NO. 31867-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND JORDAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Robert Lawrence-Berry, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to instruct the jury on self-defense.

2. The trial court violated appellant's constitutional right to present a defense.

Issue Pertaining to Assignments of Error

An accused person is entitled to have the jury instructed regarding the lawful use of force when there is any evidence the accused had a reasonable belief he was about to be injured and the force used was no more than necessary. Here, appellant awoke to find himself being held down by paramedics and firefighters who injected a sedative without his consent and strapped him to a backboard. Appellant yelled at them to get off, swore at them, and resisted by swinging his fists, kicking, and trying to bite. No one was injured except appellant. Did the court err in refusing to instruct the jury on self-defense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Yakima County prosecutor's office charged appellant Raymond Jordan with five counts of third-degree assault. CP 5-6. The jury found him guilty, and the court imposed a standard range sentence. CP 35-39, 41-42. Notice of appeal was timely filed. CP 49.

2. Substantive Facts

Jordan was found lying face down in the handicapped stall of the men's bathroom in the Yakima public library. RP 79-80. In the ensuing 15 minutes, Jordan was pinched, pushed, held to the ground, forcibly drugged, kneed in the chin, punched twice in the face, and strapped to a backboard. RP 53-55, 80-81, 85, 91-92, 112. He spent the night in the hospital. RP 68. No one else was injured. RP 172, 181-82.

Library staff called paramedics, who initially found Jordan unresponsive. RP 79-80. When they rolled him over to check his airway, Jordan opened his eyes and began swinging and kicking at the paramedics. RP 80-81, 110-11. They pushed him to the floor to protect themselves from being hit, but did not back away. RP 81.

Jordan did not respond to their attempts at communication other than to say "Fuck off" and "Get the fuck off me." RP 82-83. His apparent goal was to get away and decline the medical treatment they were attempting to provide. RP 84. The paramedics testified Jordan did not want to be strapped to the backboard and wanted them to "stop doing things to him." RP 97, RP 128.

Nevertheless, the paramedics, and the firefighters who arrived shortly thereafter, determined to hold Jordan down to provide medical assistance. RP 98-99, 161. Because he refused to answer their questions,

they decided to substitute their judgment for his. RP 98-99. One of the paramedics testified Jordan was throwing punches. RP 112. In response, the paramedic forcefully hit him to push him back to the ground and jumped with his knees onto Jordan's legs. RP 111-12, 125. The paramedics, with help from firefighters, held Jordan down and administered an injection of Versed, a sedative. RP 84-85. Jordan did not stop swinging, kicking, and swearing at them. RP 84.

The paramedics expected Jordan would pass out within 10 to 15 minutes. RP 86, 94. One of the paramedics testified that, if they had backed off when Jordan woke up, it was possible there would have been no "combat." RP 97.

While they were holding Jordan down, firefighter Travis Dexter testified he saw Jordan try to bite his partner Tim Gese. RP 135. Gese testified Jordan tried several times to bite him, and on one occasion actually made contact with his teeth, but Gese pulled away quickly enough to avoid a skin puncture. RP 149-50. Gese testified Jordan said nothing except swearing and incoherent rambling. RP 150. From what Dexter saw, Jordan did not want their help and was trying to get away. RP 140.

After the injection, Yakima police officers began to arrive. RP 86. Dexter testified the officers were between Jordan and the door, preventing him from leaving. RP 141. The first officer to arrive immediately placed

Jordan in handcuffs. RP 164. However, with Jordan's hands behind his back, he could not be strapped to the backboard, so at the paramedics' request, the handcuffs were removed. RP 87. When the handcuffs were removed, Jordan again began to be "combative." RP 87.

Officer Grow replaced one of the firefighters holding down Jordan's left arm. RP 175-76. He testified Jordan pinched and twisted his arm and then tried to bite both him and Officer Grant. RP 176.

