

2004

Utah v. Fitz : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH, : APPELLEE'S OPENING BRIEF
Respondent/appellee, :
v. : Case No. 20040552-CA
ALAN REED FITZ, : Priority No. 2
Petitioner/appellant. :

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT,
UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF
DOMESTIC VIOLENCE IN THE PRESENCE OF A CHILD.

Supreme Court
UTAH [REDACTED]
BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED AND STANDARD OF REVIEW.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENTS.....	2
FACTS.....	2
ARGUMENT.....	3
I. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT’S CONDUCT WAS NOT JUSTIFIED AS SELF-DEFENSE.....	3
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

State v. Jackson, 528 P.2d 145 (Utah 1974).....1, 3

State v. Strieby, 790 P.2d 98 (Utah App. 1990).....1, 3

State v. Gonzales, 545 P.2d 187 (Utah 1975).....5, 6, 7

Statutes

Utah Code Annotated §76-2-402.....4

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	APPELLEE'S OPENING BRIEF
Plaintiff/Appellee,	Case No. 20040552-CA
vs.	Priority: No. 2
ALAN REED FITZ,	Appellant Not Incarcerated
Defendant/Appellant,	

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Section 78-2a-3(2)(e) of the U.C.A.

ISSUES PRESENTED AND STANDARD OF REVIEW

The only issue presented in this case is whether or not the trial court erred in finding that the evidence was sufficient to establish beyond a reasonable doubt, that the defendant did not act in self defense. "A defendant is entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self-defense." State v. Jackson, 528 P.2d 145, 147 (Utah 1974).

Challenges to the sufficiency of evidence from a bench trial conviction are reviewed from a "clearly erroneous" standard and the lower courts decision will only be overturned only if the decision was against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. State v. Strieby, 790 P.2d 98 (Utah App. 1990). This standard is less deferential than the standard applied to a verdict from a jury trial due to the multi-member versus single fact finder and requires only that the evidence presented not be contrary to the verdict. *Id.* (citations omitted).

STATEMENT OF THE CASE

A. Nature of the Case

Defendant Alan Reed Fitz appeals from a judgment, sentence and commitment of the Fourth District Judicial Court after being convicted of assault, a class B misdemeanor, and domestic violence in the presence of a child, a class B misdemeanor.

B. Prior History

The disposition of this case is correctly laid out in the defendant's brief.

SUMMARY OF ARGUMENTS

The trial court correctly applied the state's self-defense statute and determined that the defendant did not act in self defense. The nature of the danger the defendant faces was minimal at best. The threat was no longer immediate as the victim had retreated and sat down on the couch next to a small child and there was no probability that the force used by the victim in her initial advance would have resulted in serious bodily injury.

FACTS

On or about September 26, 2003, at approximately 3:00 am., Deputy Murphy and Deputy Scott of the Utah County Sheriff's Office were dispatched to 1803 Cedar Street in Eagle Mountain on a report of a suspected domestic violence. (R. 10:8-16). She made contact with Brenda Fitz. (R. 10:8-10). She was crying and carrying a very young baby, and invited the deputies inside. (R. 11:22-25).

Upon entering the home, the deputies found man, the defendant, sitting in an easy chair who was groggy and almost asleep. (R. 13:4-10). The deputies determined that some type of

altercation had taken place. (R. 13:22-24). The parties confirmed that they were married. (R. 14:7-9). After a brief investigation, the deputies determined that the defendant was the primary aggressor in the incident. He was taken into custody on charges of simple assault, domestic violence and domestic violence in the presence of a child. (R. 16:10-17). Later, a charge of child endangerment was added also.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT'S CONDUCT WAS NOT JUSTIFIED AS SELF-DEFENSE.

The defendant correctly states that “[a] defendant is entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self-defense.” State v. Jackson, 528 P.2d 145, 147 (Utah 1974). Challenges to the sufficiency of evidence from a bench trial conviction are reviewed from a “clearly erroneous” standard and the lower courts decision will only be overturned only if the decision was against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. Strieby, 790 P.2d at 98. This standard is less deferential than the standard applied to a verdict from a jury trial due to the multi-member versus single fact finder and requires only that the evidence presented not be contrary to the verdict. *Id.* (citations omitted).

First and foremost, there is no question here that the defendant was guilty of an assault. He admitted to such several times on the witness stand. (R. 63:24-64:4; R. 64:13-17; R. 75:12-13). The trial judge found this to be the case. (R. 93:13-16). The defense has not challenged this. Instead, the defendant's only argument is that his assault was a justifiable response to an

aggressive attack by his spouse.

