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NO. 64631-1-1

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

REC'D  
MAR 31 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOHN THOMPSON,

Appellant.

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

The Honorable Theresa Doyle, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 403 and denied appellant a fair trial when it permitted evidence that appellant was a “cage fighter.”

2. The prosecutor engaged in misconduct during closing argument when he used evidence of appellant’s cage fighting beyond the very limited purpose for which the trial court permitted its admission.

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault. Over a defense objection, the prosecution was permitted to reveal that appellant was involved in “cage fighting,” a combat sport where two men are placed in a metal cage to fight. Where this evidence was irrelevant to the charged crime and resulted in significant unfair prejudice, did the court err under ER 403 and deny appellant a fair trial?

2. In overruling the defense objection to evidence appellant was a cage fighter, the court ruled the evidence admissible for a limited purpose. The prosecution, however, went beyond this purpose during closing argument in using the evidence to obtain a conviction. Was this misconduct that denied appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor's Office charged appellant John Thompson with one count of assault in the second degree. CP 1-6.

Prior to trial, defense counsel moved to exclude any evidence that Thompson was a cage fighter, arguing it was not relevant and, given Thompson was claiming self-defense/defense of another, it could mislead jurors into thinking he had a special duty of care. 2RP<sup>1</sup> 6-8. The State argued it was relevant to show "a learned skill that the defendant possesses" and made it less likely the victim would have provoked an altercation. 2RP 7. Defense counsel responded that the alleged victim knew nothing about Thompson's cage fighting. 2RP 8.

The court expressed doubt whether this evidence was admissible, but indicated it would examine case law. 2RP 8. As discussed in detail below, the court would later find the evidence admissible, although for a purpose different than that suggested by the State pretrial. Ultimately, the prosecutor focused on the

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – November 12, 2009; 2RP – November 16, 2009; 3RP – November 17, 2009; 4RP – December 11, 2009.

evidence with two witnesses and during closing argument. 2RP 55-56; 3RP 47-49, 94, 97-98.

The jury found Thompson guilty, the trial court imposed a standard-range 12-month sentence, and Thompson timely filed his Notice of Appeal. CP 33-36, 40-47.

2. Substantive Facts

a. The charged assault

In May 2009, Niki Macheta rented a room in the home of Carol Knigge. Carol's son, Michael, also lived in the home. 2RP 16-17, 102. Macheta and Michael had known each other for years and, for a period, had been "friends with benefits," meaning they had sex but no formal dating relationship. 2RP 15. But that was no longer the case and by the time Macheta moved in to the Knigge home, she and Michael were not on speaking terms. 2RP 15, 35.

Macheta and Michael both had jealousy issues. 2RP 35. In an attempt to avoid problems with Macheta living in the home, Carol Knigge imposed a policy that neither Macheta nor Michael could invite guests of the opposite sex to spend the night. 2RP 16, 35. Despite this policy, on May 16, 2009, Macheta brought a friend – John Thompson – to the house and asked Carol if Thompson

and his nine-year-old daughter Alyssa could stay the night. 2RP 34; 3RP 6. Carol allowed them to stay. 2RP 113-14. Thompson knew nothing about Carol's policy or the history between Macheta and Michael. 3RP 10-12, 37-38.

Carol was hosting a wedding reception at the home. For several hours after their arrival, Macheta and Thompson mingled with the guests, ate, and enjoyed the punch, which contained alcohol and made Macheta "very intoxicated." 2RP 19-21. Thompson, however, was not intoxicated. 3RP 19.

Michael had not been home all evening. 2RP 22. He had been drinking at a friend's house. 2RP 61. Michael weighs about 120 lbs. Over the course of an hour to an hour and a half, he consumed 60-70 ounces of malt liquor on an empty stomach. 2RP 72-73. When Michael arrived home, he discovered that Thompson was staying the night and felt this was a violation of his mother's policy. He was not happy. 2RP 62.

