

70743-4

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NO. 70743-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

FRANCISCO RIOS-THOMAS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE.....	2
1. SUBSTANTIVE FACTS	2
a. Initial fight at Victor Steinbrueck Park.....	2
b. Assault in front of Beecher's Cheese Store.....	3
c. Post-Arrest, Rios-Thomas told police, "I never touched her"	6
d. At trial, Rios-Thomas instead insisted that he was defending himself.....	6
2. PROCEDURAL FACTS	6
C. ARGUMENT	9
1. THE VICTIM'S ALLEGED PRIOR ARRESTS FOR ASSAULT WERE UNSUBSTANTIATED, UNKNOWN TO THE DEFENDANT, AND IRRELEVANT.....	9
a. No evidence supported the claim that the alleged arrests of Jena Pay Pay ever even occurred.	9
b. Nothing in record indicates that the defendant knew about the supposed arrests of crime victim Jena Pay Pay at the time he knocked her unconscious.....	10
c. Even if Rios-Thomas had been prepared to say he knew Jena Pay Pay had prior arrests for assault, specific prior acts are not admissible to show character.....	12

2.	CONCUSSION AND UNCONSCIOUSNESS WAS SUFFICIENT EVIDENCE OF SUBSTANTIAL BODILY HARM.....	14
D.	CONCLUSION	16

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Alexander</u> , 52 Wn.App. 897, 765 P.2d 321 (1988).....	13
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	14
<u>State v. Hutchinson</u> , 135 Wash.2d 863, 959 P.2d 1061 (1998).....	12, 13
<u>State v. Kelly</u> , 102 Wash.2d 188, 197, 685 P.2d 564 (1984).....	13
<u>State v. Martin</u> , 169 Wn.App 620, 281 P.3d 315, 317 (2012), <u>review denied</u> , 176 Wn.2d 1005, 297 P.3d 68 (2013).....	12
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	14
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	14

Washington Statutes

RCW 9A.04.110(4)(b)	15
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Washington Evidence Rules

ER 405(b).....	13
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A. ISSUES PRESENTED

1. In a self-defense case, evidence of an assault victim's character for violence is only relevant if it was known to the defendant at the time of the assault. Instead of allowing speculative questioning of the crime victim, the trial court gave the defendant the opportunity to argue whether he knew of the crime victim's alleged prior arrests. Absent any offer of proof that the defendant knew of such incidents, did the trial court properly prohibit the questioning of the crime victim on the subject?

2. The second degree assault statute provides a definition of substantial bodily harm that includes a temporary but substantial loss or impairment of the function of any bodily part or organ. The emergency room physician who diagnosed and treated the crime victim's concussion testified that her loss of consciousness was a loss of brain function with serious medical consequences. Was this evidence sufficient to prove substantial bodily harm?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Jena Pay Pay¹ is the long-time girlfriend and mother of the children of Francisco Rios-Thomas. 2RP 86². On April 23, 2013, Jena Pay Pay and her aunt, Mariam Pay Pay, went to meet Rios-Thomas at the Victor Steinbrueck Park on the North end of the Pike Place Market. 2RP 56-57, 87. All had consumed some alcohol. 2RP 58, 88-89, 131.

a. Initial fight at Victor Steinbrueck Park³

Defense counsel at trial called on bystander witness Jordan Pickett to confirm Rios-Thomas' testimony that Jena Pay Pay threw a bottle at Rios Thomas. 3RP 19. Pickett was on a date at the Seatown restaurant across the street from the park. 3RP 17-18. Pickett said he heard the glass break and he could tell that Jena Pay Pay had thrown it at Rios-Thomas. 3RP 18.

When asked by Rios-Thomas' attorney on direct examination if he could hear their words, Pickett reported hearing

¹ Jena Pay Pay and her aunt, Mariam Pay Pay, were both trial witnesses and are referred to throughout this brief by their full names to make clear which witness's testimony is described. Other witnesses and Francisco Rios-Thomas are initially identified by full name and thereafter abbreviated to last names.

² The State refers to the verbatim report of proceedings using the same numbering as Rios-Thomas' brief as follows: 1RP – 7/1/13; 2RP – 7/2/13; 3RP – 7/3/13; and 4RP – 8/9/13.

³ Victor Steinbrueck Park is abbreviated as "the park" throughout the rest of this brief.

Jena Pay Pay say, "Stay away from me, stay away from me, stay away from me." Then Pickett testified that Rios-Thomas, "Hit the woman. Punched the woman." 3RP 20. Pickett explained that Jena Pay Pay, "Continued to keep yelling get away from me, and while doing that she was flailing a jacket, a coat at the gentleman." Still on direct examination as a defense witness, Pickett went on,

They were moving in the direction south from where I was sitting so they were moving away from us, but they were constantly face to face as she was moving away. So he would kind of take a step, she would take a step. She would take a step back, he would take a step forward – step back.