Utah law permits a person to defend himself when he reasonable believes that it is necessary to defend himself against the imminent use of force. U.C.A. §76-2-402 states:

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

The statute also lays out a set of five considerations that courts may use in determining whether or not the self-defense was justified.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

- (a) the nature of the danger;
- (b) the immediacy of the danger;
- (c) the probability that the unlawful force would result in death or serious bodily injury;
- (d) the other's prior violent acts or violent propensities; and
- (e) any patterns of abuse or violence in the parties' relationship.

The trial court appropriately applied these factors and correctly arrived at the following conclusions: 1) The nature of the danger posed to the defendant was minimal. (R. 93:21); 2) There was no immediacy of more attack because Ms. Fitz had retreated to the couch. (R. 93:23-25); 3) There was no possibility that the force used would cause death or serious bodily injury. (R. 94:1-2).

The court then weighed these factors against the fact that Ms. Fitz did have a history of some violence toward the defendant. (R. 94:3-7); and a pattern of violence existed in the relationship. (R. 94:10).

The State now undertakes the same analysis that the trial court undertook, using the relevant case law from this jurisdiction.

I. Nature of the Danger.

The trial court found, and that State agrees, that Ms. Fitz was the initial aggressor in this case. She appears to have launched a single, open-handed slap against her husband. (R. 63:19-64:4). The Utah case with the closest affinity to this case is the case of State v. Gonzales, 545 P.2d 187 (Utah 1975). That case represents a somewhat similar fact pattern in that the victims were the initial aggressors when then retreated, only to be re-engaged by the defendant. In that case, the defendant drove his father to the liquor store. His father entered the store to make his purchases and then returned. As he was walking back to the vehicle he was accosted by two people. *Id.* at 188. The two were apparently drunk and requested money, which they were refused. *Id.* The father fell against the car and it was disputed whether he was struck or whether he fell due to his own intoxication *Id.*

The father was able to make it back into the vehicle, and the two men began moving away. *Id.* At that point, the defendant got out of the car and called the men back. *Id.* One of them returned and struck the defendant with a “nunchucks” and the other punched him, causing the defendant to fall to the ground. *Id.* The defendant then got to his feet, produced a gun and shot one of the men. The man walked to the side of the vehicle and laid his hands on top of it. The two spoke to each other for a moment before the defendant shot him again, killing him. *Id.* The defendant then pursued the second victim, firing three shots.¹ *Id.*

The defendant was charged with manslaughter but countered that he was acting in

¹The case is somewhat vague but it appears that the second victim was unharmed.

defense of himself and his father. *Id.* at 188-189. The court noted that “a defendant is entitled to an acquittal if, based upon the whole evidence, there is a reasonable doubt as to whether or not he acted in self-defense.” *Id.* The court then stated that nothing in the case “compel[led] a finding that the defendant, when he fired the shots. . . was acting in defense of himself or his father.” *Id.*

The court found that “the record does disclose that at the time both shots were fired, the father had gotten into the vehicle and was no longer in danger.” *Id.* The court seems to have felt that, despite the victim’s use of the “nunchucks” the nature of this danger was insufficient to warrant the defendant’s response.

Here, the trial court found that the danger was minimal. (R. 93:21). Moreover, in his testimony, the defendant admitted that this was the case. On cross-examination, when asked if he was afraid she would cause seriously bodily injury, the defendant replied, “No.” (R. 76:24-77:1).

Thus, if an attack with a dangerous weapon such as nunchucks in *Gonzales* were not sufficient to justify a claim of self-defense, the State fails to see how the mere fact of a slap across the face, which the defendant admits posed no danger himself, is sufficient to justify the defendant’s actions.

II. Immediacy of the Danger.

In *Gonzales*, the court also found that at the time of the encounter, the victim was “leaving the scene of his confrontation with [the father] when the defendant left the car and called [the victim] and his companion back.” *Id.* And that “after the first shot was fired, [the victim] attempted to reach a place of safety when the second shot was fired.” *Id.* The court concluded that “the defendant acted from anger rather than in defense of himself or his father.”

Id.

Here, the evidence is uncontroverted that, like the victims in Gonzales, Ms. Fitz (the initial aggressor) was retreating away from the couch and actually was able to sit down next to her baby before the defendant reached her. The defendant admitted as much when he stated, “I don’t recall if she backed up or walked – turned and walked forward, but *she sat down in the corner of the love seat*, and she had Kaylee next to her. I grabbed her arm and I socked her in the shoulder, and that’s about it.” (R. 64:1-4).(see also R. 75:3-14)(emphasis added). Whereas the defendant in Gonzales merely called the victims back to him, here, the defendant literally got up off the couch where he was laying, walked across the room in pursuit of his wife, grabbed her from a sitting position on the couch and punched her a minimum of two times. Moreover, unlike the victims in Gonzales, who actually attacked the defendant after being called back, Ms. Fitz made no apparent effort to re-engage in the fight with her husband when he pursued her.

