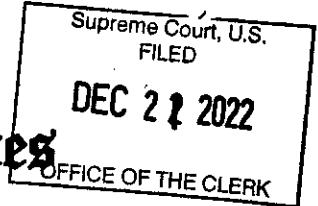


22-6442

ORIGINAL

In the
Supreme Court of the United States



BRENNAN T. BAKER – PETITIONER

VS.

STATE OF WYOMING – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
WYOMING SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Brennan T. Baker, Petitioner, pro se
WMCI #33896
7076 Road 55F
Torrington, WY 82240-7771

QUESTION(S) PRESENTED

- I. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT ADMITTED THE STATE'S CELL PHONE RECORDING OF SURVEILLANCE FOOTAGE THAT CAPTURED THE ALTERCATION BETWEEN MR. BAKER AND HIS VICTIM?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment indicated below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States District Court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at 2022 WY 106 (Wyo. 2022); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at
Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied by the United States Court of Appeals on _____, and a copy of the order denying rehearing appears at Appendix _____.
- An extension of time to file the petition for writ of certiorari was granted to and including _____ (date due) on _____ in Application No. _____.

The jurisdiction of this Court is invoked 28 U.S.C. §1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix A.

- A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
- An extension of time to file the petition for writ of certiorari was granted to and including _____ (date due) on _____ in Application No. _____.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“Evidentiary rulings on the admissibility of evidence are reviewed for a clear abuse of discretion and we will not disturb those rulings if the court could have reasonably concluded as it did. *Boykin v. State*, 2003 WY 116, ¶ 5, 105 P.3d 481, ¶ 5 (Wyo. 2005); *Seward v. State*, 2003 WY 116, ¶ 13, 76 P.3d 805, ¶ 13 (Wyo. 2003).”

Adams v. State, 2005 WY 94, ¶ 17, 117 P.3d 1210, 1218 (Wyo. 2005).

The evidence at issue here in the cell phone video recorded from the coffee shop surveillance monitor. The *Hole in the Wall* coffee shop had a video surveillance system that was operational at the time of the incident in question. That system had both audio and video capability. Unable to download a duplicate of the surveillance video, Gillette Police Department Detective Eric Small used his department-issued cell phone to record the surveillance footage. Detective Eric Small testified that he returned to the coffee shop the next day for the purpose of trying to retrieve the video. Detective Eric Small then testified that he returned a second time because the coffee shop employees were unable to download the video and neither Detective Eric Small nor Detective Wagner was able to download the video. Detective Eric Small made the decision to use his department-issued cell phone to record the footage because he thought that would be an acceptable solution. Detective Eric Small further testified the original video also contained audio. The audio in Detective Eric Small’s cell phone recording captured background noises and conversation between law enforcement and Ms. Tolliver (coffee shop staff member), but it did not capture the conversation between Mr. Baker and the victim, Jesse Heppner, which was present on the original audio recording. Detective Small also testified during the July 06, 2021 hearing that on the re-created video that there was no Taser discharged during the

altercation, but instead was microphone scuff that occurred during the cell phone recording of the video. Detective Small intentionally and purposefully withheld the audio recording from the altercation by covering the microphone, thus acting in bad faith. During Detective Small's trial testimony, he stated to the jury that he in fact heard from the officer that there was a Taser involved, only to be called back to the stand to correct his testimony where he said he misspoke earlier and in fact never knew of a Taser being used by the victim. The State of Wyoming agreed, describing the cell phone video as "a fairly accurate, comparatively speaking, video." The State of Wyoming Also admitted the cell phone video is not a duplicate of the original. Detective Wagner testified that he and Detective Eric Small spent only about twenty (20) minutes attempting to retrieve a duplicate of the video before they gave up and used a cell phone. This would qualify as *bad faith*, as defined in *Gardner v. Schumacher*, 547 F.Supp.3d 995, 1036 (D.N.M. 2021) (citing *Cross v. United States*, 149 F.3d 1190 (10th Cir. 1998)(unpublished table opinion)).

Mr. Baker's trial defense counsel objected to the admission of the cell phone video pursuant to Rule 1002 of the Wyoming Rules of Evidence (W.R.E.). After a hearing on the objection, the Court allowed the video evidence over Mr. Baker's continuing objection. The trial court reasoned that because the video is not controlled by law enforcement, such as a body camera, and because the video portion was not distorted or incomplete, the evidence would be admissible without audio. The trial court also found there was no bad faith in not obtaining an original or duplicate. This ruling is an abuse of discretion and contrary to the Wyoming Rules of Evidence.

