

NO. 48125-1-II

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

STATE OF WASHINGTON, Respondent

v.

M.B., JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-8-00481-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. The trial court effectively allowed M.B. to raise the claim of self-defense and then having considered that claim found the State to have met its burden of proof. 1

STATEMENT OF THE CASE..... 1

 A. Procedural Facts 1

 B. Adjudicatory Hearing 1

ARGUMENT..... 6

 I. The Trial Court effectively allowed M.B. to raise the claim of self-defense, and then having considered that claim, found the State to have met its burden of proof. 6

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

<i>State v. Alvarez</i> , 105 Wash.App. 215, 19 P.3d 485 (2001).....	8
<i>State v. B.J.S.</i> , 140 Wn.App. 91, 169 P.3d 34 (2007)	7, 8
<i>State v. Bell</i> , 60 Wn.App. 561, 805 P.2d 815 (1991).....	7
<i>State v. Dyson</i> , 90 Wn.App. 433, 952 P.2d 1097 (1997)	6
<i>State v. Graves</i> , 97 Wn.App. 55, 982 P.2d 627 (1999).....	6, 9
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993)	7
<i>State v. Levy</i> , 156 Wash.2d 709, 132 P.3d 1076 (2006)	8
<i>State v. Thomas</i> , 150 Wash.2d 821, 83 P.3d 970 (2004)	7
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	7, 8
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883, 885 (1998)	6, 7
<i>State v. Woods</i> , 138 Wn.App. 191, 156 P.3d 309 (2007)	7

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court effectively allowed M.B. to raise the claim of self-defense and then having considered that claim found the State to have met its burden of proof.**

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

The respondent agrees with procedural facts as presented by the appellant.

B. ADJUDICATORY HEARING

In the summer of 2015, M.B. had recently moved back in with his mother, Kelly Borroz, and her partner of almost ten years, Daniel Bowers. RP 8. To move back in with them, house rules had been established. RP 11. One of those rules was that no one of the opposite sex was allowed in M.B.'s room. RP 12. However, on July 27, 2015, at around 4:30 in the morning, Mr. Bowers found a girl in M.B.'s room. RP 12. He testified that she was on top of M.B. RP 12.

Angry, he told M.B. to get the girl out of the house. RP 13. He then went and woke Ms. Borroz. RP 13. Mr. Bowers then went downstairs to calm down but soon came back upstairs to deal with the situation. RP 13. Mr. Bowers was in the middle of telling M.B.'s mother that M.B. is a "liar" and "sneaky" when M.B. yelled at him, "fuck you motherfucker,"

[RP 59], “do you want to fucking fight me?” [RP 14]. At that moment

M.B. got up from the bed and Mr. Bowers took a step forward,

A. With my intention being to stand chest to chest, feeling like it was my last opportunity as a parent to regain control of my household. I was going to stand chest to chest as a bluff and say, what are you going to do about it? Because after this, it’s only physical or getting shot, so I’ve got nothing left to lose.

Q. Okay. Had it ever gotten physical before?

A. Never. I’ve never raised my hand to him. I’ve never touched him. I’ve – it’s rare that I even have to correct him verbally.

[RP 14-15].

Mr. Bowers testified that he was not able to make it fully around Ms. Borroz before M.B. hit him twice in the side of the head. [RP 15]. He further testified that leading up to the assault he never raised his arms [RP 20], because his intention was not to be physical,

No, my option was not to be physical. My option was, as the man of the house, to stand up to a 17-year-old trying to own my house by calling me out and wanting to beat my ass.

RP 18.

I was still trying to get around his mother – and my – get my – my intentions were never to get physical with him.

RP 20-21.

After the assault, the police were called. RP 16. During that time, M.B. took the girl home. RP 26. He returned when his mother called him and told him to come home. RP 27. As he stepped out of his car, he was still angry. RP 37. He was agitated to the point where he continued to curse and yell toward Mr. Bowers, despite the fact that a deputy sheriff was present. RP 37. The deputy had to actively work to diffuse and de-escalate the situation. RP 37. During that period, M.B. admitted to striking Mr. Bowers. RP 38. No marks were observed on M.B. RP 38. The deputy testified that he thought had he not been there, that there could have been another assault based on the foul language M.B. was hurling at Mr. Bowers in front of the deputy sheriff. RP. 46.

