

2004

Utah v. Alan Reed Fitz : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

ALAN FITZ,

Defendant/Appellant.

Case No. 20040552-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT FROM A CONVICTION
OF MISDEMEANOR ASSAULT (d.v.) AND DOMESTIC VIOLENCE IN
THE PRESENCE OF A CHILD BEFORE THE HONORABLE DEREK P. PULLAN

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**UTAH COURT OF APPEALS
BRIEF**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

ALAN FITZ,

Defendant/Appellant.

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Case No. 20040552-CA

ARGUMENT

**THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE HAD
PROVED BEYOND A REASONABLE DOUBT THAT FITZ’S CONDUCT
WAS NOT JUSTIFIED AS SELF-DEFENSE**

The State claims that the trial court appropriately analyzed the five factors used to determine if self-defense was justifiable (Br. of Appellee at 4). Fitz disagrees with this claim and relies upon the assertions stated in his original brief.

The State also claims that the nature of the danger the defendant faced was minimal at best, that the threat was no longer immediate as the victim had retreated and sat down on the couch, and that there was no probability that the force used by the victim in her initial advance would result in serious bodily injury (Br. of Appellee at 4). Fitz disagrees with these claims.

Further, Fitz disagrees with the State’s claim that the “Utah case with the closest affinity to this case is the case of *State v. Gonzales*, 545 P.2d 187 (Utah 1975).” Since the State used this case exclusively to support their claims, it is important to look closely at the fact of this case. The facts of the *Gonzales* case, as presented by the State, show that Gonzales claimed self-defense after re-engaging the victim who had retreated from the

area after assaulting Gonzales' father (Br. of Appellee at 5). In the present case, Fitz did not re-engage he reacted. The facts show that he had been awakened in the early morning hours by a slap to the face (Br. of Appellee at 5). Unlike Gonzales, Fitz did not call his wife back. Rather, within seconds of being hit, he reacted and hit his attacker (R. 41 at 58, 69). Further, unlike Gonzales, the victim had not "left the area," rather she had walked a few feet to sit on a loveseat (R. 41 at 63, 64). Fitz asserts that although both cases relied on the defense of self-defense that is where the similarities stop. In the *Gonzales* case, Gonzales had not been personally attacked when he called the victims back, he used unreasonable force against his victims, and there was no history of violence between the parties. In the present case, Fitz had been personally assaulted, he used reasonable force against the attacker, and there was a history of violence between the parties.

Fitz disagrees with the State's claims that the threat was no longer immediate as the victim had retreated and sat down on the couch, In *State v. Jackson*, 528 P.2d 145, 147 (Utah 1974), the court held that the law specifies that as long as the danger exists, self-defense could be a defense, but when the danger is removed then that defense would no longer exist. The victim in this case did not leave the immediate vicinity; she did not leave the room, instead she walked to a loveseat six feet away.

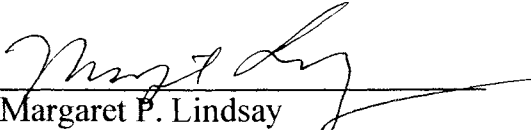
Fitz disagrees with the State's claims that his response was disproportionate to the danger he faced. The *Gonzales* court found that the nature of the danger was insufficient to warrant the defendant's response *Gonzales*, 545 P.2d 187, 189. The court in *Gonzales* held that "[t]he force that one may use in defense of himself or another is prescribed by the provisions of Section 76-2-402(1)" *Id.* Unlike Gonzales, the force that Fitz used did not result in death or serious bodily injury. In this case, the force that Fitz used was

reasonable. The facts show that Fitz had been awakened in the early morning hours by a slap to the face and he used similar force in a punch to the shoulder. Fitz asserts that he did not escalate the nature of the incident beyond a level that would be justified under Brenda's original provocation, especially considering the history of abuse (Br. of Appellee at 8), that Fitz had encountered from his wife, it was not unreasonable for him to believe that she could cause him further injury.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Fitz asks that this Court conclude that the trial counsel erred in determining that his action was not justified as self-defense pursuant to Utah Code Annotated § 76-2-402. Accordingly, Fitz asks that this Court reverse his convictions for assault and domestic violence in the presence of a child because the evidence was insufficient to establish—beyond a reasonable doubt—that he did not act in self-defense.

RESPECTFULLY SUBMITTED this 11th day of July, 2005.


Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief to Randy Kennard, Deputy Utah County Attorney, 100 East Center Street, Suite 2100, Provo, Utah 84606 this 11th day of July, 2005.