The rules at issue here are Wyoming Rules of Evidence 1001, 1002, 1003 and 1004. Rule 1001(3) of the W.R.E. states:

For purposes of this article the following definitions are applicable:

(3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original;

Rule 1001(3) of the Wyoming Rules of Evidence (2022 Lexis Edition).

Rule 1001(4) of the W.R.E. states:

For purposes of this article the following definitions are applicable:

(4) Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Rule 1001(4) of the Wyoming Rules of Evidence (2022 Lexis Edition).

Rule 1002 of the W.R.E. states:

Rule 1002. Requirement of Original. To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Rule 1002 of the Wyoming Rules of Evidence (2022 Lexis Edition).

Rule 1003 of the W.R.E. states:

Rule 1003. Admissibility of Duplicates. A duplicate is admissible under this rule or as may be otherwise provided by statute to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1003 of the Wyoming Rules of Evidence (2022 Lexis Edition).

Rule 1003 of the W.R.E. states:

Rule 1004. Admissibility of Other Evidence of Contents.

The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1004 of the Wyoming Rules of Evidence (2022 Lexis Edition).

First, it is clear the cell phone recording obtained by law enforcement does not meet the definitions of original or duplicate pursuant to Rule 1001 of the W.R.E. The cell phone video was not made from the surveillance system itself. It is not an accurate reproduction of the original because the audio captured sounds made during the cell phone recording and does not contain the audio from the surveillance system itself. It is also not an exact copy of the original. It may be “fairly accurate” as described by the State of Wyoming, but it is not a true and correct copy. In addition, the State of Wyoming conceded in the motion hearing on July 06, 2021, that the cell phone video is not a duplicate.

Turning to Rule 1002 of the W.R.E., it is clear the cell phone video is not an original. It is not the recording itself, nor is it a printout or other output readable by sight, shown to reflect the data accurately, as in the original. It is clear from the testimony at trial and in the July 06, 2021 motion hearing that the audio does not accurately reflect the

original surveillance. It is distorted by audio from the room when the cell phone recording was made. After establishing the recording is not an original, the Court must determine whether it is admissible by other means.

Rule 1003 of the W.R.E. allows for the admission of a duplicate. However, as conceded by the State of Wyoming, the cell phone video is not a duplicate. The video was not made by the “same impression”, meaning the video was not taken directly from the surveillance system. It is not an accurate copy of the original because it contains missing, distorted, and added audio. In short, because of the audio, the cell phone recording does not accurately reproduce the original and is therefore not a duplicate. “Fairly accurate” does not meet the requirement of a duplicate.

Finally, the Court must determine if the cell phone recording was admissible under Rule 1004 of the W.R.E. This rule allows for the admission of other evidence under certain circumstances. First, other evidence can be admissible if the original was lost or destroyed. Here, the trial court determined the original was not lost or destroyed in bad faith. There was testimony that at the time of the motion hearing, the original was no longer available because the system overrides video after a certain period of time. This, however, does not mean the original or a duplicate could not have been obtained earlier in the investigation. To the contrary, Detective Wagner testified that they simply gave up after about twenty (20) minutes and never followed up with the coffee shop owner to see if their technology resources could have downloaded the video. This may not have been in bad faith, but it certainly cannot be said to be a diligent investigation.

The second possibility under Rule 1004(2) of the W.R.E. allows for the admission of the evidence if the original was not obtainable. Testimony from Detective Wagner

does not support the requirement that the evidence was not obtainable. Quite the opposite is true. Detective Wagner testified that the video likely could have been obtained, but law enforcement did not want to inconvenience the business owner.

The third possibility under Rule 1004(3) of the W.R.E. does not apply in this case. The original video was never in the possession of Mr. Baker; therefore, this subsection does not apply in this case.

Finally, Rule 1004(4) of the W.R.E. allows for the admission of other evidence if the writing, recording, or photograph is not closely related to a controlling issue. The video at issue here purported to be a video of the fight that was central of the *Aggravated Assault* charge. The video was not of a collateral issue, but instead was absolutely related to the controlling issue in the case.

The trial court determined that because the cell phone video was adjudged to be accurate outside the inaccurate audio, and because there was no bad faith in obtaining the video by law enforcement, that the video portion would be admissible, over the objection of defense counsel. Inexplicably, the trial court also made a finding that part of its decision was a consideration that the surveillance video was that of a third party and not a video controlled by law enforcement, such as a body camera. While this finding may be relevant to the determination that law enforcement did not act in bad faith, it is completely irrelevant to the Rules of Evidence.

