

**FILED**

MAY 15 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 346340

FRANKLIN COUNTY SUPERIOR COURT NO. 168000257

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

KARION THOMAS,

Appellant.

---

---

BRIEF OF APPELLANT

---

---

MICHELLE TROMBLEY  
WSBA # 42912  
Attorney for Appellant

TROMBLEY LAW PLLC  
7135 West Hood Place  
Kennewick, Washington 99336  
(509) 491-3941

BRIEF OF RESPONDENT  
TABLE OF CONTENTS

TABLE OF AUTHORITIES  
..... i

A. ASSIGNMENTS OF ERROR  
..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR  
..... 1

C. STATEMENT OF THE CASE  
.....1

D. ARGUMENT  
..... 1

    1. *Defense counsel as ineffective when it failed to raise a  
    claim of defense of others*  
    .....4

    2. *The court erred in allowing hearsay and improper  
    rebuttal testimony.*  
    .....7

E. CONCLUSION  
.....9

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

*State v. Huddleston*, 80 Wn. App. 916, 926, 912 P.2d 1068 (1996).....5,6,7

*State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251  
(1995).....4,5, 7

*State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977).....5

*State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).....8

*State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....5

*State v. White*, 74 Wn.2d 386, 444 P.2d 661 (1968).....7, 8

**United States Supreme Court**

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.  
2d 674 (1984).....5

Court Rules

ER 801..... 8

A. ASSIGNMENTS OF ERROR

1. Mr. Thomas received ineffective assistance of counsel.
2. The trial court erred in overruling defense counsel's hearsay and improper rebuttal objections.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was trial counsel ineffective for failing to raise a claim of defense of others?
2. Did the trial court err in overruling defense counsel's hearsay and improper rebuttal objections?

C. STATEMENT OF THE CASE

On December 11, 2015, Karion Thomas was at the home of a friend, Ruben Lizarraga. (CP 104; RP 12-14, 19-20, 38). Ruben's father (Joseph Lizarraga) and stepmother (Erica Cauffman) had given Karion permission to be at their home with Ruben while they were away for several hours.<sup>1</sup> (CP 104; RP 20-21, 37-39). When Mr. Lizarraga and his wife returned home they found a number of juveniles at the home consuming alcohol. (CP 104; RP 13-14, 21-22, 25, 38-40, 42-43, 49).

---

<sup>1</sup> Given that Ruben Lizarraga and Joseph Lizarraga have the same surname, Ruben Lizarraga is referred to by his first name. No disrespect is intended.

Mr. Lizarraga confronted Ruben and the two then began physically fighting. (CP 104; RP 14-15, 21-22, 40-41). The fighting continued and moved from inside the home to out in the backyard. (CP 140; RP 15-17, 22, 25). The fighting initially was mutually combative between father and son until Mr. Lizarraga hit his son hard enough to knock him to the ground where Ruben was unable to get back up. (RP 15).

Ruben testified that he recalled being on the ground, unable to get up and hearing a commotion between Mrs. Cauffman and his father. (RP 15). Ruben did not see Mr. Thomas assault anyone. (RP 17). When he was able to get up and see clearly, Mr. Thomas was not near his father. (RP 16).

Officer John Raby testified that he responded to the location for a domestic disturbance between a father and a son. (RP 5). Officer Raby further testified that the only injuries or marks on Mr. Lizarraga was a bloody lip which was the result of Ruben hitting him. (RP 10-11). Officer Raby was never informed during the course of his investigation of any allegations of assault made against Mr. Thomas by Mr. Lizarraga. (RP 64-65).

Joseph Lizarraga testified that he and his son got into a serious physical fight. (RP 21-22). During this fight, he hit Ruben hard enough to knock him to the ground more than once. (RP 22-23). At one point one of Ruben's friends attempted to intervene and was yelling "don't hurt him, don't hurt him." (RP 22-23). After Mr. Lizarraga knocked his Ruben to the ground outside, Joseph

Lizarraga indicates Mr. Thomas was upset and began calling him out. (RP 26). Mr. Lizarraga testified “I mean, I can understand him protecting his friend, which was my son. But with the argument and being pissed off. I mean, I got in his face...” (RP 26). Mr. Lizarraga stated that it was at that time he turned around and someone, he assumed Mr. Thomas, grabbed him from behind and put his arm around his neck. (RP 26). Prior to this, Mr. Lizarraga had already been having difficulty breathing as he was winded from fighting his son. (RP 26). Mr. Lizarraga was able to breathe somewhat but believed if the hold had continued he may have wound up passing out. (RP 28-29). Mr. Lizarraga reiterated that he was winded but did not feel dizzy. (RP 30).

