

70743-4

70743-4

REC'D

FEB 11 2014

King County Prosecutor
Appellate Unit

NO. 70743-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO RIOS-THOMAS,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
FEB 11 2014

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

The Honorable Sean O'Donnell, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	7
1. THE TRIAL COURT DEPRIVED RIOS-THOMAS OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.....	7
2. THE STATE FAILED TO PROVE SUBSTANTIAL BODILY HARM BEYOND A REASONABLE DOUBT.....	12
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. A.M.</u> 163 Wn. App. 414, 260 P.3d 229 (2011).....	12
 <u>State v. Adamo</u> 120 Wash. 268, 207 P. 7 (1922)	9
 <u>State v. Ashcraft</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	14
 <u>State v. Bebb</u> 44 Wn. App. 803, 723 P.2d 512 (1986) <u>aff'd.</u> , 108 Wn.2d 515 (1987).....	7
 <u>State v. Budik</u> 173 Wn.2d 727, 272 P.3d 816 (2012).....	12
 <u>State v. Crowder</u> 103 Wn. App. 20, 11 P.3d 828 (2000) <u>review denied</u> , 142 Wn.2d 1024 (2001).....	8
 <u>State v. Engel</u> 166 Wn.2d 572, 210 P.3d 1007 (2009).....	12
 <u>State v. Fondren</u> 41 Wn. App. 17, 701 P.2d 810 <u>review denied</u> , 104 Wn.2d 1015 (1985).....	9
 <u>State v. Garcia</u> 146 Wn. App. 821, 193 P.3d 181 (2008) <u>review denied</u> , 166 Wn.2d 1009 (2009).....	15
 <u>State v. Hovig</u> 149 Wn. App. 1, 202 P.3d 318 <u>review denied</u> , 166 Wn.2d 1020 (2009).....	13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	7
<u>State v. Janes</u> 121 Wn.2d 220, 850 P.2d 495 (1993).....	8, 11
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010)	11
<u>State v. Maupin</u> 128 Wn.2d 918, 913 P.2d 808 (1996).....	7
<u>State v. McKague</u> 172 Wn.2d 802, 262 P.3d 1225 (2011).....	13
<u>State v. Walden</u> 131 Wn.2d 469, 932 P.2d 1237 (1997).....	10
<u>State v. Walker</u> 136 Wn.2d 767, 966 P.2d 883 (1998).....	8, 9
<u>State v. Walker</u> 40 Wn. App. 658, 700 P.2d 1168 <u>review denied</u> , 104 Wn.2d 1012 (1985).....	8, 10
 <u>FEDERAL CASES</u>	
<u>Washington v. Texas</u> 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 401	7
RCW 9A.04.110	13
RCW 9A.16.020	8
RCW 9A.36.021	12
U.S. Const. amend VI	7
Wash. Const. art I, § 22.....	7

A. ASSIGNMENTS OF ERROR

1. The trial court's exclusion of relevant defense evidence was manifestly unreasonable and based on untenable grounds.

2. The State failed to prove each element of second degree assault beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1. The State charged Francisco Rios-Thomas with assaulting his girlfriend, Jena Pay Pay, by punching her in the face and kicking her in the head. Rios-Thomas admitted he punched her after she – for the second time – ran up to him and put her hands on him. Rios-Thomas sought to admit evidence that he was aware Pay Pay had previously been arrested for assault to support his defense that he reasonably believed he needed to strike Pay Pay to prevent further attack. The court excluded this evidence. Did the court's exclusion of relevant evidence to support a defense of self-defense constitute an abuse of discretion that violated Rios-Thomas' constitutional right to present a defense?

2. An emergency room physician diagnosed Pay Pay with a concussion after learning she briefly lost consciousness when Rios-Thomas punched her in the face, knocked her to the ground, and kicked her in the head. Pay Pay had swelling on the left back side of her head.

She had no bleeding in her brain and no fractures. Did the State fail to prove Rios-Thomas caused "substantial bodily harm" beyond a reasonable doubt?