3RP 21.

On cross-examination, the State asked if any onlookers approached or looked like they would intervene. Pickett testified,

Gentleman walking his dog who lived in the building started – he yelled hey, to get the attention, and started to approach the situation, and two gentlemen stepped up and got in his way.

3RP 22.

b. Assault in front of Beecher's Cheese Store

Rios-Thomas testified that he walked away from the fight with Jena Pay Pay, but she caught back up with him at the

Beecher's Cheese Store⁴ at the south end of the Market. 2RP 141. Alternatively, Mariam Pay Pay testified that she told her niece they needed to get away from Rios-Thomas and that once they got further south through the Market, he was no longer with them. 2RP 63. Jena Pay Pay's testimony described the same movements. 2RP 93. Then, both Mariam and Jena Pay Pay testified that the defendant reappeared coming towards them at the corner near Beecher's. 2RP 63, 93. Mariam Pay Pay explained, "He must have ran all the way around somewhere because he came back running towards us as we were leaving to get away from him. 2RP 63. Then,

Well, we got right there to the corner of the block right there by Beecher's, and I looked up and I go, oh, I said he's coming Jena, and, by that time, it was too late, he came and just hit her.

...

Oh, man, he just hit her really hard because he came running like that, and he just swung and he just hit her (demonstrating) and just knocked her down.

She kind of like got knocked out, and he went and kicked her, and she came back to consciousness.

2RP 65.

⁴ The Beecher's Cheese Store, marked by an arrow on both pages of State's Exhibit #2, is abbreviated as "Beecher's" throughout the rest of the brief.

Meanwhile, 911 caller Eugene Syder was in his upstairs apartment across the street from Beecher's. 2RP 33-35. He heard Mariam Pay Pay's scream. He testified,

And just as I looked outside, I saw a gentleman rushing towards a female, he punched her. She flew back. She hit – at Beecher's, at the cheese place, there are two big pane glass windows, and there's like a concrete middle, and she hit that.

She fell to the ground. Her legs were apart. She looked dazed. Another lady, girl, she rushed in, tried to help her. I saw the guy, same guy that punched the girl, he grabbed her and pushed her away.

He circled around her, then kicked her in the back of the neck. She tumbled off the sidewalk into the street, laid motionless for a little while.

I was on the phone with 911, and I ran downstairs. By the time I got there, they were gone.

2RP 35

Syder further observed,

I mean, it was just shocking to me to see someone kick a woman that hard and, like I said, she tumbled onto the cobblestone and she, you know, her body was just – she just laid there for a couple of seconds, you know.
2RP 52.

Syder said that he recognized Rios-Thomas from around the neighborhood and had also had dinner socially with Jena Pay Pay who was a friend of one of his neighbors. 2RP 47-48.

c. Post-Arrest, Rios-Thomas told police, "I never touched her"

After Rios-Thomas was arrested, Seattle Police Officer Camilo DePina was responsible for driving Rios-Thomas to the jail. 3RP 41-42. The video recording from inside his patrol car was admitted as State's Exhibit #8. On the recording, Rios-Thomas screamed as the patrol car pulls away "Jena, Jena, I love you!" State's Exhibit #8. During the drive, not in response to any questions, he continued yelling, "I didn't touch her" approximately 30 times. 2RP 154, 3RP 43, State's Exhibit #8.

d. At trial, Rios-Thomas instead insisted that he was defending himself.

Instead of the general denial he had previously offered to police officers responding to the 911 call, Rios-Thomas claimed at trial that he had been defending himself from an attack by Jena Pay Pay. 2RP 131-153.

2. PROCEDURAL FACTS

Rios Thomas was charged with second degree assault for knocking out Jena Pay Pay in front of Beecher's. The trial court correctly observed that witnesses were all describing two different

confrontations. 2RP 109. The first confrontation was at the park, which is visible just to the north of the Pike Place Market on the first page of the two aerial images admitted as State's Exhibit #2.⁵ The second confrontation was in front of Beecher's, at the south end of the Market about two blocks away, marked by an arrow on both pages of State's Exhibit #2 pointing next to the intersection of Pike Place and Pine Street. The State was properly required by the court to elect which incident was the basis for the second degree assault charge. 2RP 109, 3RP 51-52. The State elected the incident in front of Beecher's (3RP 67) as reflected in jury instruction number 10, which is CP 106.⁶ During the State's case-in-chief, Rios-Thomas' trial counsel initially sought to cross-examine assault victim Jena Pay Pay about whether she had previously been arrested for assault herself. 1RP 17-18. The trial court instead invited defense counsel to revisit the issue if Rios-Thomas later chose to testify. 2RP 106-107, 109. When Rios-Thomas did later choose to testify, he said that he struck Jena Pay

⁵ State's Exhibit #2 was admitted without objection at 2RP 34 and later used to assist witnesses throughout the trial by both the State and Rios Thomas' trial counsel. A black and white photocopy is attached to this brief as Appendix A.