Erica Cauffman did not see any assault other than that between Mr. Lizarraga and Ruben. (RP 39-42, 45-46). Ms. Cauffman was not present at the time when the fight spilled out into the backyard but indicates she was only gone for 5-15 seconds. (RP 42).

Darion Simon testified that after Mr. Lizarraga had knocked Ruben to the ground outside, Karion was upset. (RP 50). Mr. Simon testified he was holding Mr. Thomas back. (RP 50).

The trial court admitted the 911 call into evidence, over Mr. Thomas’ hearsay and confrontation clause objections. (RP53-54, 57-59; Pl.’s Ex. 3). The witness the State called to testify in regards to the 911 call was not the

dispatcher on the call and is not the individual who made the recording. (RP 53).

In its case-in-chief, the State called Officer Raby as its first witness and Officer Raby was questioned about his investigation. (RP 5-11). The State called Mr. Lizarraga and Ms. Cauffman after Officer Raby. (RP 19-47). The State rested. (RP 61). In its case-in-chief, defense counsel re-called Officer Raby. (RP 63-65). Officer Raby testified that to his recollection, nothing was mentioned during his investigation the night of the incident about Mr. Thomas fighting or choking anyone. (RP 63-69). The State called Mr. Lizarraga as a rebuttal witness. (RP 67-70). Defense counsel objected on hearsay and improper rebuttal grounds but was overruled and Mr. Lizarraga was allowed to testify regarding the statements he made to law enforcement the day after the incident. (RP 67-69).

The trial court found Mr. Thomas guilty of second degree assault. (CP 103-105, 115-123; RP 82). This appeal timely followed. (CP 125-126).

D. ARGUMENT

***1. Defense counsel was ineffective when it failed to raise a claim of defense of others.***

The defendant bears the burden of showing ineffective assistance. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). To meet that burden, a defendant must show both deficient performance and resulting

prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35. "To show deficient performance, he or she must show that given all the facts and circumstances, counsel failed to meet an objective standard of reasonableness." *State v. Huddleston*, 80 Wn. App. 916, 926, 912 P.2d 1068 (1996). To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *McFarland*, 127 Wn.2d at 335; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693.

It has long been the law in Washington that one may lawfully use force in defense of others when one has a reasonable belief that the person being protected is in imminent danger. *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). If properly requested by the defense, a "defense of others" instruction must be given whenever there is evidence from which the jury could conclude that, under the circumstances, the actor's apprehension of danger and use of force were reasonable. *State v. Penn, supra*.

The evidence presented during the trial supports a defense of others claim. Multiple individuals testified that Mr. Lizarraga had been engaged in a physical fight with his son that resulted in his son being knocked down more

than once. (RP 15, 22-23, 26, 50). The fighting was intense and lasted only a short amount of time. (RP 21-23, 26, 39-42). There was testimony that Ruben's friends were concerned for his safety and at least one other juvenile attempted to intervene. (RP 22-23, 26, 39-42). Even Mr. Lizarraga testified that Mr. Thomas' reaction was clearly a reaction to his fighting with his son and Mr. Thomas wanting to protect Ruben. (RP 26).

Trial counsel's failure to raise the claim of defense of others was unreasonable. There was no basis not to seek this clearly applicable defense, given the evidence that was presented, there was sufficient ground to make that claim. Had it not been for the deficient performance of counsel, there is a reasonable probability that the outcome would have been different.

Much like *Huddleston*, we are at a disadvantage with the record currently before the court. *State v. Huddleston*, 80 Wn. App. at 927. No one inquired into the state of mind of defense counsel, for obvious reasons, and Mr. Thomas did not testify at trial.<sup>2</sup> *State v. Huddleston* provides enlightenment on factual scenario such as this:

It does not show why defense counsel opted not to argue self-defense or defense of others. It does not show Huddleston's version of events. Counsel's choice of defenses may have been tactical, as the State contends. On the other hand, it may have been negligent, as Huddleston contends. Given only the present record, it

---

<sup>2</sup> Mr. Thomas has indicated he desired to testify and was not allowed to do so despite his request. Because there is no record of this, which is not uncommon for such claims, he understands the need to pursue that particular issue in the form of a personal restraint petition.

would be speculative to pick one assertion over the other, and speculation is not a proper basis for decision.

