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

STATE OF WASHINGTON,	)	No. 63830-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
KENT REGAN DILLARD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 26, 2009
	)	

Ellington, J. — Kent Dillard appeals his conviction for first degree assault. He contends the evidence was insufficient to prove he was not acting in lawful defense of another and that the cumulative effect of evidentiary errors deprived him of a fair trial. We disagree and affirm.

BACKGROUND

Kent Dillard and his best friend Darrell Albery went fishing at Clear Lake. Afterward they stopped at Ma & Pa's Roundup Tavern for a few beers. An altercation occurred when Albery discovered off-duty tavern staff *in flagrante delicto* in the men's room. When the situation appeared to be "going sour," bartender Justin Greenwood asked everyone to leave. Greenwood assured Albery he was welcome to return another time.

Dillard and Albery had consumed about 10 beers between them. They left the

bar and drove back to Clear Lake, where they drank more beer and Albery told Dillard what had happened in the men's room. They decided to return to the tavern so Albery could make sure Greenwood had no problem with him.

They arrived shortly before closing. Dillard was concerned for Albery's safety and persuaded him to carry an eight-inch fishing knife. Dillard himself was armed with his customary .32 caliber handgun, for which he had a permit.

Greenwood confirmed he had no problem with Albery, but asked the men to leave because he was closing the bar. He later testified he thought the two were acting strangely.

As Dillard and Albery walked toward one of the exits, regular patron William Horn tried to escort them out. An argument ensued. The karaoke operator, Michael Strong, told Albery and Dillard to leave and told Horn to stay out of it. Dillard, Albery and Horn went outside, where the situation deteriorated.

Albery took the knife out of his pocket. Horn testified Albery began swinging the knife close to Horn's face, and Horn told him to "drop the knife or I am going to nunchakus your ass."[1] Horn went to his van to look for his nunchakus, but did not find them. He briefly picked up a baseball bat, but put it back inside and shut the door. Horn followed Albery at a distance, telling him to drop the knife, go home, and sleep it off. Horn then saw that Dillard was holding a small handgun. As Albery lowered the knife, Dillard shot Horn in the back. At the time, Horn was 35 to 40 feet away from

[1] Report of Proceedings (RP) (Mar. 19, 2008) at 217. "Nunchakus" (more commonly known as "nunchucks") are martial arts weapons consisting of two sturdy sticks separated by a length of chain.

Albery.

Tavern employees and patrons gave testimony largely consistent with Horn's, though none of them saw the shooting. Strong testified Albery and Dillard had their weapons out as soon as they exited the tavern. Patron Porter Thompson observed Horn and Albery exchanging words and heard Horn say, "I'll kick your ass" as he went to his van.[2] Another patron, Christopher Wodjenski, saw Albery pull out the fishing knife in the doorway as he left the bar. Wodjenski said Albery did not do anything but display the knife.

According to Albery, Horn "was in my face . . . with bad intentions,"[3] and though Albery was four or five inches taller and outweighed Horn by 40 or 50 pounds, he brandished the fishing knife to escape, holding it at waist level so Horn would see it and telling Horn to back off. He then turned and started walking down the alley next to the tavern, away from the car he and Dillard arrived in. He heard Dillard yell, turned around, and saw Horn running toward him with a pair of nunchakus at the ready.

Initially, Albery testified Horn said nothing as he ran toward Albery. Later in his testimony however, Albery claimed Horn yelled "I'm going to kill you."[4] Albery acknowledged he had never told anyone about this threat and said "I just now remembered that he said that."[5]

Before Horn could swing the nunchakus, Albery turned and ran away, yelling to Dillard to "take the shot."[6] Albery ran around the tavern and back to Dillard's truck.

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[2] RP (Mar. 25, 2008 A.M.) at 15.

[3] Id. at 68.

[4] Id. at 120.

[5] Id. at 122.

[6] Id. at 83.

Dillard's testimony differed from Albery's in some respects. He testified Horn brought his fists up to fight before Albery brandished the knife, that Albery ran away after the confrontation with Horn, and that Horn said "I'm going to kill him"[7] while walking to his van to get the nunchakus. For the first time on cross-examination, Dillard said Albery slipped and nearly fell just as Horn was approaching with nunchakus raised over his head: "At that point he was close enough to Darrell, within striking distance, and I withdrew my pistol and I shot him."[8]

Dillard admitted he shot Horn before Horn started swinging the nunchakus, and said it was quite possible that had Horn swung, he might have done nothing but give Albery a bump or a bruise. Dillard agreed he took a deadly shot at Horn "[b]efore Mr. Horn had done any act that actually threatened Mr. Albery's life."[9] Dillard acknowledged that Horn never touched Albery and was not close enough to grab him, and that Dillard did not warn Horn before shooting.

After the shooting, Dillard "covered" the front of the bar with his pistol until Albery came back around. Dillard testified that had someone come out of the bar at him with a pool cue, "I would take them out."[10]

Dillard and Albery then drove to Albery's home, hid Dillard's truck behind Albery's barn, and drove Albery's truck back to Clear Lake. Albery called his wife, who advised them to turn themselves in. They returned to their homes, and Dillard was

[7] RP (Mar. 27, 2008) at 570.

[8] RP (Mar. 26, 2008) at 438.

[9] RP (Mar. 27, 2008) at 574.

[10] Id. at 580.

arrested and charged with first degree assault with a firearm.

The jury convicted Dillard as charged. At issue on appeal is whether the State proved that Dillard did not act in lawful defense of Albery, and whether the court erred in several evidentiary rulings.

DISCUSSION

Defense of Others

Dillard first contends the State presented insufficient evidence to disprove his claim of defense of others. A person may lawfully use force to aid another person he reasonably believes is about to be injured.[11] In doing so, the force and means must be only those a reasonably prudent person would use under the same or similar conditions.[12] In general, a person may use force to defend a third party to the same extent the person could use force in self-defense.[13]

When self-defense or defense of others is properly raised, the absence of the defense becomes another element of the State's proof.[14] In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[15] All reasonable inferences from the

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[11] State v. Watkins, 61 Wn. App. 552, 561, 811 P.2d 953 (1991); RCW 9A.16.020(3).

[12] State v. Penn, 89 Wn.2d 63, 67, 568 P.2d 797 (1977).

[13] 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 3305, at 260 (1998).

[14] State v. Acosta, 101 Wn.2d 612, 615–16, 683 P.2d 1069 (1984); see also Penn, 89 Wn.2d at 66 (person may use force to defend third party to the same extent the person could defend himself or herself).

[15] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

evidence must be drawn in the State's favor and interpreted most strongly against the defendant.[16] A claim of insufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it.[17]

Horn testified he was unarmed and 35 to 40 feet away from Albery when Dillard shot him in the back. This is sufficient evidence for a jury to find that Dillard had no reasonable belief Horn was about to injure Albery.

Further, even if Dillard reasonably believed Albery was in danger, Dillard's own testimony supported a finding that he exceeded the degree of force and means a reasonable person would have used under the circumstances. Dillard admitted that Horn had not begun to swing the nunchukas when he fired, and that had Horn attempted to use the nunchukas, he might have missed or inflicted only minor injuries. Dillard also agreed that he took a "deadly shot" at Horn with no warning, "[b]efore Mr. Horn had done any act that actually threatened Mr. Albery's life."[18]

This evidence amply supports a finding that Dillard did not use lawful force in defense of Albery when he shot Horn.

Evidentiary Rulings

Dillard next contends the court made three erroneous evidentiary rulings, the cumulative effect of which deprived him of a fair trial. A decision to admit evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion.[19] An abuse of discretion occurs when a decision

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[16] Id.

[17] Id.

[18] RP (Mar. 27, 2008) at 574.

is manifestly unreasonable or based upon untenable grounds or reasons.[20]

Dillard argues the court erred by denying his pretrial motion to preclude the State from referring to Horn as "the victim." Dillard argued the term is "both inaccurate, as well as inflammatory, designed to garner the sympathy of the jury."[21] The State countered that Horn was the victim of the shooting, and "whether or not he deserved to be shot is something that the jury might determine later."[22]

The court pointed out that law enforcement officers and professional witnesses "identify people during the course of their investigation by names. There is a victim. There [are] suspects. There [are] witnesses. . . . These identification markers are for that purpose only, and don't represent a conclusion as to their legal status until the jury determines a verdict."[23] The court allowed police officers to use the term as they normally do in their investigations and allowed the prosecutor to use it in opening and closing remarks. But the court ordered the State not to refer to Horn as the victim during the presentation of evidence.

On appeal, Dillard attempts to characterize the references to Horn as the victim as opinion testimony about his guilt and as a comment on his and Albery's credibility. He cites authority prohibiting opinions on the defendant's guilt or the credibility of witnesses. But none of the cases cited supports his contention that witnesses necessarily give opinions about a defendant's guilt by referring to someone as a victim.

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[19] State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

[20] State v. Stenson, 132 Wn.2d 668, 701, 940 P. 2d 1239 (1997).

[21] Clerk's Papers at 4–5.

[22] RP (Mar. 5, 2008) at 46.

[23] Id. at 48.

