

FILED
FEB 22 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COA No. 29057-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant/Cross Respondent,

v.

RAMIRO CHAVEZ, JR., Respondent/Cross Appellant.

BRIEF OF RESPONDENT/ CROSS APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Respondent and
Cross Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

FILED
FEB 28 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COA No. 29057-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant/Cross Respondent,

v.

RAMIRO CHAVEZ, JR., Respondent/Cross Appellant.

BRIEF OF RESPONDENT/ CROSS APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Respondent and
Cross Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR ON CROSS APPEAL

 A. The State’s evidence was insufficient to support a finding of guilt.....1

 Issue Pertaining to Assignment of Error

 1. Was the State’s evidence insufficient to support a finding of guilt when it failed to show Ramiro Chavez inflicted “substantial bodily harm” or assaulted the victim with a deadly weapon?.....1

II. ANSWER TO APPELLANT’S ASSIGNMENT OF ERROR...1

 A. The court properly imposed an exceptional sentence downward.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT ON STATE’S APPEAL.....4

 A. The court properly imposed an exceptional sentence downward.....4

V. ARGUMENT ON CROSS APPEAL.....8

 A. The State’s evidence was insufficient to support a finding of guilt because there was no evidence to show beyond a reasonable doubt that Mr. Chavez inflicted “substantial bodily harm” or assaulted the victim with a deadly weapon.....8

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Table of Cases

<i>State v. Hale</i> , 146 Wn. App. 299, 189 P.3d 829 (2008).....	5
<i>State v. Hinds</i> , 85 Wn. App. 474, 936 P.2d 1135 (1997).....	7
<i>State v. Green</i> , 94 Wn.2d 216, 616 p.2d 628 (1980).....	8, 9
<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	5
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	5
<i>State v. Pascal</i> , 108 Wn.2d 125, 736 P.2d 1065 (1987).....	7, 8
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005)....	8

Statutes

RCW 9.94A.021(1)(a).....	9
RCW 9.94A.021(1)(c).....	9
RCW 9.94A.535(1)(a).....	4
RCW 9.94A.535(1)(c).....	4
RCW 9.94A.585(4).....	4, 5, 8

I. ASSIGNMENT OF ERROR ON CROSS APPEAL

A. The State's evidence was insufficient to support a finding of guilt.

Issue Pertaining to Assignment of Error

1. Was the State's evidence insufficient to support a finding of guilt when it failed to show Ramiro Chavez inflicted "substantial bodily harm" or had a deadly weapon?

II. ANSWER TO APPELLANT'S ASSIGNMENT OF ERROR

A. The court properly imposed an exceptional sentence downward.

III. STATEMENT OF THE CASE

Mr. Chavez was charged by amended information with one count of second degree assault. (CP 1). The case proceeded to jury trial.

Jose Moncivaiz lived at 1521 S. 2nd Ave. in Yakima with Maria Rodriguez, and their son Jose Jr. (RP 25). Ramiro Chavez, her brother, was living there at the time as well. (RP 132). Ms. Rodriguez was 7 months pregnant. (RP 139).

On November 6, 2009, Mr. Moncivaiz and Ms. Rodriguez got into an argument. (RP 26). She left the house to go to a friend's, where Jose Jr. already was. Just before she went, Mr. Moncivaiz

broke her TV, threw it in the front yard, and put an ax in it. (RP 62). He walked to a bar, had several beers, and went home. (RP 26, 27).

When Ms. Rodriguez and her son came back about 12:30 or 1 a.m., she saw her TV, picture mirror, VCR, and little boxes thrown in front of the house. (RP 134). The TV had an ax in it. (*Id.*). Mr. Moncivaiz and Ms Rodriguez began yelling at each other and arguing. (RP 28, 31, 135, 162). Mr. Chavez arrived. (RP 31, 135, 162).

According to Mr. Moncivaiz, he was punched in the face and stumbled back to the kitchen where Mr. Chavez got a knife and tried to slice him. (RP 31, 32, 45-47). He dropped the knife and went towards the bathroom. (RP 47). Seeing that, Mr. Moncivaiz said, "I proceeded to go after him more then." (RP 48). Mr. Moncivaiz threw punches at Mr. Chavez in the living room, kitchen, and bathroom. (RP 47-48, 68). The fight returned to the living room where Mr. Moncivaiz grabbed the face of Mr. Chavez, who punched him in the nose and drew blood. (RP 48-49). Mr. Moncivaiz went for the ax that was right outside the door, grabbed it, and tried to get back in. (RP 49-50). Someone closed the door

and locked it. (RP 50). He saw Ms. Rodriguez and Mr. Chavez walk out and get into a car. (RP 52).

Mr. Moncivaiz said the police came later as did an ambulance. (RP 53). Paramedics looked at him. (*Id.*). He did not go to the hospital. (*Id.*). After everybody left, he went back into the house and secured it. (RP 54). Later in the morning, he saw Mr. Chavez in a car in the back. (RP 55).

Mr. Chavez testified these events took place:

[Mr. Moncivaiz and Ms. Rodriguez] were fighting or arguing back and forth and the only thing I said was, man, you guys shouldn't be fighting and that's what I recall. My brother-in-law tells me, well, it's none of your business, stay out of it – none of my business and my nephew was like, oh, fuck that. He's like, no, fuck that and pushes his dad. His dad pushes him out of the way and they're fighting. He pushed my sister and that's when the fight – the fight started and we were fighting in the living room. He went outside after a while and he grabbed the ax. My nephew closed the door on him, locked it and I go to the kitchen because I tell him, so you want to play with weapons and my sister sees me going to the kitchen and I did pick up a knife, but the knife that they bring for evidence is not the same one. My sister takes it from me. She said, no, brother, no. Okay, you know, thank you, pretty much saved my life, and she takes it away from me. At this time, I'm bleeding. I have right here a scar on my knuckle from one of his teeth and on the side of my pants you could see that I was bleeding. There was a lot of blood on the side of my pants and in my shoe and the blood that was in the kitchen was from me. It was my hand was leaking and the puddle of blood was my blood. (RP 162-63).

The jury convicted Mr. Chavez of second degree assault, but found by special verdict that he was not armed with a deadly weapon. (CP 31, 32). Before sentencing, the defense moved for a downward departure based on the victim being a willing participant in the incident and a sentence within the standard range being significantly disproportionate to any criminal conduct under RCW 9.94A.535(1)(a) and (c). The standard range was 63-84 months. (CP 61). Entering findings and conclusions in support, the court imposed an exceptional sentence of 12 months. (CP 57-59, 61). The State appealed and Mr. Chavez cross-appealed. (CP 68, 80).

IV. ARGUMENT ON STATE'S APPEAL

A. The court properly imposed an exceptional sentence downward.

Appellate review of the trial court's imposition of an exceptional sentence is governed by RCW 9.94A.585(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; and (3) whether the sentence is clearly too excessive or too lenient under the abuse of discretion standard. *State v. Hale*, 146 Wn. App. 299, 189 P.3d

829 (2008). The State contends the court's reasons are unsupported by the evidence and do not justify a departure as a matter of law and the sentence was clearly too lenient. To the contrary, the court's reasoned and principled decision to impose an exceptional sentence downward is indeed supported by the evidence and law and the 12-month sentence is clearly not too lenient. RCW 9.94A.585(4).

The State assigned error only to the court's finding that Mr. Chavez and Mr. Moncivaiz struck each other with their hands and Mr. Chavez grabbed a knife and used it in the altercation. (State's brief, p. 1; FF 6, CP 58). The rest are thus verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The trial court's findings will be reversed only if no substantial evidence supports its conclusions. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

Here, the State's own recitation of facts shows that substantial evidence supports finding of fact 6. Both men testified they punched each other. (RP 47-48, 68, 163). Mr. Moncivaiz testified Mr. Chavez got a knife from the kitchen and used it. (RP 44-47). The court's finding is not clearly erroneous.

The State next argues the court's reasons do not justify an exceptional sentence as a matter of law. The court determined a downward departure from the standard range was justified because the victim was an initiator, willing participant, aggressor, or provoker of the incident under RCW 9.94A.535(1)(a). (CP 58-59). But the court' findings on the circumstances of the offense clearly support its conclusion that Mr. Moncivaiz was a willing participant.

In findings of fact 3, 4, and 5, to which the State has assigned no error, the court found Mr. Moncivaiz had been drinking and had been involved in an argument with Ms. Rodriguez, Mr. Chavez's sister; Mr. Moncivaiz had placed furniture belonging to her in the front yard of the house that they shared; he had actually used an ax to destroy or damage some of the property; and Mr. Chavez became upset at the victim's behavior toward his sister. (CP 58). And there is evidence in the record that Mr. Moncivaiz's pushing Mr. Chavez's sister precipitated the fight. (RP 163). The men fought. (RP 47-48, 68, 163). Mr. Moncivaiz said he went after Mr. Chavez. (RP 48). At the sentencing hearing, the victim spoke on Mr. Chavez's behalf and acknowledged to the court they both struck each other with their hands. (4/26/10 RP 4). Mr. Moncivaiz said that if maybe he were in Mr. Chavez's shoes, he would have

done the same thing. (4/26/10 RP 3). The trial court recognized the causal connection between the victim's conduct and Mr. Chavez's offense. *State v. Hinds*, 85 Wn. App. 474, 482, 936 P.2d 1135 (1997). In these circumstances, Mr. Moncivaiz was a willing participant as a matter of law.

Last, the State claims the sentence was clearly too lenient. This argument fails. The abuse of discretion standard applies to reviewing such a sentence. *State v. Pascal*, 108 Wn.2d 125, 138, 736 P.2d 1065 (1987). Under this standard, the sentence will be deemed "clearly too lenient" only if the trial court's action was one that no reasonable person would have taken. *Id.* at 139. Here, the court heard pleas for leniency from the victim and family. After articulating reasons for the downward departure, the court imposed an exceptional sentence of 12 months:

Twelve months is appropriate considering all of the circumstances described herein as well as the nature of the charge and the defendant's prior criminal history. . . . I think 12 months for what you did in this case is justified given the love I hear coming from the family and the message I send to the other people on the wall is don't use a knife to settle a dispute. . . . I've been impressed with the way you present yourself. (4/26/10 RP 15; CP 59).

As its action was not one that no reasonable person would have taken, the court did not abuse its discretion by ordering a 12-month sentence. *Pascal*, 108 Wn.2d at 139.

The sentencing court's reasons are supported by the evidence and justify as a matter of law the imposition of the exceptional sentence downward, which was not clearly too lenient. RCW 9.94A.585(4). The court did not err.

V. ARGUMENT ON CROSS APPEAL

A. The State's evidence was insufficient to support a finding of guilt because there was no evidence to show beyond a reasonable doubt that Mr. Chavez inflicted "substantial bodily harm" or assaulted the victim with a deadly weapon.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005).

The court's instruction 4 defined second degree assault under RCW 9A.36.021(1)(a), (c):

A person commits the crime of second degree assault when he intentionally assaults another and recklessly inflicts substantial bodily harm or when he assaults another with a deadly weapon. (CP 15).

"Substantial bodily harm" was defined in instruction 8:

"Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any body part. (CP 19).

The court also gave instruction 7, defining a deadly weapon:

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, or threatened to be used, is readily capable of causing death or substantial bodily harm. (CP 18).

Here, there was no evidence produced by the State that Mr. Chavez inflicted "substantial bodily harm" on Mr. Moncivaiz, who offered no testimony that he suffered substantial disfigurement, a substantial loss or impairment of the function of any bodily part or organ, or a fracture. He did not go to the hospital. (RP 53). Rather, the evidence was his worst injury was a bloody nose. (RP

49). Thus, one of the means of committing second degree assault was not proven beyond a reasonable doubt.

The other means was assault with a deadly weapon. In the special verdict, the jury unanimously found Mr. Chavez was not armed with a deadly weapon. (CP 32). The definition of a deadly weapon for purposes of the special verdict is different than its definition for second degree assault and was given in instruction 17:

A deadly weapon is an implement that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. A knife with a blade more than three inches long is a deadly weapon. Whether a knife has a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide. (CP 28).

When the jury unanimously found in its special verdict that Mr. Chavez was not armed with a deadly weapon, it necessarily had to find that he did not assault Mr. Moncivaiz with a deadly weapon. Although the full definitions are not exactly the same, the relevant portions of each are indeed to the same effect: a deadly weapon is an implement, in the circumstances in which it is used, that can cause death. The jury's unanimous finding on the special verdict thus indicates no juror could have found he assaulted the

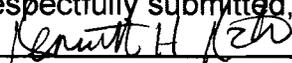
victim with a deadly weapon, the other means of committing second degree assault. The trial court so recognized that principle. (4/8/10 RP 11). Accordingly, the State failed to prove guilt beyond a reasonable doubt. *Green, supra*.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Chavez respectfully urges this Court to reverse his conviction and dismiss the charge or, in the alternative, to uphold the exceptional sentence downward.

DATED this 22nd day of February, 2011.

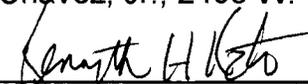
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Respondent and
Cross Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on February 22, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Kevin Eilmes, Yakima County Prosecutor's Office, 128 N. 2nd – Rm 211, Yakima, WA 98901, and Ramiro Chavez, Jr., 2405 W. Lincoln, #16, Yakima, WA 98902.



Kenneth H. Kato