There is scant case law to assist with a best evidence rule challenge. *Adams v. State*, 2005 WY 94, 117 P.3d 1210 (Wyo. 2005) addressed these rules in the context of computer printouts of internet communication. The *Adams* case involved printouts that were purported to be exact copies of chatroom communications between two parties.

Adams v. State, 2005 WY 94, ¶ 25, 117 P.3d 1210, 1218 (Wyo. 2005). This case is distinguishable, because the video at issue here is not an original or a duplicate, nor is it an exact copy in any sense.

Other jurisdictions have addressed the admissibility of other evidence when the original is lost or destroyed or not obtainable. However, none of these cases support the admission of evidence when the original or a duplicate was not obtained through lack of diligence on the part of law enforcement. (12 A.L.R. 7th Art. 1 (2016)).

The evidentiary issue central to Mr. Baker's case can be distilled into a few relevant facts. First, there can be no argument that the cell phone video of the surveillance video is an original or a duplicate. The State of Wyoming conceded this point in the motion hearing held in the trial court on July 06, 2021. Second, the cell phone can, **at best**, be described as "fairly accurate" video. The cell phone video does not contain accurate audio, a point which Mr. Baker argued before the trial court that was important to understand the fight. This is especially important given the testimony of Mr. Heppner that (1) the alleged "crowbar" was not metal, and in fact was not a crowbar at all; (2) that he knew that the two were going to fight; (3) that he got out of his vehicle with a Taser; and (4) that he was not seriously injured. The conversation between Mr. Baker and Mr. Heppner was material to Mr. Baker's defense. The admission of the video portion without the audio did not give the jury a fair and accurate picture of the fight, but rather eliminated audio that could have supported Mr. Heppner's testimony and allowed video that was prejudicial to the defense without the accompanying audio. It is worth noting that Judge John R. Perry stated at the July 06, 2021 hearing that the video would be played for the jury **WITHOUT** audio; however, at trial when the video was played for

the jury, it included the added audio of law enforcement and the coffee shop staff, which was not an accurate representation of the original audio, and most certainly contributed to the prejudices of the jurors against Mr. Baker in finding him guilty at the conclusion of the trial.

At the time the cell phone video was obtained, law enforcement had the means to preserve the video. Officers spent a mere twenty (20) minutes in an effort to obtain the video and never followed up with the coffee shop to ascertain if their own technology resources could obtain the video. Detective Wagner testified the video could probably have been obtained with more effort. Because of the unwillingness of law enforcement to be diligent in their efforts to obtain the video, the original recording was lost. Detective Eric Small thought a cell phone video would be adequate. However, there is no evidence that he checked with the prosecutor to see if he needed to expend more effort. Law enforcement may not have deliberately destroyed evidence, but they did neglect to preserve it properly. The stakes in this case could not have been much higher for Mr. Baker. He was facing a Habitual Offender sentencing enhancement. He had every right to expect the rules of evidence would be enforced.

STATEMENT OF THE CASE

This is an appeal stemming from criminal convictions arising in the Sixth Judicial District Court for Campbell County, Wyoming before the Honorable John R. Perry (Retired). Mr. Baker appealed to the Wyoming Supreme Court, who had general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes. Wyo. Const. art. V, § 2. The United States Supreme Court shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law. U.S. Const. art. III, § 1. A defendant may appeal his conviction in any criminal case in the manner provided by the Wyoming Rules of Appellate Procedure (W.R.A.P.) Wyo. Stat. Ann. §7-12-101 (Lexis). An appeal from a trial court in Wyoming to the Wyoming Supreme Court shall be taken by filing the *Notice of Appeal* with the clerk of the trial court within thirty (30) days from entry of the appealable order and concurrently serving the same in accordance with the provisions of Rule 5 of the Wyoming Rules of Civil Procedure (W.R.Cv.P.), or as provided in Rule 32(c)(4) of the Wyoming Rules of Criminal Procedure (W.R.Cr.P.). This is articulated in Rule 2.01 of the W.R.A.P.

