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NOV 24 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290573

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

RAMIRO CHAVEZ, JR.,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL SCHWAB, JUDGE

BRIEF OF APPELLANT

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Defendant, Ramiro Chavez, Jr., and the victim, Jose Moncivaiz, struck each other with their hands and that the defendant grabbed a knife and used it in the altercation . **(CP 58, Finding of Fact 6)**

2. The trial court erred in concluding that a downward departure from the standard range was justified when sentencing Chavez, because the victim was an initiator, willing participant, aggressor or provoker of the incident, as the reasons stated were not supported by the evidence in the record, and were clearly erroneous. **(CP 58-59, Conclusion of Law 2)**

3. The trial court erred in concluding that an exceptional sentence of 12 months was

appropriate, as the reasons stated did not justify a departure from the standard range as a matter of law. **(CP 59, Conclusion of Law 3)**

4. The trial court abused its discretion in imposing an exceptional sentence of 12 months, as the sentence was clearly too lenient. **(CP 61)**

II. ISSUE

Whether a victim is an initiator, willing participant, aggressor or provoker, thus justifying an exceptional sentence below the standard range for the defendant, where the defendant initiated the fistfight with the victim, pursued the victim while continuing to strike him with his fists, and then assaulted the victim with a knife, causing injury to the victim.

III. STATEMENT OF FACTS

Mr. Jose Moncivaiz lived at a residence in Yakima with his son, also named Jose, and the mother of his child, Maria

Rodriguez, as well as, on occasion, the Defendant Ramiro Chavez, Jr., Ms. Rodriguez' brother. **(RP 25-26)**

On the evening of November 6, 2009, Mr. Moncivaiz and Ms. Rodriguez argued, after which Mr. Moncivaiz left the residence and went to a bar. Ms. Rodriguez had been upset that Moncivaiz damaged her TV with an axe. **(RP 62)** After some time at the bar, he returned straight home. **(RP 26-27)**

Later on that evening or early morning, Ms. Rodriguez returned home herself with Jose, Jr. and the Defendant, Chavez. The argument between Ms. Rodriguez and Mr. Moncivaiz resumed. **(RP 27)**

Mr. Chavez yelled at Mr. Moncivaiz, then punched him, causing Moncivaiz to stumble toward the kitchen. Mr. Moncivaiz was surprised by this, and went into the kitchen. Chavez followed him and kept on punching. At that time, Chavez obtained a knife which had been on a table in the kitchen. **(RP 31-32; EX 19)**

Mr. Moncivaiz noticed the knife in Chavez' right hand. It was drawn up above Moncivaiz' head, and although he tried to block it, Chavez "just sliced my head." (CP 44; 46-47)

The two men exchanged blows in the kitchen, then the fight moved back to the living room. Chavez went to the restroom , which concerned Moncivaiz since sharp objects were kept there. After being intercepted, Chavez tried to poke Monciviaz' eyes out, while Monciviaiz pressed Chavez up against a wall. (CP 47-48)

Chavez punched Moncivaiz in the nose, causing heavy bleeding. Moncivaiz feared that Chavez would again retrieve the knife; he left the residence to get the axe from outside, but was prevented from reentering the residence. (RP 49)

Officer Jesus Sanchez of the Yakima Police Department responded to Moncivaiz' residence in the early morning hours of November 7th. A neighbor had called 911, reporting an assault. Upon arriving, the officer observed that Moncivaiz was "pretty bloody", and there appeared to be blood on the

front exterior door. There was blood on Moncivaiz' face and shirt, and his wounds appeared to still be bleeding. **(RP 94; 96-97; EX 6)** The officer testified at trial that Moncivaiz appeared to be intoxicated. **(RP 105)**

A knife was retrieved from the kitchen, with what appeared to be fresh blood around it. The blade was 7 and a half inches in length. **(RP 98-99; EX 18-20; 30)**

Mr. Chavez left the residence, but was arrested later the next morning when he was located in a car outside the residence. There was blood on some of his clothing. **(RP 118; EX 32)**

Mr. Chavez testified at trial, and denied that he ever struck Mr. Moncivaiz with a knife. He further testified that the blood on his clothing, in his shoe, and in a puddle in the kitchen was his, a result of a cut on his knuckle obtained during the fight and contact with Mr. Moncivaiz' tooth. He stated that the fistfight began when Moncivaiz pushed his sister and nephew.

