

NO. 64397-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY C. JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

Did the trial court abuse its discretion by excluding evidence of prior specific acts of misconduct on the part of the victim?

**B. STATEMENT OF FACTS**

On April 18, 2009, officers from the Seattle Police Department responded to a 911 hang-up call from the residence at 9419 39<sup>th</sup> Avenue S. in Seattle, WA. (RP 87<sup>1</sup>). Upon arrival, the officers observed the female resident, Susan McNeal, visibly upset, crying, and bleeding heavily from her mouth. (RP 88). According to the officers, Ms. McNeal's teeth appeared to be "unaligned." (RP 88). One of the officers said her upper front teeth had been "caved in." (RP 100). Another officer said her front teeth resembled "shark's teeth" in the way they pointed back toward her throat. (RP 96). Ms. McNeal was transported by the Seattle Fire Department to Harborview Medical Center. (RP 89).

As a result of their initial investigation, several of the officers went to the residence of the appellant, located at 9419 39<sup>th</sup> Avenue S. in Seattle, WA. (RP 96). When the appellant answered the

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<sup>1</sup> RP will refer to Report of Proceedings and CP will refer to Clerk's Papers.

door, he spontaneously stated to the officers, "I didn't do anything to that woman." (RP 97). Following an advisement and waiver of Miranda rights, the appellant stated to the officers that Ms. McNeal had "gone crazy" and had attacked him. (RP 98). The officers noted that the appellant had scratch marks on his neck and chest and abrasions on his knuckles. (RP 98).

The appellant told the officers he had gone over to the McNeal residence to help her move, and she got mad at him because she thought he only wanted to do the easy tasks. (RP 108). According to the appellant, Ms. McNeal suddenly jumped on his back. (RP 108). In the process of trying to push Ms. McNeal off, the appellant told the officers he "may have contacted her neck with his hand." (RP 108). The appellant was adamant to the officers that he never punched her, assaulted her, or choked her. (RP 108-09). The appellant further stated that the damage to his knuckles was caused by Ms. McNeal scratching him (RP 106-07).

At trial, Ms. McNeal testified that she was 59 years old and trained as a nurse tech. (RP 121). She stated she had been disabled for two years after injuring her left arm on the job.

(RP 122). This injury involved torn ligaments and arthritis, and her range of motion for that arm is now limited. (RP 122).

According to Ms. McNeal, she had known the appellant for four or five years and they had always been good friends.

(RP 123). He came over to her house at her request to help her move. (RP 123). When he entered her house, the appellant seemed to be angry about something. (RP 124). At one point, Ms. McNeal began to tease him about only wanting to do the easy tasks. (RP 125). The appellant got very angry and started to call her dirty names. (RP 125).

At this point, Ms. McNeal demanded that the appellant leave her residence. (RP 126). The appellant disregarded her demands and continued to yell at her and call her names. (RP 126).

Ms. McNeal pushed him and told him to leave. (RP 126). The appellant slapped her on the right side of her face with an open hand. (RP 127). He began to choke her and she had trouble breathing. (RP 127). While he was choking her, Ms. McNeal was slapping back at him with an open hand. (RP 127). Ms. McNeal testified she had no idea whether or not she scratched him during this altercation. (RP 128). The appellant finally stopped choking her, and she punched him in the face. (RP 128). She told him

again to leave her residence, and she picked up her phone and dialed 911. (RP 129).

The appellant turned and started to walk toward the back door which led out to the back yard where he had parked his car. (RP 129). Thinking that the appellant was leaving, Ms. McNeal hung up her phone and started to walk toward her back door in order to lock it. (RP 130). The appellant, however, had not left her residence – he was standing behind a partition in her utility room. (RP 130).

According to Ms. McNeal, the appellant hit her in the chest and knocked her back against the wall. (RP 130). The appellant punched her in the face three times with his closed fist. (RP 130). According to Ms. McNeal, the second punch broke her tooth; she actually heard it crack. (RP 130). The appellant then ran out of the house and left in his car. (RP 130). According to Ms. McNeal, she was bleeding heavily from her mouth when the police arrived, and her upper front teeth were bent over and “dangling.” (RP 131). Ms. McNeal testified she still suffers from headaches and is unable to eat any food with her front teeth. (RP 132).

