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5-26-16

Court of Appeals
Division I
State of Washington

NO. 73921-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MOORE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Mr. Moore has spent a life trying to survive. He lived rough as a youth, stealing rides on trains between his relatives in Mississippi, Tennessee and Illinois. He lives in a space in Ballard and comes into downtown Seattle to take advantage of services for poor and homeless persons. Mr. Moore suffered a gunshot wound as a child which left a bullet lodged in his brain. Mr. Moore is sensitive to being around people because of his fear this bullet will move and cause him to die.

When Mr. Moore found a quiet place to play online video games with his grandchildren near the University Street Metro Station, he did not expect to be confronted by Metro security guard Jessica Branson because of the cigarette he was smoking.

He became extremely concerned as Ms. Branson violated her company's policies and came within three inches of his face, still arguing with him. When she moved her hand towards his face, Mr. Moore acted reasonably in defending himself.

Mr. Moore used no more force than was necessary to prevent serious injury to himself. When he believed he was no longer in danger, he returned calmly to his seat. The State's failure to disprove self-defense beyond a reasonable doubt entitles him to dismissal.

B. ASSIGNMENT OF ERROR

The State failed to present sufficient evidence to disprove the essential element of self-defense.

C. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Due process requires to State to prove every essential element of a crime beyond a reasonable doubt. Where self-defense is properly raised as a defense against a charge, the State has the burden of disproving self-defense beyond a reasonable doubt. Is Mr. Moore entitled to dismissal where the State failed to present sufficient facts to disprove beyond a reasonable doubt Mr. Moore acted in self-defense?

D. STATEMENT OF THE CASE

Mr. Moore lives in Ballard. 7/20/15 RP 20.¹ Every Sunday, he comes into downtown Seattle, where he can take advantage of services for homeless and low income persons like himself. 7/20/15 RP 20. He knows that there is a foyer right outside the Starbucks coffee shop located at Third Avenue and Seneca Street near the University Street Metro station where he can access Starbucks' Wi-Fi. 7/20/15 RP 20.

¹ Because each volume of the transcript begins with new pagination, references to the record are made by the date stated on the cover page of the volume and then the page number.

Mr. Moore has six children and twenty four grandchildren.

7/20/15 RP 19. They live in Mississippi, Tennessee and Illinois.

7/20/15 RP 19. When he is able to access the internet, he tries to play a game called “Miniclip Pool” with some of his grandchildren. 7/20/15 RP 21, 22.

Mr. Moore had lived a hard life, starting with a difficult childhood. 7/20/15 RP 7. He was one of eleven children. 7/20/15 RP 9. As a child growing up in the South in the 1960’s, Mr. Moore experienced the “animosity and racism” of the times. 7/20/15 RP 9.

Mr. Moore stopped living regularly at home when he was seven years old, spending much of his time “jumping box cars.” 7/20/15 RP 7. He moved around between family members living in Mississippi, Tennessee and Illinois. 7/20/15 5. Mr. Moore was sent to a reform school in Mississippi by his mother, where he suffered from punishment most now would term as abuse. 7/20/15 RP 10.

Mr. Moore was shot in the head when he was eleven or twelve years old while staying with his father in Chicago. 7/20/15 RP 15. The bullet hit him on the left side of his head and went into his brain. 7/20/15 RP 15. It is still lodged in his brain and contributes to his blackouts and other problems. 7/10/15 RP 15. Mr. Moore believes that

if his head is hit in the wrong way he could be “gone.” 7/20/15 RP 18.

Mr. Moore tries to avoid places where there are a lot of people, so no one accidentally bumps his head. 7/20/15 RP 18.

Mr. Moore moved to Seattle in 2005. 7/20/15 RP 12. He is disabled, having been hit by a car approximately three to four years prior to his arrest. 7/20/15 RP 13. He also suffers from traumatic arthritis. 7/20/15 RP 13. At the time of his trial, he was confined to a wheel chair. 7/20/15 RP 13. He also suffers from other maladies, including tuberculosis and chronic obstructive pulmonary disease. 7/20/15 RP 14, 17.

On the quiet Sunday morning when Mr. Moore was arrested, he was sitting on a window sill outside Starbucks smoking a cigarette and playing videogames with his grandchildren. 7/20/15 RP 23. He had just bought a pack of Newport cigarettes. 7/20/15 RP 24. Mr. Moore was approached by Jessica Branson, who was employed as a security guard by King County Metro. 7/16/15 RP 60. No one had approached Ms. Branson to complain of Mr. Moore’s behavior. 7/16/15 RP 112. Mr. Moore was not bothering anyone. 7/16/15 RP 112. He was ordered to put out his cigarette, ultimately flicking it away when Ms. Branson got closer to him. 7/16/15 RP 64.

