

No. 33702-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,
v.
ROBERT M. CHICANO,
Appellant.

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STATE OF WASHINGTON
BY 

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Foscue

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

 1. IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT ROBBIE DID NOT ACT IN SELF-DEFENSE, THE JURY'S VERDICT CANNOT STAND 1

 2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO THE ADMISSION OF THE EVIDENCE REGARDING A PRIOR CONFRONTATION BETWEEN ROBBIE AND MR. THOMPSON..... 3

B. CONCLUSION 6

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....5

WASHINGTON CASES

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) 1

State v. Callahan, 87 Wn.App. 925, 943 P.2d 676 (1997)..... 4

State v. Carter, 56 Wn.App. 217, 783 P.2d 589 (1989) 5

State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1996)..... 3

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 5

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) 1

State v. Walker, 40 Wn.App. 658, 700 P.2d 1168, *review denied*,
104 Wn.2d 1012 (1985) 2

A. SUMMARY OF ARGUMENT

1. IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT ROBBIE DID NOT ACT IN SELF-DEFENSE, THE JURY'S VERDICT CANNOT STAND

In response to the State's accusation that Robbie assaulted Mr. Thompson, Robbie contended he acted in self-defense based upon a series of increasingly violent threats by Mr. Thompson. Many of the threats included threats by Mr. Thompson to kill Robbie. RP 216-17, 238.

The State's response brief does nothing to negate this argument and fails to point to any evidence wherein the State disproved self-defense beyond a reasonable doubt.

It is important to restate the burden the State bears once a claim of self-defense has been raised. Once the defendant presents a prima facie case of self-defense, the burden shifts to the State to prove the absence of self-defense *beyond a reasonable doubt*. (Emphasis added.) *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984). Further, to establish a prima facie case of self-defense, Robbie was required to prove that there was a confrontation, not provoked by himself, from which a reasonable

person would have perceived a danger of imminent bodily harm.

State v. Walker, 40 Wn.App. 658, 662, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985).

The State contends that when Mr. Thompson began to leave the restaurant, Robbie assaulted him without provocation.

Response brief at 9. This State's version of the facts ignores that when Mr. Thompson first saw Robbie at Privatsky's, he stood up and turned his back, causing Robbie, who had been threatened by Thompson with death just two months prior, to think Mr. Thompson was reaching for a weapon. RP 238-39. The State provided no evidence in response that Mr. Thompson did not intend to carry out his repeated threats to Robbie, only hollow denials by Mr.

Thompson belied by the internet threats. In addition, the State attempts to cast doubt upon Robbie's testimony of threats by calling the internet threats "alleged." Response brief at 9. Again, the State ignores the testimony of Robbie that Mr. Thompson personally threatened to kill him in September 2004, two months before the charged incident, when Robbie attempted to merely speak to Mr. Thompson to attempt to soothe any tensions between the two. RP 238-39.

The State failed to disprove that Robbie acted in self-defense. Robbie is entitled to reversal of his conviction with instructions to the trial court to dismiss. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996).

2. DEFENSE COUNSEL RENDERED
INEFFECTIVE ASSISTANCE OF COUNSEL
IN FAILING TO OBJECT TO THE ADMISSION
OF THE EVIDENCE REGARDING A PRIOR
CONFRONTATION BETWEEN ROBBIE AND
MR. THOMPSON

The State introduced testimony through Mr. Thompson and his mother, Christine Oestreich, concerning a confrontation between Robbie and Mr. Thompson over a year prior to the charged event, which apparently exacerbated Mr. Thompson's pain from a recent hernia operation. Robbie contended in the opening brief that his attorney's failure to object to the admission of this evidence constituted ineffective assistance of counsel. Robbie argued the evidence of the prior act was not admissible as a prior bad act under ER 404(b), was not *res gestae*, was not evidence of motive or intent, and even if admissible, was more prejudicial than probative.

In response, the State initially contends that Mr. Thompson's testimony was admissible as an excited utterance, was admissible,

to rebut an accusation of recent fabrication of testimony, and admissible as relevant to Robbie's claim of self-defense since it showed Mr. Thompson's fear of Robbie. Response brief at 12-14. But, to be admissible, the evidence of this event, which occurred over one year prior to the charged event had to be relevant to the assault which occurred in November 2004. Mr. Thompson's fear of Robbie was irrelevant to the equation; Robbie's fear was the only relevant inquiry since reasonable fear is an element of self-defense. See *State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997) (To prove self-defense, the following elements must be met: "(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor."). As argued in the opening brief, evidence of this 2003 incident was propensity evidence admitted by the State for no other purpose than to portray Robbie as a violent person, when in fact Mr. Thompson was the violent person.

The State completes its argument by claiming that even if it was error to admit this evidence, the error was harmless. Nothing could be further from the truth. As has been argued, Robbie's

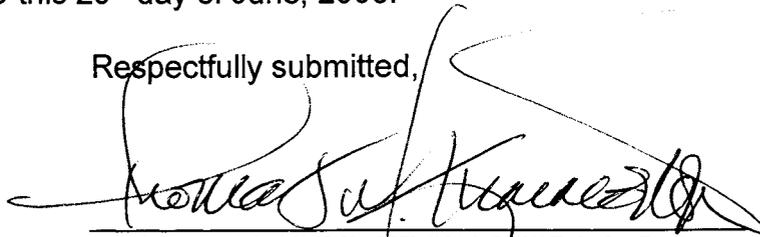
defense at trial was self-defense. The evidence of the shoulder check by Robbie on Mr. Thompson severely undercut the argument that Robbie was fearful of Mr. Thompson at Privatsky's on the day of the charged incident. Since defense counsel was charged with knowing the Rules of Court, had defense counsel made an objection to Mr. Thompson's and Ms. Oestreich's testimony regarding the 2003 incident, which the court would have been obligated to sustain as the evidence of the prior incident was inadmissible, there was a reasonable probability the outcome of the trial would have been different, that Robbie's conduct would have been seen as lawful. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's deficient performance severely prejudiced him at trial, essentially denying him the right to present a valid defense, thus violating his Sixth Amendment right to counsel. Robbie is entitled to a new trial for ineffective assistance of his attorney at trial. *State v. Carter*, 56 Wn.App. 217, 225-26, 783 P.2d 589 (1989).

B. CONCLUSION

For the reasons stated in the opening brief and the instant reply brief, Robbie urges this Court to reverse his conviction and either dismiss the action or remand for a new trial.

DATED this 20th day of June, 2006.

Respectfully submitted,



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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 33702-9-II
)	
ROBERT CHICANO,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 20TH DAY OF JUNE, 2006, I CAUSED A TRUE AND CORRECT COPY OF THIS **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> GERALD FULLER, DPA
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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JUNE, 2006.

x _____ *gnl*

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