

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs.) No. 11-1115 (Kanawha County 09-M-AP-32)

**Gregory Jeffries,
Defendant Below, Petitioner**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Dennis R. Bailey, arises from the Circuit Court of Kanawha County, wherein he was found guilty of the crime of misdemeanor battery and resented by order entered on March 31, 2011. The State, by counsel Desiree Halkias Divita, has filed its response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On February 1, 2010, petitioner appeared in the Circuit Court of Kanawha County for a bench trial on a single count of misdemeanor battery. Petitioner was previously convicted of this offense in magistrate court and appealed the matter to the circuit court. The charge arose out of an incident at the home of Shavonna Mortimer, the mother of petitioner's wife, Stacey Jeffries.¹ According to the record, petitioner entered the victim's home and intentionally struck her in the face and head, causing injuries to her. As a defense, petitioner raised the doctrine of defense of another, claiming that he was justified in striking the victim in order to protect his child, who he was holding when he perpetrated his attack. However, the circuit court found that this defense was not applicable, as petitioner had been the initial aggressor. The circuit court also found that there were no reasonable grounds for petitioner to believe that danger to the child was imminent, that the State proved the child was in no imminent danger, that petitioner used more force than was necessary, and that the doctrine of defense of another is not available to a defendant who strikes someone after the purported danger has passed by way of revenge, as petitioner did. As such, the circuit court sentenced petitioner to six months of home confinement and six months of probation, to run consecutively.

¹ According to the record for this matter, petitioner and Stacey Jeffries were not married at the time of the incident in question.

On appeal, petitioner alleges five specific assignments of error. Practically, however, petitioner raises a lone argument regarding the sufficiency of the evidence below. According to petitioner, the evidence at trial was insufficient to rebut, beyond a reasonable doubt, that he was the initial aggressor in the incident, or that he did not act lawfully in the defense of his son. In his brief, petitioner alleges that the circuit court made several findings related to his assignment of error, but does not cite specifically to the record in this matter. For instance, petitioner states in his petition for appeal that the circuit court “commented that [he] had every right to come and retrieve his child at the request of [Stacey Jeffries], who resided at the home, and that he most certainly did not burst through Mrs. Mortimer’s door in an angry rage.” However, petitioner does not cite to the record in support of this assertion. More importantly, petitioner alleges that the circuit court actually made the express finding that petitioner met his burden of establishing the affirmative defense of defense of another, and that the State was then required to prove beyond a reasonable doubt that petitioner did not act in the defense of his son. Petitioner argues that the State never met this burden, and instead simply stated that their witness was more believable, despite inconsistencies in her story. Further, petitioner argues that the State never even raised the issue of petitioner being the initial aggressor, and that the investigating officer’s testimony established that he was not the initial aggressor. Lastly, petitioner argues that all evidence established that Mrs. Mortimer was the initial aggressor, and further argues that the circuit court established a motive for her anger by expressly finding that she did not like the petitioner.

According to petitioner’s version of events, he admitted to striking the victim only after she had attacked his son by throwing a telephone and striking the child. Citing *State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (1999), petitioner argues that the force used was minimal and in no way excessive for the threat presented. Petitioner argues that the circuit court agreed that the evidence was insufficient, as evidenced by closing arguments between the circuit court and counsel. In light of his assertion that the circuit court agreed the evidence was insufficient to support his conviction, petitioner then questions how the order convicting him of battery came to be entered. Petitioner postulates that the proposed order, prepared by the State, seems to have been inadvertently entered without regard to the testimony or the evidence presented. According to petitioner, the entry of the order goes so far as to disregard the circuit court’s own findings from the bench on the day of the trial.

The State responds and argues in support of petitioner’s conviction. To begin, the State argues that petitioner has not complied with Rule 10(c) of the West Virginia Rules of Appellate Procedure because his assignments of error are vague and incomplete, contain no citation to the record, and also contain assertions that are not supported by the facts or are simply inaccurate. The State argues that nothing in the record supports the contention that the circuit court found petitioner sufficiently established defense of another during his trial. In fact, the State argues that the circuit court found the exact opposite to be the case. Citing the order following the bench trial, the State argues that the circuit court found that petitioner was the initial aggressor, that there was no rational basis to support the theory there was imminent danger to the child, that petitioner used excessive force, and that his actions were not justified on the grounds of defense of another. According to the State, the undisputed evidence is that petitioner set out to confront the victim concerning criticisms and accusations the victim had made against her daughter, Stacy Jeffries,

lacking parental responsibility earlier in the evening. According to the State, the evidence established that petitioner approached the victim's home in a rage, stormed in and accosted the victim using threatening and aggressive behavior and foul language. Because of petitioner's threatening actions and in an attempt to defend herself, the victim pushed or threw a telephone at him, at which point petitioner struck the victim in the face and head. According to the State, despite a lack of imminent danger to the child, petitioner attacked the victim and caused her to have visible wounds and profuse bleeding. The State argues that the circuit court's order is clear on these issues and on the ultimate issue of petitioner's guilt. According to the State, petitioner failed to produce evidence to establish that his actions were justified to warrant acquittal. Based upon all of the foregoing, the State argues that the essential elements of battery were proven beyond a reasonable doubt.

This Court has previously established the following standard of review:

"A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 7, *State v. White*, 228 W.Va. 530, 722 S.E.2d 566 (2011). Based upon our review of the record, the Court finds no merit in petitioner's argument that the evidence below was insufficient to support his conviction. To begin, West Virginia Code § 61-2-9(c) states that

[i]f any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both such fine and imprisonment.

Based upon the evidence presented below, it is clear that the circuit court did not err in finding petitioner guilty of battery. The petitioner himself even admitted in a statement to police that was introduced into evidence at trial that he struck the victim in the face and head on the night in question. However, petitioner argues that he clearly established as a defense the doctrine of defense of another, and that the circuit court stated that he established the same. However, there is nothing in the record to indicate that the circuit court ever made such a finding. According to petitioner, this finding was made from the bench during discussions with counsel at closing argument. While the record does indicate that the circuit court found that petitioner had raised this

defense and proceeded to question the State as to how it could rebut the same, nothing in the record establishes that the circuit court found that petitioner had established the defense such that the ultimate order following the bench trial is inconsistent with the evidence or with the circuit court's rulings made during trial.

In fact, the circuit court's order regarding petitioner's conviction is expressly clear on this issue, stating that "the [c]ourt finds that 1) the [petitioner] has failed to sufficiently raise the doctrine of defense of another and 2) in any event, the State has proven beyond a reasonable doubt that the [petitioner] did not act in defense of another when he struck the victim in the face and head." These findings were based upon the credible evidence presented below, including the following: the fact that petitioner was the initial aggressor; the lack of reasonable grounds to believe the child was in imminent danger; the fact that petitioner injected the child into the heated argument; the petitioner's use of more force than was reasonably necessary; and the fact that petitioner struck the victim after the purported danger had passed by way of revenge. In discussing the doctrine of defense of another, we have previously held that

[t]o establish the doctrine of defense of another . . . , a defendant must show by sufficient evidence that he or she used reasonable force in a situation where the defendant had a reasonable belief of the lawfulness of his or her intervention on behalf of another person who was in imminent danger of death or serious bodily harm from which such person could save himself/herself only by using force, including deadly force, against his or her assailant, but was unable to do so.

Syl. Pt. 3, in part, *State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (1999). In rendering its opinion, the circuit court specifically found that petitioner used an unreasonable amount of force, as "[petitioner's] conduct in forcefully punching . . . the *grandmother* victim in the face causing profuse bleeding and severe injury was *clearly excessive*." (Emphasis in original). Further, the circuit court also found that there were no reasonable grounds for the petitioner to believe that danger to the child was imminent because, "[a]part from the [petitioner's] own actions, the . . . child would have continued to sleep in peace." Additionally, the circuit court noted that the telephone receiver, which petitioner cited as the instrument causing his belief of imminent danger to the child, was no longer in the victim's control at the time he struck her. Because petitioner used an unreasonable amount of force and because he had no reasonable belief that his child was in imminent danger, the circuit court was correct to conclude that the doctrine of defense of another was inapplicable to petitioner.

Further, the circuit court noted that petitioner's own statement established that he was the initial aggressor, having burst through the victim's door in an angry rage after having been inflamed over "fairly routine (and apparently truthful) criticism leveled by [the victim] toward [Stacey Jeffries]." While petitioner makes much of the uncontroverted evidence that the victim struck either him or the child with a telephone receiver prior to the battery, the circuit court found that the victim only took this action to fend off petitioner's advance toward her, which is supported by the victim's testimony below. As such, the circuit court found that petitioner himself initiated the confrontation, and was therefore not entitled to the doctrine of defense of another.

In discussing this doctrine, we have previously held that “[t]he right to defense of another usually falls under the rubric of self-defense. One simply steps into the shoes of the victim and is able to do only as much as the victim himself would lawfully be permitted to do.” *State v. Cook*, 204 W.Va. 591, 598, 515 S.E.2d 127, 134 (1999) (quoting *State v. Saunders*, 175 W.Va. 16, 19, 330 S.E.2d 674, 677 (1985)). Given that the doctrine of defense of another is so closely akin to self-defense, the circuit court was correct to apply our prior holdings regarding limitations on self-defense to the matter below. Specifically, the circuit court noted that this Court has previously held that “[a] person ‘in no imminent danger from a minatory foe may not purposely confront him and then invoke self-defense for an immediate [assault].’ *State v. Curry*, 112 W.Va. 549, 551, 165 S.E. 810, 811 (1932).” *State v. Wykle*, 208 W.Va. 369, 373, 540 S.E.2d 586, 590 (2000). Based upon this holding, it is clear that petitioner was not entitled to the doctrine of defense of another as an affirmative defense to the charge of battery because the evidence established that petitioner was the initial aggressor and that there were no reasonable grounds for the defendant to believe that danger to the child was imminent. While petitioner argues that defense witness Stacey Jeffries provided a differing version of events wherein petitioner was attempting to exit the home when the victim attacked him, the circuit court found no merit to this testimony.

“[T]he trier of fact is the ultimate judge of credibility and is free to accept or reject any testimony it does not find credible.” *Sims v. Miller*, 227 W.Va. 395, 402 n. 11, 709 S.E.2d 750, 757 (2011) (quoting *Brown v. Gobble*, 196 W.Va. 559, 569, 474 S.E.2d 489, 499 (1996)). In this matter, the circuit court specifically made findings as to Stacey Jeffries’ credibility, finding that a reasonable inference may be made that she, in concert with petitioner, made false accusations of criminal charges against the victim “for the dual purpose of 1) attempting to exculpate the [petitioner] from the criminal charge [of battery] and 2) falsely accusing the victim of criminal activity.” For these reasons, the Court finds that the petitioner failed to establish the doctrine of defense of another as an affirmative defense to the crime of battery, and that the evidence below was sufficient to support his conviction.

For the foregoing reasons, we find no error in the decision of the circuit court, and the petitioner’s conviction is hereby affirmed.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh