

FILED
APR 17, 2014
Court of Appeals
Division III
State of Washington

No. 31054-0-III

IN THE
APPELLATE COURT OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER J. BORDEAU

Appellant.

BRIEF OF RESPONDENT

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

- 1. The State's evidence was sufficient to support the conviction of assault in the second degree as there was sufficient evidence to disprove self-defense beyond a reasonable doubt.**
- 2. The failure of the Court to enter written findings of fact and conclusions of law is harmless error.**

I. STATEMENT OF FACT

Mr. Kirschner, a computer scientist-turned house painter, was living in Cle Elum on February 1, 2012 (RP 100-101) At some time in the evening, he realized he was out of cigarettes and decided to hop on his bike and ride six blocks to the store for some more. (RP 100-101) On the way, he saw a small maroon car behind him which was heading the same direction as he was. (RP 102-103) It got a little close to him at one point and he moved over. (RP 103) The occupant appeared to wave at him and he waved back. (RP 105) He thought it was his daughter's friend's mother. (RP 103)

The car sped up, drove forward and then abruptly pulled over and stopped. (RP 103) He stopped his bicycle and just stood there on the side of the road. (RP 104) The defendant (Ms. Bordeau) got out and started marching back toward him, cussing and going on and on. She wasn't who he had thought, and he did not know her after all. (RP 104, 113) She seemed angry. (RP 104) Mr. Kirschner pulled out his phone and said he was going to call the police. (RP 104) It was 11:15 at night, the defendant looked angry, and nobody else was around. (RP 105)

She turned around and went back to her car. (RP 105) Mr. Kirschner put

his phone back and she pulled away. He got on his bike and started riding toward the Chevron for his cigarettes. (RP 105) The defendant pulled over again, about 50 yards up, got out of her car, and began running back toward Mr. Kirschner. (RP 105) Mr. Kirschner veered his bicycle into the street to avoid her. (RP 105) He began to call 911.

Ms. Bordeau started running toward his position where he was standing, straddling his bicycle. (RP 106) She was cursing, yelling, and not making any sense. (RP 106) She was obviously angry and trying to grab him. She was swinging at him. (RP 106) He got off his bike and tried to hold her off while he was on the phone to 911. (RP 106) He could smell alcohol on her breath. (RP 106-107) He decided to run over to her car to get her license plate to give to the 911 operator. He headed off while she was running behind him. (RP 107) She ran past him and got in the car again. (RP 107)

He assumed she was going to drive away, and he was reading the license plate to the 911 operator when the defendant got out of the car with what he thought was a baseball bat. (RP 107-108) She came at him swinging the bat. (RP 108) He tried to fend her off with one hand while she hit him with the bat. One blow was to the arm and one to the back of his head. (RP 109) He lost

consciousness momentarily and when he came to she was standing over him screaming at him. (RP 109, 127) She told him she was going to kill him. (RP 109) He got up quickly and grabbed her throat and threw her back away from him. (RP 111) She got back up, swinging the “bat” while he backed away. (RP 112)

Mr. Kirschner testified that he never attacked her or touched her at all until he grabbed her throat to push her back after she had hit him twice and knocked him down. (RP 112) Mr. Kirschner described the defendant, whom he had never met, throughout the incident as “crazy, out of control, screaming, nonsensical.” (RP 113)

The police showed up and took charge. (RP 114, 161) Mr. Kirschner said he had ringing in his ears and the side of his head hurt for a couple days. (RP 116) He refused treatment because he was worried about medical bills. (RP 127) The police saw Ms. Bordeau walking around in the middle of the road, throwing her arms and muttering. (RP 161) They could see a large stick-like object lying on the ground, and recognized it as the “bat” that dispatch had described. (RP 161) The “bat” turned out to be a heavy splitting maul handle. (RP 135)

Ms. Bordeau had also hit her own taillight with the axe handle while the

police were on the way. (RP 123) When police arrived, they saw her hands had blood on them and she kept flipping the blood around. (RP 162) They called for an aid car for her. (RP 162) Police said she was agitated and pacing and had been drinking. (RP 163) Medical personnel testified that Ms. Bordeau was moving constantly and was not cooperating. (RP 149-150) Later, on the way to the jail, Ms. Bordeau was still agitated. She was yelling. (RP 180-181) She knocked herself in the head on the police car screen between the driver and the back, saying "I will knock myself out." (RP 181) She also kept striking her head on the window at the jail repeatedly while waiting to be booked. (RP 181)

The defendant was charged with Assault in the Second Degree. (CP 3, 46-47) The defendant had some mental health issues. (RP 12) She resumed her medication to become stable and was competent to assist her attorney. (RP 12-13, 18) Because her initial counsel was often in other trials, she ended up getting new counsel. (RP 27-28) The pre-trial 3.5/3.6 hearing was conducted on the morning of trial. (RP 54-68) Immediately after the court ruled, the court went on to discuss other in limine issues for the trial, and then the trial occurred. (RP 68-73)

ARGUMENT

- 1. The State's evidence was sufficient to support the conviction of assault in the second degree as there was sufficient evidence to disprove self-defense beyond a reasonable doubt.**

The Law regarding Sufficiency of Evidence

The standard for review when sufficiency of the evidence is questioned, is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the State. State v. Bergeron, 105 Wn. 2d (1985). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn. 2d 192 (1992).

