

No. 49676-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

A.P., Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Chris Wickham
No. 16-8-00345-1

BRIEF OF APPELLANT
A.P.

JENNIFER VICKERS FREEMAN
Attorney for A.P.
WSBA # 35612

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996

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I. ASSIGNMENTS OF ERROR

1. The Exclusion of Evidence of Prior Threats Made by the Victim to the Respondent, Was Error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a respondent have a constitutional right to present evidence that the victim of an assault had previously threatened him as part of his self-defense argument?
2. Is a prior threat by the victim to the respondent hearsay when it is not offered to prove the truth of the matter asserted, but is offered to show the reasonableness of the respondent's fear of the victim in a self-defense case?

III. STATEMENT OF THE CASE

A.P., a juvenile, was convicted after a bench trial, of one count of assault in the second degree. The trial court found that A.P. did not act in self-defense and the force used was excessive. He appeals his conviction.

1. History between A.P. and D.F.

A.P. and D.F. were acquaintances. (RP 7). D.F. had disappeared for a while and A.P. heard he had been charged as a sex offender. (RP 134). There was an incident where A.P. was intoxicated and he asked D.F. about the charges. (RP 135). D.F. was shocked, said the charges were dropped and it was none of A.P.'s business. (RP 136).

A.P. was telling people about D.F.'s sexual offender charges and calling D.F. a child rapist. (RP 10). This made D.F. furious. (RP 11). On a couple of occasions, A.P. came to a park by D.F.'s house and D.F. confronted A.P., yelling at him and telling him to leave. (RP 11-12). In those instances, nothing physical happened and A.P. left the park after D.F. threatened him. (RP 12, 159). D.F. told A.P. he would not hesitate to fight him. (RP 12).

Defense counsel attempted to elicit testimony regarding prior threats D.F. made towards A.P., but the court held that they were inadmissible hearsay. (RP 138-39).

2. The Assault.

On July 25, 2016, A.P. went to the park with his girlfriend. (RP 34). They were hanging out with their friends and then their friends left. (RP 35). They saw some other people they knew, so they walked up the hill to see who else was hanging out at the park. (RP 35). As they approached a group of people, D.F. jumped up and came towards A.P. and his girlfriend, yelling, and telling them to leave. (RP 35-36). D.F. was with a group of ten to thirty people, who were mostly friends with D.F. (RP 53, 63, 75, 146).

D.F. testified that he told A.P. it was his park and to leave because he didn't want there to be an issue. (RP 27-28). D.F. was angry and

yelling. (RP 28).

A.P. and his girlfriend told D.F. to chill out. (RP 39). D.F.'s friend testified that A.P. said he wasn't trying to leave, he was trying to chill. (RP. 58). D.F.'s brother testified that A.P. said I don't want any trouble, I'm just trying to find marijuana. (RP 68). A.P. asked the group if anyone was selling marijuana; they said no. (RP 77, 143).

D.F. said that the only reason he wasn't hitting A.P. was because his girlfriend was there, so she got in between them and said, "good." (RP 39). D.F. testified that A.P.'s girlfriend was irritating him, saying you're not gonna hit me, you're not gonna do anything. (RP 29). D.F. asked his friends to come get A.P.'s girlfriend out of the way or fight her, but no one did. (RP 28, 50).

D.F. testified that he pushed A.P.'s girlfriend to the side and stepped towards A.P. (RP 15). D.F. testified that A.P.'s girlfriend was trying to stop them from fighting, but he pushed her out of the way. (RP 29). D.F. acknowledged that the way he was acting made it look like he wanted to fight A.P. (RP 29).

One of D.F.'s friends testified that D.F. threw a punch and hit A.P.'s girlfriend. (RP 58). D.F.'s brother testified that D.F. got up in A.P.'s face. (RP 71).

A.P.'s girlfriend testified that they were leaving when D.F. lunged

at A.P., she tried to get back in between them, D.F. pushed her out of the way, started swinging, and hit her in the back of the head. (RP 41). She was scared that D.F. was going to assault her and A.P. and that his friends would also jump in if D.F. and A.P. started fighting. (RP 53-54).