After the reception ended, Alyssa was provided a downstairs couch on which to watch a movie and sleep. 2RP 22; 3RP 13, 15. The couch was within six feet of the front door to the home. 3RP 16. Thompson checked on Alyssa periodically and eventually, around 10:30 p.m., he fell asleep upstairs in Macheta's room. 2RP

22; 3RP 15, 17. Carol Knigge went out for the night to a casino.  
2RP 23, 104.

Michael's bedroom is directly across the hall from Macheta's. 2RP 16-17. Michael was angry. He turned on his stereo, played some rap music, and turned the volume up "full blast." 2RP 23, 63-64. Michael's door was open and the music awakened Macheta. 2RP 40. She went to Michael's room and asked him to turn the volume down. He refused. 2RP 24, 40, 43-44. Michael was rude and made her cry. 2RP 24, 44. She called her brother, who calmed her down, and she went downstairs to smoke a cigarette. 2RP 24, 44. Michael followed her, punching the walls and yelling. 2RP 45-46.

Thompson was still in Macheta's room. 2RP 44-45. Macheta went back to her room and noticed that Thompson was now awake. 2RP 46; 3RP 19. She headed back into Michael's room and Thompson followed her. 2RP 46. Thompson spoke to Michael. Macheta could not hear everything they said, but she described the conversation as quiet and without any shouting. 2RP 24-25, 46. She did hear Thompson telling Michael to turn down the music because Alyssa was sleeping downstairs. 2RP 47.

Macheta worried about a confrontation between the two men and called Carol, who said it would be best if Macheta and Thompson just left the house. 2RP 24-25, 47. Thompson agreed they should go. 2RP 25. He immediately began packing his belongings, took them downstairs to his car, and started the car to warm it up for Alyssa. 2RP 25, 49; 3RP 24. Macheta also was standing outside by the car. 2RP 53. Thompson started to head back inside the house to grab Alyssa from the couch. 2RP 53-54. When he turned toward the front porch, however, he saw that Michael was now standing on the porch and talking to his mother on the phone. 2RP 25-26, 65.

Macheta heard Thompson say that Michael was glaring at him. 2RP 26-27. She could not hear the words exchanged between Thompson and Michael, but Thompson moved toward Michael quickly. 2RP 27, 54. Although Macheta did not see Michael make any gesture toward Thompson, her view was obstructed. 2RP 28, 54. Macheta sensed there was going to be a fight and tried to grab Thompson around the waste. 2RP 27. But Thompson was able to punch Michael twice in the face and Michael fell to the floor. 2RP 27-28. Thompson did not want the police involved because he knew they would take custody of

Alyssa. 2RP 29; 3RP 40. He, Alyssa, and Macheta left in Thompson's car. 2RP 29.

At trial, Thompson and Michael presented very different versions of what happened on the porch. According to Thompson, just before he went outside to put his belongings in his car, he told Alyssa that he would be right back for her. 3RP 26-27. Thompson left the front door open and an outer screen door was propped open. 3RP 27-29. When he headed back toward the door to get Alyssa, Michael was on the porch and said "what the fuck are you looking at?" 3RP 32, 35. Thompson said he was going back inside to get his daughter. 3RP 32, 35. Michael was standing in front of the door, which was now closed. 3RP 33-34. He said, "no, you are not" and made a threatening gesture with his hand, scaring Thompson and making him worry for his and his daughter's safety. 3RP 35-38. The two men were within three feet of one another, and Thompson reacted, quickly hitting Michael two times. 3RP 35-37. Thompson immediately went inside, grabbed his daughter, and left for home. 3RP 39.

In contrast, Michael testified that he stepped outside on the porch and was smoking and speaking with his mother on the phone when he noticed Thompson standing by his car and glaring at him.

2RP 65-66. He told Thompson not to glare at him and to leave. 2RP 66, 90, 92. He went to light his cigarette, and does not remember anything thereafter until he woke up at the hospital. 2RP 66. He was hit in the eye, suffering an orbital fracture, and he lost a tooth. 2RP 67.

Michael testified he was merely “buzzed” from drinking the malt liquor, noting he had a high tolerance for alcohol. 2RP 72-73. He denied feeling jealous, but admitted Macheta got into his “anger zone” by breaking the house rule and that he had expressed his irritation with the loud music. 2RP 63, 76, 80-81. He had no memory of Macheta asking him to turn the volume down. Nor did he remember following her downstairs and punching the walls. 2RP 83.

Michael and Thompson also disagreed on the nature of their conversations in the house, before the fray. Whereas Thompson testified that he politely and respectfully asked Michael to turn down the music, Michael testified that when he refused to turn the volume down, Thompson asked if he wanted to step outside and settle the matter. 2RP 64, 85-86; 3RP 21-24. Michael conceded he may have told Thompson, “get the fuck out of my room” and that this interaction left him even more agitated. 2RP 85-86.

Carol Knigge testified that she was on the phone with Michael when he was hit. 2RP 106-07. Michael had called her a few minutes earlier, to complain that Thompson had been in his room, and Carol told him that if he needed a safe place to go, he should get in her car, which was parked outside the house. 2RP 105-06, 119. She spoke to him again as he stood on the porch. She was telling him to go to her car when she heard somebody say something to Michael, heard Michael say something back, heard Macheta scream, and finally heard the sound of the phone tumbling to the ground. 2RP 106-107, 120. When Carol arrived home, she saw that Michael was bleeding. Police were called, and Michael was treated at a hospital. 2RP 108-109.

During closing arguments, both sides agreed the main issue was justification – whether Thompson reasonably believed Michael presented a threat of injury to Thompson or his daughter, thereby justifying the use of force. 3RP 90, 100. Jurors were instructed that one who reasonably believes he or someone else is about to be injured may use necessary force to prevent that injury. CP 24. The State argued Thompson did not reasonably fear Michael. The defense argued that he did based on Michael blocking access to

Alyssa and making a quick threatening movement toward Thompson. 3RP 93-94, 104-05.

b. Evidence of Thompson's cage fighting

As noted above, as part of its attempt to convince jurors of Thompson's guilt, the State had hoped to share with jurors the fact Thompson was a cage fighter. 2RP 7. Ultimately, the State succeeded.

During Niki Macheta's testimony, the trial judge held a sidebar at the prosecutor's request. 2RP 54. At that sidebar, the prosecutor requested permission to ask Macheta what Thompson said to her right after the incident. 2RP 69. According to the prosecutor, "Ms. Macheta would testify that the defendant said they had to get out of there because he was a cage fighter, his hands were considered to be lethal weapons. And that's why he wanted to get out of there before the police came." 2RP 69. The court allowed the testimony "to explain why [Thompson] left the scene," finding that the unfair prejudicial impact did not substantially outweigh the probative value. 2RP 70-71.

The following exchange then occurred between the prosecutor and Macheta:

Q: Now, after the incident, when you were in the car, did John Thompson indicate to you why he wanted to leave?

A: He said that he didn't want the police involved because he was a cage fighter and that would put him away for a long time.

Q: He did talk about his hands?

A: If you're a cage fighter your hands are considered lethal weapons.

Q: Did he say that to you?

A: Yes.

2RP 55-56.

Over additional defense objections, the prosecutor was permitted to raise cage fighting again on cross-examination of Thompson. 3RP 47-48. This time, the prosecutor spent considerably more time on the subject:

Q: Did you tell Carol Knigge that you were a cage fighter?

A: I did.

MS. MOREKHOVA: Objection, beyond the scope.

THE COURT: I'll allow it.

Q: (Mr. Hamilton continuing) I'd like to ask you some questions about that.

What does that mean to be a cage fighter?

A: Quite a few different things. It started in our town as a way to – this guy opened a club called Kessler's. It's very non-professional. Seen it going, but it was extremely – you'd come in, sign a waiver, and if your weight matched then you had a bout.

Q: Is this what is called mixed martial arts?