By the time Officer Grant arrived, there were two police officers, three firefighters, and two paramedics in the stall with Jordan. RP 51. Jordan was initially calm, but, Grant testified, he became combative when the paramedics tried to roll him onto a backboard. RP 52. He saw Jordan struggling, trying to push the firefighters and police officers away. RP 52.

Grant then put his knee on Jordan's chest and held Jordan's right arm while Officer Grow held his left arm. RP 52, 59. Grant did not know the paramedics had already administered a sedative. RP 66. Based on the smell and the vomit, Grant believed Jordan had been drinking. RP 61.

Grant claimed Jordan grabbed his radio microphone, but he, Grant, was able to wrest it out of Jordan's grip. RP 53. Then Grant claimed Jordan looked at his knee and leaned forward with an open mouth as if to bite him. RP 53. Grant testified this initial attempt was weak. RP 66. Grant told Jordan not to try to bite him again and also kneed him in the chin. RP 53.

Grant claimed then, Jordan lunged forward with his mouth open and would have bitten him if he had not moved. RP 54. This time, Grant responded by punching Jordan in the face, twice. RP 54. Grant testified this "took the fight out of him." RP 55.

The jury was instructed it could consider the effect of voluntary intoxication on the ability to form intent. CP 30. But the court refused to instruct the jury on involuntary intoxication because it determined there was no evidence the Versed caused Jordan's conduct. RP 205-06. The court also refused Jordan's proposed jury instruction on the lawful use of force in self-defense. RP 201; CP 8.

Jordan was convicted of assaulting the two paramedics, one of the firefighters, and Officers Grant and Grow. CP 5-6, 35-39.

C. ARGUMENT

JORDAN'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE COURT DENIED HIS REQUEST FOR JURY INSTRUCTIONS ON SELF-DEFENSE.

A defendant "'is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error.'" State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (quoting State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). For a self-defense claim, the threshold burden of production is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The evidence

does not even need to be sufficient to create a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). To raise a claim of self-defense, there need only be some evidence of self-defense from any source. Id. at 500.

The trial court must view the evidence in the light most favorable to the defendant. State v. George, 161 Wn. App. 86, 95-96, 249 P.3d 202 (2011). A request for self-defense instructions should always be granted unless "the defense theory is completely unsupported by evidence." Id. at 100. "It is not the trial court's prerogative to resolve the question of whether a defendant in fact acted in self- defense." Id. "Once any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions 'even if the judge might deem the evidence inadequate to support such a view of the case were he the trier of fact.'" State v. Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982) (quoting Allen v. Hart, 32 Wn.2d 173, 176, 201 P.2d 145 (1948)).

The standard of review for the denial of self-defense instructions depends on the trial court's reason for the denial. George, 161 Wn. App. at 94-95 (citing State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002)). The abuse of discretion standard applies when the trial court refused to give the instruction because it found no evidence supporting the defendant's

subjective belief of imminent danger. Id. The standard of review is de novo when the trial court determined, as a matter of law, no reasonable person would have acted as the defendant acted under the circumstances. Id.

Here, the trial court ruled as follows:

> I agree with the State on this point. I think the right to refuse does not include the right to use physical force, at least the hitting, the biting and kicking, and it's obviously also a limited right to refuse. I think the EMT probably testified accurately that when a person's mental state is such that they have an obligation, a legal obligation, to substitute their own judgment for a person who isn't able to protect themselves with their decisions, so I agree with the State. The instruction will not be given.

RP 201. Because the court essentially concluded Jordan had no right to defend himself against unwanted medical care as a matter of law, review is de novo. George, 161 Wn. App. at 94-95.

a. The Court Erred in Ruling Jordan Had No Right to Defend Himself Against Unwanted Medical Treatment.

Jordan was entitled to use reasonable force to defend himself against unwanted medical treatment because such treatment meets the definition of an assault. State v. Kyllo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009). Use of force is lawful "Whenever used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary." RCW 9A.16.020. A person is entitled to use non-lethal force to defend himself against "any assault."