While King County Metro has a no smoking policy, witnesses from the sheriff's office recognize it is a policy which is selectively enforced. 7/15/15 RP 130. The area where Mr. Moore was accessing the Wi-Fi is an area where a number of people smoke and where a number of cigarette butts were visible when Mr. Moore was confronted by Ms. Branson. 7/16/15 RP 65. When asked if she engaged Mr. Moore because of the color of his skin, Ms. Branson denied that she did, asserting that some of the people she stopped were "just little white people that are, you know, on drugs and they're smoking cigarette butts that are found on the ground." 7/16/15 RP 65.

After he had gotten rid of his cigarette, Ms. Branson told Mr. Moore he had to move from where he was sitting. Ms. Branson engaged Mr. Moore in argument, talking over him when he was speaking. 7/16/15 RP 114-15. Ms. Branson continued to come closer to him, aggressively ordering him to leave. 7/16/15 RP 64, 116. Mr. Moore took his phone and attempted to take a picture of her. 7/16/15 RP 67. Ms. Branson became upset and raised her hand, getting very close to Mr. Moore's face. 7/16/15 RP 67. At this point, her hand was approximately three inches from Mr. Moore's face. 7/16/15 RP 67. Mr. Moore believed Ms. Branson was close enough to him that her spit

went inside his mouth. 7/20/15 RP 31. Ms. Branson continued to get more mad. 7/20/15 RP 44. Mr. Moore warned Ms. Branson of the bullet lodged in his head and his fear that an assault on his face might dislodge the bullet. 7/20/15 RP 32.

The security guards contracted by King County Metro are trained to keep a distance from persons they are engaging. 7/16/15 RP 116. They are also trained in de-escalation. 7/16/15 RP 105. Policy requires them to calm down and attempt to remain pleasant. 7/16/15 RP 105. Ms. Branson failed to follow these rules, so much so, that the firm contracted with King County Metro to provide security now uses her interaction with Mr. Moore as a training video about what not to do when engaging persons at Metro stations. 7/16/16 RP 117.

Mr. Moore just wanted to be left alone. 7/20/15 RP 43. His mind was never on hitting Ms. Branson. 7/20/15 RP 43. But in an attempt to protect himself from Ms. Branson, Mr. Moore hit her. 7/16/15 RP 67. He then got up and struck her a second time. 7/16/15 RP 71. Once it was clear Ms. Branson had retreated, Mr. Moore returned to the place where he was sitting. 7/16/15 RP 71. He did not attempt to engage Ms. Branson again. When the police arrived, Mr. Moore was in the same calm state he had been in when Ms. Branson first approached him.

7/16/15 RP 22. He was not screaming, yelling or otherwise acting belligerently when contacted by law enforcement. 7/16/15 RP 22.

Mr. Moore was charged with assault in the second degree, based upon the injury Ms. Branson suffered to her lip. CP 1. He was convicted of the lesser included offense of assault in the fourth degree. 7/16/15 RP 88.

E. ARGUMENT

The State presented insufficient evidence to disprove self-defense beyond a reasonable doubt.

- 1. Due Process requires the State to prove each element of an offense beyond a reasonable doubt.*

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). “*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of

every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979).

The purpose of the sufficiency inquiry is to ensure the fact finder rationally applies the constitutional standard required by due process, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *State v. Phuong*, 174 Wn.App. 494, 502, 299 P.3d 37 (2013). “In other words, the *Jackson* standard is designed to ensure that the defendant’s due process right in the trial court was properly observed.” *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310, 314 (2014).

2. *Where self-defense is properly raised to justify an assault, the State must disprove self-defense beyond a reasonable doubt.*

The use of force is lawful when used in self-defense. RCW 9A.16.020 (3). Once properly raised, the burden to disprove self-defense falls upon the State. *State v. Dyson*, 90 Wn.App. 533, 437, 952 P.2d 1097 (1997). If established, a claim of self-defense constitutes a complete justification and does not serve to mitigate or reduce the degree of assault. *State v. Rodrigues*, 21 Wn.2d 667, 668, 152 P.2d 970 (1944).