⁶ Jury Instruction number 10 states: "In alleging that Mr. Rios-Thomas committed Assault in the Second Degree as charged in Count I, the State alleges that the specific act which is the basis for the charge occurred at the intersection of Pike Place and Pine street. To convict the defendant on Count I, you must unanimously agree that this specific act was proved."

Pay because she would not stop attacking him and he was afraid for his own safety. 2RP 141-147. However, he did not testify about his own knowledge of the supposed prior arrests of Jena Pay Pay for assault. Nor did his counsel ask to re-call Jena Pay Pay to question her on the subject.

After the defense rested, the State offered the in-car video recording of the defendant repeatedly and emphatically telling the patrol officer driving the car, "I never touched her." 3RP 43, State's Exhibit #8.

At Rios-Thomas' request, self-defense WPIC instructions 17.02, 16.05, and 17.05 were provided to the jury as instructions 16-19. CP 112-114. The jury convicted him of second degree assault (CP 91) and he received a standard range sentence (CP 121-129). His appellate council filed a timely appeal and Rios-Thomas offered additional pro se assignments of error.

C. ARGUMENT

1. THE VICTIM'S ALLEGED PRIOR ARRESTS FOR ASSAULT WERE UNSUBSTANTIATED, UNKNOWN TO THE DEFENDANT, AND IRRELEVANT.

- a. *No evidence supported the claim that the alleged arrests of Jena Pay Pay ever even occurred.*

Rios-Thomas claims that he was deprived of the opportunity to present evidence that Jena Pay Pay had supposedly been arrested for assault herself on prior occasions. However, no reliable evidence was ever offered to support the claim that Jena Pay Pay had been arrested for assault. Instead, at 1RP 18, Rios-Thomas' trial counsel explained,

The two prior arrests, as far as defense could uncover in its investigation to this point... one against her sister that Mr. Rios-Thomas was made aware⁷ of. The other involved a stranger on the street, or someone that may be known to Ms. Pay Pay that's not related to her.... I believe there was some documentation that... we are working to uncover.

Thus, defense counsel at trial was not even prepared to prove that Jena Pay Pay had actually been arrested for any assault at all. Instead, he was proposing to insinuate that she had a violent

⁷ Although trial counsel at this point opined that Rio-Thomas was "made aware" of one arrest of Jena Pay Pay, the defendant did not testify to having such knowledge.

character using cross-examination questions without regard to what her answer could be.

b. Nothing in record indicates that the defendant knew about the supposed arrests of crime victim Jena Pay Pay at the time he knocked her unconscious.

At 1RP 21, the prosecutor correctly explained,

It must be known by Mr. Rios-Thomas to be admissible, and mere arrest is not admissible proof of somebody's reputation for something... So again, I don't object to Mr. Rios Thomas or some witness known to him having expressed to him that Miss Pay Pay has a reputation for violence if that's his point. But for Mr. Rios-Thomas to say that he's found out from his defense counsel that there [were] some arrests... doesn't advance the jury's knowledge of what Mr. Rios-Thomas's knowledge of her reputation for violence was at the time.

At 1RP 25, Rios-Thomas's trial counsel asked to reserve an opportunity to revisit his request once his client decided whether to testify,

I would ask the Court, if the Court is denying it, then to reserve on admissibility unless and until Mr. Rios-Thomas elects to testify.

I think if he were to testify, that would resolve the issue if he were to testify about his knowledge of Miss Pay Pay's prior acts of violence, and how he came to learning those.

The prosecutor agreed,

I would concede [Mr. Rios-Thomas] probably does get to testify about instances that he's aware of her

violence and why he fears needing to defend himself. [The d]efendant is uniquely qualified to testify about his own state of mind.

1RP 26.

The trial court also agreed, saying, "Alright, let's move on to the next issue." 1RP 26. Later in the trial, the trial court again offered the defendant the opportunity to raise the issue, if the defendant chose to testify and said that Rios-Thomas could also recall Jena Pay Pay on the subject.

You may have to think about whether you want to recall her after he testifies, should he choose to testify, to really put the issue of whether there's reasonable fear or apprehension that he might have.

2RP 107.

However, when the defendant testified at 2RP 131-150, no evidence of Jena Pay Pay's supposed arrests for assault. Nor did defense make any attempt to recall Jena Pay Pay. If Rios-Thomas actually *knew* of the supposed arrests his attorney argued so hard to insinuate, surely he would have accepted this opportunity to offer such testimony himself. But he did not.

- c. *Even if Rios-Thomas had been prepared to say he knew Jena Pay Pay had prior arrests for assault, specific prior acts are not admissible to show character.*

Rios-Thomas argues that his assertion of a self-defense claim is enough by itself to permit the questioning of Jena Pay Pay about her supposed prior arrests. However, as this Court held in State v. Martin, 169 Wn.App 620, 281 P.3d 315, 317 (2012), review denied, 176 Wn.2d 1005, 297 P.3d 68 (2013), “specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense.”

In Martin, the defendant shot her husband after he told her that he was having an affair. Significantly, the assailant in Martin uttered the exact same words Rios-Thomas used immediately before delivering his knock-out punch to Jena Pay Pay. Both are quoted saying, “If I can’t have you, no one can.” Id at 281; 2RP 95.

The trial court precluded Martin from testifying that her husband had been abusive to her in the past. This Court’s opinion denying Martin’s appeal relied heavily upon our Washington Supreme Court’s decision in State v. Hutchinson, 135 Wash.2d 863, 959 P.2d 1061 (1998). In that case, Hutchinson shot two Island County Sheriff’s Deputies who were taking him to a

Breathalyzer machine for testing whether he was too impaired to drive.

Hutchinson sought to introduce the deputies' performance evaluations, which were critical of their aggressive handling of prior intoxicated arrestees. However, the Supreme Court affirmed the trial court's ruling that would only allow the testimony of "specific witnesses if they testify to the general reputation of Deputy Heffernan or Deputy Saxerud for a pertinent trait of character relevant hereto." Hutchinson at 870.

This Court's opinion in State v. Alexander, 52 Wn.App. 897, 765 P.2d 321 (1988), provides an earlier articulation of the same rule .

[S]pecific instances of conduct are only admissible "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense". ER 405(b). For character to be an essential element, character itself must determine the rights and liabilities of the parties.

Alexander at 901 (citing State v. Kelly, 102 Wash.2d 188, 197, 685 P.2d 564 (1984)).

Similarly now in Rios-Thomas' case, evidence of the supposed prior arrests of Jena Pay Pay for assaults against people other than Rios-Thomas would not confer any right upon Rios-Thomas to accost her two blocks south of the place where he says

she threw a bottle and “put hands on” him. Nor could specific evidence of prior violence by Jena Pay Pay against others more than a year prior justify delivering a knockout punch and then kicking her in the head while she was down. Therefore, the trial court properly excluded the questioning of Jena Pay Pay on the subject of the supposed prior arrests for assaults against others.

2. CONCUSSION AND UNCONSCIOUSNESS WAS SUFFICIENT EVIDENCE OF SUBSTANTIAL BODILY HARM.

Rios-Thomas claims that the evidence at trial was insufficient to prove one of the elements of the assault in the second degree charge - substantial bodily harm. A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is just as reliable and probative as direct evidence in reviewing the sufficiency. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

Rios-Thomas correctly recites the RCW 9A.04.110(4)(b) definition of substantial bodily harm to include injury that “causes a temporary but substantial loss or impairment of the function of any bodily part or organ.” Dr. Ryan Keay, the Emergency Room Physician who treated Jena Pay Pay right after the assault, diagnosed that she had suffered a concussion. 2RP 22. Dr. Keay explained that Jena Pay Pay temporarily lost the function of her brain while she was unconscious. 2RP 22. The Doctor confirmed that the brain is an organ, and discussed current understanding in the medical community of the necessity for “brain rest” (not watching TV, avoiding contact sports, etc.) while healing from a concussion to prevent “second hit phenomenon where, if you get a second head injury, it could result in some longer lasting or longer term sequel.” 2RP 23-24.

Witnesses who testified that Rios-Thomas knocked Jena Pay Pay unconscious include Jena Pay Pay, her Aunt Mariam Pay Pay, and 911 caller Eugene Syder. 2RP 52, 63, 94. Therefore, the jury had sufficient evidence to support a finding that Jena Pay Pay suffered a temporary but substantial loss of the function of an organ – her brain – when the defendant knocked her unconscious.

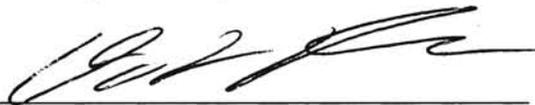
D. CONCLUSION

For all of the above reasons, the State respectfully requests that this Court affirm Rios-Thomas' conviction for assault in the second degree.

DATED this 1st day of April, 2014.

RESPECTFULLY submitted,

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Certificate by 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 Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. FRANCISCO RIOS-THOMAS, Cause No. 70743-4 -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.

Dated this 1st day of April, 2014

U Brame

Name

Done in Seattle, Washington