

**Case No. C072654
Nevada County Case No. F10-159**

**IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT**

The People Of The State Of California

Plaintiffs and Respondent

v.

Gregory Pellerin

Defendant and Appellant.

**Appeal from the Superior Court for Nevada County
R. Michael Smith, Judge,
Denying Petition For Finding Of Factual Innocence
Pursuant to PC §851.8(c)**

APPELLANTS' REPLY BRIEF

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April 5, 2013

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I. **Reply Argument**

Appellant and Respondent have no significant differences about the applicable law. However, the parties draw opposite conclusions from the factual evidence. Appellant now focuses on those differences.

A. **The Video Tape Proves That Benzine Was The Aggressor**

The most important evidence is the video footage taken by Mrs. Pellerin at the incident scene. This footage¹ was broken into three separate video files on Respondent's Exhibit B designated² as "Files" or "Clips" 15, 16, and 17. Still frames were made from Exhibit B, Clip # 15, and were admitted into evidence at the trial as Petitioner's Exhibit's ("PE") 11-25.

Respondent does not dispute that the officers that came to the incident scene were given the video footage taken by Mrs. Pellerin, and thus, had knowledge of its contents. RT 89-92.

Respondent never disputes that Exhibit B, Clip #15 shows Benzine turning towards Appellant, putting him in a bear hug, and knocking Appellant backwards onto the ground.

Instead, Respondent attempts to argue on pages 11-12 of Respondent's Brief ("RB") that Appellant was the aggressor for three reasons. First, Respondent argues that Clip #15 shows Benzine running away from Appellant. RB p.11. The footage, however, speaks for itself and plainly shows that Benzine was running about three feet to the left and slightly behind Appellant until the very

¹ The only video footage that the Prosecution turned over in discovery was the first one minute and eighteen seconds of Clip #16. This "excerpt" was prepared by Officer King. Clip #15, the rest of Clip #16, and Clip #17 were only discovered after Appellant obtained a court order to forensically examine the computers at the NCSD.

² In Appellant's Opening Brief, these exhibits were referred to as DE B, Vid. Files 15-17. Respondent has used the designation Exhibit B, Clip # 15-17. Appellant will use the same designation as Respondent in this Reply.

end when Benzine pulled ahead, turned, and tackled Appellant. Nowhere is Appellant chasing Benzine.

Second, Respondent argues that Clip #15 contains audible grunts and vocalizations made by Benzine that are consistent with exertion and fright. RB p.11. Appellant has listened to the tape many times at high volume and the only audible sound is a yell or grunt when Benzine is tackling Appellant. It is not possible to tell exactly who is making the sound, but most likely the yell came from Appellant as a result of his hitting the ground on his back.

Third, Respondent argues that Clip #15 shows Appellant, a larger man, running Benzine down. RB 11-12. The footage in Clip #15 speaks for itself: Appellant is on the right and clearly headed down his driveway to the location where John Schema had hidden many times before. Appellant is not running after Benzine, but rather, is avoiding Benzine who is trying to stop Appellant from finding Schema. As Appellant gets closer to Schema's hiding spot, Benzine tackles Appellant to the ground.

Next, Respondent misstates the testimony at the hearing about when and where Appellant was first attacked by Benzine. RB p. 12. Appellant testified that Benzine's first assault occurred not far from the front door of his home, to the right of the horse trailer, when Benzine hit him with his shoulder and knocked him off balance. The attack by Benzine was the second, not the first attack by Benzine as stated by Respondent. RT 178-183, in particular, RT 182, lines 1-16. The horse trailer and its proximity to the location of Mrs. Pellerin, who started filming the incident after the first attack by Benzine next to the horse trailer, as shown in Clip #15 corroborates Appellant's testimony.

All of the evidence, especially the footage in Clip #15, proves that Appellant was assaulted and battered by Benzine twice. It was only after Benzine tackled Appellant to the ground that Appellant put Benzine into an arm lock so that he would not attack a third time.

B. Appellant Used Lawful, Minimal Force To Detain Benzine

Respondent attempts to argue that, even though Appellant made a lawful arrest, he must have used excessive force and caused Benzine's injuries. RB, pp. 8-10.

The first problem with this *ipso facto* type argument is that there is no evidence that the force used by Appellant to detain Benzine, i.e., an arm lock, caused any of Benzine's injuries. Indeed, if excessive force were used in an arm lock, the injuries would have been very different, e.g., something like torn muscles or ligaments in the arm held in the lock. However, Benzine did not have any such injuries. Instead, Benzine had a minor facial abrasion and a small cut on his *right* elbow, see the medical records, p. 16 of the Clerk's Augmented Transcript on Appeal, while Clip #16 shows that the arm lock was on Benzine's *left* arm. Thus, Respondent's attempt to connect the use of the arm lock to effect the detention and Benzine's injuries utterly fails.

The second problem with this argument is that the evidence proves that Appellant used the minimal, police approved force necessary to accomplish the detention. Appellant testified that after being tackled, with Benzine on top, he rolled Benzine over and put him into an arm lock. The purpose of the arm lock was to protect himself from further attack by Benzine and to make sure he could not hurt Appellant's wife. RT p. 199, lines 7-19. Appellant further testified that an arm lock was the only viable means of detaining Benzine, especially because Benzine kept trying to attack him. RT p. 201, line 27, to p. 207, line 1. Appellant testified, and Clip #16 proves, that Benzine refused to sit still for five minutes until the NCSD arrived, and further, that if Benzine had done so, he would have released Benzine from the arm lock. Appellant even allowed Benzine to use his cell phone to call the NCSD. RT p. 204 lines 12-22.

