

No. 33702-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT M. CHICANO,
Appellant.

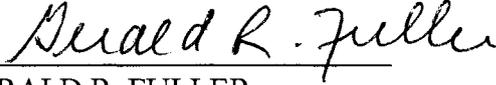
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STATE OF WASHINGTON
BY 

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

THE HONORABLE DAVID FOSCUE, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 
GERALD R. FULLER
Deputy Prosecuting Attorney
WSBA #5143

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on January 12, 2005 with Assault in the Second Degree, RCW 9A.36.021(1)(a). The matter was tried to a jury commencing on July 1, 2005. The defendant interposed a defense of self-defense. The jury returned a verdict of guilty. The defendant was sentenced on July 29, 2005.

Factual Background

On November 30, 2004 Brad Thompson went to Privatsky's, a restaurant located near the Aberdeen High School campus. He arrived in the late morning hours and ordered lunch. (RP 50) While there he was speaking to two of his friends, Ryan Onasch and Gordon Villa-Maltais. About ten minutes after he arrived, students began showing up for their lunch break. (RP 51)

While Mr. Thompson was in Privatsky's the defendant arrived with his friend Seveye Trautman. (RP 52) When Thompson saw the defendant enter the restaurant he turned around and started speaking to one of the employees, trying to avoid the defendant. Eventually he picked up his sweatshirt and started to walk out of the restaurant. (RP 53) As he went

to leave, he was confronted by the defendant, with words to the effect “...I’m going to kick your ass, you’re a f-ing faggot”. (RP 54) The defendant blocked Thompson from leaving. (RP 54) The defendant shoved Thompson, called him names, and took a swing at him. Thompson recalled the assault as a “blur”, but did remember being thrown up against the wall. He remembered being hit in the head. (RP 55) Thompson was eventually able to get up and leave. He went to the high school principal’s office to report the matter. He stayed for a short time until his mother and sister arrived. (RP 57)

Brad Thompson suffered a fractured jaw from the assault. The doctor described it as an “open complete fracture” that was minimally displaced. (RP 172) His jaw was wired shut for four weeks, in order to immobilize the jaw and allow it to heal. (RP 172-173)

At the time of this incident, the defendant was dating a girl named Justine Sturm. (RP 213) They had been dating since approximately September 2003. Prior to that time she had dated Brad Thompson. (RP 213) In January and February 2004 Ms. Sturm communicated over the internet with Bradley Thompson on a number of occasions. On February 10, 2004 she received a message which she believed came from Thompson regarding the defendant. Referring to the defendant, Thompson allegedly said, “...he may have muscles, but I have knives, guns, bats, and brass

knuckles so tell his doofy ass to f-ing bring it on..." (Exh.20). Ms. Sturm showed the communication to the defendant at the time. She later retrieved the document from her computer and printed a copy in preparation for trial. (RP 220-221) Ms. Sturm also recalled that she and the defendant had seen Bradley Thompson on the Aberdeen High School campus in September 2004. The defendant saw Thompson and approached him saying, "Let's settle this right now". She recalls that Thompson laughed, started to walk away, then swore at the defendant, and made a threat to kill the defendant. (RP 225) Brad Thompson denied the internet conversation and denied making any threats toward the defendant.

The defendant saw the ICQ communication in February 2004. (RP 234, 236) He also recalled that he had seen Brad Thompson on the high school campus in September 2004. He testified at trial that he asked Thompson if they could solve the problem to which Thompson walked away and then swore at him, threatening to kill him. (RP 238) The defendant acknowledged that following that contact in September 2004, he did not see or hear from Thompson again until the day of the incident. (RP 238)

A number of other people were present at Privatsky's at the time of the assault. The defendant arrived with his friend, Sevey Trautman, shortly after noon during his lunch period. (RP 101) Trautman recalls

that he saw Thompson sitting on a bench and pointed out Thompson to the defendant saying, "...there is your boyfriend in the corner". (RP 103)

Trautman recalls knowing that there were difficulties between Thompson and Chicano and that they didn't get along. (RP 103)

The defendant immediately told Trautman that he was going to fight Thompson. The defendant walked up to Thompson, pushed him in the chest and threw him up against the wall. (RP 104-105) Trautman did not see Thompson throw a punch or try to fight back. He saw the defendant throwing punches and pushing Thompson. (RP 105) When it was over Thompson went straight out the door. (RP 106)