Self-defense requires a “subjective, reasonable belief of imminent harm.” *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O’ Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Once an accused person produces some evidence demonstrating self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237, 1239 (1997); *see also State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984).

Evidence of self-defense is evaluated “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) (citing *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984)). Self-defense is established as an absolute defense to an assault charge where the accused is able to show they acted reasonably considering “all the surrounding facts and circumstances as they appeared to the defendant.” *State v. Rodriguez*, 121 Wn.App. 180, 185, 87 P.3d 1201 (2004).

The standard for self-defense incorporates both objective and subjective elements. The subjective portion requires the jury to stand in

the shoes of the defendant and consider all the facts and circumstances known to that person. *Janes*, 121 Wn.2d at 238. The objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Id.* The State presents insufficient evidence of guilt where the State is unable to disprove both the objective and subjective elements of this test beyond a reasonable doubt.

3. *The State failed to disprove self-defense beyond a reasonable doubt.*

To satisfy due process, the State must present sufficient proof of every fact beyond a reasonable doubt. *Phuong*, 174 Wn.App. at 502. Where self-defense negates an essential element of a crime, the State must prove the absence of self-defense beyond a reasonable doubt. *Dyson*, 90 Wn.App. at 437.

The State presented insufficient evidence Mr. Moore did not act in self-defense to protect himself from Ms. Branson's actions. The State's witnesses established Ms. Branson engaged Mr. Moore in argument when she chose to order him to extinguish a cigarette in an area where it was common to smoke and then to order him to move from the window sill where he was playing video games with his

grandchildren when he did not extinguish the cigarette quickly enough for her satisfaction. 7/16/15 RP 114-15, 7/20/15 RP 21- 22.

Even law enforcement recognized the smoking rules in King County Metro are selectively enforced. 7/15/15 RP 130. Ms. Branson also admitted the area where she confronted Mr. Moore had a number of cigarette butts on the ground. 7/15/15 RP 65. She denied selectively enforcement the smoking code, admitting she also ordered “little white people . . . on drugs” to extinguish the cigarette butts they find on the ground. 7/16/15 RP 65.

The subjective standard of reasonableness was satisfied by Mr. Moore’s testimony. Mr. Moore believed he was about to be assaulted by Ms. Branson. A hit to his forehead could result in severe consequences to his health because of a bullet which is lodged in the left side of his head. 7/20/15 RP 15. The State did not challenge this evidence.

A reasonably prudent person similarly situated to Mr. Moore would have acted as he did. Mr. Moore is a homeless man who was trying to access Wi-Fi so he could play video games with his grandchildren. 7/20/15 RP 21, 22. He was smoking a cigarette and not

otherwise bothering anybody. 7/20/15 RP 23. There was no reason for Ms. Branson's aggressive behavior towards him.

Mr. Moore used no more force than was necessary to protect himself from what he reasonably believed to be a potential assault by Ms. Branson. 7/16/15 RP 71. Instead of following company policy, Ms. Branson aggressively engaged Mr. Moore. She got within three inches of his face and ordered him to leave the spot where he was sitting. 7/16/15 RP 67. Her actions were so severe that her security firm created a training video demonstrating how not to engage a person violating Metro policies. 7/16/16 RP 117.

When Ms. Branson came within spitting distance of his face and prevented him from taking a photograph of her by moving within three inches of his face, Mr. Moore reasonably believed an assault was imminent. 7/16/15 RP 67, 7/20/15 RP 31. His actions were consistent with his intent to use no more force than was necessary to prevent what he believed to be a significant injury to himself if actually assaulted by Ms. Branson. 7/16/15 RP 22.

Mr. Moore warned Ms. Branson of his concern she was going to hit him in the head. 7/20/15 RP 32. When she persisted in engaging him, he hit her two times. 7/16/15 RP 71. Once he felt safe, he stepped

back and returned where he had been before Ms. Branson's aggressive behavior caused him to fear for his health and safety. 7/16/15 RP 71. He remained calm and cooperative until law enforcement arrived. 7/16/15 RP 22.

F. CONCLUSION

Due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a person is charged. Where self-defense is properly raised, the burden is on the State to establish beyond a reasonable doubt force was not justified. The State failed to establish sufficient evidence Mr. Moore did not act in self-defense. This Court should find the State presented insufficient evidence to disprove self-defense and order dismissal.

DATED this 26th day of May 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73921-2-I
v.)	
)	
DAVID MOORE,)	
)	
Appellant.)	

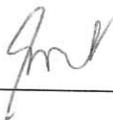
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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