B. STATEMENT OF THE CASE

Marian Pay Pay (Marian) accompanied her niece, Jana Pay Pay (Pay Pay), to a park near Pike Place Market in search of Pay Pay's boyfriend, Rios-Thomas. 2RP 56-57, 87.¹ Pay Pay had met Rios-Thomas three years earlier and they lived together. 2RP 86-87. They also shared a child together. 2RP 86. Marian, Pay Pay, and Rios-Thomas had been drinking alcohol that night. 2RP 58, 88-89.

Pay Pay met Rios-Thomas in the park and the two began to argue. 2RP 57. Marian walked away and Pay Pay joined her. 2RP 57-58. Rios-Thomas ran up and he and Pay Pay "started like fighting around, they both fell down." 2RP 58. Rios-Thomas got up and left. Marian urged Pay Pay to leave with her and the two began walking down the street. 2RP 59-63, 83.

Somehow, Rios-Thomas got ahead of them, and Marian saw him running toward them. 2RP 63-65, 71-72, 79. Rios-Thomas punched Pay

¹ Rios-Thomas refers to the verbatim report of proceedings as follows: 1RP – 7/1/13; 2RP – 7/2/13; 3RP – 7/3/13; 4RP – 8/9/13.

Pay and knocked her down. 2RP 63-66. Marian heard Pay Pay's head hit the sidewalk and "her eyes were funny." 2RP 66. Rios-Thomas came around behind Pay Pay and kicked her, which seemed to bring her back to consciousness. 2RP 66. Pay Pay jumped up and Marian followed her to a nearby restaurant. 2RP 66.

Pay Pay recalled that when she first met up with Rios-Thomas, he was drunk. 2RP 89-91. She used the restroom once and returned. 2RP 89-90. After Rios-Thomas got aggressive with her, Pay Pay got up again to use the restroom. 2RP 91-92. Marian intervened, and she and Pay Pay began to walk off. 2RP 92, 96. Rios-Thomas yelled for Pay Pay to come back, but she kept walking. She then saw Rios-Thomas "running across the street like a crazy man," and he punched her in the face. 2RP 92-93. She fought back and started swinging, but he punched her again and she fell to the ground. 2RP 93. She got back up and grabbed him, but he hit her again. Finally, she threw him to the ground. 2RP 93.

Pay Pay and Marian ran off, but Rios-Thomas approached them and punched her in the face. 2RP 93-94. Pay Pay took a step back and Rios-Thomas hit her again. He then grabbed her by the hair and hit her again, which is at the point Pay Pay believed she lost consciousness. 2RP

94-95, 111. When she came to, she stumbled to a nearby restaurant and told patrons to call the police. 2RP 94-95, 111-12.

Jordan Pickett was at a restaurant near Pike Place Market when he heard arguing outside between a man and a woman. 3RP 17-18. The woman repeatedly said, "Stay away from me." 3RP 19-20. Pickett then heard glass breaking and could see it shatter on the ground behind the man. Given its landing spot, Pickett deduced the glass object came from the woman. 3RP 18-19. The man then punched the woman and knocked her to the ground. 3RP 20. She got back up, continued yelling "get away from me," and flailed a jacket at the man. 3RP 20-21.

Eugene Sydor was in his fourth-floor apartment above Pike Place Market when he heard a woman scream. 2RP 32-35. He looked outside and observed a man run up and punch the woman "hard like she was a grown man." RP 35-39, 44. The woman was dazed and fell to the sidewalk. 2RP 42-43. Sydor recognized the woman as Pay Pay, an acquaintance of his. 2RP 41, 47-48, 114-15. He identified Rios-Thomas as a man he had often seen at the park. 2RP 41-42.

Another woman rushed up after the punch, and Rios-Thomas pushed her back. 2RP 35, 43. He then circled the fallen Pay Pay and kicked her hard in the back of her neck. 2RP 35, 43-44. Pay Pay tumbled

off the sidewalk onto the cobblestone street. 2RP 35, 44. Sydor called 911. 2RP 35.

Police arrived and Pay Pay was taken to the hospital. 2RP 19. Marian told hospital staff Pay Pay had lost consciousness. 2RP 20. Part of Pay Pay's head was swollen and she had scrapes and bruises. 2RP 21, 25. There was no bleeding in her brain and her skull was not fractured. 2RP 22. Because of the report of unconsciousness, a doctor diagnosed her with a concussion. 2RP 22.

Based on this evidence, the State charged Rios-Thomas with second degree assault. CP 1-7.² Rios-Thomas testified he had one beer at the park with friends, then left to get something to eat. 2RP 131-32. He denied being drunk. 2RP 147-48. Pay Pay arrived at the park while he was gone, and Rios-Thomas came back to meet her. 2RP 132-34. He let Pay Pay use his cell phone, and she saw text messages that angered her. Pay Pay yelled and swore at him as he was seated on a bench. An argument ensued and Pay Pay threw the cell phone at him. 2RP 134-36.

Rios-Thomas and his friends left the park and began to walk through the Market. 2RP 134-37. He looked back and saw Pay Pay and

² The State also charged Rios-Thomas with intimidating Marian. CP 1-2. The jury found Rios-Thomas not guilty of the charge. CP 92. That portion of the incident is therefore not discussed further.

Marian quickly approaching. 2RP 134-38. Pay Pay ran up and pushed him hard, so he pushed her back. 2RP 138-39. She threw a liquor bottle at him and it hit him in the face. 144-45. A tussle ensued and both he and Pay Pay fell to the ground. 2RP 138-40. Rios-Thomas pushed Pay Pay off of him, got up, and walked away. 2RP 140.

Pay Pay caught up with him again and began punching him and grabbing his clothes. 2RP 143-44. Tired of defending himself, Rios-Thomas responded by punching her and knocking her to the ground. 2RP 143-44. He walked away. He did not kick her. 2RP 140, 145. As he walked up the hill, Rios-Thomas saw the police arrive. 2RP 145-46. He was arrested and taken away. 3RP 41-45.

After hearing this evidence, the jury found Rios-Thomas guilty of second degree assault. The jury also found Rios-Thomas and Pay Pay were family or household members. CP 91-92. The trial court imposed 13-month standard range sentence based on an offender score of 3. CP 121-29.

C. ARGUMENT

1. THE TRIAL COURT DEPRIVED RIOS-THOMAS OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A defendant's right to present evidence in his defense is guaranteed by both the federal and state constitutions. U.S. Const. amend 6; Const. art I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury so the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Although a defendant has no constitutional right to present irrelevant evidence, only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) aff'd., 108 Wn.2d 515 (1987). Evidence is relevant if it has "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.

Relevant, admissible defense evidence may be excluded only if the prosecution demonstrates a compelling state interest for exclusion. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). While a trial court

has discretion in ruling on evidentiary matters, a decision that is manifestly unreasonable or based on untenable grounds must be reversed on appeal. State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024 (2001).

A person about to be injured is legally justified in using force to prevent an offense against his person, so long as the force used is not more than necessary. RCW 9A.16.020(3). This statutory definition of self-defense includes both subjective and objective components: the subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him, and the objective portion requires the jury to determine what a reasonable person in the defendant's situation would have done. State v. Janes, 121 Wn.2d 220, 238-39, 850 P.2d 495 (1993).

Because self-defense includes a subjective component, the circumstances known to the defendant at the time of the incident are relevant. The defendant's knowledge of the victim's reputation and past conduct thus may support a claim of self-defense. State v. Walker, 136 Wn.2d 767, 774-76, 966 P.2d 883 (1998). Although not admissible to establish the victim's character, evidence of the victim's specific earlier acts is admissible for the limited purpose of showing whether the

defendant had a reasonable apprehension of danger. State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810, review denied, 104 Wn.2d 1015 (1985); State v. Walker, 13 Wn. App. 545, 549, 536 P.2d 657, review denied, 86 Wn.2d 1005 (1975); see State v. Adamo 120 Wash. 268, 270-71, 207 P. 7 (1922) (to establish belief he was in danger of injury, defendant may show specific acts of the victim of which he had knowledge before he committed the offense charged).

