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Court of Appeals
Division I
State of Washington

NO. 74124-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL HENRY RAMM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where the defendant's post-assault assertions to police were offered to prove that the defendant believed he was acting in self-defense during the assault, but whether the defendant believed he was acting in self-defense was not relevant because no claim of lawful force was raised, did the trial court properly exercise its discretion in excluding the statements?

2. Where the defendant's statements were not admissible as excited utterances and the outcome of the trial would not have been affected even if they had been admitted, has the defendant failed to establish that his trial counsel was constitutionally ineffective in failing to argue that the statements were admissible as excited utterances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Mitchell Henry Ramm, with one count of assault in the second degree, with a special allegation that Ramm was armed with a deadly weapon at the time of the crime. CP 11. A jury found Ramm guilty as charged and found the special allegation proven. CP 51-52. The trial court imposed a standard range sentence of nine and a half months on

the assault charge and twelve months for the deadly weapon enhancement, for a total sentence of 21.5 months. CP 79-81. Ramm timely appealed. CP 91.

2. SUBSTANTIVE FACTS.

In May 2014, 66-year-old John McKissick worked as a security guard at the Woodland Park Zoo. RP¹ 105, 109. One of McKissick's duties was to deal with anyone attempting to camp overnight on zoo property in violation of a Seattle city ordinance prohibiting camping in city parks. RP 105. When working as a zoo security guard, McKissick was unarmed and did not carry a gun, Taser, mace, or baton. RP 118. He did carry a rechargeable LED flashlight that was approximately 8 inches long and one inch in diameter. RP 119. When attempting to rouse people camping illegally on zoo property, zoo guards' standard practice was to never touch the person; they instead stayed about 10 feet away to minimize the risk that the person will respond physically. RP 113.

Around 8:00 a.m. one morning, McKissick was notified by a zoo employee that someone was camping near the zoo's rose garden. RP 110, 281. McKissick found Ramm camping in a clump

¹ The ten volumes of the verbatim report of proceedings are consecutively paginated, and will be collectively referred to as "RP."

of trees. RP 114-15. McKissick approached on foot and stopped approximately 10 feet from Ramm, who was asleep in a sleeping bag; near him was a fire pit that had been dug in the ground and lined with rocks. RP 108-09, 115-16.

McKissick called out to Ramm, saying "Sir, you're not allowed to camp here. You'll have to move on." RP 116. He repeated that with increasing volume until Ramm woke, at which point McKissick repeated it one more time. RP 116. Ramm stated that he would not move on. RP 117. McKissick informed him again that he could not camp there, and Ramm again refused to leave. RP 118. McKissick told Ramm that if he did not move on, McKissick would have to call the Seattle Police Department and have Ramm removed. RP 117. McKissick did not yell, make any physical threats, or use any foul language. RP 117. He then walked out of sight of the campsite and called 911 from his cell phone. RP 118.

As McKissick was on the phone with 911, Ramm emerged from the trees and began yelling at McKissick, attempting to persuade McKissick to engage with him physically. RP 119-20. When McKissick refused to do so, Ramm became more aggressive, approaching McKissick and repeatedly attempting to

punch him in the face as McKissick backed away. RP 120-21.

McKissick, still on the phone with 911, was able to avoid the blows by using his free hand to deflect Ramm's punches as he continued to back away. RP 121-22.

Eventually, Ramm, apparently frustrated at McKissick's evasions, stepped back briefly and pulled two wooden billy clubs out of his back pocket. RP 122. Each was approximately 15 inches long and thicker than a broomstick. RP 148, 189. Ramm proceeded to repeatedly strike at McKissick's head with the clubs as hard as he could. RP 122-24. McKissick put his left forearm up to defend himself; some of the blows landed on his arm, and some struck his head. RP 122, 127-28.

McKissick radioed for help from other zoo staff and informed 911 that Ramm was now armed. RP 123. He continued backing away from Ramm in an attempt to escape, and he eventually tripped over a curb and fell into a ditch. RP 126. There, McKissick found some bicycle parts that he was able to use to block further blows from the billy clubs. RP 126. When Ramm could no longer reach McKissick with the clubs, he picked up a wooden pallet that weighed 60 or 70 pounds and threw it on top of McKissick. RP 126-27. McKissick used the pallet as a shield as Ramm picked up

several chunks of cement and threw them at McKissick's head. RP 127. Around that time, numerous other zoo employees arrived on the scene, and witnessed Ramm throwing the cement at McKissick and yelling angrily about topics such as being a veteran and not wanting to return overseas. RP 127, 148, 160, 254-59.