A: Yeah, sort of.

Q: It's a form of combat?

A: If you're in the professionals, yeah.

Q: And people are allowed to use boxing?

A: There's boxing. There's a lot of different rules to what I was allowed to do, and the professionals, what they are allowed to do.

3RP 47-48.

The prosecutor then elicited from Thompson that participants are allowed to use skills from boxing, karate, and jujitsu. Moreover, people are sometimes knocked unconscious or, if they don't submit, they may pass out. 3RP 48. Over a defense relevance objection, the prosecutor was permitted to continue, revealing that Thompson had fought as a cage fighter four times.

3RP 49.

The prosecutor used this evidence to its advantage during closing argument. In arguing that Thompson did not have a

reasonable fear of Michael, the prosecutor told jurors that Michael was “not as skilled as Mr. Thompson,” a clear reference to cage fighting. 3RP 94. Later, the prosecutor argued:

And, ladies and gentleman, he [Thompson] says he was scared of Michael Knigge. I’m telling you that is not candid, that’s not frank testimony, and I ask you to reject that. There is no way under the sun that Michael Knigge could have stood up to this man.

By Mr. Thompson’s own admission, he has been a cage fighter. How many people do you know that can say that? They get into a ring made out of metal and they fight people where anything goes. Almost anything. Where people can use wrestling, boxing, karate, jujitsu. Where people try to knock out their opponent or choke out their opponent or try to submit their opponent. Where people can have broken bones from submissions that get carried away.

Would it be reasonable for any one of you to face a cage fighter? Of course not. And it’s not reasonable to expect Mr. Thompson was afraid of Michael Knigge. It’s not reasonable to accept that he believed that Alyssa was in imminent danger of harm.

3RP 97-98. Thompson was convicted and now appeals.

C. ARGUMENT

1. THE COURT ERRED WHEN IT ALLOWED EVIDENCE THAT THOMPSON WAS A CAGE FIGHTER.

The trial court permitted the State to elicit evidence that Thompson was a cage fighter to explain why he left the scene. 2RP 70. By doing so, the court denied Thompson a fair trial.

Evidence must be relevant to be admissible. ER 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." ER 403. The trial court's balancing of probative value and prejudicial impact is reviewed for abuse of discretion. State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

Jurors knew that Thompson did not remain at the scene after hitting Michael. That was never disputed. That Thompson's decision to leave was based partly on his belief that, as a cage fighter, his hands were considered lethal weapons and therefore he

might go to prison for a long time was not relevant. It did not make the existence of any fact of consequence – those related to whether an assault occurred and, if so, whether the assault was legally justified – more or less probable. The resulting prejudice, however, was significant. It portrayed Thompson as a violent, professional fighter who sought out trouble with others.

Over defense objections, the trial court allowed the prosecution to elicit not just the fact Thompson had concerns about his status as a cage fighter – damaging by itself – but also details of cage fighting that demonstrated its violence, including the fact it involves mixed martial arts, people are sometimes knocked unconscious or pass out, and Thompson had engaged in this activity multiple times. 2RP 55-56; 3RP 47-49. The prosecutor highlighted this evidence during his closing argument. 3RP 94, 97-98.

The erroneous admission of evidence requires reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The error is harmless “if the evidence is of minor significance when

compared with the evidence as a whole.” Wilson, 144 Wn. App. at 166 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Evidence that Thompson was a cage fighter was not “of minor significance.” Defense counsel attempted to downplay the evidence. See 3RP 59-64, 115-116. But those efforts were futile. In a case where the jury’s verdict rested on determining whether Thompson reasonably feared for his and daughter’s safety and reacted accordingly or assaulted Michael without legal justification, this was critical evidence. It portrayed Thompson as a violent individual who sought combat for sport, increasing significantly the chance jurors would reject Thompson’s lawful force defense. Thompson should receive a new trial. See State v. Saltarelli, 98 Wn.2d 358, 366-67, 655 P.2d 697 (1982) (improper admission of evidence under ER 403; reversal required).

2. FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT ALSO DENIED THOMPSON A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096

(1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Consistent with their duties, prosecutors must not misstate the law of the case or otherwise mislead the jury. To do so is a serious irregularity. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Nor may prosecutors urge a guilty verdict on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

While the trial court should never have allowed evidence of Thompson's cage fighting under ER 403, the State's closing argument went well beyond the limited purpose for which that evidence had been admitted. The trial court admitted evidence of Thompson's cage fighting "to explain why [Thompson] left the scene." 2RP 70. Despite this narrow purpose, during closing argument, the trial deputy used this evidence for a much broader and more damaging purpose – to undermine Thompson's only defense, i.e., that he struck Michael out of fear for his safety and that of his daughter.

The prosecutor described cage fighters like Thompson as people who "get into a ring made out of metal and they fight people where anything goes. Almost anything." 3RP 97. He said people

like Thompson “try to knock out their opponent or choke out their opponent or try to submit their opponent. Where people can have broken bones from submission that get carried away.” 3RP 98.

The prosecutor argued that it would not be reasonable for any member of the jury to face a cage fighter, it was not reasonable to expect Thompson was afraid of Michael, and it was not reasonable to believe that Thompson feared for Alyssa. 3RP 98.

This argument violated the law of the case by far exceeding the limited purpose for which the evidence was admitted. It also misstated the law generally because there is no special standard for cage fighters. The defense was merely required to demonstrate that Thompson reasonably believed he or Alyssa was about to be “injured.” CP 24; RCW 9A.16.020(3). Being prepared to defend oneself – through cage fighting or any other defensive training – does not vitiate the right to claim self-defense. Reasonable fear one is about to be injured means fear of imminent harm if one does *not* defend oneself. Yet, the prosecutor was permitted to argue that someone trained in cage fighting cannot reasonably claim fear from those without similar training.

Defense counsel’s failure to object during the prosecutor’s closing argument is surprising. Earlier in the trial, when counsel

objected to the admission of *any* evidence of cage fighting, counsel had expressed her fear that jurors might erroneously conclude that one who is experienced in cage fighting is subject to a different standard of care when it comes to self defense or defense of another. 2RP 6, 70. Defense counsel even suggested she would propose a limiting instruction to avoid this mistake by jurors. 2RP 70. Despite these valid concerns, counsel failed to object when the prosecutor effectively argued for such a standard, telling jurors that it was not reasonable that a cage fighter would have feared injury.

But the absence of a defense objection is not fatal on appeal. Reversal is still required where “the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice.” State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P. 2d 426 (1994) (citing Belgarde, 110 Wn.2d at 507). Given the very limited purpose for which the cage fighting evidence was admitted, only ill intention can explain the prosecutor’s decision to use this evidence for a much broader purpose. This was flagrant. Moreover, it could not be cured by an instruction. The argument went directly to the heart of the defense case, incurably infecting jurors with the notion that based on

defensive capabilities, a cage fighter like Thompson can't reasonably fear injury from a non-cage fighter.

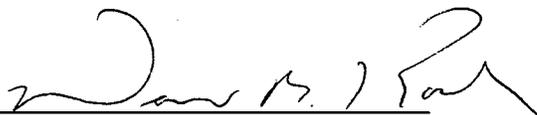
D. CONCLUSION

The trial court's erroneous admission of cage fighting evidence, which the State used to its advantage with two witnesses and during closing argument, denied Thompson a fair trial. Moreover, the prosecutor's expansive and improper use of this evidence during closing was misconduct. Thompson's conviction should be reversed and the case remanded for a new trial without the offending evidence and argument.

DATED this 31<sup>st</sup> day of March, 2010.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64631-1-I
	)	
JOHN THOMPSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     JOHN THOMPSON  
          NO. 209017955  
          KING COUNTY JAIL  
          500 FIFTH AVENUE  
          SEATTLE, WA 98104

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MARCH, 2010.

x *Patrick Mayovsky*