
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

FORT PECK ASSINIBOINE AND SIOUX TRIBES,
Plaintiff/Appellant,

vs.

Appeal No. 082

DARRELL REDDOG,
Defendant/Appellee.

THIS APPEAL is from a judgment of "not guilty" of Simple Assault rendered by the Honorable Howard Bemer, Chief Judge without a jury on July 20, 1989.

FOR APPELLANT/PLAINTIFF: RON ARNESON, Special Tribal Prosecutor, P.O. Box 1027, Poplar, Montana 59255

FOR APPELLEE/DEFENDANT: Clayton Reum, Lay Advocate, 821 6th Ave. South, Wolf Point, Montana 59201

CRIMINAL: FEDERAL RULE OF EVIDENCE 404(a) (2) PERMITS CHARACTER EVIDENCE OF VICTIM OF CRIME OFFERED BY AN ACCUSED; IN ALL CRIMINAL PROCEEDINGS, THE TRIBES MUST SUSTAIN ITS BURDEN OF PROOF AS TO ALL THE ELEMENTS OF THE OFFENSE CHARGED; AND ONLY THE ACCUSED'S TESTIMONY IS NOT THE SUFFICIENT EVIDENCE OF A DEFENSE CONTEMPLATED BY III CCOJ 103(b).

Argued: October 27, 1989 Decided: January 3, 1990

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice and Floyd Azure, Associate Justice.

HELD: THE APPELLEE'S JUDGMENT OF "NOT GUILTY" FOR SIMPLE ASSAULT OF VANESSA EAGLE ON FEBRUARY 6, 1989 IS HEREBY REVERSED AND A JUDGMENT OF "GUILTY" ENTERED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR IMPOSITION OF AN APPROPRIATE SENTENCE WHICH IS TO INCLUDE RESTITUTION TO THE VICTIM AND COUNSELING WITHIN TEN (10) DAYS OF THE FILING OF THIS OPINION.

FACTS:

On February 6, 1989, the defendant was charged by a Criminal Complaint with Simple Assault a violation of III CCOJ 215.

The Criminal Complaint was signed by Vanessa Eagle. Vanessa Eagle alleged defendant kicked and hit her. Vanessa Eagle further alleged that as a result of the incident some of her teeth were knocked out and she had to go to a dentist and have the roots pulled and stitches put in her mouth.

A trial was scheduled for July 6, 1989 at 1:30 p.m. Defendant filed to appear. A Warrant to Apprehend dated July 7, 1989, was served upon defendant July 10, 1989 for his failure to show for the trial. On July 20, 1989, the bench trial was held and defendant found "not guilty". From this judgment the Tribes appeal.

On appeal, the Tribes raised the following issues:

Whether the Tribal Court committed reversible error when it allowed into evidence character evidence of the victim?

Whether the Tribe met its burden of proof and proved each element of the Simple Assault by defendant and defendant should be found guilty thereof.

A transcript of the July 20, 1989 proceedings was available which enables this Court to thoroughly address the Tribes issues.

I.

Defendant was charged with Simple Assault, a violation of III CCOJ 215. This section reads in applicable part as follows:

"A person who

"(a) intentionally causes bodily injury to another; or

"(b) recklessly or negligently causes bodily injury to another with a deadly weapon; or

"(c) attempts by physical menace to put another in fear of serious bodily harm, or be physical menace causes another to harm himself/herself

" is guilty of an assault.

"...."

On July 20, 1989, there was a judgment of "not guilty" entered by Chief Judge Bemmer after a bench trial. The Tribes have the right of appeal as provided for under I CCOJ 205(a). This section reads as follows:

"The defendant in a criminal case shall have an appeal as of right from a judgment of conviction. The Tribe shall have no right of appeal from a jury verdict of "not guilty" in criminal cases, but shall have a right of appeal from a judgment of "not guilty" rendered by the Tribal Court without a jury. Appeals in criminal cases shall be taken as provided in Section 206. (Emphasis Added.)

Upon the granting of an appeal, the jurisdiction and extent of this Court's review is established in I CCOJ 202. This section reads in applicable part as follows:

"The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence...."

In the instant case, the Tribes complain the Tribal Court erred by allowing into evidence character evidence of the victim. This determination of the Tribal Court is a matter of law and will be reviewed de novo by this Court.

In reviewing the transcript, the Tribal Court did permit character evidence on the victim's previous drinking and fighting with defendant. The relevant portion of the transcript read as follows:

When did the incident actually take place?

Vanessa Eagle (sic): February 3rd, Friday.

On Friday. Okay. Prior to that, had you and Darrell ever drank together? Have you ever drank? Are you both drinkers?

Yes.

Objection, Your Honor. I don't understand the relevance.

I will make my point then if I'm allowed to continue.

I'm going to allow it. The Court has knowledge of both of these people personally.

Previous to this particular incident, had you and Darrel (sic) ever fought before? Or have you had any physical confrontations.

Yes, we have.

In any of those incidents, had both or your been drinking?

yes.

In this particular incident, you stated, that you had found Darrell and he had been drinking. Had you been drinking that day?

No. We had went shopping to Wolf Point.

Had you drank anything after . . during that day?

Objection, your Honor, I don't understand. The witness is not the defendant in this case. The witness is the victim. I don't understand the line of questioning.

Would the defense counsel explain to the Court?

Your Honor, that the incident in relationship to what Mr. Arneson has already asked. He has led the Court to believe that there is . . that this is the way it happened. All I'm trying to establish is that, on that day, that both parties had been drinking and that is merely, the only reason why I asked the questions, to establish a pattern prior to that day, that there had been confrontations like that previously. I am merely asking to establish whether or not, that that particular day was one of those days.

The Court can . . stipulate . . or both parties can stipulate to the fact that well, I guess maybe not . . . The Defendant contends that she was not drinking.

[Transcript, p. 20, 1. 18 through p. 22, 1. 10.]

This Court has previously recognized and adopted the Federal Rules of Evidence. (See Fort Peck Assiniboiné and Sioux Tribes vs. McDonald, Appeal No. 039, March 31, 1988. Affirmed in Fort Peck Assiniboiné and Sioux Tribes vs. Ronald Keiser, Appeal No. 038, August 4, 1988.) Federal Rule of Evidence 404(a) (2) sets forth when character evidence of a victim is admissible and reads:

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

" ...

"Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

" "

The accused offered evidence the victim was drunk and had fought with him on the day in question and on previous occasions. In that regard, the evidence would have been admissible under Federal Rules of Evidence 404(a)(2). Therefore, the Tribal Court did not commit reversible error when it allowed into evidence character evidence of the victim by way of testimony from the accused. However, the Tribal Court erred in the amount of weight given to the testimony of the accused as will be discussed in the next issue.

Before concluding the discussion on this issue, this Court must address a possible error by the Tribal Court judge which is evident from the judge's comments in the portion of the transcript set out above. The Tribal Court judge may have erred in not disqualifying himself pursuant to I CCOJ 307 since he admitted to personal knowledge of both people which implies "personal knowledge of disputed evidentiary facts concerning the proceeding". Because the Tribal Court judge may have erred in not disqualifying himself pursuant to I CCOJ 307 he must clarify if his personal knowledge of the people includes knowledge of disputed evidentiary facts concerning the proceeding before hearing anything further in this matter.

II.

In addressing issue no. 2, under I CCOJ 202 this Court shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. The Court finds the Tribal Court erred in entering a judgment of "not guilty" when the Tribe met its burden of proof and proved each element of the Simple Assault by defendant. Therefore, this Court has the right to set aside any factual determinations of the Tribal Court not supported by substantial evidence.

This Court recognizes defendant asserted a defense during Tribal Court proceedings. Although the defendant asserted a defense of self defense for his assault upon the victim, the only evidence offered was defendant's testimony most of which

corroborated the victim's testimony and the significance of this will be discussed below.

In the instant case, the Tribes' burden of proof and defendant's introduction of evidence of a defense is governed by

III CCOJ 103. This section reads in full as follows:

"(a) The Tribes have the burden of proving each element of an offense beyond a reasonable doubt.

"(b) Whenever the defendant introduces sufficient evidence of a defense to support a reasonable belief as to the existence of that defense, the Tribes have the burden of disproving such defense beyond a reasonable doubt, unless this Code or another ordinance expressly requires the defendant to prove the defense by a preponderance of evidence.

The elements of the offense of Simple Assault were previously set out. The following will address each element and the evidence offered by the Tribes and proved the same. The Tribes proved defendant intentionally caused bodily injury to the victim in her home in the following:

Ron Arneson: Could you tell us where the incident occurred?

Vanessa Eagle: In my home.

[Transcript p. 10, 1, 4-5.]

The Tribes proved defendant intentionally caused bodily injury to the victim. The Tribes also proved the victim sustained medical bills as a result of the defendant's intentional acts. Finally, the Tribes proved the victim was not so much out for vengeance but for restitution and counseling for defendant. This proof is set forth in the following:

Vanessa Eagle: He left and I laid down and I dropped off to sleep. I don't know how long it was after that. I locked all the doors. And I don't have a lock on my garage door. And I hear the garage door open so I jumped up and Darrell came through the back stairway, through the garage and came up and I said what are you doing here? and he said, 'I'm not leaving until you get some of this.' He showd (sic) me his fist.

Ron Arneson: Then what happened next?

Vanessa Eagle: I told him to leave and he wouldn't leave.

Ron Arneson: And then next?

Vanessa Eagle: He pushed me against the window there in the living room. He started hitting me and kicking me.

Ron Arneson: And where did he hit and where did he kick you?

Vanessa Eagle: He kicked me right here. I still have a kick mark on my leg.

Ron Arneson: Would you describe the left leg an the approximate location?

Vanessa Eagle: Right here on the thigh.

Ron Arneson: On the thigh on the left leg.

Vanessa Eagle: Right.

Ron Arneson: Did you receive any bruises there?

Vanessa Eagle: Yes, I did. I had boot mark there.

Ron Arneson: And where else did he hit you?

Vanessa Eagle: He was hitting me all over the place.

Ron Arneson: Do you recall any specific other places besides your leg?

Vanessa Eagle: Well, he didn't hit me in the mouth until I ran into the bedroom.

Ron Arneson: And then what did he do in the bedroom?

Vanessa Eagle: He knocked me in the closet. And when I stood up to fight him off or to push him away, that's when he hit me like this. Knocked my teeth out. I didn't know it until I ran into the bathroom and I looked at my mouth, my mouth was all bloody and I told him what he did. He got scared and took off.

Ron Arneson: Did you subsequently go to any medical doctor or anyone to examine you?

Vanessa Eagle: No. No, I didn't. I didn't go until the following Monday.

Ron Arneson: Alright. would you demonstrate both to the Defendant and to the Judge, the fact that you do have some teeth missing. Show them, what you have. And are you affirming that that was a result of this particular incident on this particular day? The missing of those teeth?

Vanessa Eagle: Yes. I have one here . . . what do you call it. Where he knocked out, both the doctor put a pin in there and capped it.

Ron Arneson: And you said on the following Monday, you did go to a medical practitioner?

Vanessa Eagle: Yes

Ron Arneson: And who was that?

Vanessa Eagle: Dr. Hawker at the Dental clinic.

Ron Arneson: And he began to do some work on your teeth or whatever could be done at that time?

Vanessa Eagle: Yeah! He had a hard time with my one tooth. He had to cut my gum open and pull it out.

Ron Arneson: Did you report this incident to any one?

Vanessa Eagle: Yes, I did.

Ron Arneson: Who did you report it to?

Vanessa Eagle: I came up here and signed a complaint against Darrell.

Ron Arneson: You reported it to . . . would that have been Mr. Schauer or do you recall who it was you reported it to?

Vanessa Eagle: I think it had to be Emmett.

Ron Arneson: Did the Defendant give you any monies to help you cover some of the medical costs as a result of this incident?

Vanessa Eagle: After I got a statement from the doctor, an estimate of \$450. Darrell came me \$150 to apply towards that dental. But the receipt is in my name.

Ron Arneson: Do you still owe an amount on those medical bills?

Vanessa Eagle: yes, I do.

Ron Arneson: Would you state the total amount of the medical bill and what you still owe?

Vanessa Eagle: The amount if \$450. Dr. Hawker told me recently it would cost more. It might come up to more. But Darrell came me \$150 towards that and I got \$300 to pay.

Ron Arneson: And are you requesting this court if the court does find the alleged defendant guilty to order the Defendant to cover your medical costs which were a result of this incident?

Vanessa Eagle: Yes, I do.

Ron Arneson: Do you have any other request that you may wish to make to the Court at this point?

Vanessa Eagle: Yes, I would. I would like to see him in Detox I don't think it's doing him any good sitting behind jail. I think that he needs counseling and its not going to do him any good sitting in jail here. You can't get any counseling sitting in jail. I rather seem (sic) him sitting in Detox.

[Transcript, p. 16, 1. 13 through p. 20, 1. 5.]

In addition to the above, the victim admits defending herself but denied the use of any knife in the following:

Clayton Reum: Okay. During this confrontation, had you made any attempt to defend yourself?

Vanessa Eagle: While he was hitting me . . . Yes.

Clayton Reum: Or had you made any . . what would that be?

Vanessa Eagle: I was trying to push him away.

Clayton Reum: Okay. Did you have a knife in your hand at the time?

Vanessa Eagle: No, I wasn't even in the kitchen at all. He hit me in the living room and I ran into the bedroom.

[Transcript, p. 23, 1. 6-13.]

Defendant then corroborated much of the victim's version of events while raising the issue of self defense. The evidence of self defense presented by defendant is only his testimony which went as follows:

Clayton Reum: You said that you had another argument after her daughter left . . would you define that?

Darrell Reddog: well, yes . . I told her that I was going to move out and she started getting mad. I told her I was going to pack my clothes up. So I went into our bedroom and started packing them up and she got mad. She said just leave them, I'll take care of them. She said . . I said, no, I'm going to leave. I started picking my clothes up and she started hitting me again. I started swinging back. Right after that, she ran into the kitchen and grabbed a knife. And that's when she started fighting and that is when I busted her.

Clayton Reum: What did she . . she grabbed a knife . . did you see the knife?

Darrell Reddog: Yes.

Clayton Reum: Did she do anythign (sic) with the knife?

Darrell Reddog: She . . well, you know, she'd stick you in the stomach but she didn't push it all the way in. She just stopped at the point when it touched my body.

Clayton Reum: Okay. were you scared at the time?

Darrell Reddog: Yes. I was . . well, you know how you get, you get fearsome like that, I started swinging back.

Clayton Reum: Okay. Did you swing at her then?

Darrell Reddog: Yes. I was trying to get away from that knife.

Clayton Reum: Okay. And what did you do? Did you hit her?

Darrell Reddog: Yes.

Clayton Reum: Do you recall where you hit her at?

Darrell Reddog: In the mouth, Sir. Then she followed me back . . I went into the bedroom to get my clothes and she followed in there and I pushed her in the closet. Soon as she went into the closet, I grabbed my clothes and out I went to the door and I went to my Grandma's and took my clothes over there.

Clayton Reum: Okay. You say you went to the bedroom. Did she still have the knife with her?

Darrell Reddog: No. She threw it down.

[Transcript, p. 34, 1. 8 through p. 35, 1.17.]

In addition to the above, defendant admitted agreeing to and actually paying towards the victim's injuries. This portion of defendant's testimony went as follows:

Clayton Reum: Okay. Now concerning the injuries that Vanessa sustained during that fight . . did you agree to help her pay for it?

Darrell Reddog: yes. After this happened, we got back together later on. I told her that I would start paying on it. I gave her a little bit of money for it.

Clayton Reum: How much money did you give her?

Darrell Reddog: I gave her \$150.

[Transcript, p. 37, 1. 17-24.]

In viewing the above testimony in the light most favorable to defendant and applying Ill CCOJ 103(b), defendant did not introduce sufficient evidence of self defense with only his testimony to support a reasonable belief as to the existence of that defense.

First, the knife (or an injury from a knife however slight) was never produced by defendant. Second, defendant made no effort to leave the victim's premises when this knife was allegedly produced by the victim, but admittedly proceeded to attack the victim and inflicted serious injuries to the victim. Third, defendant never immediately reported the alleged knife attack as he would have been reasonable expected to do in light of the injuries he alleged were necessary to inflict on the victim. Finally, defendant could not reasonably be expected to voluntarily agree to pay victim (or anyone else) for damages he necessarily inflicted as a result of the person's own knife attack.

In conclusion, because the Tribes met their burden of proof and defendant did not introduce sufficient evidence of self defense, the Tribal Court erred in finding defendant "not guilty" of Simple Assault. Therefore, based on this Court's reasoning in Fort Peck Assiniboine and Sioux Tribes vs. John Stormy, Appeal No. 075, June 23, 1989, the only remedy available is that the judgment of "not guilty" be and the same hereby is set aside and judgment entered that defendant Darrell Reddog is "guilty" of Simple Assault on the victim Vanessa Eagle on February 6, 1989.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT DEFENDANT DARRELL REDDOG IS HEREBY "GUILTY" OF SIMPLE ASSAULT ON THE VICTIM VANESSA EAGLE ON FEBRUARY 6, 1989. THIS MATTER IS REMANDED TO THE TRIBAL COURT FOR IMPOSITION OF AN APPROPRIATE SENTENCE WHICH IS TO INCLUDE RESTITUTION TO THE VICTIM AND COUNSELING WITHIN TEN (10) DAYS OF THE FILING OF THIS OPINION.

DATED this _____ day of January, 1990

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd G. Azure, Associate Justice