Furthermore, like the defendant in Gonzales, it is quite clear from the record in this case that the defendant struck his wife out of anger, not out of any attempt at self defense. On cross examination he was asked, “Isn’t it true that you hit your wife really at some portion during that time because you lost your temper with her?” The defend responded, “Possibly.” (R. 70:1-4). He subsequently denied this. (R. 70:20). However, he admitted on cross examination that he did indeed tell the investigating officer that he had lost his temper with his wife. (R. 70:17-71:4).

Finally, the defendant makes a tepid argument that, being asleep when he was struck, on awakening he feared that an intruder had come into the home and attacked him. Whether or not this is true, it is ultimately irrelevant since the defendant freely admitted on cross that by the time the assault occurred, he was well aware it was his wife he was striking. (R. 75:9-14).

III. Force Resulting in Death of Bodily Injury.

As noted above, both the trial court and the defendant stated that there was absolutely no risk of death or bodily injury. The defendant also acknowledges this in his brief, but tries to explain it away by pointing to the fact that the defendant was asleep and in a vulnerable position and thus impaired his ability to perceive this. Nevertheless, in Gonzales, the defendant was actually struck with a pair of nunchucks and knocked to the ground, yet the court held that his response was unwarranted, despite the very obvious danger of serious bodily injury, because the victim had retreated. Here, no matter what the defendant may have perceived his situation was on awakening, the defendant admitted that by the time he reached his wife, he knew full well who she was and what had happened. Thus, his response was completely unreasonable and unjustified.

IV. Prior Violent Acts and Propensities.

The trial court found that Ms. Fitz did have some “violent propensities” and had engaged in prior acts of violence. (R. 94:2-4). It is unclear, however, how the court weighted this factor except that appears to have weighted in favor of the defendant. (R. 94:10-15). The testimony was that Ms. Fitz had slapped her husband approximately once every two weeks over a period of about two years. (R. 94:6-7). The State asserts that, in this case, this fact mitigates against the defendant’s assertion of self-defense. In the State’s view, the purpose of this factor is to help measure the “reasonableness” of the defendant’s response. If a person had violent proclivities, and if the a potential victim knew of the proclivities, then his defense of self might be seen as more reasonable under those circumstances. Here, however, the defendant was aware of his wife’s tendencies and also knew that her proclivities posed little or not threat to him. In fact, it is

on record that in no prior instance did he ever feel sufficiently threatened to respond in kind to her violent advances. (R. 62:1-7). Of course, the State in no way condones Ms. Fitz actions, but notes this fact solely to point out that the defendant had other options to deal with his wife's behavior rather than resorting to violence.

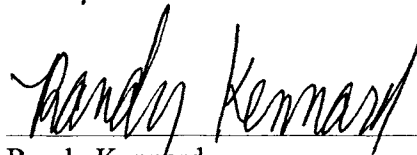
V. Patterns of Abuse and Violence.

The State views this factor much as it view the factor above. A pattern of abuse is relevant to determine the reasonableness of the defendant's actions in defending himself. As with the analysis given above, the State believes that a pattern of abuse did exist, but that the pattern shows that the defendant was in little to no danger and this his response was disproportion to the danger he faced. He knew that his wife suffered from mental instability (or at least had done so in the past). (R. 62:11-63:8). And in all prior instances he dealt with the situation by merely "restraining" her. (R. 63:9-12)

CONCLUSION

The State freely admits that the defendant was not the initiator of the physical altercation in this case, nevertheless, his claim of self-defense cannot stand. The nature of the danger he faced was slight and it was no longer immediate as his wife had retreated to the other side of the room when he attacked her. The force of his wife's slap had no potential for serious bodily injury, let alone death, and therefore is not a consideration. Moreover, his knowledge of his wife's violent proclivities and their pattern of abuse should have clearly indicated to him that he was in no danger and faced no threat that would have justified his use of violence against here. The State, therefore, respectfully requests that this court deny the defendant's motion and affirm the trial court's ruling.

RESPECTFULLY SUBMITTED THIS 27 day of April, 2005.

A handwritten signature in black ink, reading "Randy Kennard". The signature is written in a cursive style with a horizontal line underneath it.

Randy Kennard
Deputy Utah County Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Appellee's Opening Brief were delivered via U.S. mail, postage prepaid, this 29th day of April, 2005 to:

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