IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: CJAP 06-21
LOWER COURT CASE NO: 2006-MM-13590

RUBEN DIAZ,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court for Orange County, Florida, John E. Jordan, County Court Judge

Robert Wesley, Public Defender, Shontell English and Jerrett Brock, Assistant Public Defenders, for Appellant

Lawson Lamar, State Attorney, Betty Cheramie and Andrew Leone, Assistant State Attorneys, for Appellee

Before WHITEHEAD, JOHNSON, and J. ADAMS, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant Ruben Diaz appeals the Orange County Court's judgment and sentence for the offense of battery, in violation of section 784.03, Florida Statutes. We affirm.

On January 30, 2006, Eric Straus ("Strauss") and four friends attended an event at the TD Waterhouse Centre that ended at about eleven o'clock pm. As the event drew a large crowd, cars in the parking ramp sat bumper-to-bumper waiting to exit. The chronology of the following events is not completely clear.

One of Strauss' passengers, Kevin Mays ("Mays"), exited the vehicle to help him get out of the parking spot. At some point, all four of Strauss' friends exited the vehicles. When Strauss looked into his rearview mirror, he saw that a car (driven by Appellant) had rolled into Mays' legs. Two of Strauss' friends approached Appellant, who was still behind the wheel of his car.

Appellant then got out of the car. He had two people with him. Mays put his hands on the car and possibly sat on it. Mays approached Appellant and pushed him. Then a fight broke out. When Strauss looked back to see if the vehicle had moved, he saw Mays on the ground being assaulted.

Strauss reacted by getting out of his vehicle and going toward Mays to help him and stop further injury. One of the assailants was the Appellant. Strauss grabbed the Appellant and told him that they were trying to back out of their parking spot, and to relax. Appellant then punched him in the face twice. The force sent Strauss reeling into his driver's side rear car door.

At the April 24, 2006 trial, the court denied Appellant's motion for judgment of acquittal after the state rested. The jury found Appellant guilty as to count one (Strauss) and not guilty as to count two (Mays). Appellant moved for judgment notwithstanding the verdict [judgment of acquittal], and the court denied it. The court sentenced Appellant to twenty days jail with credit for one day time served to be followed by six months probation.

Appellant argues that the trial court erred when it denied Appellant's motions for judgment of acquittal. He asserts that Strauss, one of the victims, "interjected himself into an altercation" between Appellant and another victim, Mays. Further, he asserts that Strauss grabbed Appellant without knowing what was going on between the Appellant and Mays. He contends that Strauss was the primary aggressor and that when Appellant punched Strauss, he acted in self-defense or as a mutual combatant.

Appellant argues that the State failed to meet its burden of overcoming his self-defense theory. "The state has the burden of proving guilt beyond a reasonable doubt, which includes proving beyond a reasonable doubt that the defendant did not act in self-defense." *Sneed v. State*, 580 So.2d 169, 170 (Fla. 4th DCA 1991). The State "was required by rebuttal or by inference to overcome [the defense theory]." *K.W.S. v. State*, 924 So.2d 80, 81 (Fla. 5th DCA 2006). Failing to do so should result in a judgment of acquittal. *Id.*

The State counters by arguing that it presented "competent, substantial evidence" that Appellant committed the battery. It asserts further that the trial court properly denied the motion for a judgment of acquittal, leaving the jury to determine guilt. The State contends that the Appellant did not preserve the mutual combat issue for appeal.

In cases involving a self-defense theory where courts have granted motions for judgments of acquittal, including those referenced by Appellant, the facts showed to be more clearly one-sided and favorable to the Defendant. The facts presented relatively non-debatable portraits of self-defense. *See Brown v. State*, 454 So.2d 596 (Fla. 5th DCA 1984) (*superseded by statute on other grounds as stated in Thomas v. State*, 918 So.2d 327 (Fla. 1st DCA 2005)) (uncontroverted evidence of Defendant defending himself and others from a reputably violent, dangerous, strong man who moments prior almost killed another person, and whom nobody else could stop from harming others); *K.W.S.*, 924 So.2d at 81 (uncontroverted evidence that Defendant acted in defense of smaller girl against larger, older girl, that force was minimal and possibly unintentional); *Sneed*, 580 So.2d at 170 (uncontroverted evidence that Defendant protected himself from a reputably violent person charging him with a knife). In all the fact patterns cited, the State's evidence corroborated the Defendants' self-defense theory.

The facts in Appellant's situation are not so clear. As stated earlier, the State presents Appellant as the aggressor, while the Appellant portrays himself as either defending himself or as a mutual combatant. Testimony introduced at trial presented conflicting scenarios; nothing clearly corroborated a self-defense theory.

A jury, not the judge, should determine guilt or innocence "when the evidence is reasonably susceptible of two views…." *Hoffman v. State*, 708 So.2d 962, 964 (Fla. 5th DCA 1998). As the *Darling* Court held:

> Where there is room for a difference of opinion between reasonable men as to the proof of facts from which the ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from conceded facts, the

> Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Darling v. State, 808 So.2d 145, 155 (Fla. 2002) (quoting *Lynch v. State*, 293 So.2d 44, 45 (Fla. 1974)). Furthermore, "if evidence of self-defense is adduced,…self-defense becomes an issue for the jury to determine." *Stewart v. State*, 672 So.2d 865, 867 (Fla. 2nd DCA 1996) (quoting *Garramone v. State*, 636 So.2d 869 (Fla. 4th DCA 1994)). It is the duty of the trial court, not the appellate court, "to weigh the evidence to determine the propriety of the appellant's defense." *Id.*

The evidence presented here could lead reasonable people to disagree on whether or not the State overcame Appellant's self-defense argument. The trial court correctly allowed the jury to determine guilt. Competent, substantial evidence supported the conviction.

Lastly, Appellant failed to preserve for review the mutual combat theory as a basis for a judgment of acquittal. For an issue to be preserved, the "specific legal argument or ground to be argued on appeal must be part of that presentation." *Perez v. State*, 919 So.2d 347, 359 (Fla. 2005). Appellant failed to argue mutual combat when he raised his motions at the trial level. The issue has not been preserved.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the trial court's judgment and sentence are hereby **AFFIRMED**.

DONE AND ORDERED on this _17___ day of __November_____ 2006.

___/S/_____
REGINALD WHITEHEAD
Circuit Court Judge

____/S/_____
ANTHONY JOHNSON
Circuit Court Judge

____/S/_____
JOHN H. ADAMS, SR.
Circuit Court Judge

Certificate of Service

I hereby certify that a copy of the foregoing Final Order Affirming Trial Court has been provided to **Leslie Thomas**, Assistant Public Defender, 435 North Orange Avenue, Suite 401, Orlando, Florida 32801; and to **Lamya Henry**, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801 this __17__ day of ___November_____ 2006.

___/S/_____
Judicial Assistant