



State v. Baker

121 Wash.App. 1070 (2004) | Cited 0 times | Court of Appeals of Washington | June 2, 2004

Concurring: Christine Quinn-Brintnall, J Dean Morgan

UNPUBLISHED OPINION

Jackie Lynn Baker appeals her third degree assault conviction with a firearm enhancement. She argues that the trial court erroneously failed to give her proposed instruction that if Baker withdrew from the altercation, her right to self-defense revived. Finding no reversible error, we affirm.

FACTS

Following an earlier episode of domestic violence, Donald Baker ('Donald') moved out of the family home he shared with his wife, Jackie Lynn Baker ('Baker'). Thereafter, he regularly left his truck with Baker during the day and rode his bicycle to work.

I. Assault

While driving their daughter to preschool in Donald's truck, Baker found a note from his girlfriend. When Donald returned to the house to pick up his truck, he noticed bags and boxes of his personal belongings stacked by the door, and went into the house. Baker confronted Donald with the note. Donald's reaction was 'pretty blas', he expressed no anger, and he told her 'it was obviously over.' Report of Proceedings (RP) Vol. IV at 586, Vol. II at 236.

After a brief but heated exchange, Baker began throwing things at Donald, including a TV Guide, oak coasters, a telephone book, and a telephone. Donald began moving the bags and boxes from inside the house and into the yard to load into his truck. Baker threw the bags closer to the truck.

According to Donald, (1) Baker then jumped onto his back and began beating him; (2) he pushed Baker towards the house; and (3) she must have fallen into the refrigerator behind the door. Baker claimed that Donald 'body slammed' her into the refrigerator. Both agree that immediately after colliding with the refrigerator, Baker locked the kitchen door with the dead bolt. At this point, Donald was outside the house.

Donald started to leave, but returned when he realized that his keys, cell phone, and work badge were still inside the house. Aware that Donald was still outside, Baker ran to her bedroom for her gun, went 'straight to the kitchen,' and pointed the gun at Donald, who was standing outside the locked



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door on the back porch knocking on the door. RP Vol. IV at 614. Baker demanded that he leave, aimed the gun at Donald's face, lowered the gun, and shot through the door hitting Donald in the thigh.

II. Procedure

The State charged Baker with first and second degree assault as acts of domestic violence, both with firearm enhancements.

Baker proposed two jury instructions that withdrawal revives a claim of self-defense.¹ The trial court declined to give these instructions. But noting that 'the withdrawal issue is a trigger issue to determine if self-defense is available,' RP Vol. VI at 812, the court allowed Baker to argue her withdrawal theory to the jury.

The trial court gave the jury eight other self-defense instructions, including the following 'aggressor' instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Clerk's Papers (CP) at 207.

The jury convicted Baker of the lesser-included offense, third degree assault, with a firearm enhancement. Baker appeals.

ANALYSIS

A defendant who is a first aggressor is entitled to an instruction on self-defense only if she has withdrawn from combat in such a way as to have clearly apprised her adversary that she was desisting, or intending to desist, from her aggressive action. See *State v. Brown*, 3 Wn. App. 401, 404, 476 P.2d 124 (1970); (citing *State v. Wilson*, 26 Wn.2d 468, 480, 174 P.2d 553 (1946)). A defendant is entitled to a jury instruction supporting this theory of the case only where her withdrawal is supported by substantial evidence in the record. *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991). Here, there was not sufficient evidence in the record to support an instruction on self-defense predicated on withdrawal.²

Baker not only failed to communicate an intent to desist, but rather continued her aggressive conduct toward Donald when (1) she got a gun from her bedroom; and (2) standing inside her house



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behind a dead-bolted door, she pointed her gun at Donald, who was standing outside on the porch, and shot him. The record does not support Baker's assertions that she either withdrew from the altercation or she 'clearly apprised' Donald that she was withdrawing from the altercation. Therefore, the trial court did not err in refusing to give her proposed instruction to the jury.

Affirm.

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

Hunt, J.

We concur:

Morgan, J.

Quinn-Brintnall, C.J.

1. Baker's alternate proposed instructions read: A defendant who is a first aggressor is entitled to a claim of self-defense only when she has withdrawn from combat in such a way as to have clearly apprised {sic} her adversary that she was desisting, or intending to desist, from the aggressive action. Clerk's Papers (CP) at 168. An aggressor who provoked the altercation in which she assaulted the other person engaged in the conflict, cannot successfully invoke the right of self-defense to justify or excuse the assault, unless she in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised her adversary that she in good faith was desisting, or intended to desist, from further aggressive action. CP at 170.

2. The parties do not dispute that Baker was the aggressor, although they do dispute whether throwing the coasters or jumping on Donald's back and beating him was the 'triggering event.'