In State v. Roth, 131 Wn. App. 556, (19) the court further stated, "The appellate court does not determine whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the pertinent question is

whether any rational trier of fact could have found the essential elements after viewing the evidence in the light most favorable to the State. State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide disputed questions of fact. State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980). This court must defer to the determinations of the trier of fact on such issues. State v. Fiser, 99 Wash.App. 714 at 719, 995 P.2d 107 (2000). In reviewing the sufficiency of the evidence, circumstantial evidence is not considered any less reliable than direct evidence. State v. Delmarter, 94 Wash.2d 634, 638 (1980).”

The Law Regarding Self Defense

When a defendant raises the issue of self-defense in an assault case, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wash.2d 612, 615–19, 683 P.2d 1069 (1984); State v. Redwine, 72 Wash.App. 625, 629–30, 865 P.2d 552, review denied, 124

Wash.2d 1012, 879 P.2d 293 (1994); State v. Sampson, 40 Wash.App. 594, 597–99, 699 P.2d 1253, review denied, 104 Wash.2d 1005 (1985);

Self-defense instructions are required when a defendant meets his initial burden of producing “some evidence demonstrating self-defense” Walden, 131 Wash.2d at 473, 932 P.2d 1237; see Redwine, 72 Wash.App. at 630, 865 P.2d 552. The burden then shifts to the State to prove the absence of self-defense. State v. Miller, 89 Wn. App. 364 (1997).

Discussion

In this case, proper self-defense instructions were given and argued. (See Instructions Number 16 and 17, CP 120-121) These instructions were given despite the fact that Ms. Bordeau claimed she never hit anyone with the big axe handle. (RP 213, 220). The jury was told ,

“The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that she 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 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 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.” (CP 120)

The instructions, however, do not force the jury to believe what Ms. Bordeau said. The jury was free to believe Mr. Kirschner instead. Their accounts were different and could not both be accurate.

As case law indicates in sufficiency of the evidence cases, the reviewing Court is to look at the evidence in the light most favorable to the state, and admit the truth of the State’s evidence. (Salinas at 201) The jury was entitled to make credibility determinations. (Theroff at 593). The reviewing Court should find the jury was entitled to believe Mr. Kirschner and to not believe Ms. Bordeau. In considering the testimony in the light most favorable to the state, the jury believed Mr. Kirschner, in which case it is clear he never threatened the defendant with anything but calling the police, and never touched the defendant until after she had hit him in the arm and the head with the splitting maul handle. (RP 107-111) The reviewing Court should look at the evidence as though the jury did *not* believe Ms. Bordeau, who said she did not actually use any force, never hit Mr. Kirschner, and committed no assault at all. (RP 213, 220) If the jury believed Mr. Kirschner, that he never touched Ms. Bordeau and that she came at him with

the maul handle while he was looking at her license plate, then Ms. Boudreau's hitting him with the big splitting maul handle was not in self-defense. Admitting the truth of the State's evidence, no reasonable person would believe he or she was about to be injured by a man just standing and reading a license plate. If the jury believed Mr. Kirschner, then that finding, that the defendant did not use self-defense, is beyond a reasonable doubt.

There were many reasons why the jury would believe Mr. Kirschner. He was on the telephone with 911 through the whole assault, and that 911 call was played which corroborated his testimony. (RP 110, 128) Also, Ms. Boudreau was obviously drinking and suffering from mental issues, and her bizarre and unacceptable behavior was reported by the police as well as Mr. Kirschner. (for example at RP 113, 163, 165, 179-181, but also throughout the testimony) The jury was entitled to take all of these factors into account and believe the defendant beat Mr. Kirschner with the maul handle for no reason, as Mr. Kirschner describes. This reviewing court must defer to the jury on that credibility determination. See State v. Fiser, 99 Wash.App. 714 at 719, 995 P.2d 107 (2000),₂ cited above.

