

FILED

JAN 10 2012

COURT OF APPEALS
OF THE STATE OF WASHINGTON
BY _____

29647-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER GARDNER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....5

CONCLUSION.....11

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. WALDEN, 131 Wn.2d 469,
932 P.2d 1237 (1997)..... 5, 6

STATE V. WALKER, 136 Wn.2d 767,
966 P.2d 883 (1998)..... 6

COURT RULES

CrR 4.7..... 10

I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The court erred in refusing to instruct the jury on self-defense.

II.

ISSUE PRESENTED

- A. Did the defendant supply any evidence supporting the giving of a self-defense instruction?

III.

STATEMENT OF THE CASE

The victim, Ronnie Quintana, testified that he had been separated from his wife for approximately a year and a half. RP 52. Mr. Quintana testified that the separation took a turn for the worse when he found the defendant in bed with his wife. RP 72. Up until that point Mr. Quintana and the defendant had been best friends. RP 54.

On March 17, 2010, Mr. Quintana recalled that he had at least six phone conversations and text messages between himself and the defendant. RP 60. During one of the calls the defendant stated that he wanted to meet Mr. Quintana at a local school to resolve the ongoing

issues occurring between the defendant and Mr. Quintana. RP 60. According to his testimony, Mr. Quintana interpreted the defendant's suggestion as an indication that the defendant wanted to "fight it out." RP 60.

Later that evening Mr. Quintana was eating dinner at a neighbor's apartment in the same complex that Mr. Quintana also lived. RP 61. While eating, Mr. Quintana received a phone call from the defendant stating that the defendant had come to Mr. Quintana's apartment and wanted Mr. Quintana to come outside to talk. RP 61.

Eventually, Mr. Quintana went outside and asked the defendant "...what was up." RP 64. According to Mr. Quintana, the defendant pushed him, and struck him four times while Mr. Quintana had his arms up in a crouched position. RP 64. Mr. Quintana testified that when his neighbor opened her apartment door the defendant left. RP 66.

Although Mr. Quintana did not think he had a serious injury at the time of the assault, an x-ray taken on March 19 showed that his jaw was broken. RP 70. Mr. Quinn Tomas required surgery and was unable to eat solid food for the next five to six weeks. RP 71.

Ms. Angelina Raber recalled that she heard a "big bang" on her front door. RP 101. She went outside and saw Mr. Quintana on the ground. RP 102. She also saw the defendant who went up the stairs and

departed. RP 102. Ms. Raber stated that she could tell that Mr. Quintana's jaw was red. RP 103.

Officer Nathan Donaldson testified that he interviewed Mr. Quintana on March 17 around 9:45 p.m. RP 128. Mr. Quintana told the officer that the other person involved was the defendant. RP 130.

The defense called the defendant who testified that he was a martial arts instructor. RP 164. According to the defendant, he and Mr. Quintana were still friends on March 17th, although they were arguing. RP 165. The defendant acknowledged that he asked Mr. Quintana to meet at a local school ground. RP 172. The defendant claimed that he was invited to Angelina Raber's apartment and he was driven there by Amy Quintana, Mr. Quintana's estranged wife. RP 173. The defendant claimed that he felt "threatened" when he arrived. RP 174.

According to the defendant, Mr. Quintana came from an apartment and shut the door behind him. RP 174. The defendant testified that Mr. Quintana stated "what do you want." RP 134. According to the defendant, Mr. Quintana was angry and began pumping into the defendant's chest. RP 175. The defendant stated that he pushed Mr. Quintana and started to walk away. RP 176.

When asked if it was possible that he hit Mr. Quintana the defendant stated "I don't think so. I mean – there was a lot that happened.

He – When I pushed him, he hit the wall. I’m not sure.” RP 177. On cross-examination the defendant admitted pushing Mr. Quintana but again stated that he did not think it was possible that he hit Mr. Quintana. RP 184. The defendant confirmed that he is a trainer in martial arts and is paid to give private lessons. RP 186. The defendant confirmed that the victim never hit him. RP 186.