As the State points out, the common understanding of the word "victim" readily encompasses a reference to a person who has been shot. The court did not abuse its discretion by permitting its use by police officers. Nor did the court abuse its discretion by permitting the prosecutor to use the term in opening and closing remarks to describe the State's theory.

Dillard next argues the court abused its discretion by refusing to admit evidence of Horn's two 2006 convictions for third degree assault under ER 609(a) and ER 404(a).

ER 609(a) provides:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness had been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

Horn's convictions for assault in the third degree were punishable by up to five years in prison.[24] Under the rule, the convictions were therefore admissible if the court found them more probative than prejudicial. The court determined the convictions were not admissible because they were not crimes of dishonesty. Although Dillard had stressed the point, the court did not explicitly address whether evidence of Horn's previous assault convictions was more probative than prejudicial.

The decision to exclude the evidence was nonetheless correct. Dillard's theory

[24] RCW 9A.36.031(2); RCW 9A.20.021.

was that the fact Horn had committed assault in the past made it more likely that he was trying to assault Albery. But because third degree assault can be committed through criminal negligence,[25] Horn's convictions have no probative value on the issue of his character or conduct unless the context of the crimes supplies it.[26] Dillard offered no information about the circumstances underlying Horn's prior convictions.

Dillard also sought permission under ER 402(a) to "question witnesses regarding the reputation of Mr. Horn, who is well known by the people in his community to (a) carry and often brandish nunchucks, and (b) start fights or quarrels in public places."[27] He relies on the holding in State v. Adamo[28] that "[w]hen a defendant seeks to excuse the killing on the ground of self-defense, it is competent for him to show the general reputation and character of the deceased for a quarrelsome disposition."

But Adamo is not pertinent, because Dillard did not offer proof of Horn's reputation. Instead, he offered proof of specific instances of belligerent behavior and use of nunchakus. His offer of proof was that two people "knew that William Horn regularly carried nunchakus," and that a friend of Horn's family "can tell the jury of a number of occasions where he has seen Mr. Horn brandishing the nunchakus, training with the nunchakus . . . [and] can also testify that at one point Mr. Horn went all the way back up to the Roundup to get into an argument with some college kids who were new to the area, and took the nunchakus to their car."[29]

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[25] See RCW 9A.36.031(1)(d), (f).

[26] For the same reason, we reject Dillard's argument that the convictions should have been admitted under ER 404(a)(2) to show Horn is prone to starting fights.

[27] Clerk's Papers at 41.

[28] 120 Wash. 268, 270, 207 P. 7 (1922).

This is not reputation evidence. Under ER 404(a)(2) and ER 405, "[e]vidence of a character trait . . . must be in the form of reputation evidence, not evidence of specific acts."[30] Specific instances of conduct are admissible to prove character only "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense."[31] Further, under Adamo, specific acts of violence may not be shown unless they were known to the defendant before the crime.[32]

Horn's character is not an essential element,[33] and Dillard does not claim to have known of Horn's past before the shooting. Therefore, evidence of Horn's conduct on prior occasions was properly excluded.

The only other evidence offered was that Horn was known to carry nunchakus. Dillard contends the "character trait of carrying nunchakus"[34] was probative of Horn's credibility because Horn denied carrying nunchakus or attacking Albery. Dillard also argues this evidence made it more likely Horn was the aggressor and is precisely the type of evidence admissible under ER 404(a)(2) and Adamo.

Assuming that a predilection for carrying nunchakus is a "trait of character" under ER 404, the court was within its discretion to refuse the evidence. Horn freely admitted he owned nunchakus and testified that he went to his van to get them and

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[29] RP (Mar. 5, 2008) at 64.

[30] State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998).

[31] ER 405(b); Hutchinson, 135 Wn.2d at 886–87.

[32] 120 Wash. at 271.

[33] See Hutchinson, 135 Wn.2d at 887 ("Specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense").

[34] Appellant's Br. at 34.

would have used them had he found them. Evidence that he regularly carried them therefore added nothing, and would neither undermine his credibility nor make it more likely he used them that night.[35] The court did not err.

Affirmed.[36]

WE CONCUR:

[35] For the same reason, even if it was error to exclude evidence that Horn was known to carry nunchakus, there was no prejudice. Horn essentially admitted he normally had nunchakus by responding to the knife threat by promising to "nunchakus [Albery's] ass" and going to retrieve a pair from his van. RP (Mar. 19, 2008) at 217. Given that testimony, evidence of his reputation for carrying nunchakus would have been cumulative.

[36] Because Dillard has established no prejudicial error, we need not reach his cumulative error claim. See State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).