Rios-Thomas moved to admit evidence of specific incidents that resulted in Pay Pay's arrests for fourth degree assault during a time when he and Pay Pay were dating. He maintained the evidence was relevant to the reasonable fear component of the defense of self-defense. CP 31-32; 1RP 18-21, 23-26. The trial court reserved ruling pending further foundation. 1RP 25-26.

Rios-Thomas reiterated his request during cross examination of Pay Pay, again asserting the evidence was relevant to show he reasonably feared injury and acted in self-defense. He maintained he was aware of Pay Pay's past assaultive behavior at the time of the instant offense. 2RP 105-06. As an offer of proof, Rios-Thomas said he expected Pay Pay would acknowledge being arrested during a time they were in a

relationship together. 2RP 107. The trial court denied the motion. 2RP 108-09. This was error.

Some evidence of aggressive or threatening behavior or gestures by the victim is typically required to show that the defendant reasonably believed he was in danger. State v. Walker, 40 Wn. App. 658, 663, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985). Contrary to the court's conclusion, Rios-Thomas met this burden here. He showed Pay Pay was an angry young woman who threw a glass object at him from a short distance away. Evidence that Rios-Thomas knew Pay Pay had previously been arrested for assaultive behavior tended to support his reasonable apprehension of injury at Pay Pay's hands. This demonstrated evidence of aggressive behavior was not unfairly prejudicial and supported Rios-Thomas' defense of self-defense. The trial court's exclusion of the evidence violated Rios-Thomas' constitutional right to present a defense.

The jury must be able to stand in the defendant's shoes and look at his subjective beliefs when considering a self-defense claim. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Only by considering the accused's perceptions and the circumstances surrounding the act is the jury able to make the determination of whether a reasonably prudent

person similarly situated would have believed the defendant's act to be necessary. Janes, 121 Wn.2d at 239.

Because of the court's erroneous ruling, Rios-Thomas was precluded from informing the jury of the relevant circumstances known to him at the time of the incident. He was not able to show that he knew of specific instances in which Pay Pay used conduct that gave trained police officers probable cause to believe she committed the crime of assault. Because the jury lacked this information, it could not evaluate the situation from Rios-Thomas' perspective. Without knowing what Rios-Thomas knew about Pay Pay, the jury could not legitimately decide if a reasonable person would have acted as Rios-Thomas did.

The court's error is harmless only if this Court is convinced beyond a reasonable doubt that any reasonable jury would have found Rios-Thomas guilty without the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576, 582 (2010). The State cannot meet that burden. The case hinged largely on the credibility of the combatants. The jury's verdict of not guilty as to the intimidation charge indicated it did not believe Pay Pay's testimony that Rios-Thomas threatened to kill Marian if she reported the incident. 2RP 95-96. Both parties had eyewitness testimony that Pay Pay was yelling at Rios-Thomas. Even Marian testified that both Pay Pay

and Rios-Thomas hit the ground during the initial confrontation. Pay Pay herself reported to hospital staff she had three or four beers before the incident. 2RP 24.

A juror who fully understood the situation from Rios-Thomas' perspective could reasonably have concluded that his use of force was justified. The court's erroneous exclusion of defense evidence cannot be considered harmless beyond a reasonable doubt, and reversal is required.

2. THE STATE FAILED TO PROVE SUBSTANTIAL BODILY HARM BEYOND A REASONABLE DOUBT.

Due process requires the State to prove each essential element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In assessing a challenge to the sufficiency of the evidence, a reviewing court views the evidence in the light most favorable to the State. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The question is whether a rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

To sustain the assault conviction, the State has to prove beyond a reasonable doubt that Pay Pay suffered substantial bodily harm. RCW 9A.36.021(1)(a). "Substantial bodily harm" is bodily injury that "involves a temporary but substantial disfigurement, or which causes a temporary

but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]" RCW 9A.04.110(4)(b).

