednecks had retreated, Riley became the aggressor. These facts support the trial court's

ruling that the "rednecks" had withdrawn, and its ruling denying the self defense claim on this basis should be upheld.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF RILEY'S BEHAVIOR AT THE TIME OF THE ARREST.

Riley claims that the trial court erred when it allowed evidence of Riley's belligerent behavior towards police at the time of his arrest. This claim is also without merit.

A trial court is armed with broad discretion when making evidentiary rulings. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). The reviewing court will uphold a ruling on the admissibility of evidence unless the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615; State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1972). A reviewing court may affirm the trial court's ruling on any ground the record supports. See State v. Carter, 127 Wn.2d 836, 841, 904 P.2d 290 (1995). Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 403. But relevant evidence is presumed admissible, and the burden is on the defendant to show it should have been excluded. State v. Burkins, 94 WN.App. 677, 692, 973 P.2d 15 (1999). Evidence of Riley's

belligerent behavior at the time of his arrest is not admissible to prove character and to show action in conformity therewith. See ER 404(b); State v. Perrett, 86 Wn.App. 312, 319-320, 936 P.2d 426 (1997). But such evidence may be admissible for other purposes. ER 404(b). When admitting ER 404(b) evidence the trial court should conduct the weighing analysis on the record, but failure to do so is harmless if the record as a whole reflects that the court weighed the potential prejudice of the evidence against its probative value when deciding to admit the evidence. State v. Powell, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995).

When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), a reviewing court should decide the issues of admissibility if it appears possible after examining the record as a whole. State v. McGhee, 57 Wn.App. 457, 460-61, 788 P.2d 603 (1990). As the court stated in State v. Gogolin, 45 Wn.App., 640, 645, 727 P.2d 683 (1986), "[W]hat purpose is served by reversing a conviction where the questioned evidence is relevant and admissible? The trial court's failure to articulate its balancing process on the record does not make admissible evidence inadmissible." In the end, when balancing the probative value of the evidence versus its potential for prejudice,

the question is whether the evidence has a potential for *unfair* prejudice. Carson v. Fine, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994). Evidence is unduly prejudicial when it is likely to "arouse an emotional response rather than a rational decision among the jurors." Carson, 123 Wn.2d at 223.

In the present case, the trial court ruled initially as follows regarding the admissibility of the defendant's behavior at the time of his arrest:

I'm going to allow the officer to testify to Mr. Riley's statements at them rather than to them. . . largely because it appears to me that the time difference between when the allegations occurred and the officers' contact with Mr. Riley is pretty short, and that his state of mind is going to be at issue here.

1RP 23,24. Then, after hearing more evidence, the trial court ruled again:

Well, I do think it's relevant and I'm going to allow the defendant's statements to become part of the evidence. I think it's relevant to his state of mind, also to some extent to the self defense argument. But really I think there is a close enough connection here in time to make it relevant.

1RP 116. This was an assault case in which Riley wanted tried to claim self defense. As such, Riley's demeanor at the time of his arrest when he was still in the same agitated state he had been in when he was waiving the knife and hammer around was relevant to

the assault charge and was also relevant to Riley's claim that he was defending himself. Moreover, as the trial court noted, Riley's demeanor at the time of arrest was the same as it had been just a short time earlier when he was waving the knife and hammer around. And, because this was an assault case, the jury expected to hear about the involved parties' demeanor, so the likelihood that such evidence would evoke a purely "emotional" response from the jury was diminished. Thus, admission of this demeanor evidence was not unduly prejudicial to Riley. Accordingly, the trial court did not abuse its discretion when it admitted the evidence of Riley's belligerent demeanor upon his arrest.

C. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED WITHOUT A JURY AT SENTENCING THAT RILEY HAD TWO PRIOR "STRIKES" BECAUSE BLAKELY DOES NOT APPLY TO THE PERSISTENT OFFENDER ACT.

Riley claims that he was entitled to a jury determination on the issue of whether he had two prior "strikes" under the Persistent Offender Act. Brief of Appellant 27-32. This argument, too, is without merit.

It is well-settled that Blakely does not apply to sentencing under the Persistent Offender Accountability Act (POAA).¹ See

¹ Blakely was followed by Apprendi v. New Jersey, where the Supreme Court ruled that: "Other than the fact of a prior conviction, any fact that increases the

State v. Ball, 127 Wn.App., 956, 959-60, 113 P.3d 420 (2005)(ruling that Blakely does not apply to the POAA). In reaching its conclusion, the Ball Court noted that Blakely addresses exceptional sentences, but the POAA is directed at recidivism. Id. The Washington Supreme Court is in accord. See State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001)(Apprendi does not require that prior convictions used to establish persistent offender status be submitted to a jury and proven beyond a reasonable doubt); State v. Smith, 150 Wn.2d 135, 141, 75 P.3d 934 (2003)("the United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt").

According to the previously set-out law, Riley's argument that his prior convictions under the POAA needed to be submitted to the jury rather than determined by the trial judge is quite simply wrong, and ignores binding precedent. State v. Ball, supra; State v. Wheeler, supra. This Court should find that Riley's argument is likewise without merit, and Riley's conviction should be affirmed.

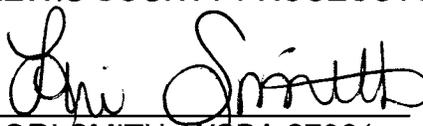
penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(emphasis added).

CONCLUSION

The trial court did not abuse its discretion when it refused to instruct the jury on self defense because, as the trial court properly found, the "rednecks had withdrawn" and there was no longer any immediate threat to Riley. Likewise, the trial court did not abuse its discretion when it admitted evidence of Riley's demeanor at the time of his arrest because it was relevant to the charged crimes and to Riley's state of mind and it was not unfairly prejudicial. Finally, it is well-settled that Riley's claim that the trial court erred when it determined without a jury that he was a persistent offender is without merit. Accordingly, Riley's conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 11 day of December, 2008.

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COURT OF APPEALS
DIVISION II

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

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STATE OF WASHINGTON
BY Lori Smith
DEPUTY

STATE OF WASHINGTON,)
Respondent,)
vs.)
KENNETH LAMAR RILEY,)
Appellant.)
_____)

NO. 37407-2-II

DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On this 11TH Day of December, 2008, I served a copy of the Response Brief upon the Appellant by depositing the same in the United States Mail, postage pre-paid, to the attorney for the Appellant addressed as follows:

Peter Tiller
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P.O. Box 58
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Dated this 11th day of December, 2008, at Chehalis, Washington.

Lori Smith
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