When Ramm noticed the onlookers, he broke off his attack. RP 128, 247, 257. However, he remained agitated and was talking somewhat incomprehensibly about topics such as not liking officers and wanting to be left alone. RP 251, 266, 279. McKissick's coworkers interceded between the two men and instructed Ramm to calm down. RP 150, 280-81. As the sound of approaching police sirens became audible, Ramm walked calmly to a nearby picnic bench and sat down. RP 128, 281. When officers arrived, Ramm complied with their commands calmly and without hesitation; he displayed no unusual behavior and did not make any outlandish comments. RP 187-89, 209, 222, 281, 318. One of the wooden clubs was recovered near Ramm, and the other was provided to an officer by McKissick. RP 189, 286.

McKissick was taken by ambulance to the emergency room, where x-rays revealed that the blows from the wooden clubs had broken his left forearm into multiple pieces. RP 127, 237.

McKissick also received 11 stitches to close a wound on his scalp.

RP 128, 235.

At trial, McKissick, numerous other zoo employees, numerous officers, and an emergency room physician testified to the facts above. Ramm did not testify, and called only two witnesses, both psychologists who had evaluated him in the months following the incident. Dr. Wayne Winters of Western State Hospital testified that Ramm suffers from schizophrenia and described his symptoms, but offered no testimony regarding Ramm's actions or mental state on the day of the charged incident. RP 334, 342-69, 379. However, he testified that someone with Ramm's symptoms could still be capable of engaging in intentional conduct such as intentionally assaulting someone. RP 381-83. He agreed that actions such as building a camp, obtaining a sleeping bag, and building a fire were all intentional acts. RP 382.

Dr. Kenneth Muscatel testified about an interview he conducted with Ramm regarding the charged incident and the opinions he formed based on reviewing discovery and Ramm's mental health records. RP 412-16. He testified that Ramm suffers from schizoaffective disorder, and related the account of events

that Ramm had given him about the charged incident.² RP 427, 434-38. Ramm told Muscatel that he had just returned from a nearby coffee shop when McKissick jumped out and confronted him. RP 434-36. Ramm said that he at first tried to engage McKissick, and felt threatened by him. RP 436. Ramm said McKissick had swung at him or hit him with a Maglite, a type of flashlight, but did not say with what force, or claim that he had been injured by it. RP 436, 457. Muscatel noted that it was unclear whether that part of the incident had actually happened. RP 436.

Ramm told Muscatel that he had then pulled out two sticks he kept for defense, which Ramm described as the type of sticks that can be purchased at a county store for beating fish to death, and that he then got very aggressive with McKissick. RP 436, 454, 458. Ramm described hitting McKissick with the sticks several times, throwing a pallet at him, and McKissick falling into a ravine. RP 436-38. Ramm indicated that he had known at the end of the incident that he was in a lot of trouble. RP 438.

² The jury was given an oral instruction at the time of Muscatel's testimony that statements by Ramm to Muscatel were being "admitted for the limited purpose of establishing a basis for the expert's opinion and for evaluating the credibility of the opinions offered, and not independently for the truth of the matters asserted by the Defendant." RP 418-19. No written limiting instruction was given. CP 53-75.

Muscatel testified that, in his opinion, Ramm was capable of forming intent on the day in question, though he offered no opinion as to whether Ramm actually formed the required intent. RP 440-41. However, he noted that it was possible that Ramm, due to his mental illness, perceived events such that he believed he was acting in self-defense. RP 445. Muscatel also testified that Ramm was aware at the time of the incident that hitting a person on the head with the sticks could hurt them. RP 446.

Muscatel testified that it was clear Ramm's decision to arm himself with weapons was an intentional act, and that Ramm also acted intentionally in striking McKissick with the sticks. RP 461. He acknowledged on cross-examination that his report stated that it was unclear whether Ramm engaged in the assault under the belief that he was defending himself, but that on balance the evidence Muscatel reviewed did not tend to support that interpretation. RP 471-72.