(RP 163; 172-180) Chavez could not recall that Moncivaiz
bled at all. **(RP 183)**

IV. STATEMENT OF PROCEDURE

Chavez was charged by amended information with a
single count of second degree assault, under Yakima County
Superior Court cause number 09-1-02081-2. **(CP 1)**

The case proceeded to a trial before a jury, and Chavez
was found guilty as charged. **(CP 31)** The jury did not find by
special verdict that Chavez was armed with a deadly weapon at
the time of the assault. **(CP 32)**

Prior to sentencing, Chavez moved the court to find that
an exceptional sentence below the standard range was justified
pursuant to RCW 9.94A.535(1)(a) and (1)(c)-that the victim
was a willing participant and provoker of the incident, and that
a sentence within the standard range would be significantly
disproportionate to any criminal conduct. **(CP 43)**

Mr. Chavez had an offender score of 9, reflecting juvenile convictions for first degree assault, first degree escape and third degree assault, as well as adult court convictions for second degree malicious mischief, residential burglary and attempting to elude a police vehicle. His standard range for second degree assault was 63-84 months. **(CP 61)**

The court found substantial and compelling reasons existed which justified an exceptional sentence, specifically that the victim was “an initiator, willing participant, aggressor or provoker of the incident. RCW 9.94A.535(1)(a).” **(CP 58-59; 61)** The exceptional sentence imposed was 12 months. **(CP 61)**

Chavez timely appealed his conviction on May 21, 2010. **(CP 80)**. Because the State of Washington timely appealed the exceptional sentence on May 7, 2010, it is designated as the Appellant in this proceeding. **(CP 68)**

V.
STANDARD OF REVIEW

Review of a court's imposition of an exceptional sentence is governed by RCW 9.94A.210(4): (1) whether the reasons given by the sentencing judge are supported by the evidence under the clearly erroneous standard of review; (2) whether the reasons justify a departure from the standard range, under *de novo* review, as a matter of law; or (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review.

State v. Jeannotte, 133 Wn. 2d 847, 855-56, 947 P.2d 1192 (1997), *citing* State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991).

VI. ARGUMENT

A. The exceptional sentence was not supported by the record, the reasons stated by the court do not justify the downward departure, and the sentence was clearly too lenient.

The Sentencing Reform Act provides that certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range. State v. Hutsell, 120 Wn.2d 913, 921-22, 845 P.2d 1325 (1993), *citing* former RCW 9.94A.390(1)(a) (now codified at RCW 9.94A.535(1)(a)), and *citing* DAVID BOERNER, SENTENCING IN WASHINGTON 9-23 (1985):

The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that

involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle. Certainly the fact that the substantive law treats these circumstances as complete defenses established the legitimacy of their use in determining relative degrees of blameworthiness for purposes of imposing punishment.

Self-defense is considered such a 'failed defense'

mitigating circumstance. Jeannotte, 133 Wn.2d at 851.

1. Clearly Erroneous.

In applying the "clearly erroneous" standard in reviewing a trial court's reasons for imposing an exceptional sentence, the Washington Supreme Court has held that "we will reverse the trial court's findings only if no substantial evidence supports its conclusions. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991), *quoted in* Jeannotte, 133 Wn.2d at 856; State v. Pascal, 108 Wn.2d 125, 138, 736 P.2d 1065 (1987). Substantial evidence has been defined as "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared

premises.” Olmstead v. Department of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991).