A defendant may file his *Petition for Writ of Certiorari* with the United States Supreme Court in accordance with Rule 12 of the Rules of the Supreme Court of the United States. A *Petition for Writ of Certiorari* may be brought within ninety (90) days after entry of the lower court's mandate. Rule 13.1 of the Rules of the Supreme Court of the United States. In this case, the Wyoming Supreme Court entered its Mandate Affirming Judgment on September 26, 2022, whereby making the deadline to file his *Petition for Writ of Certiorari* December 26, 2022.

This matter encompasses three (3) separate cases decided by the trial court. The crimes that led to Mr. Baker being sentenced as a habitual offender all occurred within a relatively short timeframe.

The incidents relevant to this appeal all occurred in the Sixth Judicial District Court for Campbell County, Wyoming, which is in the City of Gillette, State of Wyoming. Mr. Baker was charged in docket number 2019-CR-0008652 with *Burglary*, a felony, in violation of Wyoming State Statute Annotated §6-3-301(a) in October 2018.

In February 2019, Mr. Baker, while on bond in docket number 2019-CR-0008652, was charged in docket number 2019-CR-0008702 with *Burglary*, a felony, in violation of Wyoming State Statute Annotated §6-3-301(a). Mr. Baker entered into a Plea Agreement in both docket number 2019-CR-0008652 *Burglary*, and in docket number 2019-CR-0008702 *Burglary*. Mr. Baker was sentenced in each docket to a term of imprisonment for not less than three (3) and not more than five (5) years' incarceration suspended for a period of probation of four (4) years. These sentences were ordered to be concurrent with each other.

In August 2020 in docket number 2020-CR-0009456, Mr. Baker was charged with the crime of *Identity Theft*, a felony, in violation of Wyoming State Statute Annotated §6-3-901.

Mr. Baker was then charged in October 2020 with *Aggravated Assault*, a felony, in violation of Wyoming State Statute Annotated §6-2-502(a)(i)(b), in docket number 2020-CR-0009458. This charge appeared to satisfy the requirements for the State of Wyoming to seek the *Habitual Criminal* sentencing enhancement. This enhancement is defined in Wyoming State Statute §6-10-201, as:

6-10-201. Habitual criminal defined; penalties.

(a) A person is an habitual criminal if:

- (i) He is convicted of a violent felony; and**
- (ii) He has been convicted of a felony on two (2) or more previous charges separately brought and tried which arose out of separate occurrences in this state or elsewhere.**

(b) An habitual criminal shall be punished by imprisonment for:

(i) Not less than ten (10) years nor more than fifty (50) years, if he has two (2) previous convictions;

(ii) Life, if he has three (3) or more previous convictions for offenses committed after the person reached the age of eighteen (18) years of age.

Wyoming State Statute Annotated §6-10-201 (2022 Lexis Edition).

The basis of the *Habitual Offender* enhancement for Mr. Baker was his conviction of the crime of *Burglary* in docket number 2019-CR-0008652, his conviction for *Burglary* in docket number 2019-CR-0008702, and his *Aggravated Assault* charge in docket number 2020-CR-0009458. These charges appear to meet the statutory requirements for the *Habitual Criminal* enhancement for sentencing purposes, which carries a potential sentencing enhancement of not less than ten (10) years and not more than fifty (50) years of incarceration. *See*, Wyoming State Statute Annotated §6-10-201(a)(b)(i).

The facts of the burglaries that Mr. Baker pled guilty to are not relevant to this *Petition*, as Mr. Baker did not appeal the underlying convictions. Mr. Baker challenges the revocations in those dockets only to the extent that should his conviction in docket number 2020-CR-0009458 be reversed, so too must the probation revocations in docket numbers 2019-CR-0008652 and 2019-CR-0008702, as the basis of those revocations is the conviction for *Aggravated Assault* charged in docket number 2020-CR-0009458.

The charge of *Aggravated Assault* stemmed from an accusation that Mr. Baker attempted to cause serious bodily injury to Mr. Jesse Heppner while the two of them were at the *Hole in the Wall* coffee shop in Gillette, Wyoming. Detective Eric Small, who responded to a call from an employee of the coffee shop, observed video surveillance footage that appeared to show Mr.

