

FILED
JUNE 29, 2015
Court of Appeals
Division III
State of Washington

No. 32860-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARCOS AVALOS BARRERA, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by instructing the jury on transferred intent when its application resulted in a separate felony conviction where the original assault was only a misdemeanor.

2. The State's evidence was insufficient to support the convictions because it failed to disprove self-defense beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

A. Did the court err by instructing the jury on transferred intent in instruction 10 when its application resulted in a separate felony conviction where the original assault was only a misdemeanor? (Assignment of Error 1).

B. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt because it failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error 2).

II. STATEMENT OF FACTS

Marcos Avalos Barrera was charged by information with count 1: custodial assault and count 2: fourth degree assault. (CP

1). The case proceeded to jury trial.

Corrections Officer Alex Aragon was on duty about 7 p.m. on May 7, 2014, at the Grant County Jail. (9/17/14 RP 73). He and Officer Jose Ramirez went to pull Anthony Vasquez from his cell for a scheduled visit. (*Id.* at 74). Two inmates, including Mr. Barrera, were on their scheduled hour out. (*Id.* at 75).

Officer Ramirez went up to the tier to get Mr. Vasquez; Officer Aragon stayed at the bottom of the stairs. (9/17/14 RP 77). As they came down, Officer Aragon noticed Mr. Barrera stood up quickly and tried to get around him going after Mr. Vasquez. (*Id.*). The officer tried to get in between Mr. Barrera and Mr. Vasquez, who said nothing and did not make any gestures or threats to Mr. Barrera. (*Id.* at 78).

Mr. Barrera hit Mr. Vasquez on the left shoulder about four times. (9/17/14 RP 78). One strike missed and Mr. Barrera hit Officer Aragon on the left side of his mouth. (*Id.* at 80). The officer testified the punch was intended for Mr. Vasquez, not him. (*Id.* at 82). Officer Aragon was, however, offended by the punch. (*Id.* at 84). Mr. Vasquez was in jail on a first degree murder charge. (*Id.* at 91). He did not want to pursue charges against Mr. Barrera. (*Id.* at 109).

Officer Ramirez saw Mr. Barrera hit Mr. Vasquez, but not Officer Aragon. (9/17/14 RP 140). Mr. Vasquez did nothing before Mr. Barrera went after him. (*Id.* at 122).

Mr. Barrera knew Mr. Vasquez, who was in for murder. (9/17/14 RP 140). He was aware of Mr. Vasquez's propensity for violence in jail from other inmates and the newspaper. (*Id.* at 143). Mr. Barrera also knew Mr. Vasquez followed through on what he said he would do and he told him the first chance he got, he was going to take care of Mr. Barrera. (*Id.* at 145). Mr. Vasquez threatened him. (*Id.*). Mr. Barrera was aware Mr. Vasquez would attack him when he came down the stairs. (*Id.*).

Mr. Barrera did not intend to hit Officer Aragon. (9/17/14 RP 146). He did, however, intentionally hit Mr. Vasquez three or four times. (*Id.* at 157). Mr. Barrera believed an attack by Mr. Vasquez was imminent. (*Id.* at 165).

Defense counsel argued against the court's giving an instruction on transferred intent. (9/18/14 RP 188). The jury convicted Mr. Barrera as charged. (CP 141, 142). This appeal follows. (CP 180).

III. ARGUMENT

A. The court erred by instructing the jury on transferred intent in instruction 10 when its application resulted in a separate felony conviction where the original assault was only a misdemeanor.

Transferred intent is an accepted rule in this state. *State v. Elmi*, 166 Wn.2d 209, 215-16, 207 P.3d 439 (2009). Since assault is not defined in the criminal code, the courts turn to the common law for its definition. *Id.* at 215. The definition applicable here is unlawful touching, that is, battery. The question is whether transferred intent should apply when the original assault is only a misdemeanor, but transferred intent, because of the status of the unintended victim, makes this charge a felony. Mr. Barrera contends transferred intent should be used only when crimes of like classification are involved. To do otherwise would be a violation of equal protection.

By his own admission, Mr. Barrera intended to assault Mr. Vasquez, albeit out of self-defense. But he had no intent to assault Officer Aragon, who knew there was no such intent. Because he was a corrections officer, the transferred intent made the fourth degree assault on him into a class C felony. Like persons in like

circumstances thus suffer different and more severe penalties through this principle of transferred intent, a legal fiction that should have no application when it results in a violation of equal protection. *Cf. Elmi, supra* (due process); *State v. McEnroe*, 179 Wn.2d 32, 44, 309 P.3d 428 (2013). Indeed, there appear to be no cases considering whether transferred intent even applies when a fourth degree assault is involved. See *State v. Abaun*, 161 Wn. App. 135, 156-58, 257 P.3d 1 (2011); *State v. Cortes Aguilar*, 176 Wn. App. 264, 275, 308 P.3d 778 (2012), *review denied*, 179 Wn.2d 1011 (2014). The convictions must be reversed.

B. The State's evidence was insufficient to support the convictions because it failed to disprove self-defense beyond a reasonable doubt.

Mr. Barrera 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 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 293-295, 297).

For self-defense, the defendant must have subjectively feared that he 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 him, and determine what a reasonable person in the same situation would have done. *Id.*

Mr. Barrera believed an attack on him by Mr. Vasquez, who was in for first degree murder, was imminent. He knew Mr. Vasquez had a propensity for violence in the jail and had threatened him. The State offered no evidence to the contrary and Mr. Vasquez did not testify. Evidence of self-defense must be

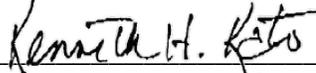
viewed by the jury from the standpoint of a reasonably prudent person, knowing all Mr. Barrera knew and seeing all he saw.

Janes, supra. In these circumstances, the State did not disprove self-defense beyond a reasonable doubt. *Redwine, supra.* His convictions must be reversed and the charges dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Barrera respectfully urges this court to reverse his convictions and dismiss the charges.

DATED this 30th day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 30, 2015, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Marcos Avalos Barrera at his last known address, c/o Grant County Jail, 35 C St. NW, Ephrata, WA 98823; and by email, as agreed by counsel, on Garth Dano at kburns@grantcountywa.gov.

