

NO. 64359-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RENE NAITOKO,

Appellant.

REC'D
JAN 05 2011
King County Prosecutor
Appellate Unit

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

The Honorable Helen Halpert, Judge

REPLY BRIEF OF APPELLANT

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A. SUMMARY OF REPLY

Ranae Naitoko's lawyer did not investigate defense witnesses identified by his client. When Naitoko sought to fire his attorney, counsel assured the trial court he had no information to merit calling the witnesses to court. In fact, their testimony corroborates Naitoko's claim he was assaulted twice before the shooting outside the First Avenue Pub. Naitoko was tried and convicted without effective assistance of counsel. This court should reverse his 31-year prison sentence and order a new trial.

B. ARGUMENT IN REPLY

1. TUIFUA AND LATU TESTIFIED SEVERAL ASSAILANTS ATTACKED NAITOKO INSIDE THE BAR.

Malu Tuifua and Sioeli Latu corroborated Naitoko's claim that Michael Schirmer and others ganged up to pummel Naitoko inside the bar. Tuifua testified he saw "a bunch of guys", including Schirmer, holding Naitoko down and punching him. 2RP 94, 96. Latu similarly described "a whole bunch of people on somebody." 3RP 7. Latu then observed the assailants were punching and kicking Naitoko. 3RP 7-8.

The scene described by Tuifua and Latu contrasts with the state's version of what occurred inside the bar. None of the state's witnesses acknowledged a concerted attack on Naitoko by a group of

assailants. According to state witness Schirmer, friends of his and friends of Naitoko intervened after Schirmer initiated the confrontation with Naitoko. RP 148-49. The situation was then defused. RP 149-50. Schirmer described the incident as merely “a little bit” of pushing. RP 161. He denied hitting anyone and claimed he saw no punches thrown. RP 166. State witness Mayer described the incident as “tussling back and forth.” RP 116. State witness Luuga said five to seven people “on both sides” became involved in the confrontation between Schirmer and Naitoko. RP 280. Luuga said he intervened to stop the fight, but eventually threw “a couple punches.” RP 280. He did not say he punched Naitoko. Luuga testified he saw Schirmer “hitting other people,” but he did not say Schirmer hit Naitoko. RP 290. Luuga did not say a group of combatants ganged up on Naitoko to hold him down, punch him, and kick him. He did not say anyone hit Naitoko.

The Superior Court found Tuifua’s testimony “would support the State’s version of events.” 2CP 62 (FOF No. 6). The finding lacks substantial evidence because, critically, the state’s version does not include a concerted attack by a pack of assailants immobilizing and

punching Naitoko. The focused attack by many against one is the basis of Naitoko's self-defense claim.¹

Latu's testimony is consistent with Tuifua; however, the Superior Court did not find Latu supports the state's case. The court noted Latu was somewhat intoxicated, but did not find he was impaired in his ability to perceive or recall events that night. In addition, Latu's description of the attack inside the bar is substantially similar to Tuifua's account. The court did not find Tuifua was intoxicated.²

The witnesses at the reference hearing corroborated Naitoko's testimony he was set upon and beaten inside the bar by a group of assailants. Evidence of the attack inside the bar supports Naitoko's claim he acted in self-defense moments later outside the bar.

¹ The state argues Tuifua supports the state's case because he did not see a subsequent fight outside the bar. The fact is inconsequential: Tuifua testified he feared he might also be attacked, and he ran out the front door and to his car. He heard gunshots when he reached his car. 2RP 96-97. Tuifua's attention was focused on reaching his car, not on monitoring the tavern exterior.

² As addressed in Naitoko's opening brief, the court did not question Schirmer's testimony, although Schirmer admitted he had "a lot to drink," having arrived at the bar at 6:30 that evening. RP 146, 175-76.

2. LATU AND FAINGA CORROBORATE NAITOKO'S CLAIM HE WAS ASSAULTED OUTSIDE THE BAR IMMEDIATELY BEFORE THE SHOOTING.

The witnesses who were missing from Naitoko's trial also support his claim he was assaulted a second time, outside the tavern.

Latu said he left the tavern through the "back door" a short time after Naitoko. 3RP 19. He saw a fight outside, he heard a gunshot, and he ran for safety. 3RP 10, 19-20.

Nesiteko Fainga was outside the bar when she saw several people "jumping somebody" near the "back door." 2RP 145, 152. She saw people on top of Naitoko, punching and kicking him. 2RP 145, 152. The state asserts Fainga did not see Naitoko,³ but that is plainly incorrect: Fainga testified she saw Naitoko was the person being attacked. 2RP 152. The state also argues the assault witnessed by Fainga "could not have been the fight that led to the shooting" because her time of day estimate was inaccurate.⁴ The argument is hollow because Fainga heard gunfire as she returned to her car parked at the Thai restaurant. 2RP 153. As addressed in Naitoko's opening brief, to discredit Fainga for her time-of-day estimate is to apply a double standard in comparing the parties'

³ Brief of Respondent (BOR) at 18.

⁴ Brief of Respondent at 19.

evidence. The state's witnesses offered widely varying, inaccurate time estimates for the events that night. In addition, Fainga had the disadvantage of testifying more than four years after the trial.⁵

The defense witnesses absent from Naitoko's trial corroborate his self-defense claim based on events inside and outside the bar. The failure of Naitoko's lawyer to investigate and offer their testimony undermines confidence in the outcome of the trial. Naitoko was convicted without the benefit of an effective attorney. This court should order a new trial for Naitoko.