It is simply not true that no reasonable jury could find there was no self-defense here. The existence of facts negating self-defense would not have to be based on guess, speculation, or conjecture. Mr. Kirschner absolutely testified he never threatened or touched Ms. Bordeau. (RP 105-109, 112) His testimony disproves self-defense by itself. The conviction should stand.

2. The failure of the Court to enter written findings of fact and conclusions of law is harmless error.

The pre-trial hearing in this case was done on the day of trial. (RP 54-68). The statements of Ms. Bordeau, which were largely exculpatory, were admitted. (RP 68) There was no time to enter written findings at that time. However, it is true that written findings are mandatory. State v. Landsiedel, 165 Wn. App. 886 (2012) The purpose of written findings and conclusions is to promote efficient and precise appellate review. Landsiedel at 893. However the lack of written findings in this case has not prejudiced Ms. Bordeau at all, and

should be considered harmless error. Ms. Bordeau told the court at the pre-trial she did not mind if her statements came in, because she “had nothing to hide,” (RP 62, 63) although her counsel did not necessarily agree. (RP 63) It is difficult to see what counsel would have gained by suppressing Ms. Bordeau’s statements. Ms. Bordeau also testified at the trial. (RP 206-226). It is difficult to see how counsel could argue self-defense without the testimony of Ms. Bordeau. The only two people present were Mr. Kirschner, who certainly did not support a self-defense claim, and Ms. Bordeau. Therefore, she was bound to testify. The main relevant portions of her statement to police and her testimony were the same—essentially that he was choking her or had grabbed her by the neck. (RP 170 and RP 212)

Moreover, it is not likely that the statement would be found to be suppressed, which means it would not likely be an appellate issue. Both Ms. Bordeau and the officer testified at the hearing that she was not under arrest until she went over to the aid car, (RP 57-59, 61, 65-66) and therefore, the statements she gave before she was read her rights at the aid car would not be considered custodial interrogation. The trial court found:

“Ms. Bordeau was not under arrest. She didn’t even feel like she was under arrest until she was told she was under arrest. So statements are coming in.” (RP 68)

Since the defendant’s statements were not likely to be suppressed and since the defense would not have gained anything by suppressing the statements, there is no prejudice to the defendant that the statements were admitted, nor that the findings were not completed in a timely way.

Nevertheless, if the reviewing Court wishes to see findings, the matter can be remanded for entry of those findings.

CONCLUSION

There was sufficient evidence for the jury to reasonably find an absence of self-defense beyond a reasonable doubt where the victim testified that Ms. Bordeau was acting irrationally, that he threatened to and then did call the police as she was coming toward him, that he never threatened or touched her (before she struck him), and where he was on the telephone with 911, trying to read her license plate, when she got out a splitting maul handle and proceeded to hit him on the arm and the head, knocking him out briefly.

The failure of the trial court to enter written findings on 3.5 was harmless error where it happened the day of the trial, the statements of the defendant were properly not suppressed, and the defendant has not been prejudiced. Any remedy if needed would be to remand for entry of written findings.

The conviction for Assault in the Second Degree should be affirmed

Respectfully submitted,



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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
Plaintiff/Respondent.)
vs)
JENNIFER J. BORDEAU,)
Defendant/Appellant.)
_____)

No. 31054-0-III
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
County of Kittitas) ss.
)

The undersigned being first duly sworn on oath, deposes and states:

That on the 17th day of April, 2014, affiant deposited into the mail of the United States a properly stamped and addressed envelope directed to:

Renee S. Townsley, Clerk
Court of Appeals
Division III
500 N. Cedar St.
Spokane WA 99201-1905

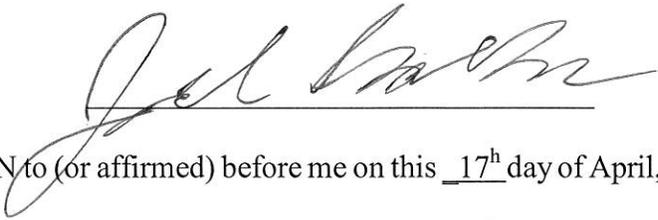
Kenneth H. Kato

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PO Box 501
Pateros, WA 98846

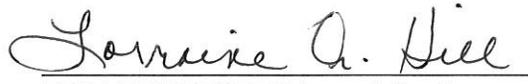
containing copies of the following documents:

- (1) Brief of Respondent
- (2) Affidavit of Mailing

I have spoken with Kenneth Kato by phone and he indicated that he would accept the brief via email at: khkato@comcast.net



SIGNED AND SWORN to (or affirmed) before me on this 17th day of April, 2014, by Jacob R. Schroder.



NOTARY PUBLIC in and for the
State of Washington.
My Appointment Expires: 09-10-17