On redirect, the defendant reiterated that he was just visiting the apartment in an attempt to find a peaceful solution to the domestic situation. RP 189. Defense Council attempted to establish a reason for the defendant to fear Mr. Quintana by eliciting testimony that there had been threats to stab the defendant. This testimony was stricken by the trial court. RP 188. Defense counsel then tried another tack by attempting to present what the daughter of Mr. Quintana had told the defendant earlier that day. RP 188-189. After an objection to this question, the defendant was asked what he saw of the defendant and the response was “Him frantic.” RP 189.

Ms. Amy Quintana testified to try again the defendant to the incident location. RP 219. When asked why he did not turn the car off, she stated “I had the radio going, too. It was just supposed to be a friendly talk, so I wasn’t concerned about anything going on.” RP 221. Ms. Quintana had a limited view of the actions in question. RP 221.

On redirect Ms. Quintana responded to a question regarding a concern she might have had for the defendant that evening by stating “no. We were just going to talk --. It was just going to be a conversation.” RP 227.

The defendant was charged by information filed in Spokane County Superior Court with one count of Second Degree Assault. CP 1.

Following deliberations, the jury returned a verdict on the lesser included a charge of Fourth Degree Assault RP 272. This appeal followed. CP 86-92.

IV.

ARGUMENT

The defendant on appeal wishes to claim that he was entitled to both a “no intent”/accident defense and self-defense. The problem with this argument is that the defendant did not present sufficient evidence of his self-defense claim. Before a judge can give a self-defense instruction, the defendant has to present at least some evidence that tends to support a self defense argument. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wash.2d 727, 731, 912 P.2d

483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

State v. Walker, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).¹

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *Janes*, 121 Wash.2d at 238, 850 P.2d 495 (*citing Allery*, 101 Wash.2d at 594, 682 P.2d 312). This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wash.2d at 238, 850 P.2d 495.

State v. Walden, 131 Wn.2d at 474.

The defendant's testimony regarding the events surrounding the assault was inconsistent at best. The defendant first stated that Amy Quintana drove him to the victim's location at the victim's invitation. If the defendant was in fear of the victim, going to the victim's apartment makes little sense. The defendant stated that Amy Quintana had not gone to the actual scene of the fight as she was afraid of Mr. Quintana. RP 184. Yet, the defendant also stated that Amy did see the events but did not want

¹ The court in *State v. Walker*, *supra* held that if the issue for the trial court's refusal to give a self-defense instruction was based on legal issues, the review would be de novo. No doubt it would be to the defendant's benefit to push the argument towards the legal aspects as opposed to the factual bases so as to be able to take advantage of the *de novo* review standard as opposed to the abuse of discretion standard.

to become involved. RP 185. In direct contradiction to the defendant's attempts to claim that he was afraid when he went to the victim's apartment, Ms. Quintana testified that "It was supposed to be a friendly talk, so I wasn't concerned about anything going on." RP 221. Ms. Quintana's recollections of the incident did not show that the defendant was in such fear from the chest bumping that he needed to act in self-defense. RP 221.

The defendant testified that the victim did not punch him. RP 186. The defendant did admit that he was a martial arts trainer who was occasionally paid to give lessons in martial arts. RP 185. The defendant said several times that he did not hit the victim. RP 176-77, RP 184.

Even in closing argument the defense counsel stated, "In those seconds we don't know if the thump that Ms. Raber [neighbor] heard on the door was Mr. Quintana hitting his head." The defendant's theory was that since the defendant asserted that he did not purposely hit the victim and if the victim was injured, it was as a result of self-defense actions. The defense in closing argument claimed that the defense did not know whether or when the defendant might have caused the victim's fractured jaw. RP 251. The defendant's theory was: "I did not do anything to the victim, but if I did, it was self-defense." The trial judge did not accept this theory.

The defendant stated that he did not think he hit the victim. RP 177. He did admit that he pushed the victim. The defendant testified to a “chest bumping” occurring approximately eight times between the defendant and the victim. RP 175.