Kyllo, 166 Wn.2d at 866. An assault is an offense against a person defined as an intentional touching or striking that is harmful or offensive regardless of whether actual injury results. State v. Tyler, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007). Jordan was forcibly held down and given an injection without his consent. RP 84-85. A reasonable person could find this to be harmful or offensive contact and, therefore, an assault.

The court's ruling may reflect a belief that because the paramedics' conduct was reasonable, self-defense was not available. Any such argument should be rejected under State v. Graves, 97 Wn. App. 55, 62-63, 982 P.2d 627 (1999). In that case, the State argued there was insufficient evidence to instruct on self-defense because the defendant's father used reasonable force to discipline him. Id. at 62. But the court rejected this argument, declaring, "[T]he question of whether the father's own use of force was reasonable is a completely separate inquiry from whether the child was initially entitled to raise the claim of self-defense." Id. at 62-63. By analogy to Graves, whether the paramedics and firefighters were acting reasonably in their attempt to provide medical care is an entirely separate question from whether Jordan presented sufficient evidence he was acting in self-defense.

A Florida court recently concluded self-defense instructions should have been given when the defendant was trying to leave the hospital and refuse unwanted care. Spurgeon v. State, 114 So.3d 1042, 1047 (Fla. Dist.

Ct. App. 2013). Spurgeon was charged with assaulting a hospital security guard. Id. at 1044. When Spurgeon tried to leave the hospital, nurses tried to stop him because he was on a medical hold. Id. He became "verbally abusive and physically aggressive," so the nurses called security for assistance. Id. A security guard grabbed Spurgeon, carried him to a bed, and held his shoulders down. Id. In response, Spurgeon spat on her. Id.

On appeal, Spurgeon argued the trial court erred in denying his request for jury instructions on justifiable use of non-deadly force. Id. at 1047. The court found Spurgeon "repeatedly expressed a desire to leave the hospital," and that much of his agitation was due to his being prevented from doing so. Id. The court concluded, "He spat on [the security officer] only after she placed her hands on him without his consent and physically restrained him. This evidence was sufficient to warrant an instruction on self-defense and failing to give it was reversible error." Id. Given the potential concerns for, and potentially devastating results of, drug interactions and allergic reactions, this Court should follow the reasoning of the Spurgeon court and hold that a person may use force to resist unwanted medical attention.

b. Jordan Presented Sufficient Evidence He Subjectively Feared Imminent Assault and His Limited Use of Force Was Reasonable.

Self-defense instructions are warranted when there is evidence of a "'subjective, reasonable belief of imminent harm from the victim.'" State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)). The jury need not find actual imminent harm. Rodriguez, 121 Wn. App. at 185. Jordan's reaction made clear he subjectively believed he was in danger of imminent assault and wanted the various responders to stop engaging in what he deemed to be offensive contact. RP 97, 128, 140. To the extent the trial court's ruling reflects a belief Jordan did not present evidence of a subjective belief he would be harmed, that ruling is an abuse of the court's discretion because it is manifestly unreasonable in light of the evidence. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (court abuses its discretion when decision is manifestly unreasonable or based on untenable grounds).

The degree of force permitted in self-defense is limited to "'what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.'" State v. McCreven, 170 Wn. App. 444, 462-63, 284 P.3d 793 (2012) (quoting State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997)). The jury should put itself in the accused's shoes and consider all the facts and circumstances from his perspective. Rodriguez,

121 Wn. App. at 185 (quoting LeFaber, 128 Wn.2d at 900). To the extent the court's ruling can also be construed as ruling that Jordan's response was more than reasonably necessary, this ruling should also be reviewed de novo and reversed. See George, 161 Wn. App. at 95 (whether defendant meets reasonableness standard is reviewed de novo). Jordan met the low standard of presenting some evidence. Id.

No Washington case has determined the degree of force a person may use in refusing unwanted medical attention. See State v. Koch, 157 Wn. App. 20, 35, 237 P.3d 287 (2010) ("[T]here is no settled law addressing unwanted health care forced by one individual on another. There is, however, settled law holding that unwanted contact constitutes assault.")).