Another student, Shaw Christensen, recalled walking into Privatsky's around noon. When he walked in Brad Thompson was sitting on a bench in the restaurant. He said hello to Thompson for a few moments. (RP 111-112) Christensen saw the defendant walk into the restaurant, walk up to Thompson and push him. He recalled Thompson asking, "What did I do?" He saw the defendant punch Thompson. (RP 113) Thompson then turned to run out of the restaurant. He estimated that the entire incident took about twenty seconds. (RP 114)

Gordon Villa-Maltais came into the restaurant with his friend, Ryan Onasch. He saw Brad Thompson in the restaurant and said hello to him. (RP 136) A short time later he saw the defendant come into the

restaurant with Seveye Trautman. Villa-Maltais heard arguing. He looked over and saw the defendant pushing Thompson. Villa-Maltais recalls that Thompson pushed him back and that the defendant then threw Thompson up against the wall. (RP 137-138) The defendant threw a punch hitting Thompson in the back of the head. Thompson had his back to the defendant. Villa-Maltais saw the defendant immediately after the assault and described him as being “riled up”. During a pre-trial interview, Villa-Maltais stated that after the altercation he heard the defendant say words to the effect “...I have been waiting to do that for a long time”. At trial, Villa-Maltais would only say that he recalled the defendant saying, “...I was waiting to see him, I have been waiting to see him for a long time”. (RP 140)

The defendant called several witnesses who were also present. Darrin Trask was visiting with his friend, Kyle Russell. He heard words exchanged and a commotion. (RP 185) When he turned around he saw that Brad Thompson had his back to the defendant. The defendant was throwing punches, hitting Thompson in the side. (RP 189)

Kyle Russell didn't see the defendant come into Privatsky's. (RP 197-198) The first he knew was when he heard the commotion. He saw the defendant and Thompson lock arms. The defendant pushed Thompson back against the wall. He observed that after Thompson had been thrown

against the wall, it “looked like he was trying to get away”. (RP 199) At this point the defendant was hitting Thompson in the back of the head. (RP 199) Russell didn’t see Thompson throw any punches. He did see, however, that Thompson was trying to throw an elbow to defend himself as he had his back to the defendant. (RP 199-200)

The defendant testified on his own behalf. He entered the restaurant with his friend Seveye Trautman. He saw Brad Thompson in the restaurant. When Thompson saw him, Thompson immediately got up, turned his back to the defendant and walked away from him, heading toward the counter across from the kitchen. (RP 250) He admitted that Thompson did not approach him. (RP 250) The defendant testified that he believed that Thompson may have been going for a weapon. The defendant claimed that he felt threatened because of the previous internet communication between Thompson and the defendant’s girlfriend, Justine Sturm, in which he believed Thompson had threatened him. (RP 251)

When Thompson turned around, the defendant walked up to him. (RP 251-252) At this point, Thompson was still standing in the corner of the restaurant. The defendant acknowledged that Thompson said nothing to him nor made any threats toward him. The defendant walked up to Thompson and said, “Let’s solve this right now”. The defendant admitted that he then pushed Thompson in the chest and took a swing at Thompson.

(RP 252-253) Thompson ended up against the wall and then on his hands and knees on the floor. The defendant recalls that Thompson eventually had his back to him and that he was hitting Thompson from behind. (RP 254) The defendant acknowledged that his friend, Seveye Trautman, had pointed out Thompson and made the remark, “There’s your boyfriend”. The defendant acknowledged that the only words that he heard from Thompson were at the end of the incident when he asked the defendant, “...What did I do?” (RP 255)

RESPONSE TO ASSIGNMENT OF ERROR

The State of Washington presented ample evidence to establish the defendant’s guilt beyond a reasonable doubt.(Response to Assignment of Error 1)

The standard of review when there has been a challenge to the sufficiency of the evidence is well established. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)

the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Jackson v. Virginia, supra at 318. This inquiry does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead the relevant question

is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, supra at 319.

