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STATEMENT OF THE CASE

The Appellant, Carlos Saucedo Zamora, was charged by an indictment returned on August 10, 1982 with the crime of Aggravated Assault, a class 3 and dangerous felony. Appellant was arraigned on August 20, 1982 and his trial was scheduled for October 5, 1982 before the Honorable Philip W. Marquardt.

Appellant's counsel filed a motion on October 8, 1982 to produce the trial transcript of a previous case in which both the Appellant and the victim were involved. Judge Marquardt granted the motion on October 26, 1982. For this and several other reasons, Appellant's trial did not begin until February 15, 1983 before the Honorable Irwin Cantor. After granting Appellant's motion in limine, the court and counsel selected the jury. The State made a motion in limine to preclude Appellant's counsel from questioning the victim about a possession of marijuana charge and his discharge of a firearm and arrest for possession of a concealed weapon. The court granted the motions, unless Appellant's counsel could show the victim took drugs or possessed a firearm within 48 hours of the incident. Both counsel then gave their opening statements and the court recessed the trial until the following day.

The State began the presentation of its case by calling Ernest L. Maldonado to the stand. He was followed by Cornelio Verdugo and Eddie Flores. Both counsel then stipulated to the testimony of Dr. Hernandez through a letter which was read to the court. The State then rested its case. Appellant's motion for a directed verdict was denied. Appellant called Donald E. Kelleher as his first witness. At the conclusion of his testimony, the court recessed for the day.

The Appellant continued the presentation of his case by calling Jimmy Molina to the stand. Thomas E. Shorts was the next witness to testify and he was followed by Steven Werner. At the conclusion of his testimony, the court recessed

the trial until February 22, 1983. At that time, the court allowed the State to call Detective Kelleher out of order. Appellant then called Ross S. Ploeg to testify and at the conclusion of his testimony, Appellant testified in his own behalf. Both sides then rested. The court and counsel then settled the instructions and the forms of verdict. Both counsel gave their closing argument and Judge Cantor instructed the jury. The jury eventually returned a verdict of guilty. Judge Cantor set sentencing for March 22, 1983.

Appellant's counsel filed a motion for a new trial on March 4, 1983. Judge Cantor denied the motion on March 25, 1983 and continued the sentencing and mitigation hearing until April 11, 1983. Both matters were reset to April 18, 1983. At that time, Judge Cantor sentenced Appellant to serve seven and one half years in the Department of Corrections. Judge Cantor gave Appellant credit for 70 days of presentence incarceration.

A timely notice of appeal was filed on April 25, 1983. Appellant was represented throughout the proceedings below by the Maricopa County Public Defender's Office. This appeal is taken from the judgment of guilt entered and the sentence imposed on April 18, 1983.

ARGUMENT I

THE COURT ERRED IN DENYING APPELLANT'S MOTION
FOR A NEW TRIAL.

In the instant case, Appellant's defense was that he had shot the victim in self-defense. The State agreed with this and pointed this fact out to the jury during his opening final argument. (R.T. of 2/22/83 at p. 44). Appellant's counsel attempted to produce evidence and testimony to the effect that the victim had a reputation for carrying a weapon and a reputation for being a member of a gang. The court continually sustained the State's objections to the presentation of this evidence. (R.T. of 2/15/83 at p. 46; R.T. of 2/16/83 at p. 35, 61-62; R.T. of 2/17/83 pp. 69-70; R.T. of 2/22/83 at p. 9). Appellant's counsel made an offer of proof as to the victims gang connections. (R.T. of 2/16/83 at p. 45). This was after the victim had denied any knowledge of a gang called the Eastsiders. (R.T. of 2/16/83 at p. 36). Prior to sentencing, Appellant's counsel's motion for a mistrial on the basis of the trial court's ruling in this area was denied.

It has been held in Arizona, that where there is a question as to who the aggressor was, or where the state of mind of the defendant at the time of the incident is in issue under a claim of justification, the general reputation of the alleged victim in the community as a dangerous, turbulent and violent person may be shown. State v. Griffin, 99 Ariz. 43, 406 P.2d 397 (1965); Lawrence v. State, 29 Ariz. 247, 240 P. 863 (1925). Specific acts of violence toward third persons observed by the defendant or known by him prior to the incident may be shown in order to show that the defendant was justifiably apprehensive and that the victim was of a violent and turbulent disposition. State v. Young, 109 Ariz. 221, 508 P.2d 51 (1973); State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963). The court in Jackson, supra noted that:

. . . The purpose of such evidence is not to prove the deceased in fact performed such acts but that defendant may have had a reason to believe he had and that this adds to a justifiable state of apprehension. . . . - Here the excluded evidence tended to show that defendant had knowledge that deceased carried a weapon and that he was of a violent and turbulent disposition. It would have a bearing on defendant's state of mind and the reasonableness of his belief that Evans was capable of harming him at the time of the homicide.
94 Ariz. at 121, 382 P.2d at 231-32.

Appellant submits the same reasoning applies to his case. The court's rulings effectively prevented him from demonstrating to the jury the reasonableness of his actions in light of his knowledge of the reputation of the victim. The trial court's ruling were contrary to the law and Appellant's motion for a new trial should have been granted.

ARGUMENT II

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO
THE JURY.

The trial court, over Appellant's objection, gave the following instruction:

One who is at fault in provoking a difficulty which necessitates his use of force may not rely upon a plea of self defense to justify or excuse his conduct.
(R.T. of 2/22/83 at p. 84).

As Appellant's counsel noted, the record does not support a finding that he provoked the incident. Without this evidence, the trial court was in error in giving this instruction. See A.R.S. § 13-404(B)(3). In light of Appellant's defense, the giving of this instruction was very detrimental to his case and denied him a fair trial. His case should be remanded for a new trial.

CONCLUSION

The trial court erred in denying Appellant's motion for a new trial and in its instructions to the jury. For these reasons, Appellant's case should be remanded for a new trial.

Respectfully submitted this 15th day of July, 1983.

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Public Defender

By Michael G. Sullivan
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TWO COPIES of Appellant's Opening Brief mailed this 15th day of July, 1983, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 W. Washington, Criminal Division - 2nd Floor, Phoenix, Arizona 85007.

ONE COPY of Appellant's Opening Brief mailed this 15th day of July, 1983, to CARLOS SAUCEDA ZAMORA, #47178, A.C.T.P.-T., Santa Rita, 10,000 S. Wilmot Rd., Tucson, Arizona 85706.

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CRIMINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,)	
)	
Appellee,)	NO. 1 CA-CR 7109
)	
-vs-)	MARICOPA COUNTY
)	SUPERIOR COURT
CARLOS SAUCEDA ZAMORA,)	NO. CR-128338
)	
Appellant.)	
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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED AUG 8 1983

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8-23-83



QUESTIONS PRESENTED FOR REVIEW

1. Were the trial court's evidentiary rulings correct on the issue of the victim's character?
2. Was the jury properly instructed on self-defense?

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STATEMENT OF THE CASE

Appellant was charged with aggravated assault, a class 3, dangerous felony. (Indictment, filed Aug. 10, 1982.) A jury found him guilty of same. The trial court sentenced him to the presumptive term of 7.5 years in prison. (R.T. of Apr. 18, 1983, at 7.) Notice of appeal was filed on the day of sentencing. This Court has jurisdiction to hear this appeal pursuant to Ariz.Rev.Stat. Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

At approximately 9:30 p.m. on August 2, 1982, the victim Ernie Maldonado, rode his bicycle away from his girl friend's house. He was wearing a t-shirt tucked inside cutoffs. (R.T. of Feb. 16, 1983, at 5-8.) He stopped in a driveway to talk to some friends. As they were about to disperse, appellant and Jimmy Molina came along. (Id. at 10.) Appellant was carrying a .25 automatic pistol and a plastic bag full of paint for sniffing paint fumes. (Id. at 20, 70-71.) He had been both sniffing paint and drinking beer. (R.T. of Feb. 22, 1983, at 22-23.) Eventually Molina, Maldonado, and appellant were alone, with Molina and Maldonado conversing. (R.T. of Feb. 16, 1983, at 22.) There was no argument, no threats, or threatening gestures. (Id. at 13, 24; R.T. of Feb. 22, 1983, at 26.) The topic of conversation was someone having shot at Molina's house.

