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 72892-0 NO. ~~31867-2-III~~

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-Berrey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

JORDAN WAS ENTITLED TO INSTRUCTIONS ON SELF-DEFENSE BECAUSE THE EVIDENCE SHOWS HE TRIED TO PREVENT UNWANTED CONTACT.

Any reasonable person, upon hearing the phrase "get the fuck off" would understand that the speaker does not desire any further physical contact. It is reasonable to infer the speaker considers that contact offensive. Jordan was being subjected to first medical care and then physical restraint, both of which were against his will, as indicated by both his physical resistance and his use of the phrase "get the fuck off." RP 82-83. "[U]nwanted contact, even if helpful in intent, can constitute assault." State v. Koch, 157 Wn. App. 20, 34-35, 237 P.3d 287 (2010) (citing State v. Elmi, 166 Wn.2d 209, 215–16, 207 P.3d 439 (2009)). There is not a shred of evidence in the record that Jordan welcomed or even tolerated the intervention by emergency medical professionals. The evidence is unequivocal that he wanted them to stop and leave him alone.

A person is entitled to use force in defense to prevent any assault, regardless of whether the assault actually threatens great bodily harm. State v. Kyllo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009). A requested jury instruction on self-defense must be given unless "the defense theory is completely unsupported by evidence." State v. George, 161 Wn. App. 86, 100, 249 P.3d 202 (2011). The burden is one of production, not persuasion,

and the threshold burden is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Jordan met his burden to show some evidence he acted reasonably in self-defense.

The State argues that, in order to avail oneself of a self-defense instruction at trial, one must have made a "verbal indication" that the contact is unwanted. Brief of Respondent at 6, 8. This argument should be rejected for two reasons. First, Jordan did make a "verbal indication" by saying, "get the fuck off." RP 82-83. Obviously, to say "he was fine and he did not need the assistance of the EMT's, the firemen, and the police" or "no thank you I do not wish to be treated at this time" as the State suggests, would have been more polite. Brief of Respondent at 8, 22. But politeness is not a pre-requisite for jury instructions on self-defense. All that is required to warrant instructions on self-defense is "some evidence." State v. Miller, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997).

The mere fact that Jordan was unconscious moments before does not, as a matter of law, negate his manifested intent to avoid unwanted contact. A jury would certainly have the right to draw its own conclusions from the evidence. But Jordan met the low threshold burden of production to allow the jury to make that determination.

The State cites RCW 70.96A.120[1] and argues the medical professionals had a duty to take Jordan into protective custody because he appeared incapacitated by alcohol in a public place. Brief of Respondent at 11-13. But the reasonableness of the medical professionals' conduct is not the question before this Court. Once self-defense is raised, the question is whether the defendant's act was reasonable under the circumstances as they appeared to him. State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004). Whether the original use of force was also reasonable is "a completely separate inquiry from whether the [defender] was initially entitled to raise the claim of self-defense." State v. Graves, 97 Wn. App. 55, 62-63, 982 P.2d 627 (1999) (emphasis added). The trial court's reliance on this rationale is an error of law that requires reversal even under an abuse-of-discretion standard of review. See State v. Corona, 164 Wn. App. 76, 78-79, 261 P.3d 680 (2011) (trial court abuses discretion when it "applies the wrong legal standard or bases its ruling on an erroneous view of the law").

The State may be correct that a negligence action would arise if Jordan were not cared for under the circumstances. Brief of Respondent at 12-15. But this merely means that there is more than one way to view the

[1] It bears noting that RCW 70.96A.120 requires that the peace officer detaining a person "shall make every reasonable effort to protect his or her health and safety." RCW 70.96A.120. It is unclear what part of that mandate involves punching a person twice in the face.

evidence in this case. It does not mean Jordan could be prohibited from arguing his theory of the case.

The State concedes there was some testimony that appellant's actions indicated he was trying to refuse the medical treatment that was being administered to him. Brief of Respondent at 17. That is all that is required to meet his burden of production. See Miller, 89 Wn. App. at 367-68 (Self defense instructions required when a defendant produces "some evidence" demonstrating self-defense).

The State suggests a person should have no right, as a matter of law, to use force in defending against unwanted medical treatment, by analogy to the absence of a right to physically resist arrest. Brief of Respondent at 22-24. Whether, as a matter of policy, that would be a good rule is a question of law, not fact, and it would be a new rule that did not exist at the time of Jordan's offense. A jury might well agree with the State that Jordan did not actually fear the medical treatment or that his response was not reasonable. But it was not the trial court's prerogative to decide those questions itself by refusing the instruction. George, 161 Wn. App. at 95-96.

When a person is being administered medical care, struggles against the provider, and yells, "get the fuck off," a reasonable inference is that the person does not wish to receive the care or wishes to be left alone. That reasonable inference was sufficient to require instructions on self-defense.

The trial court's failure to view these facts in the light most favorable to Jordan and its decision to substitute its judgment for the jury's were also errors of law that constitute an abuse of discretion. See Corona, 164 Wn. App. at 78-79. The failure to instruct the jury on the defense theory of the case requires reversal of Jordan's conviction. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant and in the Answer to the State's Motion on the Merits, Jordan requests this Court reverse his convictions on counts I, II, and III.

DATED this 5th day of November, 2014.

Respectfully submitted,

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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 5th day of November, 2014, I caused a true and correct copy of the **Reply Brief of Appellant** 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.

David Trefry
David.Trefry@co.yakima.wa.us

Raymond Jordan
DOC No. 270012
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 5th day of November, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 05, 2014 - 3:04 PM

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Reply Brief of Appellant

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