The defendant was allowed to present evidence concerning his claim of self-defense. The facts, as set forth herein, reflect the facts as most favorable to the defendant on the issue of guilt. His claim of self-defense rested on an alleged internet communication that occurred in February 2004, about eleven months prior and an alleged confrontation that occurred two months prior to the incident, in which the victim allegedly made a threat toward the defendant. There was no evidence that the victim did anything to follow through on either threat. Indeed, there was no evidence that the defendant or his girlfriend had any contact of any kind with the victim in the two month period prior to the assault.

The evidence at trial was that when Brad Thompson saw the defendant walk into the restaurant that he tried to avoid the defendant. He turned to talk to one of the waitresses. He then picked up his sweatshirt and started to leave. The defendant wanted a fight. Thompson was confronted by the defendant, who came across the room and immediately began assaulting him. There was no evidence of any kind of provocation on the part of Thompson at the time of the assault.

The defendant claimed that he was in fear for his life because of the alleged prior threats. The jury heard his testimony. The jury was properly instructed regarding the defendant's claim of self-defense. The jury rejected any claim of self-defense and found, based upon ample evidence, proof beyond a reasonable doubt that the defendant committed the crime of Assault in the Second Degree.

It is not for this court to interpose its judgment over that of the jury. This Assignment of Error must be denied.

**The Defendant Received Effective Assistance of Counsel
(Response to Assignment of Error 2)**

On direct examination Brad Thompson described that there was "a little bit of tension between himself and the defendant." During the cross examination of Mr. Thompson, counsel of the defendant asked Thompson whether there had been any prior problems with the defendant. During the initial cross examination, it was established that Thompson and the defendant had gone to school together. Thompson stated that they had never really had any problems. (RP 61) Thompson denied making any threats to kill the defendant and denied making any threats toward the defendant through communications on the internet. (RP 64)

Upon further cross examination Thompson explained that there had been a prior physical confrontation in which the defendant had seen him on campus and “shoulder-checked” him. (RP 76-77, 91) Thompson said that this was the reason he was afraid for his safety when he saw the defendant enter the restaurant. When Thompson explained about this prior confrontation, counsel for the defendant essentially accused him of lying and making it up, asking him, “...are you telling me the truth now or were you telling the truth then?” (RP 90)

Once this issue was raised, Brad Thompson explained, on re-direct examination that this event occurred when he was walking off-campus to meet his mother to obtain some medication that had been prescribed for him following hernia surgery. Thompson explained that he told his mother at the time what had happened.

The State then called Thompson’s mother, Christine Oestreich. She described that when her son approached the car he was shaking and visibly upset, asking her, “Did you see that?” Her entire testimony on that subject is as follows:

- Q: Do you recall a time when your son came to you and spoke to you about an incident that occurred between himself and the defendant?
- A: I do.
- Q: What did he tell you happened?
- A: It was his first day back to school and I was waiting for him in the parking lot and he approached the car shaking and

visibly upset and said, did you see that, and I said no, and he said he was walking to his class and he crossed – he was outside, he crossed paths with Robbie Chicano who was walking with Justine Sturm. Robbie did a shoulder block on him, kind of went out of his path of travel to run into Brad with his shoulder and Brad of course was due for his pain pill so he was already uncomfortable and having his torso twisted after surgery.

Q: Did you give him the pill?

A: I did.

This evidence was relevant in support of the statement made by Brad Thompson as to what had occurred. As described by the mother, taking into account that the incident that had just occurred, Thompson's statement qualifies as an excited utterance. ER 803(a)(2).

Similarly, such testimony is not hearsay at all. ER 801(d)(1)(ii).

The testimony of the mother was consistent with the testimony of Brad Thompson and offered to rebut the express charge made by counsel for the defendant that the prior incident involving the shoulder check was a recent fabrication. See State v. Smith, 30 Wn.App. 251, 155, 633 P.2d 137 (1981). The statement to his mother was made well before Brad Thompson would have had a motive to fabricate. State v. Osborn, 50 Wn.App. 1, 795 P.2d 1174 (1980). Thompson could not have anticipated any legal consequence to the statements. State v. Bray, 23 Wn.App. 117, 125-126, 594 P.2d 1363 (1979).

