IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,		**No. 29057-3-III**
Appellant,	)	
v.	)	**Division Three**
RAMIRO F. CHAVEZ,	)	
Respondent and Cross-Appellant.	)	**UNPUBLISHED OPINION**

Sweeney, J. — A sentencing court can impose an exceptional sentence below the standard range following a conviction for assault if the victim initiated or willingly participated in the fight. The court here found that the victim was a willing participant and imposed a sentence for a second degree assault conviction below the standard range. The decision here is supported both by law and fact and we therefore affirm the sentence. We also conclude the evidence was sufficient to support the necessary elements for second degree assault and we therefore affirm the conviction.

FACTS

Jose Moncivaiz and Maria Rodriguez lived together in Yakima, Washington. They had one son together, Jose Jr., and Ms. Rodriguez was pregnant with their second child. Ramiro Chavez, Ms. Rodriguez's adult brother, also lived with them in the same house.

Mr. Moncivaiz and Ms. Rodriguez argued on the evening of November 6, 2009. Ms. Rodriguez left the house and went to pick up Jose Jr. from a friend's house. There she drank six or seven beers. Mr. Moncivaiz threw Ms. Rodriguez's television in the front yard and smashed it with an axe. He then went to a nearby bar and drank beer. Mr. Moncivaiz returned to the house.

Ms. Rodriguez, Mr. Chavez, and Jose Jr. arrived back at the house around 1:00 a.m. She saw the damaged television in the front yard, confronted Mr. Moncivaiz, and an argument ensued. Mr. Chavez entered the house. Mr. Chavez punched Mr. Moncivaiz. Mr. Moncivaiz went to the kitchen. Mr. Chavez followed him, grabbed a knife, and used it in the fight. Mr. Chavez dropped the knife and retreated toward the bathroom. Mr. Moncivaiz followed. The two men continued to fight. Mr. Moncivaiz grabbed Mr. Chavez's neck and pressed him against the wall. The fight moved toward the living room. Mr. Chavez punched Mr. Moncivaiz in the nose and drew blood.

Mr. Moncivaiz went outside and grabbed the axe from the television in the front

yard. Someone closed the door to the house and locked it behind him. Ms. Rodriguez and Mr. Chavez left the house by a back door. A neighbor called 911 and reported the assault. Police arrived and saw that Mr. Moncivaiz was injured.

Police arrested Mr. Chavez. The State charged him with one count of second degree assault. The case proceeded to trial before a jury. Mr. Chavez testified at trial that he never struck Mr. Moncivaiz with the knife and that the fight started because Mr. Moncivaiz struck his sister.

The jury found Mr. Chavez guilty of second degree assault but refused to find that he was armed with a deadly weapon. The court concluded that Mr. Moncivaiz was a participant in and provoked the fight and imposed an exceptional sentence below the standard range.

The State appeals the sentence. Mr. Chavez appeals the conviction.

DISCUSSION

The State contends that the court's exceptional sentence is not supported by the record because Mr. Chavez started the fight and used the knife. And the State contends that the sentence is too lenient, in any event, given Mr. Chavez's criminal history.

Our analysis proceeds in three steps. *State v. Owens*, 95 Wn. App. 619, 625, 976 P.2d 656 (1999). First, we pass on whether the record supports the court's reasons for

the exceptional sentence. *Id.* Next, we decide whether the reasons justify the exceptional sentence as a matter of law. *Id.* And finally, we decide whether the sentence was clearly too lenient. *Id.;* former RCW 9.94A.210(4) (2000).[1]

Here the court found that: (1) Mr. Moncivaiz had been drinking and argued with Mr. Chavez's sister, Ms. Rodriguez; (2) Mr. Moncivaiz destroyed Ms. Rodriguez's TV set with an axe; (3) Mr. Chavez became upset at Mr. Moncivaiz's behavior toward his sister; and (4) Mr. Chavez and Mr. Moncivaiz exchanged blows and Mr. Chavez grabbed a knife and used it in the altercation. This record supports those findings.

A sentencing court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Here the court concluded that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor or provoker of the incident." RCW 9.94A.535(1)(a). And the court found that Mr. Moncivaiz willingly participated in the fight. It was also reasonable for the court to conclude that Mr. Moncivaiz instigated the fight with Mr. Chavez because of his abuse of Ms. Rodriguez. He also punched, choked, and went after Mr. Chavez. Those reasons support the exceptional sentence as a matter of law.