The jury was instructed on two alternative means by which the State alleged Ramm had committed assault in the second degree: that he "intentionally assaulted John McKissick and thereby recklessly inflicted substantial bodily harm" and that he "assaulted John McKissick with a deadly weapon." CP 70. Assault

was defined, in relevant part, as “an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or offensive” CP 63. The jury was given a standard diminished capacity instruction, which stated that evidence of mental illness “may be taken into consideration in determining whether the defendant had the capacity to form intent or knowledge.” CP 67. The jury was not instructed on the definition of unlawful force; Ramm argued that such an instruction was unnecessary because he was not claiming that his use of force was lawful. CP 67; RP 599.

The defense theory of the case was that the word “intentional” in the definition of assault modifies “touching or striking or cutting of another person with unlawful force.” RP 98-99, 599. The defense was allowed to argue to the jury that it needed to find that Ramm intended to use unlawful force in order to convict him of an intentional assault, and that Ramm’s subjective belief that he was acting in lawful self-defense, although objectively unreasonable, meant that the required mens rea was not satisfied. RP 524, 527-28, 599.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING RAMM'S STATEMENTS TO POLICE.

Ramm contends that the trial court committed reversible error in excluding his statements to police that “[McKissick] attacked me” and “you should be arresting the other guy” as inadmissible hearsay. This claim should be rejected. The exclusion of the statements was proper because they were not relevant in the absence of a claim of lawful self-defense.

a. Relevant Facts.

After Ramm was contacted by officers at the scene, he said something to the effect of, “You should not arrest me, you should arrest the other guy.” RP 54. He may have also said, “He attacked me,” referring to McKissick. RP 57. During pretrial motions, the State moved to exclude those statements as inadmissible hearsay. CP 110-11; RP 53. Ramm argued that the statements were not hearsay because they were being offered as evidence of Ramm’s state of mind rather than offered for the truth of the matter asserted. RP 53-54. He did not argue that the statements were hearsay that was nevertheless admissible under one of the exceptions to the hearsay rule. RP 53-55.

The State argued that the statements were assertions by Ramm that he believed he had acted in self-defense, and were being offered to prove that Ramm believed he had acted in self-defense, and thus were being offered to prove the truth of the matter asserted. RP 55. The State also argued that, unlike the statements in State v. Pavlik,³ which Ramm had cited to the trial court, Ramm's statements did not qualify as excited utterances because Ramm had completely calmed down and had time to think about the fact that he was in trouble before making the statements. RP 55-56.

The trial court ruled that the statements were out-of-court assertions being offered for the truth of the matter asserted, and that the "state of mind" exception did not apply. RP 57. The court therefore excluded the statements as substantive evidence. RP 57.

- b. Regardless Of Whether The Statements Were Hearsay, Their Exclusion Was Proper Because They Were Not Relevant.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is inadmissible except as provided by the evidence rules, other rules, or statute. ER 801(c), 802. A trial court's ruling on the admissibility of statements under the

³ State v. Pavlik, 165 Wn. App. 645, 268 P.3d 986 (2011).

hearsay rules is reviewed for an abuse of discretion, and will not be disturbed unless no reasonable judge would have made the same ruling. State v. Woods, 143 Wn.2d 561, 595-96, 23 P.3d 1046 (2001). This Court may uphold the trial court's ruling excluding Ramm's statements on any grounds that are supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

Ramm argues on appeal that his statements should have been admitted either because they were not offered to prove the truth of the matter asserted or because they fell within the state of mind or excited utterance hearsay exceptions. Neither of the identified exceptions provides a basis to reverse the trial court's ruling.

ER 803(a)(3)'s exception allowing admission of hearsay that is "a statement of the declarant's then existing state of mind" is restricted to situations in which the defendant's state of mind *at the time of the statement* is relevant. State v. Sanchez-Guillen, 135 Wn. App. 636, 646, 145 P.3d 406 (2006). In Sanchez-Guillen, the court of appeals rejected the defendant's claim that his post-arrest statements to an officer (which were consistent with the defendant's claim at trial that his shooting of the victim was accidental) were

admissible under ER 803(a)(3)'s "state of mind" exception. Id. at 645-46. The court of appeals held that the statements could be admitted under that rule only to prove Sanchez-Guillen's state of mind at the time he made the statements. Id. at 646. Because Sanchez-Guillen's state of mind at the time of his arrest was not relevant, and Sanchez-Guillen instead wanted to use the statements to prove his state of mind at the time of the crime, the court of appeals held that ER 803(a)(3) did not provide a valid basis for admitting the statements. Id. at 646. This case presents the same scenario. Ramm wanted to use his statements at the time of his arrest to prove his state of mind at the time of the assault, and ER 803(a)(3) does not allow that.