Jordan repeatedly expressed a desire to be left alone. RP 82-83. It was clear to the paramedics and the firefighters that he did not want to be strapped to the backboard and wanted them to stop doing things to him. RP 97. Nevertheless, they held him down and administered an injection without his consent. RP 84-85. Jordan's offensive conduct occurred only when paramedics and firefighters refused to back off and then physically restrained him. RP 81-87. One of the paramedics agreed it was possible that, if they had not gone into the bathroom stall with Jordan, there would have been no combat. RP 97.

In response to this persistent assault, Jordan did not injure anyone. RP 172, 181-82. His level of force was insufficient even to achieve his goal, which was simply to be let alone. RP 82, 140, 178.

Although a person is not entitled to use all the force that he believes necessary to repel an attack, he may use the degree of force necessary to protect himself that a reasonably prudent person would have used under the conditions appearing to him at that time. State v. Dunning, 8 Wn. App. 340, 342, 506 P.2d 321 (1973) (citing State v. Miller, 141 Wash. 104, 250 P. 645 (1926), State v. Tyree, 143 Wash. 313, 255 P. 382 (1927), State v. Hill, 76 Wn.2d 557, 458 P.2d 171 (1969)). In Dunning, the 62-year-old defendant was struck by a 35-year-old man. Dunning, 8 Wn. App. at 341. In response, he stabbed the man with a letter opener that happened to be nearby. Id. He testified he feared a second punch, perhaps to his stomach, would have been fatal because he had recently been hospitalized for serious abdominal operations. Id. at 341-42.

The trial court gave an instruction on excessive force that focused the jury's attention on the objective facts of the situation, rather than on the subjective facts that Dunning perceived. Id. at 342-43. The appellate court disapproved the instruction and remanded the case. Id. at 343. In doing so, the court implicitly recognized a person may respond with greater force than

he has already suffered, if he does so with the purpose of preventing further, more serious harm to himself and his actions are reasonable.

Force much more serious than Jordan's can be a reasonable response when a person fears imminent injury. State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194, 1196 (1996) ("A defendant's use of force against another, to a degree that ordinarily would constitute a second degree assault, is justifiable when the defendant is about to be injured and when the force is not more than is necessary."). In trying to force the paramedics and firefighters to back off, Jordan swung his arms and legs around at anyone within reach. RP 80-81, 110-11. He did not pursue anyone or try to assault anyone not directly involved in holding him down or preventing him from leaving. To avoid being injured, the paramedics and firefighters only had to do as he asked and get off him. But they did not respond to his verbal requests that they get off him. Nor did they respond to his initial physical resistance. A reasonable juror could have found his limited physical response was objectively reasonable.

Jordan met the low threshold standard of producing some evidence that his response were reasonable. Under these facts, the trial court erred in refusing to instruct the jury on the lawful use of force. George, 161 Wn. App. at 97. Reversal of the convictions on counts I, II, and III is the appropriate remedy. See Janes, 121 Wn.2d at 242 (remanding to trial court

to reconsider whether evidence existed to justify a self-defense instruction and, if so, order a new trial); George, 161 Wn. App. at 101 (reversible error for trial court to refuse to instruct jury on self-defense).

D. CONCLUSION

Jordan's convictions for assault in counts I, II, and III should be reversed because the trial court erred in refusing his proposed instructions on lawful use of force.

DATED this 21st day of January, 2014.

Respectfully submitted,

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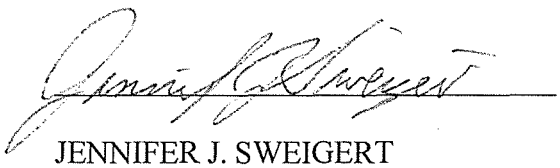

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State v. Raymond Jordan

No. 31867-2-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 21st day of January, 2014, I caused a true and correct copy of the **Motion to Reconsider** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 21st day of January, 2014.

X Patrick Mayovsky