The defendant tried to leave the impression in his testimony that he was in fear of the victim and that is why he needed to use “self-defense.” This claim seems rather incredible considering the fact that the defendant is an expert at martial arts and the defense’s own witness (Ms. Quintana) testified that the defendant was going to the apartment to “talk.” Ms. Quintana was so relaxed about the situation as to leave the truck running and the radio on. RP 220-21.

The defendant does not explain exactly what action of his is supposed to be his act of self-defense. The defendant argues that he did not hit the defendant and the defendant’s jaw injury could have happened anytime. However, according to the defendant, if those arguments are not accepted, self-defense covers the rest. It is almost as if the defendant tried to use self-defense as a sort of “floating inoculation” against any finding of guilt.

On appeal, the defendant simply skips the question of whether the defense produced “some” evidence of self-defense. The defendant promotes a different reason why the trial judge refused to give a self-

defense instruction. The defendant asserts that the trial judge refused to give the requested instructions because the defendant did not disclose to the State his intent to use self-defense until just prior to the trial starting. This assertion is not supported by the facts. It is correct that the judge does note (more than once) that he felt that giving the State notice of intent to pursue a self-defense theory on the Friday before trial was not a proper response to omnibus application. However, the trial court did not impose sanctions based on that failure to disclose. The trial court did discuss the late disclosure more than once. RP 197. However, the trial court made it quite plain that it was basing its ruling on its perceived understanding of the theories proposed by defense counsel. In reference to disclosing a self-defense theory, the trial judge stated “it is incumbent upon the defendant to make that defense known at some point.” RP 198. The trial judge mused that “I suppose even setting that aside, which I suppose we can do, although it’s an interesting approach, I don’t see how these two claims can stand together with each other.” RP 198.

After a lunch break, the trial court was again asked by the defendant to submit self-defense instructions to the jury. RP 207. Again the trial court noted its troubles accepting conflicting theories for arguing self-defense but the court again made it clear that the lateness of the defendant’s disclosures were not the controlling factors in the trial court’s

decisions. After discussing the late disclosure again, the judge stated, “But setting that aside, it does seem to me that the posture of the case and the testimony and the approach that has been taken, is opposite of a self-defense...” RP 207-08.

The defendant claims that the trial court held as a matter of law, that the defendant waived a self-defense instruction because he failed to disclose that defense in response to the order. Brf. 7. Nowhere in the defendant’s appellate arguments on this point does the defendant give a citation to the record as to where and when the trial judge supposedly issued such a ruling. After an electronic search, the State is unable to find in the record the rulings claimed by the defendant on appeal nor even the words “waiver,” or “sanction.” The State submits that the defendant has “augmented” the actual holdings of the trial court in an effort to bolster his claim that the trial court was “heavy handed” in the discussion and holdings on CrR 4.7 and the defendant’s failure to comply with proper disclosure timings on the self-defense issue.

The defendant’s arguments on appeal are in the nature of a “straw-man” type argument. On one hand the defendant asserts that the trial court made certain rulings for certain reasons (not in the record) while at the same time failing to recognize that the real issue in this case is the lack of basic evidence to support the giving of a self-defense instruction.

The defendant on appeal submits a well reasoned brief that clearly covers the issues raised by the defense. Unfortunately, none of the issues raised by the defendant is the single issue of importance in this case. The defendant analyzes in detail the various reasons the defendant believes the judge refused to give the requested self-defense instructions. The defendant entirely ignores the primary issue in this case: the trial judge correctly refused to give the self-defense instructions because there was no evidence to support an argument of self-defense.

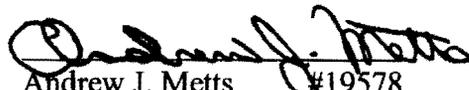
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 10th day of January, 2012.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29647-4-III
 v.)
)
CHRISTOPHER GARDNER,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on January 10, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Janet G. Gemberling
admin@gemberlaw.com

and mailed a copy to:

Christopher Gardner
925 East Crown, Apt. 2
Spokane WA 99207

1/10/2012
(Date)

Spokane, WA
(Place)

Janet G. Gemberling
(Signature)