

No. 31054-0-III

FILED
Jan 17, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JENNIFER J. BORDEAU, Appellant

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

 1. The State’s evidence was insufficient to support the conviction of second degree assault as it failed to disprove self-defense beyond a reasonable doubt.....1

 2. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

 A. Was the evidence insufficient to support the conviction of second degree assault when the State failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error A).....1

 B. Did the court err by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing? (Assignment of Error 2).....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....5

 A. The State’s evidence was insufficient to support the conviction of second degree assault as it failed to disprove self-defense beyond a reasonable doubt.....5

 B. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.....8

V. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S Ct. 1068, 25 L. Ed.2d 368 (1970).....	6
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984).....	6
<i>State v. Callahan</i> , 87 Wn App. 925, 943 P.2d 676 (1997).....	6
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7, 8
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972).....	7
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	6
<i>State v. Landsiedel</i> , 165 Wn. App. 886, 269 P.3d 347, <i>review denied</i> , 174 Wn.2d 1003 (2012).....	8
<i>State v. Redwine</i> , 72 Wn. App. 625, 865 P.2d 552, <i>review denied</i> , 124 Wn.2d 1012 (1994).....	6

Constitutional Provisions

U.S. Const., amends. 5, 14.....	6
Wash. Const. art. 1, § 3.....	6

Rules

CrR 3.5.....	8
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I. ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the conviction of second degree assault as it failed to disprove self-defense beyond a reasonable doubt.

2. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was the evidence insufficient to support the conviction of second degree assault when the State failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error 1).

B. Did the court err by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing? (Assignment of Error 2).

III. STATEMENT OF THE CASE

Ms. Bordeau was originally charged with one count of second degree assault. (CP 3). Over objection, the court later granted the State's motion amending the information to charge her with one count of second degree assault and, apparently as a lesser degree offense, one count of third degree assault. (CP 45, 46; RP 39-42).

At a bail hearing, the court was apprised by defense counsel that Ms. Bordeau was diagnosed “with border line personality disorder bipolar diagnosis and the like.” (RP 12). She acknowledged she needed to take her medication. (RP 18). Counsel advised the court there was no insanity or diminished capacity defense. (RP 52).

The case proceeded to jury trial. Prior to voir dire, Ms. Bordeau got agitated and her counsel “asked [the] court if it was okay for [her] not be present during the voir dire portion of the trial.” (RP 76). The court advised her she had the right to be present, but she declined:

I don't want to be in there while they're picking the jury because I am already bugging. (RP 78).

Kenneth Kirschner lived in Cle Elum. (RP 100). The evening of February 1, 2012, he decided to ride his bike to the Chevron about six blocks away to get some smokes. (RP 101-02). On his way, he saw a small maroon vehicle following somewhat behind and they stopped at Peoh and Main. (RP 102). As they both turned right, Mr. Kirschner felt the car got close to him. He saw the occupant wave out the window and he acknowledged the

wave. (RP 103). He thought it might be someone he knew, but he did not know Ms. Bordeau, the driver. (*Id.*).

The car drove forward about 15 yards down the road, pulled over abruptly, and stopped. (RP 103). Ms. Bordeau got out angry, marching back to him swiftly and sounding like she was cussing and nonsensical. (RP 104). Mr. Kirschner got his phone out and said he was going to call the police. (*Id.*). Ms. Bordeau turned around and got back in the car. (RP 105).

Mr. Kirschner started to ride toward the Chevron. (RP 105). Ms. Bordeau then pulled over about 50 yards down and started running back at him. (*Id.*). He went into the street and tried to avoid her. (*Id.*). Ms. Bordeau blocked his path; he called 911. (RP 106). Mr. Kirschner said she was trying to grab him and was swinging away. (*Id.*). He ran toward the back of her car to get the license plate number for the 911 operator. (RP 107). She ran past him and got back into the car. (*Id.*).

Mr. Kirschner was talking to 911 when she got out of the car with what looked like a baseball bat. (RP 108). He testified she hit his arm and the side of the back of his head. (RP 109). He regained consciousness with Ms. Bordeau standing over him. (*Id.*).

Mr. Kirschner was about 10 feet off to the side of the road in a snow bank. (*Id.*). All the while, he was still on the phone with 911. (*Id.*).

Mr. Kirschner grabbed Ms. Bordeau's esophagus and threw her down on the ground. (RP 111). She looked like she was going to come back at him so he told her to stay away, which she did. (RP 112). By then, police were coming and he walked briskly away from the car and toward their lights. (*Id.*). He was struck by the bat at least twice. (*Id.*). Mr. Kirschner said Ms. Bordeau was "crazy, out of control, screaming, nonsensical." (RP 113). He was hurt badly enough to knock him out momentarily, but he did not go to the hospital. (RP 115). He suffered ringing in his ears and the side of his head hurt for a couple of days. (RP 116).

Officer Kirk Bland responded to the call around 11 p.m. on February 1, 2012, and arrived right after Officer Ryan Potter. (RP 129-30). Officer Bland saw a yellow stick, weighing a couple of pounds, on the ground. (RP 135, 139). He saw no marks on Mr. Kirschner's head. (RP 141). Ms. Bordeau was agitated and uncooperative. (RP 150, 158).

Ms. Bordeau was out and about that night. (RP 207-08). She encountered a man, Mr. Kirschner, on a bike, startling her and

almost hitting him. (RP 209). She was sure she swore at him. (*Id.*). Having nearly hit the man, she stopped her car and started walking back to him. (RP 210). Mr. Kirschner was on the phone with who she thought were the cops. (RP 210-11). Ms. Bordeau started walking away from Mr. Kirschner when he grabbed her by the neck and threw her to the ground from behind. (RP 212). She stood up and got the maul, *i.e.*, the stick, out, but did not hit him. (RP 213). She had not hit Mr. Kirschner before. (RP 215). Ms. Bordeau was just defending herself. (RP 217).

The jury convicted her of second degree assault and fourth degree assault. (CP 124, 125). Although not reflected in the record, the fourth degree assault conviction went away. Ms. Bordeau was sentenced to a standard range sentence of 6 months for the second degree assault conviction. (CP 138-44). She appealed. (CP 150).

IV. ARGUMENT

A. The State's evidence was insufficient to support the conviction for second degree assault as it failed to disprove self-defense beyond a reasonable doubt.

Ms. Bordeau acted in self-defense. The State must prove

beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Since a claim of self-defense negates the essential element of intent for second degree assault, the burden is on the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984); *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552, *review denied*, 124 Wn.2d 1012 (1994). The court so instructed here. (CP 16, 17).

For self-defense, the defendant must have subjectively feared she was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Evidence of self-defense must be viewed “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury then is to stand in the shoes of the defendant, consider all the facts and circumstances known to her, and determine what a reasonable

person in the same situation would have done. *Id.*

Even viewed in a light most favorable to the State, the evidence nonetheless fell short of disproving beyond a reasonable doubt that Ms. Bordeau acted in self-defense. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Ms. Bordeau testified she was walking away from Mr. Kirschner upon their first encounter when she was grabbed by the neck from behind and thrown to the ground. (RP 212). She defended herself with the maul, but did not strike back. (RP 213, 217). She was not the aggressor and acted in self-defense. (*Id.*).

Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The jury necessarily resorted to guess, speculation, or conjecture to fill in the blanks for its guilty verdict. Even if she did hit Mr. Kirschner with the maul, she acted to defend herself. (RP 217). The State did not even address Ms. Bordeau's claim of self-defense in cross-examining her. (RP 215-24). The State simply failed to disprove self-defense beyond a reasonable doubt. In these circumstances, the conviction must be reversed and the

charge dismissed. *Green, supra*.

B. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

The court admitted certain statements by Ms. Bordeau upon holding a pretrial CrR 3.5 hearing. (RP 54-68). CrR 3.5 requires the entry of written findings and conclusions, but none were entered. Remand for entry of those findings and conclusions is appropriate. *State v. Landsiedel*, 165 Wn. App. 886, 269 P.3d 347, *review denied*, 174 Wn.2d 1003 (2012).

V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Bordeau respectfully urges this court to reverse her conviction and dismiss the charge.

DATED this 17th day of January, 2014.



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CERTIFICATE OF SERVICE

I certify that on January 17, 2014, I served a copy of the brief of appellant by email, as agreed, on L. Candace Hooper at candace.hooper@co.kittitas.wa.us and by first class mail, postage prepaid, on Jennifer J. Bordeau at her last-known address at PO Box 344, Roslyn, WA 98941.