Our Supreme Court has interpreted the term "substantial" as meaning a level of harm that is "considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). In McKague, for example, the complainant suffered a concussion without loss of consciousness, a scalp contusion and lacerations, head and neck pain, and lacerations on his arm. A CT scan showed a possible fracture of facial bones. He had facial bruising and swelling for several days. The complainant's severe neck and shoulder pain remained for more than a week, and residual pain lasted another two months. McKague, 172 Wn.2d at 804, 806. The Court found this constituted substantial bodily harm. Id., 172 Wn.2d at 807.

Serious, lasting bruises may alone constitute "substantial bodily harm." In State v. Hovig,³ the "substantial bodily harm" consisted of a mouth-shaped bite mark that covered an infant's entire cheek. Photographs showed "individual red and violet teeth-marks" along the

³ 149 Wn. App. 1, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009).

upper and lower circumference of the injury. The entire right cheek was bruised. Id., 149 Wn. App. at 5. A doctor testified the child would have felt pain at the time of the injury and the bruise would have lasted from seven to 14 days. Id., 149 Wn. App. at 13.

In another suspected child abuse situation, doctors observed bruises on the child's body, some of which were more than three days old, as well as adult-sized bite marks. State v. Ashcraft, 71 Wn. App. 444, 448-49, 859 P.2d 60 (1993). Some of the bruises appeared to be consistent with being hit with a cord or rope, others with a belt or ruler, and still others with a stiff-soled shoe. Ashcraft, 71 Wn. App. at 449. The bruises caused by the belt, and those consistent with a shoe strike, prompted this Court to hold that "[t]he presence of the bruise marks indicates temporary but substantial disfigurement[]" sufficient to establish substantial bodily harm. Ashcraft, 71 Wn. App. at 455.

By comparison, Pay Pay's injury was minor. After being told Pay Pay lost consciousness, the emergency room physician ordered a C.T. scan. 2RP 20-21. The scan showed no bleeding in the brain and no skull fracture. 2RP 22. The doctor could feel an area of soft tissue swelling on the back of the left side of Pay Pay's head consistent with a bruise. 2RP 20. Pay Pay also suffered some abrasions on her knees and left arm. She

complained of neck pain and pain in her left arm. X-rays revealed no broken bones. The doctor diagnosed Pay Pay with a concussion. 2RP 22.

The State failed to establish temporary but substantial disfigurement, or temporary but substantial loss or impairment of function, or any broken bones. Pay Pay did not suffer substantial bodily harm, which means Rios-Thomas' conviction should be reversed and remanded with an order to enter judgment for fourth degree assault. See State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) (unproven conviction for third degree assault, in which trial court found defendant pushed complainant, dismissed and cause remanded for entry of judgment and sentence for fourth degree assault), review denied, 166 Wn.2d 1009 (2009).

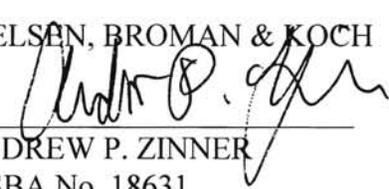
D. CONCLUSION

For the above reasons, this Court should reverse the conviction and remand with an order finding Rios-Thomas guilty of the lesser offense of fourth degree assault. Alternatively, this Court should reverse the conviction and remand for a new trial.

DATED this 11 day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 70743-4-1
)	
FRANCISCO RIOS-THOMAS,)	
)	
Appellant.)	

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 11TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANCISCO RIOS-THOMAS
DOC NO. 371651
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

RECEIVED
COURT OF APPEALS
DIVISION ONE
FEB 11 2014

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF FEBRUARY, 2014.

X *Patrick Mayovsky*