

No. 42943-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALFRED V. APODACA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 11-1-01527-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Apodaca presented any credible evidence to support a self-defense jury instruction.

B. STATEMENT OF THE CASE.

The State accepts Apodaca's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

Apodaca failed to present even the slightest evidence that he subjectively or objectively believed he was about to be injured.

At trial, Apodaca offered several proposed jury instructions. CP 58-70. At the end of the first day of testimony, defense counsel asked for the self-defense instructions. CP 62-65. Although he did not yet know if Apodaca would testify, he advised the court that "potentially the evidence would show there is self-defense to that charge." RP 130.¹ The victim testified that just before Apodaca grabbed her throat, she had leaned down to look into his face and force him to make eye contact with her. She denied touching him. RP 107-08, 151-52.

Apadoca testified. He said:

¹ All references to the Verbatim Report of Proceedings are to the two-volume, sequentially numbered trial transcript of December 7 and 8, 2011.

She wanted me to look up and make eye contact with her, so she put her finger and just kind of pushed my head like to look up at her.

....

I was upset. I reacted. I stood up. It was kind of a quick movement. She was here. The wall is here. The vanity is here. The couch with the laundry is at the door. I stood up. I had my left hand on her collar, like her collar bone here, and I rotated her and pushed her onto the couch. That's what I did.

....

I wasn't trying to hurt her. I think I was—I got frustrated from her comments to me. I felt I really did nothing wrong in the evening. When she stepped closer, she—when she stepped closer to me, that's when she took her finger and pushed my face up to look at her. I guess I could—I was getting upset, and when she pushed my face, like I said, I grabbed her collarbone, grabbed her other shoulder, and rotated her onto the couch. I wasn't trying to hurt her.

RP 187.

A defendant is entitled to jury instructions explaining his theory of the case if the evidence supports such instructions. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). If a trial court refused to give a requested jury instruction based upon a factual dispute, that ruling is reviewed for abuse of discretion. If the refusal is based on a ruling of law, the review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The

evidence is considered in the light most favorable to the party proposing the instruction. State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990).

At the conclusion of the trial, the court said that it would not be giving the self-defense instruction, and counsel chose not to argue the matter. RP 220. Apodaca, however, did want the self-defense instruction, and counsel relayed that to the court. RP 221. The court replied, "There is no basis for a self-defense instruction based upon the testimony that has been presented." RP 221. Because the basis for refusing the testimony is factual, review is for abuse of discretion. Walker, 136 Wn.2d at 771-72.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would

take,” and arrives at a decision “outside the range of acceptable choices.” Id.

The lawful use of force is addressed in RCW 9A.16.020, which reads in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

The defendant has the “low burden” of presenting “some evidence” of self-defense. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). The evidence must be credible. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). There must be evidence that “(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. . . .” In addition, there must be evidence

that the defendant intentionally used force. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) (internal cites omitted).

Self-defense has both a subjective and objective aspect. To determine whether a defendant has produced sufficient evidence that he was in good faith in fear of imminent danger, the court must view his actions in light of the facts and circumstances known to him. State v. George, 161 Wn. App. 86, 96-97, 249 P.3d 202 (2011); Walker, 136 Wn.2d at 767.

The objective aspect of self-defense requires the court to determine what a reasonable person in that situation would have done. Threat of imminent harm does not have to be real, if a reasonable person would have believed that it was. “The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant’s subjective beliefs would always justify the homicide.” Walker, 136 Wn.2d at 767.

The instructions that Apodaca offered accurately stated the law. They read:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and

(2) the amount of force used was reasonable to affect the lawful purpose intended.

CP 62, WPIC 16.05.

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 63, WPIC 16.08.

It is a defense to a charge of Assault in the Fourth Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 64, WPIC 17.02.

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of

injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 65, WPIC 17.04.

The victim denied touching Apodaca before the assault. He claims that she did, and the court must consider the evidence most favorable to him. Even by his own testimony, however, there is not even a hint that he subjectively believed he was in imminent danger of harm or that such a belief would have been objectively reasonable.

The evidence at trial did not make clear the relative sizes of the victim and Apodaca. In the defendant's closing argument, which admittedly is not evidence, counsel remarked that Apodaca weighed about 200 pounds. RP 263. He apparently had no difficulty in pushing the victim back into the chair or couch. See *e.g.*, RP 187. During Apodaca's testimony, there is not even a hint that he was afraid of being injured or having his property damaged. Indeed, it is hard to imagine what injury the victim could inflict by pushing his head up with her hand. He admitted she was trying to make eye contact, making no mention of an attempt to hit him. He made no mention of fear—he was frustrated and upset. RP 187.

After he decided to leave the apartment, and was gathering his belongings, he went into the children's bedroom where the victim was and kissed the younger boy, indicating that he was not fearful after the event either. RP 189.

A defendant is not entitled to a self-defense instruction unless he subjectively believed he was about to be injured and a reasonable person would have objectively reached the same conclusion. Here there is not even a scintilla of evidence of a subjective belief, and certainly no evidence that such a belief would have been objectively reasonable. There was no issue for the jury to decide. The court was correct in declining to instruct the jury on self-defense.

D. CONCLUSION.

Because Apodaca presented no evidence supporting an instruction for self-defense, the court did not err in declining to give one. The State respectfully asks that this court affirm his conviction for fourth degree assault, domestic violence.

Respectfully submitted this 20th day of September, 2012.



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THURSTON COUNTY PROSECUTOR

September 20, 2012 - 11:53 AM

Transmittal Letter

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