A.P. testified that he was leaving, but he stopped because his girlfriend was still with D.F., he saw D.F. backhand her and then continued towards A.P. with his fists raised. (RP 144). A.P. testified that he thought he was in danger and that D.F. was going to attack him and then possibly his girlfriend, and he was worried that D.F.'s friends would jump in. (RP 144-46). A.P. had a knife on him, one that he normally carries. (RP 141-42).

A.P. pulled out his knife and tried to stab D.F. in the shoulder to stop an attack. (RP 165, 169). D.F. was stabbed in the chest and fell to the ground. (RP 15-16). At some point, he got up, grabbed a stick, and chased A.P., threw the stick, hitting A.P.'s girlfriend, and then fell again. (RP 51, 61, 79). A.P. was taken to the hospital and had a scar on his chest. (RP 127).

After A.P. stabbed D.F., D.F.'s friends beat up A.P. (RP 51, 150). When police responded, A.P. had blood on his face. (RP 116). A.P. was also taken to the hospital to be cleared, and then interviewed at the police station. (RP 127). A.P. told police that he stabbed D.F. because D.F. hit

his girlfriend, that he was scared of D.F., he didn't think he could win in a hand to hand fight with D.F., he was afraid, and he used his knife instinctually. (RP 129-32).

3. Court's Ruling.

The court found that D.F. did not present much of a threat based on the fact that D.F.'s friends were not concerned or paying attention to the interaction between D.F and A.P. (RP 197). The court also found that A.P.'s statements to the police, his testimony, and the testimony of other witnesses was inconsistent. (RP 197). The court stated, "my sense from all the evidence is that Mr. Pyle used the knife not so much to protect himself or even [his girlfriend] but, rather, to retaliate against [D.F.] for using his hand to move [A.P.'s girlfriend] out of the way." (RP 198). The court also found that the force used by A.P. went beyond the threat presented by D.F. and was more than was necessary to defend himself and his girlfriend. (RP 198). Therefore, the court found A.P. guilty of assault in the second degree. (RP 199).

I. **ARGUMENT**

1. A.P. Was Denied His Constitutional Right to Present a Defense When the Trial Court Refused to Admit Evidence that D.F. Had Previously Threatened Him.

A criminal defendant has a constitutional right to present a defense. U.S. Const. amend. V, VI; Wash. Const. Art. I, sections 3, 22; *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 19 L.Ed.2d 1019

(1976). In a self-defense case that includes any evidence that the respondent was aware of that may have caused the respondent to fear for his safety.

“The use of force against another is lawful ‘[w]henever used by a party about to be injured, ... in preventing or attempting to prevent an offense against his person, ... [and] the force is not more than is necessary....’” *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002), citing RCW 9A.16.020(3). The defendant has the initial burden to establish “some credible evidence tending to show the assault was in self-defense.” *State v. Walker*, 40 Wash. App. 658, 661, 700 P.2d 1168 (1985) (internal citations omitted). Whether there is sufficient evidence to raise self-defense is a question of law, “viewing the evidence from the defendant's perspective.” *Id.* “The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wash. 2d 220, 238, 850 P.2d 495, 504 (1993), citing *State v. Allery*, 101 Wash.2d 591, 594, 682 P.2d 312 (1984).

In this case, A.P. sought to introduce evidence of prior threats D.F. made against him in support of his self-defense argument. Clearly, the threats were relevant to the self-defense argument and the reasonableness

of A.P.'s fear that D.F. would assault him. Therefore, A.P. was denied his constitutional right to present a defense.

2. The Threats D.F. Made to A.P. Were Not Hearsay.

A trial court's ruling on the admissibility of evidence is normally reviewed for abuse of discretion. *State v. Magers*, 164 Wash.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). However, whether a statement is hearsay is a question of law and will be reviewed de novo. *State v. Neal*, 144 Wash.2d 600, 607, 30 P.3d 1255 (2001).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802.

However, no exception is required if the statement is not hearsay. "A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement." *State v. Edwards*, 131 Wn.App. 611, 614, 128 P.3d 631 (2006).

