

FILED
Court of Appeals
Division III
State of Washington
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NO. 34853-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

BILLY TEMPLE,

Appellant.

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

The Honorable Annette S. Plese, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

DEFENSE COUNSEL'S FAILURE TO RAISE AND ARGUE
TEMPLE'S SELF-DEFENSE CLAIM DENIED TEMPLE HIS
RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR
TRIAL

As discussed in the opening brief, the evidentiary threshold for raising self-defense is “low” and merely requires “some evidence” tending to establish it. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Moreover, all the available evidence is to be viewed in the light most favorable to the defendant. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

Disregarding these standards, the State applies an extremely high evidentiary threshold and views the evidence in the light most favorable, not to Temple, but to itself.

For example, the State argues that Temple's statement to Cook that “enough's enough” – made while Cook had Temple by the throat and refused to loosen his grip – “evinces an attitude from the defendant that he was engaging in an offensive or retaliatory assault, rather than a defensive assault.” BOR, at 12. This is not borne out by the evidence.

Temple testified Cook would not let go of his throat,¹ he kept telling Cook to stop, he punched Cook once, he told Cook “enough’s enough,” and he punched Cook again because “he wouldn’t let go of my throat.” RP 138. In any reasonable light (and certainly in the light most favorable to Temple), the statement “enough’s enough” evinces Temple’s efforts to convince Cook to let go of him without the necessity of Temple punching Cook a second time. This is fully consistent with reasonable defensive force.

In a related argument, the State contends that “the defendant’s actions constituted greater force than reasonably necessary to defend himself . . . and that the defendant was acting . . . vindictively, to even the score for the victim’s alleged initial attack.” BOR, at 12. Again, however, in the light most favorable to Temple, the evidence showed that he only headbutted Cook after Cook headbutted him, he ceased hitting Cook the moment Cook fell to the ground and was no longer a threat, and he then simply left the room. RP 128-130, 132, 137-138. There was no excessive, vindictive force.

¹ By grabbing Temple’s throat and refusing to let go, Cook arguably committed Assault in the Second Degree. See RCW 9A.36.021(1)(g) (assault by strangulation). “Strangulation” means “to compress a person’s neck” while intending to obstruct blood flow or breathing. RCW 9A.04.110(26).

The State also notes that Temple never used the word “fear,” “afraid,” or some similar word to describe how he felt while being attacked by Cook. BOR, at 12-14. There is no such requirement, however. Rather:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th ed. 2016) (emphasis added); see also RCW 9A.16.020(3) (use of force not unlawful “[w]hen used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person”).

Since Cook continued to hold Temple by the throat after the two exchanged headbutts, Cook remained in close range and able to inflict another headbutt or a punch to Temple throughout the period in which Temple used force against him. Whether Temple uttered the word “fear” or not, this was easily sufficient (particularly in the light most favorable to him) for jurors to find that Temple

reasonably believed he was about to be injured and was attempting to prevent an additional offense throughout the encounter.²

The State also points out that Temple had no documented visible injuries, which could have “bolstered” his self-defense claim. BOR, at 13. But Temple’s self-defense claim did not need bolstering. While it is apparent Temple ultimately bested Cook in the fight, if jurors believed Temple’s version of events, there is a reasonable probability they would have acquitted – with or without documentation of Temple’s injuries – based on the State’s failure to disprove self-defense beyond a reasonable doubt.

Ultimately, what the State has presented in its response brief is an outline for a future closing argument. If there is a retrial, and there should be, prosecutors will be free to interpret the evidence and all inferences in their own favor. But that is not the proper standard in this appeal.

Finally, on the issue of self-defense, the State notes defense counsel interviewed witnesses prior to trial and argues counsel may have decided not to pursue self-defense because, for example, maybe Temple and Jamie presented as unreliable or perhaps Cook

² The State notes, “A cat may hiss at its owner, but the owner does not always fear bodily injury.” This is true. But when a cat hisses, then attacks its owner, biting the owner on the head and gripping the owner’s throat with its claws, the owner rightfully uses defensive force until the cat finally lets go.

presented as particularly sympathetic and genuine. BOR, at 15-16. There is no support for this conjecture.³

Instead, what the record shows is that defense counsel misunderstood the requirements for self-defense (believing it to be an affirmative defense Temple had to prove by a preponderance of the evidence) and misunderstood criminal intent (believing assault required an intent to commit assault rather than intent to commit an act that is an assault). These mistakes drove counsel to abandon self-defense and pursue a defense the prosecutor below rightfully described as legally unavailable. Through the distorted prism of these misunderstandings, counsel could not adequately and competently choose which defenses to pursue and which to abandon.

While the State claims a total absence of plausible evidence supporting self-defense, it praises defense counsel for the “defenses” he chose instead. It calls counsel’s argument that Temple never intended to commit the crime of assault “an alternative, reasonable defense.” BOR, at 17. The State also

³ Moreover, ultimately the only credibility assessment that matters is the jurors’ assessment. Competent counsel would not forego the only viable trial defense based on concerns jurors *might not* believe the evidence supporting that defense. Even assuming such concerns, the defense evidence consistently pointed to self-defense as the only legal defense to the assault charge.

praises defense counsel for arguing that inconsistencies in the witnesses' testimony raised doubts about whether an assault had occurred. BOR, at 17-18.

The problem, of course, is that even if jurors believed Temple's claim that he did not intend to commit the crime of assault, this was not a viable defense as a matter of law. The trial deputy correctly pointed this out to the jury and noted that, based on Temple's own admissions, Temple was guilty of Assault in the Second Degree. See RP 1800-185. On appeal, the State does not explain why its trial deputy was wrong on this point.

Nor was defense counsel's focus on inconsistencies in witness testimony a viable alternative to self-defense. While the parties disputed whether Cook started the fight with a headbutt and whether he persistently gripped Temple's throat, Cook, Temple, and Jamie all agreed that Temple had headbutted and punched Cook during the fray. See RP 93-94, 132, 137-138, 141-142. Without instructions on self-defense, these acts met the definition of intentional assault, and jurors were left with no option to convicting Temple as charged. RP 181-185.

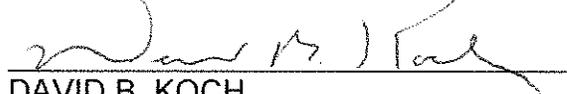
B. CONCLUSION

Defense counsel was ineffective. His deficient performance prejudiced Temple, who never had the benefit of a viable trial defense and is now serving a seven-year sentence. For the reasons discussed in the opening brief and in this brief, Temple respectfully asks this Court to reverse his conviction and remand for a fair trial.

DATED this 11th day of December, 2017.

Respectfully Submitted,

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