Officer LaCosse admitted on the stand that the use of an arm lock was a proper method for detaining someone trying to resist arrest and would not cause

serious injury. RT p. 58 line 21, to p. 60, line 17.

C. Benzine Caused His Own Injuries

All of the evidence points to one simple conclusion: Benzine caused his own injuries.

First, Respondent has never argued, nor is there any evidence, that Benzine suffered any injury *prior* to the moment when he tackled Appellant which was the second assault by Benzine.

Second, as shown above, the arm lock used by Appellant to detain Benzine *after* the second attack could not have caused any of Benzine's injuries.

If there were no injuries before the second assault and no injuries caused by the arm lock thereafter, then the only time when such injuries could have been sustained, and the only cause for those injuries, was Benzine's tackling of Appellant.

Now, if we look at the second assault it becomes very evident what caused Benzine's injuries. Clip #15 shows Benzine tackling Appellant and driving him onto his back, with Benzine on top. This sequence is corroborated by PE 6-8 which show that Appellant's back was wet and dirty. Further corroborating evidence is contained in Exhibit B, Clip #16. At the end of this footage the dirt and moisture marks on Appellant's back and left side are clearly shown. Appellant testified that these dirt and moisture marks on his clothing came from his being knocked down by Benzine. RT p. 215, line 15, to p. 216, line 9. Officer LaCrosse testified that the injuries he saw were consistent with an scuffle on the ground. RT 41-45.

When Benzine came down on top of Appellant with his arms in a bear hug around Appellant, Benzine's right elbow would have been in perfect position to strike the pavement with enough force to go through the padding of his jacket and cut his right elbow. The minor facial abrasion might also have been sustained at this time or just afterwards when Appellant stated that he rolled Benzine off of

himself and put him in an arm lock to restrain him from further attacking.

The only reasonable interpretation of the evidence is that Benzine's minor injuries were self-inflicted as the result of his wrongful battery of Appellant.

D. Benzine Did Not Suffer Serious Bodily Injury

PE 1-6 only show that Benzine sustained some minor abrasions and bruises. So did Appellant. PE 7-8. The only injury of any arguable significance was the one inch cut to Benzine's elbow. The medical report shows that there was minor, external suturing with no surgery required.

PC §243(f)(4) specifically lists a wound requiring "extensive" suturing. Clearly, the legislature intended these words to be interpreted with based upon their plain meaning. To rule that a once inch cut on an elbow that only required a few external sutures (no surgery) constitutes serious bodily injury, is to ignore the clear intent of the legislature that such a minor wound should not be the basis for a felony.

Deputy La Cosse testified that, apart from the small cut on Benzine's elbow, there were no other injuries that he was aware of that constituted "serious bodily injury". RT p. 60, line 24, to p. 61, line 24. Deputy La Cosse further testified that there was not any significant bleeding when he saw the wound. RT p. 65 lines 9-13.

Appellant acknowledges the cases cited by Respondent, but all of these are quite factually distinguishable because they involve far more serious injuries. That is why Respondent was compelled to qualify these citations with a citation to *People v. Martinez* (1985) 171 Cal. App. 3d 727, 735-736, where the Court of Appeal agreed with the prosecutor that a minor cut on the back did not constitute serious bodily injury for purposes of enhancement.

Benzine injuries are well below the level of injuries that courts have upheld as constituting serious bodily injury for purposes of charging a battery as a felony rather than as a misdemeanor.

II. **Conclusion**

Appellant has proven that it was Benzine that attacked him, that he acted within the law for making a citizen's arrest, and that the amount of force he used to detain Benzine was the minimum necessary. Appellant has further shown that the almost certain cause of Benzine's injuries was Benzine's tackling Appellant to the ground.

Benzine never took the stand and Respondent did not introduce any evidence that contradicted the evidence submitted by Appellant. Absent any evidence supporting the charges against Appellant, Respondent relies completely upon unsubstantiated inferences, coupled with the heavy burden of proof that Appellant must meet, to defeat this petition for factual innocence.

The only possible conclusion is that there was no reasonable cause for the arrest and charging of Appellant and the Petition should be granted.

Respectfully Submitted,

Date: April 5, 2013

Patrick H. Dwyer, counsel for Appellant

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this Appellant's Reply Brief is approximately 1,787.

Patrick H. Dwyer,
Attorney for Appellants

Date: April 5, 2013

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am over the age of 18 years, that I reside at P.O. Box 1705, 17318 Piper Lane, Penn Valley, CA 95946, and that I served the Appellants's Reply Brief in Appeal No. **Case No. C072654**, Case No. F10-159, by United States first class mail, addressed as follows:

1. Barton Bowers, Deputy Attorney General, 1300 I Street, Suite 1101, P.O. Box 944255, Sacramento, CA 94244-2550;
2. The Superior Court for the County of Nevada, 201 Church Street, Nevada City, California 95959 (one copy); and
3. The California Supreme Court, 350 McAllister Street, San Francisco, California 94102 (four copies)
4. The Court of Appeal, Third Appellate District, 621 Capitol Mall, 10th floor, Sacramento, California 95814-4719 (original and four copies).

Signature

Print Name

Date: April 5, 2013