The appellant took the stand in his own defense and testified that when he went over to her residence to help her move,

Ms. McNeal told him she had only slept two hours the night before. (RP 144). He also testified that Ms. McNeal was drinking gin. (RP 145). According to the appellant, Ms. McNeal began to “slander” him and call him names because she felt he was not doing anything to help her. (RP 146). Without warning, Ms. McNeal pushed him down on the sofa and jumped on top of him. (RP 147). She was able to pin his arms down with her legs. (RP 147). She started hitting him and scratching him in the face. (RP 147). She tried to gouge him in the eyes. (RP 147). The appellant testified his only goal was to get her off of him so he could get out of there. (RP 148). When asked about the injury to his hand, the appellant testified his hand could have inadvertently “caught her” when he was trying to get up. (RP 156). He was adamant on the witness stand that he never punched her or choked her. (RP 156).

The Seattle Police Officers who responded to the 911 hang-up call testified in rebuttal that appellant specifically told them Ms. McNeal had jumped on his back. (RP 180-81, 186). They testified the appellant never said Ms. McNeal straddled him from the front or blocked his arms with her legs. (RP 181, 186). The officers further testified they did not smell any alcohol on

Ms. McNeal's breath, did not see her under the influence of alcohol while questioning her, and did not see any containers of alcohol in her residence. (RP 186, 191).

On August 31, 2009, the jury found the appellant guilty of Assault in the Second Degree. (CP 17).

**C. ARGUMENT**

THE TRIAL COURT DID NOT ERR BY EXCLUDING SPECIFIC ACTS OF MISCONDUCT ON THE PART OF THE VICTIM.

The appellant claims on appeal the trial court erred by refusing to allow him to testify about two prior incidents involving the victim: (1) that the day before this incident, the victim held a knife to his throat; and (2) that a month before this incident, the victim broke an ashtray on his leg. (RP 117). The trial court balanced the probative value of this evidence against its prejudicial effect and determined that this testimony would not be allowed. (RP 117).

The admission or refusal of evidence lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Sanders, 86 Wash.App. 466, 469, 937 P.2d 193 (1997). A trial court abuses its

discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Stenson, 132 Wash.2d 668, 701, 904 P.2d 1239 (1997).

A criminal defendant has no constitutional right to introduce irrelevant evidence at trial. State v. Lord, 161 Wash.2d 276, 294, 165 P.3d 1251 (2007). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. Evidence Rule 401.

In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may be made of specific instances of that person's conduct. Evidence Rule 405(b). Conversely, specific acts of violence on the part of a victim are not admissible in an assault prosecution where the victim's character trait of violence is not an essential element of the defendant's claim of self defense. State v. Alexander, 52 Wash.App. 897, 901, 765 P.2d 321 (1988). See also, State v. Hutchinson, 135 Wash.2d 863, 886-87, 959 P.2d 1061 (1998).

In State v. Safford, 24 Wash.App. 783, 791-92, 604 P.2d 980 (1979), for example, the Court of Appeals held that the trial court properly excluded evidence of the victim's character when the

defense claimed the underlying incident was caused by accident or mistake. Similarly in the instant case, the testimony appellant wanted to produce to the jury was simply not relevant in light of his central claim that he never intentionally struck Ms. McNeal.

During his testimony before the jury, the appellant was adamant he never punched her, he never choked her, and he never assaulted her. (RP 156). He claimed that any contact between his hands and Ms. McNeal's face during the struggle was inadvertent. (RP 156). In accord with this line of defense, appellant's trial counsel stated to the jury in closing argument, "This was a tragic accident." (RP 222).

Once the appellant claimed that the injury to Ms. McNeal was inadvertent and accidental, the issue of self defense was resolvable without evidence of Ms. McNeal's alleged character trait. State v. Alexander, 52 Wash.App. at 901. The trial court did not err in ruling that testimony of these two prior incidents could not be introduced at trial.

D. **CONCLUSION**

For the foregoing reasons, this Court should affirm appellant's conviction for Assault in the Second Degree as set forth in Count 1 of the Information.

DATED this 30<sup>th</sup> day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LARRY C. JOHNSON, Cause No. 64397-5-I, 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.

April Nieman  
Name April Nieman  
Done in Seattle, Washington

8/30/10  
Date 8/30/10

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