In *Jessup*, a promoting prostitution case, the court held that the a witness' testimony regarding the defendant's prior threat was not hearsay

because it was not admitted to prove the truth of the matter, but instead to explain why the witness complied with performing sexual acts at the defendant's request. *State v. Jessup*, 31 Wash. App. 304, 314, 641 P.2d 1185, 1192 (1982).

In an unpublished opinion in *Krona*, where the defendant was charged with harassment, the court held that evidence that the defendant had made prior threats against law enforcement was not hearsay, because it was not offered for the truth of the matter, but was offered to prove that the officer had a reasonable fear that the defendant would carry out the threat he made to the officer in the present case. *State v. Krona*, 189 Wash. App. 1007 (2015), *review denied*, 184 Wash. 2d 1028, 364 P.3d 119 (2016) (Div I, unpublished opinion).

In this case, A.P. sought to introduce the prior threats D.F. made to A.P. to show that A.P. reasonably believed that D.F. would assault him and that he acted in self-defense. The statements were not offered for the truth of the matter, but to show their effect on A.P. The trial court erred by finding that the statement was inadmissible hearsay and no exception applied. The statement was not hearsay and no exception was needed.

Given that the entire defense rested on whether or not A.P. reasonably believed that D.F. was going to assault him, the trial court's exclusion of this evidence was highly prejudicial. There is no way of

knowing whether or not D.F.'s prior threats would have influenced the court's findings. Therefore, this matter should be reversed and remanded for a new trial.

3. This Court Should Not Impose Appellate Costs Because A.P. is Indigent and Unable to Pay.

This court has discretion to waive appellate costs for indigent defendants. The amended RAP 14.2 states that costs will be awarded unless this court directs otherwise in its decision, or the commissioner or clerk finds that “an adult offender does not have the current or likely future ability to pay such costs.” RAP 14.2. Furthermore, a trial court’s “finding of indigency remains in effect . . . unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.” RAP 14.2.

This Court should direct that costs not be imposed in this case.

As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

State v. Sinclair, 192 Wash. App. 380, 391-92, 367 P.3d 612, 616 (2016,

quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider “important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, “courts should seriously question that person's ability to pay” *Id.*

In this case, A.P. was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 32-35). A.P. is seventeen-year-old juvenile. (CP 15). The trial court waived all legal financial obligations. (CP 21). And, A.P. was sentenced to 80-100 weeks at the Juvenile Rehabilitation Administration (JRA). (CP 18). It is extremely unlikely that A.P. will be able to pay appellate costs. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if A.P. does not substantially prevail.

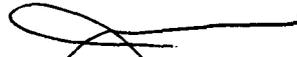
I. CONCLUSION

In conclusion, A.P. was denied his constitutional right to present a defense when the trial court improperly excluded D.F.’s prior threats as hearsay when they were not offered to prove the truth of the matter, but were offered to prove their effect on A.P. and the reasonableness of

his fear that D.F. would assault him. Therefore, this matter should be reversed and remanded for a new trial.

Dated this 17th day of April, 2017.

Respectfully Submitted,



JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant, A.P.

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 49676-3-II
vs.)	
)	CERTIFICATE OF SERVICE
A.P.,)	
)	
Appellant.)	
)	

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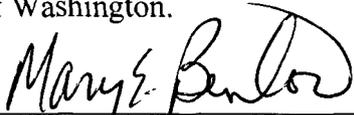
Derek Byrne, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

John Tunheim
paoappeals@co.thurston.wa.us
tunheij@co.thurston.wa.us

The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

A.P. JUV# 669897
NASELLE YOUTH CAMP
11 YOUTH CAMP DRIVE
NASELLE WA 98638

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed April 17, 2017 at Tacoma, Washington.

CERTIFICATE OF SERVICE

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996
(253)798-6715 (fax)

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL
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paoappeals@co.thurston.wa.us

tunheij@co.thurston.wa.us

jfreem2@co.pierce.wa.us

mbenton@co.pierce.wa.us