(R.T. of Feb. 17, 1983, at 6, 26.) Appellant, who appeared to be high on something, made a comment to the victim and as the victim turned appellant fired one shot into his abdomen. (R.T. of Feb. 16, 1983, at 24-25.) The victim fell down and pretended to be dead in order to keep from being shot a second time. (Id.) Appellant and Molina ran off, with Molina taking the victim's bicycle. (Id. at 26.) Appellant threw his gun into a canal. (R.T. of Feb. 17, 1983, at 66.)

A friend came along and helped Maldonado, who was taken to the hospital in critical condition. The victim, admitted that he previously owned guns, but he did not have a gun on him that night. (R.T. of Feb. 16, 1983, at 36-43, 56.) It was later determined that he had a small knife in his pants' pocket. (Id. at 52-53.) Neither appellant nor his friend Molina really disputed the victim's claim that he was unarmed. They claimed that the victim put his hand in his pocket and they thought he was going for a gun. (R.T. of Feb. 17, 1983, at 8-9, 21.) No gun was ever found. (Id. at 47.) Molina's trial testimony about the victim's alleged gesture toward his front pocket was markedly different from his previous statement to police. (Id. at 12-27.)

ARGUMENT

I

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING APPELLANT'S
REQUEST FOR A NEW TRIAL BASED UPON HIS
CLAIM THAT HE WAS NOT ALLOWED TO SHOW
THE VIOLENT CHARACTER OF THE VICTIM.

The trial court instructed on self-defense. Appellant claims that he was denied the opportunity to present evidence of the victim's violent and turbulent character. Specifically, he wanted to present evidence that the victim carried a gun and that he was a member of a gang called the "Eastsidiers." The trial court's evidentiary rulings were proper for the following reasons.

Regarding the victim's carrying of a gun, it should be noted that appellant did bring out the fact that he had seen the victim carrying a gun on a previous occasion. (R.T. of Feb. 22, 1983, at 31.) The victim was cross-examined about his ownership of guns. (R.T. of Feb. 16, 1983, at 36.) The victim admitted that he had previously carried a gun and some numchucks. (Id. at 43.) [The trial court kept out the fact that appellant had been acquitted of first-degree murder in the shooting death of George Carrera, a friend of the victim in this case. (R.T. of Feb. 15, 1983, at 5-12.)] Appellant also got in the fact that the Guadalupe area where the shooting took place was an area where much violence occurred. (R.T. of Feb. 16, 1983, at 80.) What appellant was not permitted to

do was present evidence of the victim's character by asking whether others knew that he sometimes carried a gun. (R.T. of Feb. 16, 1983, at 61-62.)

Where there is no issue as to who the aggressor was, and the defendant does not testify that he used his weapon because of the victim's reputation, then inquiry regarding the victim's reputation is irrelevant. State v. Ross, 130 Ariz. 33, 633 P.2d 442 (Ct.App. 1981). As in Ross appellant was clearly the aggressor in this case and he was not entitled to delve in to the victim's alleged reputation for violence.

Even assuming for the sake of argument that the information was relevant, appellant's method of attempting to prove character was improper. Character may not be proven by specific instances of conduct. State v. Featherman, 133 Ariz. 340, 346, 651 P.2d 868, 874 (Ct.App. 1982); UDALL and LIVERMORE, ARIZONA LAW OF EVIDENCE § 83, at 172 (1982). Whether or not the victim carried a gun on previous occasions is certainly a reference to specific acts. Moreover, possession of a weapon does not mean that the person is of a violent or turbulent character. State v. Canedo, 115 Ariz. 60, 64, 563 P.2d 315 (Ct.App. 1977), vacated on other grounds, 125 Ariz. 197, 608 P.2d 774 (1980).

Another missing prerequisite to the admission of any turbulent and dangerous character evidence is the fact that the appellant knew of this alleged character trait. Without such a showing even proper character evidence would have been inadmissible. State v. Eddington, 95 Ariz. 10, 386 P.2d 20 (1963). The trial court properly curtailed further questioning on whether the victim had previously carried a gun.

Regarding whether or not the victim belonged to a gang, appellee submits the following. Appellant wanted to present evidence that the victim had a tattoo identifying him as a member of the "Eastsidiers" gang. (R.T. of Feb. 16, 1983, at 45.) He also wanted to ask police whether they knew the victim was a gang member. (R.T. of Feb. 22, 1983, at 13.) Apparently the only arguable relevance this had to the case was as an indication of the victim's character.