As Ramm acknowledges, he did not argue in the trial court that his statements were admissible as excited utterances pursuant to ER 803(a)(2). Br. of Appellant at 19; RP 53-55. He may not argue that basis for admission for the first time on appeal. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (appellate court will not reverse trial court's evidentiary ruling on the basis that the trial court should have ruled differently "under a different rule which could have been, but was not, argued at trial."). Moreover, as explained below in addressing Ramm's ineffective assistance of

counsel claim, the statements were not admissible as excited utterances.

Whether Ramm's statements were not hearsay because they were not offered to prove the truth of the matter asserted is a closer question. However, this Court need not reach that issue. This Court should instead affirm the exclusion of the statements on the grounds that Ramm's statements were not relevant for the purposes for which Ramm offered them.

Evidence is relevant if it tends "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. Ramm argued in the trial court that his statements should be admitted as evidence that he believed he was acting in self-defense when he attacked McKissick. RP 53-55. He conceded to both the trial court and the jury that such belief was objectively unreasonable, and he did not assert a claim of lawful self-defense. RP 64, 524, 599.

In the absence of a claim of lawful self-defense, whether Ramm subjectively believed he was acting in self-defense was not a "fact that is of consequence to the determination of the action." ER 401. Contrary to defense counsel's assertions in the trial court,

the State was not required to prove that Ramm intended to act with unlawful force; the “with unlawful force” language need not even have appeared in the jury instruction defining assault. State v. Calvin, 176 Wn. App. 1, 316 P.3d 496, 505-07 (2013) (DIV 1), rev’d in part on other grounds, 183 Wn.2d 1013 (2015) (“The term ‘unlawful force’ is only necessary in the definition of assault when there is a specific argument from the defense that the use of force was somehow lawful.”). If the State were required to prove that a defendant intended to use unlawful force, any subjective belief that self-defense was necessary, however unreasonable, would shield a defendant from criminal liability; this is not the case. See State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (valid self-defense claim requires an objectively reasonable apprehension of harm); State v. Hughes, 106 Wn.2d 176, 188-91, 721 P.2d 902 (1986) (Washington law “provide[s] no room for the theory . . . that an honest (or good faith) but unreasonable belief that self-defense is necessary merits leniency”).

Evidence that Ramm possessed an unreasonable belief that self-defense was necessary did not make it any less probable that he assaulted McKissick as charged. The statements therefore

were not relevant, and the trial court properly exercised its discretion in excluding them.

c. Any Error In Admitting The Statements Was Harmless.

The erroneous exclusion of evidence on hearsay grounds is not of constitutional magnitude. State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005). A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, even if this Court were to determine that the trial court erred in excluding Ramm's statements, Ramm's conviction should be affirmed because there is no reasonable probability that the jury's verdict would have been different had the statements been admitted. The jury heard Dr. Muscatel testify about Ramm's version of events and Muscatel's opinion that Ramm may have believed he was acting in self-defense. RP 436, 445. There was overwhelming evidence that Ramm was trying to force McKissick to engage with him rather than trying to repel a perceived attack by McKissick. McKissick's testimony that Ramm had re-initiated

contact with him after McKissick had walked out of sight to call 911 was corroborated by the 911 recording, on which Ramm could be heard calling McKissick a “bitch” and urging him to fight Ramm. RP 119-20, 516; Ex. 6. And every witness who saw the end of the encounter confirmed that Ramm continued attacking McKissick after McKissick was helpless on the ground.

Even assuming for the sake of argument that the admission of Ramm’s statements would have persuaded the jury that Ramm subjectively believed that he was acting in self-defense, that fact would not have altered the verdict. Although Ramm argued to the jury that he had subjectively believed self-defense was necessary, he was forced to concede that such a belief was objectively unreasonable. RP 524. As explained above, the State was not required to prove that Ramm knew or intended that his use of force was unlawful. Given that Ramm could not and did not raise a claim of lawful self-defense, the State only needed to prove that he intentionally touched McKissick in a way that was harmful or offensive, and either did so with a deadly weapon or recklessly inflicted substantial bodily harm. CP 63, 70; Calvin, 176 Wn. App. 1. Therefore, even if the jury had found that Ramm believed he was acting in self-defense when he struck McKissick with the

clubs, they would still necessarily have found him guilty.⁴ If anything, Ramm's statements would have been helpful to the State, since evidence that Ramm believed he was acting in self-defense strengthened the State's proof that Ramm intentionally used the clubs as weapons and intentionally struck McKissick with them.

Because there is no reasonable probability that the jury's verdict would have been different had Ramm's statements been admitted as evidence of his state of mind, any error in excluding the statements was harmless.

2. **RAMM HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN NOT ARGUING THAT THE STATEMENTS WERE ADMISSIBLE AS EXCITED UTTERANCES.**

Ramm contends that his trial counsel was constitutionally ineffective in failing to argue that his statements were admissible under the "excited utterance" hearsay exception. Br. of Appellant at 20-21. This claim should be rejected. Ramm's statements were not admissible as excited utterances, and the exclusion of the

⁴ The jury was instructed for purposes of the assault charge that a deadly weapon was any weapon or device "which under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm. CP 69. Ramm did not dispute that the wooden clubs constituted deadly weapons, and on appeal does not challenge the trial court's finding, in the context of Ramm's request for a lesser included instruction on fourth degree assault, that no reasonable juror could conclude that the billy clubs were not a deadly weapon. RP 521-47, 610.

statements did not affect the verdict. Ramm has therefore failed to establish that he received ineffective assistance of counsel.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

a. Ramm Has Failed To Establish That His Counsel Rendered Deficient Performance That Prejudiced Him.

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229.

A hearsay statement is admissible as an excited utterance only if the statement relates to "a startling event or condition" and is made while the declarant is still "under the stress of excitement caused by the event or condition." ER 803(a)(2). The "key determination" of admissibility as an excited utterance is generally "whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." Woods, 143 Wn.2d at 597.

Here, there was no evidence that Ramm was in a state of excitement caused by a startling event at the time he made the statements. Ramm did not contend at trial that McKissick had actually struck him in any way, nor was there evidence to support such a contention. While being awoken by McKissick could conceivably have been a startling event, Ramm was calm until after McKissick left to call 911, indicating that being awoken did not actually cause a state of excitement. Although Ramm undeniably became very angry during the assault, the hearsay exception requires a state of excitement, not merely anger.

See State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992) (finding excited utterance exception did not apply in part because declarant made the statement “after calming down from being angry, not from being excited”).

Furthermore, even if Ramm had been in a state of excitement during the assault due to a startling event or condition, there was no evidence that he remained in such a state at the time he made the statements. All the witnesses agreed that Ramm had calmed down and was sitting quietly on a picnic table bench by the time officers arrived, and that he remained calm and compliant throughout his contact with the officers. Ramm’s statements to Muscatel also established that Ramm sat down at the picnic table because he was aware that he was in trouble. The evidence thus overwhelmingly indicated that at the time Ramm made the statements, he was not “still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” Woods, 143 Wn.2d at 597.

Because Ramm’s statements were not admissible as excited utterances, it was not unreasonable for defense counsel to forgo arguing that theory of admissibility, and the statements would have

been excluded even if defense counsel had so argued. Moreover, as explained above, the jury's verdict would have been the same even if the statements had been admitted. Ramm has therefore failed to establish that his trial counsel's failure to argue an excited utterance theory of admissibility was deficient and prejudiced him.

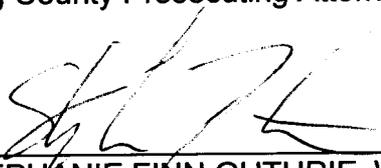
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ramm's conviction.

DATED this 5th day of October, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Mitchell Henry Ramm, Cause No. 74124-1, 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 5th day of October, 2016.

W Brame

Name:

Done in Seattle, Washington