3. THE SUPERIOR COURT DECISION IS BASED ON THE ERRONEOUS BELIEF DEFENSE WITNESSES COULD NOT OBSERVE EVENTS CONNECTED TO THE SHOOTING.

The Superior Court made no credibility findings regarding witnesses Tuifua, Latu, and Fainga. The court did note Fainga "appeared to be testifying honestly to the best of her current recollection." 2CP 63 (FOF No. 8). The denial of relief therefore did not rest on credibility determinations. Instead, the court concluded the testimony of these witnesses simply did not support Naitoko's

⁵ In a footnote, the state questions for the first time on appeal whether Fainga was one of the witnesses identified by Naitoko for his trial attorney. BOR at 18, n.6. The state did not challenge Fainga's identity at the reference hearing, and does not now challenge the Superior Court's finding that Naitoko's attorney performed deficiently. The concern expressed by the state is both waived and meritless.

defense. The court reasoned these witnesses “did not see the actual shooting.” 2CP 65 (COL No. 4).

Taken literally, the court’s conclusion sets the bar too high. Evidence that numerous persons twice assaulted the accused just prior to his discharge of a firearm supports his self-defense claim, even if witnesses did not observe the physical act of shooting. However, it is apparent the court’s reasoning stems from its belief Latu and Fainga were not situated at vantage points from which they could observe what was happening to Naitoko outside the bar. The court emphasized that the state offered evidence establishing “where the shootings occurred.” 2CP 64-65 (COL No. 3). In the court’s view, events occurring in the vicinity of the “back door” were irrelevant to the shooting, which occurred in “front” of the bar. This perception is illustrated by the court’s finding rejecting the probative value of Fainga’s testimony because “she described a fight at the back door of the bar,” whereas evidence “establishes that the shooting occurred in the front of the bar.” 2CP 63 (FOF No. 8).

The court misinterpreted testimony referring to the “back door.” As the state concedes, the door in question was in fact a side door on the south side of the tavern. A person outside the bar to the south would be able to see the area from which shots were fired that night.

This is so because it is undisputed the shots originated from the south. Detective Butterfield testified he inspected the damage to the two cars and concluded the shots came from the south. RP 137. However, he could not determine the distance separating the shooter from the cars. RP 138. State's witness Shawn Hunt had just parked his car when he "saw a bunch of commotion" and heard gunshots. RP 248, 254-55. Like Fainga, Hunt had parked at the Thai restaurant south of the tavern. Fainga and Hunt thus had similar vantage points to observe what occurred outside the tavern. State's witness Schirmer testified that, outside the bar, he first saw Naitoko in the "parking lot." RP 173. There was no parking lot in "front" of the bar on the east side. RP 254 (Hunt). The striped parking spaces were on the south side of the building. RP 186-87; Ex. 7 (photographs "D" and "F").

It is clear the Superior Court discounted the testimony of Latu and Fainga on the mistaken belief their observations outside the "back door" were not relevant to "where the shootings occurred." However, it is undisputed the back door faced south, and the shooting originated from the south. The court erred in concluding the deficient performance of Naitoko's attorney does not undermine confidence in the outcome of Naitoko's trial. 2CP 65 (COL No. 4).

4. THE STATE'S "APPENDIX A" IS IMPROPER AND INSIGNIFICANT.

The state insists the damaged vehicles, Vaivao, and Schirmer were outside the front door on the east side of the bar at the time of the shooting.⁶ In support, the state relies on a diagram attached to its brief as Appendix A. The diagram is not in the record and is therefore an improper submission. RAP 10.3(a)(8). More to the point, the state's cartography does not affect the merits of Naitoko's appeal. It is undisputed the gunshots originated from the *south* from an unknown distance.⁷ There is no evidence Naitoko was beyond the line of sight of persons outside the bar on its *south* side. Again, state witness Hunt's testimony is significant on this point: from the south, he observed a "commotion" when the shots were fired. Regardless of whether the vehicles struck by bullets were parked on the sidewalk near the bar's eastern entrance, the commotion was visible from the south side of the bar.

⁶ The record contains conflicting evidence concerning the positions of Schirmer, Vaivao, and the two cars. Detective Butterfield stated Schirmer's car was parked in the "parking lot." RP 132. However, Deputy Schrimpsheer testified he contacted Vaivao between the two cars north of the front entrance. RP 106. The state relies on testimony referring to Exhibit 1, a diagram admitted for illustrative purposes. Exhibit 1 is not preserved for review or inspection.

⁷ The state asserts, "the shooting occurred just steps from the front door of the pub." State's Response at 18-19. The claim has no factual basis and is contrary to Detective Butterfield's testimony.

The Superior Court's error arises not from the location of the vehicles or persons nearby. The error stems from the court's mistaken belief that individuals outside the "back door" were incapable of witnessing events connected with the shooting. State's witness Hunt disproves that premise, as does undisputed evidence establishing that the "back door" and the origin of the gunshots were in the same vicinity.

C. CONCLUSION

Ranae Naitoko is serving a 31-year prison sentence. It is undisputed his trial attorney did not investigate the witnesses Naitoko insisted would support his defense. Those witnesses would have strengthened Naitoko's self-defense claim, and their absence undermines confidence in the trial result. Naitoko was convicted without the benefit of an effective lawyer. He should be granted a new trial.

DATED this 5th day of January, 2011.

Respectfully Submitted,

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DIVISION ONE**

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)	
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v.)	COA NO. 64359-2-1
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RENE NAITOKO
DOC NO. 861958
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY, 2011.

x *Patrick Mayovsky*