Moreover, the reasons set out in the statute are illustrative only. RCW

[1] Recodified as RCW 9.94A.585(4) by Laws of 2001, ch. 10, § 6.

9.94A.535(1). They are not intended to be exhaustive or exclusive. Here, Mr. Moncivaiz spoke on Mr. Chavez's behalf at sentencing and, as the victim of this crime, asked for mercy and explained why things got out of hand. The sentencing judge was well within his discretionary authority to impose the exceptional sentence. Mr. Moncivaiz also acknowledged that both struck each other with their hands. Mr. Moncivaiz said that he would have probably done the same thing to protect Ms. Rodriguez if he had been in Mr. Chavez's place.

The sentencing judge considered the comments and ordered a sentence of 12 months:

> Based on the evidence that I have heard, based on the very generous comments from [Mr. Moncivaiz], which I appreciate and which I think is an expression of basic love in this family. I'm going to impose a sentence of 12 months. . . . Twelve months is appropriate considering all of the circumstances described herein as well as the nature of the charge and the defendant's prior criminal history. I think the prosecutor's recommendation [84 months] is absolutely appropriate and hope you understand why he'd make that recommendation, [Mr. Chavez]. The reason he has to do that is so that the people on the other side of that wall don't think it's appropriate to use a knife to settle an argument. I would fault him if he didn't. It's my job to see the big picture. I think 12 months for what you did in this case is justified given the love I hear coming from the family and the message I send to the other people on the wall is don't use a knife to settle a dispute. Don't be drinking and then getting into fights either. That's not good. I've been impressed with the way you present yourself.

Report of Proceedings (Apr. 26, 2010) at 14-15.

These are tenable reasons for the court to do what it did here. *See, e.g.*, *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165, *review denied*, 172 Wn.2d 1002 (2011). The standard range sentence here was 63 to 84 months. We cannot conclude that the sentence was too lenient.

Cross-Appeal

Mr. Chavez contends that the evidence will not support the essential element of "substantial bodily harm" or assault with a deadly weapon and is therefore insufficient to support the elements of second degree assault.

We must view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.*

A conviction for second degree assault requires the State show that the defendant intentionally assaulted another and thereby recklessly inflicted substantial bodily harm or assaulted another with a deadly weapon. RCW 9A.36.021(1)(a), (c). "Substantial bodily harm" is

> bodily injury which involves a temporary but substantial disfigurement, or which causes temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

Here, Mr. Moncivaiz bled significantly from cuts to his face and had visible bruising. The visible bruising itself rises to the level of temporary substantial disfigurement. *See State v. Hovig*, 149 Wn. App. 1, 5, 13, 202 P.3d 318 (2009) ("serious" "red and violet teeth-mark" bruising that lasted for 7 to 14 days constituted "substantial bodily injury"); *see also State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruises that resulted from being hit by a shoe were "temporary but substantial disfigurement"). So we easily conclude that Mr. Chavez inflicted injuries that involved "temporary but substantial disfigurement" or, at least a rational jury could so conclude. RCW 9A.04.110(4)(b).

The evidence here also satisfies the "deadly weapon" prong of the statute,

> any . . . weapon, device, instrument, article, or substance, . . . which, under the circumstances in which it is used, . . . or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

Here the jury found Mr. Chavez guilty of second degree assault but did not find by special verdict that he was armed with a deadly weapon at the time of the assault. Clerk's Papers at 31-32. Mr. Chavez argues that the two findings are inconsistent. They are not.

RCW 9.94A.825 defines "deadly weapon" for purposes of a sentencing

enhancement as

> an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: . . . any knife having a blade longer than three inches.

So for second degree assault, a deadly weapon is an item readily *capable of* causing death or substantial bodily harm; for a sentence enhancement, a deadly weapon is an implement or instrument that is used in a manner *likely to* or may *easily* and *readily* produce death. *Compare* RCW 9A.04.110(6) *with* RCW 9.94A.825.

The jury could simply have found that Mr. Chavez's use of the knife was capable of causing death or substantial bodily harm for purposes of second degree assault, but concluded that the manner in which he used it was unlikely to produce death.

Moreover, substantial evidence supports the conviction for second degree assault under either alternative reason (infliction of substantial bodily harm or assault with a deadly weapon). *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999).

We then affirm both the sentence and the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

I CONCUR:

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Sweeney, J.

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Siddoway, J.