Accordingly, resolution of these arguments must await the development of a full and complete record.

*State v. Huddleston*, 80 Wn. App at 927, citing, *State v. McFarland*, 127 Wn.

2d at 334-35. Similarly, Mr. Thomas urges this court to follow the same path and remand.

**2. *The court erred in allowing hearsay and improper rebuttal testimony.***

The trial court's decision to allow rebuttal testimony is reviewed for abuse of discretion. *State v. White*, 74 Wn.2d 386, 444 P.2d 661 (1968).

"Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense." *Id* at 394-95. The State may not withhold matters in its case-in-chief "merely in order to present this evidence cumulatively at the end of defendant's case" *Id*.

In this case, the State called Officer Raby as its first witness and Officer Raby was questioned about his investigation. (RP 5-11). The State did not ask any questions about statements that may have been made. The State called Mr. Lizarraga and Ms. Cauffman after Officer Raby. (RP 19-47). During that initial testimony, Mr. Lizarraga and Mrs. Cauffman were questioned about whether they made written statements and whether they informed Officer Raby about Mr. Thomas choking Mr. Lizarraga (RP 32-33, 46).

The issue about what was said to the investigating officer on the night of the event as well as written statements was addressed in the State's case-in-chief. It was an abuse of discretion to allow the State to readdress these issues again in rebuttal. This was an instance of the State presenting evidence "cumulatively at the end of defendant's case." *White*, 74 Wn.2d at 394-95. Given that the findings supporting guilt were based entirely on credibility determinations by the court, this was prejudicial to the defense in that it essentially allowed to prosecution to restate their case at the end, leaving the judge with the State's witness as the last individual heard.

In addition to this testimony being improper rebuttal, the testimony concerned the information contained in the written statement made by Mr. Lizarraga. (RP 69). The trial court erred in overruling defense counsel's hearsay objections to this evidence, as it clearly is hearsay. ER 801 (c):

[P]rovides in effect that the out-of-court statement of an in-court witness is generally hearsay. By hypothesis, an out-of-court statement is not made at the present trial or hearing. Necessarily then, an out-of-court statement is hearsay when offered to prove the truth of the matter asserted--even if it was made by someone who is now an in-court witness (i.e., even if it was made by someone who is presently under oath, observable by the trier of fact, and subject to cross-examination).  
*State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).

Taking into account that the testimony elicited in the State's rebuttal was both improper rebuttal and hearsay and the contents of that evidence and the importance that witness credibility played in this case, the admission of this

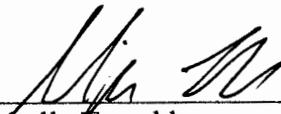
evidence likely had an impact on the outcome of this case. As such, this case should be remanded for retrial.

E. CONCLUSION

Based on the forgoing, Mr. Thomas respectfully requests that this Court remand for re-trial or additional findings regarding ineffective assistance.

May 12, 2017

Respectfully submitted,  
TROMBLEY LAW PLLC.

  
\_\_\_\_\_  
Michelle Trombley  
Attorney for Appellant, WSBA# 42912

PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 12 day of

May, 2017, I caused a true and correct copy of the Appellant's Brief to be served on the following in the manner indicated below:

Court of Appeals  
Washington Court of Appeals, Div III  
500 N. Cedar Street  
Spokane, WA 99201

U.S. Mail  
 Hand Delivery  
 Fax  
 e-mail

Counsel for Respondent  
Andrew Miller  
Benton County Prosecutor  
7122 W Okanogan Pl, Bldg A  
Kennewick, WA 99306

U.S. Mail  
 Hand Delivery  
 Fax  
 e-mail

Defendant  
Karion Thomas  
Benton County Jail  
7122 W Okanogan Pl, Bldg B  
Kennewick, WA, 99336

U.S. Mail  
 Hand Delivery

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

Dated this 12 day of May, 2017

By:   
Michelle Trombley, WSBA 42912