Baker driving a silver SUV near the coffee shop's drive-up window. Approximately one minute later, Mr. Heppner walked out of the coffee shop to his vehicle. Mr. Baker then parked his vehicle and got out, walking toward Mr. Heppner's vehicle. Mr. Heppner also got out of his vehicle and an altercation immediately ensued between the two. Mr. Baker is seen swinging a long object at Mr. Heppner several times. The altercation continued until Mikayla Plush, an employee of the coffee, shop came out of the building and said something to the two. At that point, the fight ended, and Mr. Baker left the area. Detective Small also stated in his *Affidavit of Probable Cause* that there was obviously a conversation taking place between Mr. Baker and Mr. Heppner. Although the long object wielded by Mr. Baker was described as a crowbar, no weapon was ever found. At trial, Mr. Heppner admitted that he knew he was going to fight with Mr. Baker, and he got out of his vehicle with a Taser. Mr. Heppner further testified that the object Mr. Baker hit him with was not metal.

As a result of this altercation, Mr. Baker was arrested and charged with one count of *Aggravated Assault*, a felony, in violation of Wyoming State Statute Annotated §6-2-502(a)(i)(b), which is defined as follows:

6-2-502. Aggravated assault and battery; female genital mutilation; penalty.

(a) A person is guilty of aggravated assault and battery if he engages in any of the following:

(i) Causes or attempts to cause serious bodily injury to another intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(b) Aggravated assault and battery is a felony punishable by imprisonment:

(i) For not more than ten (10) years for violations of paragraphs (a)(i) through (iv) of this section;

Wyoming State Statute Annotated §6-2-502(a)(i)(b) (LexisNexis 2020 Edition).

The *Felony Information* was later amended to add the Habitual Offender enhancement, in accordance with Wyoming State Statute Annotated § 6-10-201(a)(b)(i). Despite plea negotiations that included removing the Habitual Offender enhancement, Mr. Baker decided to exercise his right to trial. Following a trial by jury, Mr. Baker was convicted as charged. Mr. Baker was ultimately sentenced to a term of not less than thirty (30) years and not more than forty-five (45) years' incarceration. The underlying sentences in docket numbers 2019-CR-0008652 and 2019-CR-0008702 were imposed, as the State of Wyoming moved to revoke probation on those charges because of Mr. Baker's *Aggravated Assault* charge. The *Mittimus* is unclear and contradicts the oral pronouncement of sentence regarding which sentence is consecutive.

The *Notice of Appeal* was filed on October 26, 2021 and was decided by the Wyoming Supreme Court with its *Mandate Affirming Judgment* on September 26, 2022. In the Sixth Judicial District Court for Campbell Wyoming's docket number 2019-CR-0008702, the *Notice of Appeal* was filed on November 18, 2021 and was decided by the Wyoming Supreme Court with its *Mandate Affirming Judgment* on September 26, 2022. Finally, in the Sixth Judicial District Court for Campbell Wyoming's docket number 2020-CR-0009458, the *Notice of Appeal* was filed on November 18, 2021 and was decided by the Wyoming Supreme Court with its *Mandate Affirming Judgment* on September 26, 2022. All three *Notice of Appeal*'s were filed pursuant to final orders and all were timely filed. Following the *Mandate Affirming Judgment* issued by the Wyoming Supreme Court, this *Petition for Writ of Certiorari* is being filed and is timely filed. Therefore, jurisdiction is vested in this Court.

REASONS FOR GRANTING THE PETITION

The Wyoming Supreme Court issued its *Mandate Affirming Judgment* against Mr. Baker and misapplied the law. The Wyoming Supreme Court is the highest Court in the State of Wyoming and there are no further appeal options available in the State courts. Therefore, the United States Supreme Court is the Court of final jurisdiction and the interests of justice require reversal of the conviction in this case.

Mr. Baker was essentially given a *de facto* life sentence as a result of a sentencing enhancement, which should not have even been applied to this case. There was not substantial or even mild injury to the victim in this case and there was no “indifference to the value of human life.”

Mr. Baker’s constitutional rights are at stake here. He was denied a fair trial and was denied the ability to adequately defend himself against the use of the improper cell phone video. In the Wyoming Supreme Court’s decision, the court relied on the belief that law enforcement did not act in bad faith, but totally ignored the fact that law enforcement had access to the original video for months before it was destroyed and law enforcement did not take proactive or appropriate steps to preserve that video. That was through no fault of Mr. Baker’s and Mr. Baker certainly made it known very early in the proceedings that he demanded the original video and objected to the cell phone recording of the original, as the audio was distorted and, had the original audio recording been played for the jury, a much different picture of the event would have been created. The jury would have seen that it was a mutual combat situation, and not an assault as alleged by the state. Both Mr. Baker and Mr. Heppner were actively engaged in the altercation, and both individuals were dedicated to making physical contact with the other.