At this point, the State rested its case. RP 46. Defense counsel moved for dismissal based on the State not disproving self-defense beyond a reasonable doubt. RP 47. The trial court ruled that the respondent had to show some evidence that “self-defense was necessary in order to avoid being injured.” RP 47. Finding that there was no evidence to satisfy that initial burden, the court denied the motion. RP 47. Then M.B. took the stand. RP 47.

M.B. testified that he was sleeping in his room with a girl when he heard Mr. Bowers come in “yelling and screaming.” RP 49. Mr. Bowers

then left the room for a little while. RP 50-51. When he returns, M.B. and Mr. Bowers exchange foul language. RP 50-51. Then he states that Mr. Bowers moved toward him, “just – get – trying to get in my face, like, pushed me, and then that’s when I hit him twice, and then he fell.” RP 52.

When asked, M.B. claimed he felt “threatened” because he was a grown man, thirty years older than him and that force was necessary to get out of the room. RP 52-53. When asked about how the interaction occurred, he claimed that Mr. Bowers pushed him and he responded by punching him twice in the head. RP 56-57. When asked why he did not try getting out of the room using less force, he claimed Mr. Bowers, at two inches shorter, was a grown man and there was no other option, including pushing him to the side and getting out the room that way. RP 59-61.

Closing arguments then commenced. The State argued the elements of Assault in the Fourth Degree and acknowledged the burden of having to disprove M.B.’s claim of self-defense beyond a reasonable doubt.

I know that there’s been the defense raised of defense of lawful use of force. It’s the State’s burden once it’s raised by preponderance to disprove it beyond a reasonable doubt, and in this case, State argues that it’s completely unfounded....

RP 64. Defense counsel then argued in closing for M.B.’s ability to raise the claim of self-defense and how the State failed to disprove it beyond a

reasonable doubt. RP 66-70. The State addressed the claim of self-defense in its rebuttal,

We also have [M.B.] saying, he was coming toward me, I didn't know what else to do, so I had to hit him twice. And the State contends it's just not reasonable for a self-defense claim when, again, it's inconsistent with, we were pushing, I hit him twice, I don't remember if I got hit. And now, today, it's, he pushed me once, I hit him twice to get out of the room, and there was no other reasonable force I could have done to get out of that room. The State finds that unfounded.

RP 72.

At the close of the trial, the trial court determined that when weighing M.B.'s testimony about his fear of Mr. Bowers it found M.B. not credible,

The question is, were you in fear of Mr. Bowers? And based on the testimony that I've heard here today, you were not then and you are not now, and you may – since you've been a small child – not ever been afraid of Mr. Bowers. If you had that fear, you wouldn't have made the comments that you made to him, not necessarily inciting the fight, but showing that you didn't have any objective fear of Mr. Bowers.

Mr. Bowers, based on the testimony of both – Mr. Bowers and of Ms. Borroz never drew a fist towards you, never indicated by words or deed that he was going to injure you in any way. The only testimony that we had was he was going to get in your face – chest to chest, I think, is what he testified to. And there's no question that you struck him out of anger and for punishment for being disrespectful to you and the girl that was in the room to [sic] you.

RP 73-74. Having found M.B. not credible and weighing the evidence presented by the State, the trial court found that the State had proven that M.B. committed Assault in the Fourth Degree. RP 74.

ARGUMENT

I. The Trial Court effectively allowed M.B. to raise the claim of self-defense, and then having considered that claim, found the State to have met its burden of proof.

“To raise a claim of self-defense, the respondent must first offer credible evidence tending to prove self-defense.” *State v. Graves*, 97 Wn.App. 55, 61, 982 P.2d 627 (1999), *citing State v. Dyson*, 90 Wn.App. 433, 438, 952 P.2d 1097 (1997). The respondent 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.” *Graves*, 97 Wn.App. at 61, 982 P.2d 1097, *quoting Dyson*, 90 Wn.App. at 438-39, 952 P.2d 1097. “In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis.” *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883, 885 (1998).

“The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant.” *Id.*, *citing*

State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). “The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done.” *Walker*, 136 Wn.2d at 772, 966 P.2d 883, *citing State v. Janes*, 121 Wn.2d at 238, 850 P.2d 495.

“With both subjective and objective aspects taken into account, the trial judge must determine whether the defendant produced any evidence to support his claimed good faith belief that ... force was necessary and that this belief, viewed objectively, was reasonable.” *State v. Walker*, 136 Wn.2d 767, 773, 966 P.2d 883, 886 (1998) (Second degree murder case using the deadly force standard, deadly force was not appropriate here but the subjective and objective analysis is the same); *citing State v. Bell*, 60 Wn.App. 561, 567, 805 P.2d 815 (1991).

Once the respondent offers some evidence tending to show self-defense, the State then has the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d at 473. A person acting in self-defense must only fear imminent harm, not great bodily harm. *State v. Woods*, 138 Wn.App. 191, 201, 156 P.3d 309 (2007).

The reviewing court defers “to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. B.J.S.*, 140 Wn.App. 91, 97, 169 P.3d 34 (2007); *State v. Thomas*, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004).

“In reviewing a juvenile court adjudication, [the court] must decide whether substantial evidence supports the trial court's findings of fact and, in turn, whether the findings support the conclusions of law.” *B.J.S.*, 140 Wn.App. at 97, 169 P.3d 34; *State v. Alvarez*, 105 Wash.App. 215, 220, 19 P.3d 485 (2001). Unchallenged findings of fact are treated as truths on appeal. *B.J.S.*, 140 Wn.App. at 97, 169 P.3d 34; *State v. Levy*, 156 Wash.2d 709, 733, 132 P.3d 1076 (2006).

In self-defense cases, the degree of force used is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

In this case the trial court effectively allowed M.B.’s claim of self-defense to be raised and then rejected it as the trier of fact. The trial court specifically referred to the jury instruction on self-defense and considered the analysis. RP 73. The court then went on to find that M.B. was not in fear of Mr. Bowers. RP 74. As the trier of fact, the trial court considered all the testimony before it and determined that M.B.’s testimony was not credible. The court weighed in favor of Mr. Bower’s testimony as a whole and Ms. Borroz’s testimony that Mr. Bowers did not raise a fist toward M.B., and explained, “Mr. Bowers, based on the testimony of both – Mr.

Bowers and Ms. Borroz never drew a fist towards you, never indicated by words or deed that he was going to injure you in any way.” RP 74.

The court also considered *State v. Graves*, 97 Wn.App 55, 982 P.2d 627 (1999), and distinguished it from this case,

That case – that case lacks a few facts that we have in this case, though. That case lacks the colloquy between this juvenile and the mother’s boyfriend. There’s a considerable amount of disrespectful language used amongst each other and back and forth to each other to the degree that your client, even with the police officer on the scene continues that objective manifestation of no fear, so there’s some difference.

RP 75. Therefore, the trial court effectively considered self-defense in its overall determination of M.B.’s guilt.

Furthermore, once M.B. took the stand and testified that he felt “threatened” by Mr. Bowers, the State treated the claim of self-defense as raised and took on the burden of proving its absence beyond a reasonable doubt. RP 64. In its initial closing and again in its rebuttal, the State focused on M.B.’s claim of self-defense and argued that M.B. was the first aggressor and separately, that his use of force was unreasonable. RP 62-65; 70-72.

In closing argument, defense counsel argued that there was sufficient evidence to raise the claim of self-defense. Defense further argued that M.B. was in fact acting in self-defense and thus the State

failed to meet its burden. RP 66 – 70. Each side had an opportunity to present evidence of self-defense or lack thereof, and argue that way in which it should be viewed by the fact finder. The trial court did not truly address the claim of self-defense until the close of all presentation of evidence and argument. Thus by closing argument, the trial court was hearing the case as a trier of fact rather than of law. Having all the information before it, including conflicting testimony, the trial court weighed the evidence and found Mr. Bowers' testimony to be more credible. RP 74. Based on all the evidence, the trial court found M.B. to be guilty of assault in the fourth degree. As such, there is substantial evidence to support the trial court's decision.

CONCLUSION

Based on the above, the State respectfully requests this Court to uphold M.B.'s conviction for assault in the fourth degree.

DATED this 9th day of June, 2016.

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