Here, the court’s factual findings were clearly erroneous. According to Moncivaiz’ testimony, he was surprised by the first blow delivered by Chavez, and the punching continued as he stumbled into his kitchen. Also, Chavez testified that he struck first, claiming that Moncivaiz had first pushed his sister and nephew. At no time in Chavez’ own testimony does he describe Moncivaiz as the initiator of the fight.

Also, it cannot be emphasized enough that it was Chavez who elected to introduce a knife into the altercation, elevating the fistfight, which he began, into an assault with a deadly weapon.

In State v. Pascal, a mitigated sentence based upon the victim being a ‘initiator, willing participant, aggressor or provoker’, was affirmed on appeal, but the facts are easily distinguished from those present here. Pascal had been charged with second degree murder and manslaughter for stabbing her

boyfriend to death. Pascal, 108 Wn.2d at 129. The defendant's boyfriend had been abusive to her in the past and, on the day of the incident, he had shoved, hit, slapped and knocked her down. When the boyfriend further threatened to take their 18-month-old child away, Pascal stabbed him. Id., at 126-27. The defendant asserted self-defense, which was rejected by the jury, but the court sentenced the defendant, who had no criminal history, to 90 days in custody, instead of within the standard range of 31-41 months. Id., at 129.

Also, the result in State v. Birmel, 89 Wn. App. 459, 466, 949 P.2d 433 (1998), *review denied*, 138 Wn.2d 1008, 989 P.2d 1141 (1999), is distinguishable. There, the trial court dramatically reduced the defendant's sentence based upon a failed defense, where the defendant killed his wife after she had attacked him with a kitchen knife, and the two had struggled over the knife. Id., 89 Wn. App. at 463. Here, it was the defendant, Chavez, who both initiated the altercation, then assaulted Moncivaiz with a knife.

“[T]he great weight of authority disfavors the defense of consent in assault cases.” State v. Baxter, 134 Wn. App. 587, 599, 141 P.3d 92 (2006). Further, in the context of a defense to felony murder, this court has previously held that a participant in a fistfight was not a participant in getting stabbed when the other individual introduces a knife. State v. Langford, 67 Wn. App. 572, 579-80, 837 P.2d 1037 (1992).

2. Matter of Law.

As a matter of law, the reasons stated by the court do not support its conclusions, and do not justify the downward departure. The court found only that there was an altercation between the brothers-in-law on November 7th, that the victim had been drinking and arguing with Maria, that the defendant had used an axe to damage some property, and that as a result, it was the defendant who became upset at the victim’s behavior. It further found that the “defendant and the victim struck each other with their hands and that the defendant grabbed a knife from the kitchen area and used it in the altercation.” (CP 59) It

is significant that the court did not specifically find that Moncivaiz initiated the fight, or provoked Chavez into striking him.

Indeed, in order for the trial court to conclude the victim was a provoker or willing participant, it must find a causal connection between the victim's conduct and the defendant's offense. State v. Hinds, 85 Wn. App. 474, 482, 936 P.2d 1135 (1997).

Further, this assault occurred in Moncivaiz' home; he had no duty to retreat, and he was the one who had the right to defend himself. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

3. Clearly Too Lenient.

The sentence of 12 months was clearly too lenient. The defendant's history is extensive, and his offender score was calculated to be 9, reflecting past adjudications and convictions for offenses such as first and third degree assault, malicious mischief, and attempting to elude. A jury has found that he was

guilty beyond a reasonable doubt of yet another assault, this time involving a knife. The standard range for the offense is 63-84 months, and the court's exceptional sentence does not further the legislative purpose of the Sentencing Reform Act:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve him or herself;

(6) Make frugal use of the state's and local governments' resources; and

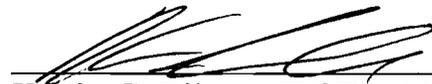
(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94.010

**VII.
CONCLUSION**

For all the foregoing reasons, this court should vacate the exceptional sentence, and remand this matter for resentencing.

Respectfully submitted this 7th day of November,
2010.


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