The police officer's testimony would not even qualify as "reputation in the community." State v. Jessen, 130 Ariz. 1, 7, 633 P.2d 410, 417 (1981). It was inadmissible hearsay. (Id.) Further, gang membership is more like a specific act of conduct and/or information not shown to be known by the defendant and thus precluded by the aforementioned authorities.

Secondly, the victim denied that any gang called the "Eastsiders" even existed. (R.T. of Feb. 16, 1983, at 36.) Out of the presence of the jury, he denied that he belonged to any gang. (Id. at 45-48.) Appellant speculated that police officers would testify that the victim was a gang member but he never called them. (Id.) Later in the trial, a police officer familiar with Guadalupe named the three predominant gangs in the area. The name "Eastsiders" was not among them. (R.T. of Feb. 22, 1983, at 13.) Information police later gave the probation department was to the effect that the victim was not a known trouble maker and that he did not belong to a gang. (Adult Probation Report, filed Apr. 19, 1983, at 2.) What all this means is, that without an offer of proof, appellant's questions about any alleged gang affiliation would have been highly improper. See State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (Ct.App. 1981) (fact prosecutor asked questions about defendant's affiliation with motorcycle gang without having evidence to controvert defendant's denial amounted to prejudicial cross-examination by insinuation).

ARGUMENT

II

THE TRIAL COURT DID NOT ERR WHEN IT
INSTRUCTED THE JURY.

Appellant argues without authority that the trial court could not instruct the jury that:

One who is at fault in provoking a difficulty which necessitates his use of force may not rely upon a plea of self-defense to justify or excuse his conduct.

(R.T. of Feb. 22, 1983, at 84.) Appellant objected on the ground there was no evidence of provocation. (Id. at 41-42.) The instruction is a correct statement of the law. An essential element of self-defense is the accused's freedom from fault in provoking the difficulty that gives rise to the use of force. State v. Lujan, No. 5739-PR (Ariz.Sup.Ct., Apr. 6, 1983); State v. Sourivathong, 130 Ariz. 461, 636 P.2d 1243 (Ct.App. 1981). Appellant presented considerable testimony regarding the victim's alleged gesture toward his pocket, and he argued that the shooting was a reaction to that gesture. (R.T. of Feb. 17, 1983, at 8-9; R.T. of Feb. 22, 1983, at 21, 28, 55, 64.)

The evidence showed that appellant and Molina appeared from behind some bushes and confronted the victim, who was left alone in a dark driveway in a rough neighborhood. Appellant was carrying a .25 automatic in his hand, as well as a plastic bag of paint. (R.T. of Feb. 16, 1983, at 20,

67-72.) He appeared to the victim to be under the influence of the paint. (Id. at 23.) Molina started questioning the victim about his having shot at Molina's house. (R.T. of Feb. 17, 1983, at 6, 26.) It was not error to tell the jury that if they accepted appellant's story that he thought the victim was reaching into his pocket to get a gun, they had to consider whether appellant could be charged with the knowledge that his actions were likely to invite violence. In other words, they had to be sure his actions did not provoke the difficulty that might acquit him on the ground of self-defense. The instruction was a proper statement of the law and no error appears.

CONCLUSION

The trial court's evidentiary rulings were correct. The jury was properly instructed. If any error appears in the case, it could only have been harmless. Appellee requests that the judgment of guilt and sentence be affirmed.

Respectfully submitted,

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DIANE M. RAMSEY *for*
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DIANE M. RAMSEY, being first duly sworn upon oath,
deposes and says:

That she served the attorney for the appellant in the
foregoing case by forwarding two (2) copies of APPELLEE'S
ANSWERING BRIEF, in a sealed envelope, first class postage
prepaid, and deposited same in the United States mail,
addressed to:

MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85003
Attorney for APPELLANT

this 8th day of August, 1983.

Diane M. Ramsey for

DIANE M. RAMSEY

SUBSCRIBED AND SWORN to before me this 8th day of
August, 1983.

Elizabeth J. Bender

NOTARY PUBLIC

My Commission Expires:
July 17, 1986

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