The admission of such evidence is within the sound discretion of the trial court. State v. Makela, 66 Wn.App.164, 168, 831 P.2d 1109 (1992). The statements, as related by the mother, were not offered to prove the truth of Brad Thompson's out-of-court statements. They were admissible to rebut a suggestion of recent fabrication. State v. Bargas, 52 Wn.App. 700,702, 763 P.2d.470 (1988). The allegation made by counsel was that this was the first time Thompson had told anyone of the prior incident. The cross examination by counsel raised a sufficient inference of recent fabrication. State v. Makel supra 66 Wn.App. at 168:

Recent fabrication is inferred when counsel's examination "raises an inference sufficient to allow counsel to argue the witness had a reason to fabricate [his] story later. Bargas, 52 Wn.App.at 702-03.

The testimony of Brad Thompson and his mother concerning the prior incident is relevant evidence on the issue of self-defense. From the very outset the defendant presented the defense of justification. In opening statements counsel for the defendant pointed out to the jury that the evidence would prove that his client had been threatened by Brad Thompson, both in the e-mail message and at a second alleged confrontation at the high school. (RP 44-45) The defendant claimed that once he walked into the restaurant and saw the defendant, that he feared for his life. (RP 46)

The fact of a prior incident in which the defendant confronted Thompson is relevant evidence on the issue of whether the defendant was, in fact, in reasonable fear for his welfare when he saw Thompson in the restaurant. Such evidence tends to disprove the claim of self-defense and is relevant to that end. (ER 401)

Once the defense of justification is interposed, the defendant is permitted to prove alleged prior misconduct of the victim that he was aware of in order to show that he had a reasonable apprehension of danger from the victim. ER 404(a)(2). Jurors are to be placed in the “shoes of the defendant” and to judge the legitimacy of the defendant’s acts based upon all that he knew at the time. This includes the circumstances as they appeared to the defendant at the time of the incident, as well as the entire history of the relationship of the parties and the knowledge of the defendant concerning alleged prior conduct and acts of the victim. State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977); State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984).

The State is also entitled to show what reasonable fear the victim had when he saw the defendant in the restaurant. State v. Barragan, 102 Wn.App. 754, 759, 9 P.3d 942 (2000). Tegland, Washington Practice, § 405.4 at 1. Proof of a prior assault is certainly relevant to show Brad Thompson’s fear of the defendant.

Given this standard, especially after the victim has been asked about his relationship with the defendant going back through their junior high school days, it is entirely relevant to present evidence to show that the defendant did not fear the victim and that the defendant did, in fact, go out of his way to assault the victim on a prior occasion. In short, the testimony was offered in rebuttal of the claim of self-defense. It completes the story of the entire relationship between the defendant and the victim.

Counsel's failure to object to this evidence was not deficient performance. Under the circumstances, counsel for the defendant had to realize that there was every likelihood that such evidence would be admitted.

Even assuming that counsel for the defendant should have objected to this evidence and that the objection would have been properly sustained, the defendant must show that such an error was so serious as to deprive the defendant of the right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 Sup.Ct. 2052, 80 L.Ed. 2d 674 (1984). In short, the defendant must show prejudice. Where the alleged error is from violation of an evidentiary rule such error is not deemed prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The evidence objected to herein, even if improperly admitted, was

of minor significance in reference to the overall, overwhelming evidence of the defendant's guilt. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The evidence was overwhelming that the defendant was not in fear of Brad Thompson at the time of the incident. Thompson saw the defendant and turned away. Thompson did not confront the defendant in any way. The defendant went across the room and sought out Bradley Thompson. The defendant immediately began assaulting him in a public place that was full of high school students, all of whom were his friends and acquaintances. The evidence was overwhelming that he had no fear of Bradley Thompson at that time and that, in fact, he was simply angry. The error, if any, in admitting the testimony of Ms. Oestreich was harmless.

CONCLUSION

For the reasons set forth this conviction must be affirmed.

Respectfully Submitted,

By: 
GERALD R. FULLER
Deputy Prosecuting Attorney
WSBA #5143

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STATE OF WASHINGTON

BY _____
CITY

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STATE OF WASHINGTON,

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v.

DECLARATION OF MAILING

ROBERT M. CHICANO,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 23rd day of May, 2006, I mailed a copy of the Brief of Respondent to Mr. David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454; Thomas M. Kummerow, Washington Appellate Project, 1511 3rd Avenue, Suite 701, Seattle, WA, 98101-3635; and Robert M. Chicano, 800 College Avenue, College of Siskiyous Residence Hall, Weed, CA, 96094 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman