NO. 73921-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID MOORE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JOSEPH MARCHESANO
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

The right to self-defense is the right to use the degree of force necessary to protect oneself, but the degree of force is limited to what a reasonably prudent person would use under the conditions as they appeared at the time. The defendant punched the victim twice in the face without provocation. Was there sufficient evidence that the State disproved self-defense?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State of Washington charged the defendant, David Moore, by information with one count of assault in the second degree. CP 1.

Trial commenced before the Honorable Monica J. Benton. 7/8/15 RP 1. After the parties rested, Moore requested jury instructions for self-defense and assault in the fourth degree, a lesser included offense of assault in the second degree. CP 77, 75. The jury left Verdict Form A, assault in the second degree, blank. CP 58. The jury unanimously found Moore guilty of assault in the fourth degree. CP 59.

2. SUBSTANTIVE FACTS

Jessica Branson has spent most of her career helping others. At trial, Ms. Branson testified that on November 2, 2014, she had been employed by Securitas Security Services for four years (hereinafter "Securitas"). 7/16/15 RP 54. At the time that Moore assaulted her, she was assigned to patrol the King County Metro transit tunnels in downtown Seattle. Id. at 55. Prior to working at Securitas, Ms. Branson worked as a customer service representative and a combat medic in the Army National Guard. Id. at 55. She summed up her responsibilities as ". . . keep[ing] patrons safe, help them feel safe. To provide customer service. We make sure that people aren't loitering, littering, smoking . . ." Id. at 56. Although frequently mistaken for law enforcement, Ms. Branson does not carry any weapons while on duty. Id. at 57. Specifically, her equipment includes a flashlight, two sets of metal handcuffs, a radio with a microphone and an earpiece, and a Securitas badge. Id. During the assault, Ms. Branson was assigned as a "rover." Id. at 59. A rover relieves other Securitas employees for their breaks. Id. A rover works alone, with no partner. Id.

As part of her regular duties in the transit tunnel, Ms. Branson interacts with the public on a daily basis, answering

questions or giving directions. Id. at 57. Her duties also include checking exits for people who may be sleeping, smoking or doing drugs. Id. at 57.

While checking exits on November 2, 2014, Ms. Branson smelled smoke and saw Moore smoking in one of the entrances/exits to the transit tunnel. Id. at 60. She asked Moore to smoke outside of the exit. Id. Ms. Branson interacts with people smoking on transit property on a daily basis. Id. at 61. She follows four steps when contacting people smoking on transit property. First, she asks the person to smoke outside of the exit. Id. Second, if the person does not comply with her request, she advises them of King County Metro's policy of no smoking on transit property. Id. Third, if the person still does not comply, she asks them to leave transit property. Lastly, if the person does not leave, she contacts her supervisor who will determine whether to contact a King County Metro District Supervisor or the Sheriff's Department. Id.

Ms. Branson followed this four-step procedure when contacting Moore. While standing about twelve feet from Moore, she first asked him to smoke outside. Id. at 62. The defendant did not comply, so Ms. Branson asked him a second time to smoke outside of the exit area. Id. When she made this second request,

she was approximately three to four feet from Moore. Id. The defendant did not respond. Id. Instead, he stared at her and continued smoking. Id.

According to Securitas training, an employee should maintain one arm's length from the person they are interacting with. Id. at 63. However, because Ms. Branson could not understand Moore at times, she moved within three feet of Moore to hear him better. Id. Because Moore did not comply with her request to exit transit property to smoke, Ms. Branson advised Moore of the policy against smoking on transit property. Id. Moore flicked the cigarette onto the ground. Id. at 64. Ms. Branson asked Moore to pick up the cigarette because he was littering. Id. In response, Moore said something to the effect of "make me" or "what are you going to do about it." Id.

Ms. Branson continued to the third step – she advised Moore that he had to leave transit property. Id. Moore replied, "Make me." Id. At that point, Ms. Branson continued to the fourth step – she contacted her supervisor via her radio. Id. While speaking with her supervisor via her radio, Moore accused Ms. Branson of bothering him only because of his skin color, and he said that she was not bothering the "other white boys that were sitting up there." Id. at 65.

Ms. Branson informed the defendant that there was nobody else in the entrance/exit area and that she did not contact him because of his race. Id. When pressed further on race, Ms. Branson testified that she contacts smokers of all different races. Id. She contacts smokers based on the fact that they are smoking, not their race. Id.

At no point during this interaction did Ms. Branson take Moore's identification or prohibit him from leaving. Id. at 66. While updating her supervisor, Moore threatened to "knock [Ms. Branson] out." Id. Moore also took out his phone and tried to take Ms. Branson's photograph. Id. at 67. Ms. Branson held out her hand to block the camera's view of her. Id. She did not touch Moore or his camera. Id. at 68.

Moore then stood up, leading Ms. Branson to believe that he was finally going to comply with her repeated requests to leave transit property. Id. Instead, Moore swung and hit Branson in the mouth on her upper left lip, spinning her completely around. Id. Moore continued to aggressively advance on Ms. Branson with his fist raised. Id. at 68. Ms. Branson shuffled backward from Moore for approximately twenty feet, but she was quickly running out of room to retreat as she approached the escalators. Id. 68-69. Moore punched Ms. Branson in the face again, knocking her to the

ground. Id. at 70. An unknown woman went to Moore and touched his arm. Id. After approximately thirty seconds, Moore went back to the location where Ms. Branson initially contacted him. Id. at 71.

When other Securitas employees arrived, Moore claimed that Branson "put hands on me first." Id. at 73. However, the entire assault was captured on security video, which confirmed that Ms. Branson never touched Moore and corroborated her version of events. Id. at 75. This video was shown to the jury at trial. Id. at 75; Ex. 14.

C. ARGUMENT

THE STATE DISPROVED SELF-DEFENSE BEYOND A REASONABLE DOUBT

Moore claims the State produced insufficient evidence to disprove his self-defense claim. He is mistaken. His argument turns wholly on his version of the facts, a version that conflicted with the video evidence and the testimony of the State's witnesses. The jury evidently found his version of events to be not credible. He cannot retry the case on appeal.

The relevant question in reviewing the sufficiency of the evidence in a criminal case is "whether any rational fact finder could have found the essential elements of the crime beyond a

reasonable doubt." State v. Drum, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). In determining whether evidence is sufficient to sustain a conviction, an appellate court views the evidence in the light most favorable to the State. Id. (citing State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). Additionally, the appellate court must interpret those inferences most strongly against the defendant. State v. Hagler, 74 Wn. App. 232, 234-35, 872 P.2d 85 (1994) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Drum, 168 Wn.2d at 24 (citing Salinas, 119 Wn.2d at 201.

Further, the appellate court defers to the fact finder on issues of witness credibility. Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). This inquiry does not require the appellate court to determine whether it believed the evidence at trial established guilt beyond a reasonable doubt.

> Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility

> of the witnesses, and to decide the disputed questions of fact.

Hagler, 74 Wn. App. at 235 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, affirmed, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

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. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). Thus, this standard incorporates both objective and subjective elements. Id. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him. Id.

Moore's testimony established his subjective belief that he needed to act in self-defense. However, the State successfully proved that a reasonably prudent person would not have acted in the same manner as Moore. The objective portion of the self-defense requires the jury to use the evidence to determine what a reasonably prudent person similarly situated to the defendant would have done. Id. "Accordingly, the degree of force used in self-

defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." Id. (citing State v. Bailey, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979)).

Although he claims the State failed to disprove the objective portion of the test, Moore does not really apply that test. Rather, he merely recites his own testimony at trial. Essentially, Moore requests this Court to insert itself as the fact finder and reach the opposite conclusion reached by the jury. This is contrary to the standard of review. See Drum, 168 Wn.2d at 24 ("The jury is the ultimate judge of the credibility of each witness and the appellate court must defer to the fact finder on such issues.").

The right to act in self-defense is limited to the use of force that is not more than necessary. Bailey, 22 Wn. App. at 650 (citing State v. Dunning, 8 Wn. App. 340, 342, 506 P.2d 321 (1973)). Not only did Moore unnecessarily punch Ms. Branson, but it was unnecessary to punch her twice over the course of approximately five seconds, in two different places, after she was desperately attempting to retreat. 7/16/15 RP 71.

D. CONCLUSION

This Court should affirm the defendant's conviction and sentence.

DATED this 19th day of July, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JOSEPH MARCHESANO, WSBA #44077
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at travis@washapp.org, containing a copy of the Brief of Respondent, in State v. David Allen Moore, Cause No. 73921-2, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 19th day of July, 2016.

LuBrame

Name:
Done in Seattle, Washington