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Court of Appeals
Division II
State of Washington
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NO. 52306-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

V.M.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding “[a]t the time, [V.M.] subjectively was not fearful of [R.K.] despite [V.M.’s] knowledge of [R.K.’s] past incidents.” Supp. CP ____ (Finding of Fact 8).

2. The court erred in finding “[V.M.] responded out of anger, not out of fear.” Supp. CP ____ (Conclusion of Law 5).

3. The court erred in finding that “[t]he force used by [V.M.] was more than necessary and the State has carried its burden to establish that it was not a lawful use of force.” Supp. CP ____ (Conclusion of Law 6).

4. The court erred in finding that “[V.M.] did not have a reasonable belief that she was going to be injured.” Supp. CP ____ (Conclusion of Law 6).

5. The court erred in concluding that V.M. was guilty of fourth degree assault. Supp. CP ____ (Conclusion of Law 7).

Issue pertaining to assignments of error

V.M. was charged with fourth degree assault and presented a claim of self defense. Where the evidence establishes that V.M. knew of R.K.’s tendency for violence from previous encounters, R.K. had just assaulted her, she believed R.K. was trying to provoke a fight, she felt she had no option but to hit R.K., the altercation lasted less than five seconds, and

V.M. stopped and walked away as soon as a teacher intervened, did the State fail to prove she did not respond with a lawful use of force?

B. STATEMENT OF THE CASE

This case involves a physical altercation between two girls in their ninth grade civics class, after which both were suspended. 1RP¹ 15, 75, 94. The classroom teacher did not see what started the altercation, but he saw V.M. stand up and hit R.K. 1RP 46. He yelled at her to stop, and she did so immediately. He told her to go to the office, and she complied without hesitation. 1RP 46-47, 116. The entire altercation lasted three to four seconds. 1RP 57.

The school resource officer, a Thurston County Sheriff's deputy, was called, and he spoke with V.M. in the office. 1RP 65-66. V.M. told him that at the start of class R.K. held a fist up toward V.M. V.M. dared R.K. to hit her, and R.K. assaulted V.M. by hitting her in the face with her backpack. V.M. responded by punching R.K. 1RP 67. V.M. told the officer the assault did not hurt, it just made her mad, and her response was almost automatic. 1RP 69. She also told the officer she believed R.K. was provoking a fight. 1RP 69. She did not believe she had any other options

¹ The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—3/13/18 and 3/20/18; 2RP—3/26/18; 3RP—7/12/18.

than to hit R.K. RP 70. The officer noticed that the side of V.M.'s face was still red where R.K. had hit her with the backpack. 1RP 76.

V.M. was charged with fourth degree assault. CP 1.

There was no dispute at trial that R.K. hit V.M. in the face with her backpack. 1RP 18. R.K. testified that it was accidental and she did not realize until afterwards that it had happened, but the court found that inconsistencies in her testimony raised questions about her credibility. 1RP 19; 2RP 93-94.

There was also no dispute that V.M. hit R.K. three to four times after the backpack was slammed into her face. 1RP 19, 117. V.M. presented a claim of self-defense. She testified that she had had negative interactions with R.K. in the past. She had seen R.K. hit other students, and R.K. had hit her unprovoked prior to this incident. 1RP 106-07. She described one incident where she was getting paper and bumped into R.K., and R.K. hit her. 1RP 108. A school administrator confirmed that R.K. has a long history of being quarrelsome and hitting at school, and her disciplinary records were entered as an exhibit. 2RP 42, 51.

On cross examination the prosecutor asked V.M. about her history with R.K. and asked if she was scared of R.K. V.M. responded that she was not. 1RP 116-17.

On the day in question, however, R.K. had been threatening V.M. in class, both verbally and by raising her fist as if she were going to punch V.M. 1RP 109, 114. V.M. did not respond physically to any of the verbal threats, but when R.K. slammed her backpack into V.M.'s face, V.M. pushed the backpack away and hit R.K. 1RP 110, 114-15.

V.M. testified that because R.K. acted like she was going to punch her and said she was going to hit her, she was afraid R.K. would hit her with the backpack, and that's what happened. 1RP 115. When R.K. hit her with the backpack, she reacted. 1RP 122. While she was not bleeding and had no broken bones from R.K.'s assault, it hurt when the backpack hit her in the face. 1RP 122.

The court found that R.K. hit V.M. in the face with her backpack hard enough to cause a red mark on V.M.'s face, and V.M. reacted almost instantaneously by hitting R.K. in the head at least three times. 2RP 92. The court further found that V.M. stopped hitting R.K. as soon as the teacher yelled at her, no further intervention was needed, and the entire altercation lasted less than five seconds. 2RP 94.

The court found that R.K.'s past reputation for being violent or aggressive was relevant to a reasonable apprehension of danger on the part of V.M. when R.K. lifted her backpack and hit V.M. in the face. 2RP 92-

93. It also found that the backpack did not hurt V.M., it just made her mad, and V.M. subjectively was not fearful of R.K. at the time. 2RP 94.

The court found that although V.M.'s past experience with R.K. would give rise to a reasonable belief she was about to be injured, V.M. responded out of anger, not fear. 2RP 97. Further, because R.K. did not keep swinging, and V.M. struck her at least three times, the force used was more than necessary. 2RP 97. It concluded the State carried its burden of proving this was not a lawful use of force. 2RP 97. The court found V.M. guilty of fourth degree assault, and entered an order of disposition. CP 6-16.

C. ARGUMENT

THE EVIDENCE DOES NOT SUPPORT THE COURT'S CONCLUSION THAT THE STATE MET ITS BURDEN OF PROVING V.M. DID NOT ACT IN SELF DEFENSE.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v.*

Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The State has the burden of proving the absence of a valid self-defense claim beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). The use of force is not unlawful when used by a party about to be injured in preventing or attempting to prevent an offense against his or her person, if the force used is not more than necessary. RCW 9A.16.020. In considering a claim of self-defense, the trier of fact must take into account all the facts and circumstances known to the defendant. Because the vital question is the reasonableness of the defendants' apprehension of danger, the trier of fact must evaluate the act from the point of view of the defendant. *State v. Wanrow*, 88 Wn.2d 221, 234-35, 559 P.2d 548 (1977).

The court below found, based on V.M.'s past experiences with R.K. and R.K.'s actions that day, that V.M. could reasonably believe she was about to be injured. 2RP 97. It concluded, however, that V.M. did not subjectively fear such injury, because she had said she was not hurt but angry. *Id.* This reasoning fails to take into account the fact that V.M. was in fact visibly injured by R.K.'s assault with the backpack, and her explanation that while she did not have any broken bones and she was not

bleeding, her face was red where she was hit and it hurt. 1RP 122. Moreover, V.M. also said she was afraid R.K. would hit her with the backpack and she believed R.K. did so intentionally to provoke a fight. 1RP 69, 114-15. V.M. did not think she had any option but to hit R.K. at that point. 1RP 70. V.M. said that her response was almost automatic, indicating that she believed if she did not hit R.K., R.K. would continue to assault her. 1RP 69.

V.M. did not have to fear great bodily harm from R.K. in order to defend herself. She just had to fear further injury like the one she had just sustained. *See State v. L.B.*, 132 Wn. App. 948, 953, 135 P.3d 508 (2006) (trier of fact must consider defendant's subjective impressions of *all* the facts and circumstances). The evidence fails to support the court's conclusion that V.M. did not subjectively fear she was about to be injured.

Next, the court concluded that V.M. used more force than necessary to prevent further injury. 2RP 97. The degree of force which may be used in self defense depends on what a reasonable person would find necessary under the circumstances as they appeared to the defendant. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). It is not the amount of force the trier of fact might say is reasonably necessary, but what appeared reasonably necessary to the defendant under the circumstances, which is relevant to a self defense determination. *State v.*

Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982) (quoting *State v. Tyree*, 143 Wash. 313, 316, 255 P. 382 (1927)).

The record shows that after R.K. repeatedly threatened and then attacked V.M., V.M. reacted almost automatically. She thought R.K. was trying to provoke a fight, implying that if she did not respond to R.K.'s attack, it would continue. RP 69. While V.M. struck R.K. more than once, this was not a long, drawn out situation in which V.M. had the time and wherewithal to consider each blow. Rather, the confrontation lasted less than five seconds, and V.M. did not continue to use force once the teacher intervened and the situation was being handled by an adult. She followed the adult's directions and left the room as instructed. 1RP 46-47, 57, 116. There is no support in the record for the court's conclusion that V.M. used more force than necessary under the circumstances.

The State did not meet its burden of proving beyond a reasonable doubt that V.M. did not act in self defense, and the finding of guilt must be reversed.

D. CONCLUSION

The State failed to prove beyond a reasonable doubt that V.M. did not act in self defense, and her adjudication of guilt must be reversed.

DATED December 2, 2019.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

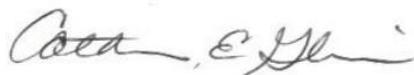
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Certification of Service by Mail

Today I caused to be mailed copies of the Supplemental Brief of Appellant in *State v. V.M.*, Cause No. 52306-0-II as follows:

V.M.
18025 Jordan Street SW
Rochester, WA 98579

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



Catherine E. Glinski
Done in Manchester, WA
December 2, 2019

GLINSKI LAW FIRM PLLC

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