FILED
October 6, 2014
Court of Appeals
Division III
State of Washington

NO. 31867-2-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND EDWARD JORDAN,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES .... ii-iii

I. ASSIGNMENTS OF ERROR 1

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR........... 1

B. ANSWERS TO ASSIGNMENTS OF ERROR............................. 1

II. STATEMENT OF THE CASE... 1

III. ARGUMENT 1

RESPONSE TO ALLEGATION... 1

IV. CONCLUSION 24

TABLE OF AUTHORITIES

PAGE

Cases

Boeing Co. v. Key, 101 Wn.App. 629 5 P.3d 16 (2000) 15

Cummins v. Lewis County, 156 Wash.2d 844,
133 P.3d 458 (2006) 12-13

Hancoop v. State, 111 Wn.2d 182, 759 P.2d 1188 (1988) 12

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995) 1

State v. Aleshire, 89 Wn.2d 67, 568 P.2d 799 (1977) 16

State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (Wash. 2000) 22-23

State v. Brown, 36 Wn.App. 549, 676 P.2d 525 (1984) 15-16

State v. Callahan, 87 Wn.App. 925, 943 P.2d 676 (1997)...................... 19

State ex rel. Carrol v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 16, 25

State v. Carter, 15 Wash.121, 45 P.745 (1896)....................................... 19

State v. Churchill, 52 Wash.210, 100 P.309 (1909) 19

State v. Gibson, 32 Wn.App. 217, 646 P.2d 786 (1982) 16

State v. Graves, 97 Wn.App. 55, 982 P.2d 627 (1999)....................... 5, 20

State v. Koch, 157 Wn.App. 20, 237 P.3d 287 (2010) 22

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)............................... 5

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006).............................. 2

State v. Miller, 89 Wn.App. 364, 949 P.2d 821 (Div. 3 1997)............... 19

TABLE OF AUTHORITIES (continued)

PAGE

State v. Picard, 90 Wn.App. 890, 954 P.2d 336,
review denied, 136 Wn.2d 1021 (1998).. 16

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002)................................ 2, 5

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994)............................ 16

State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006) 2

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) 2

State v. Werner, 170 Wn.2d 333, 241 P.3d 410 (2010)....................... 1, 19

Weaver v. Spokane County, 168 Wn.App. 127,
275 P.3d 1184 (Wash.App. Div. 3 2012).. 12

Additional Cases

Florida, Spurgeon v. State, 114 So.3d 1047 (Fla.Dist.Ct App. 2013) 21-22

Rules and Statutes

RAP 10.3(b) 1
RCW 9.A.16.020 18
RCW 46.61.266 15
RCW 46.61.790 15
RCW 70.96A.120 .... 11, 15
RCW 71.05.150(4) 13
RCW 71.05.153(2) 14
RCW 71.05.153(2)(a) 13

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The trial court erred when it denied defendant's request that the self-defense instruction be given.
2. The court violated the Appellant's constitutional right to present a defense.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court properly denied defendant's request for the a self-defense instruction.
2. The court did not deny the Appellant's constitutional right to present a defense.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ALLEGATION.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010), *citing* State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). A defendant is entitled to

an instruction on self-defense if there is some evidence demonstrating self-defense. Id., *citing* State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). An appellate court reviews jury instructions *de novo* as to whether they adequately state the applicable law, in the context of the jury instructions as a whole. Id.; State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Jordan interprets the trial court's ruling as "essentially concluding Jordan had no right to defend himself…" and therefore the standard of review would be de novo not abuse of discretion. State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002) sets for the test;

> The standard of review when the trial court has refused to instruct the jury on self-defense depends on why the court refused the instruction. Walker, 136 Wn.2d at 771-72, 966 P.2d 883. If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. **If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo**. Walker, 136 Wn.2d at 771-72, 966 P.2d 883. In

> this case, the trial court refused to consider Read's self-defense claim for both objective and subjective reasons. We will first address whether the trial court abused its discretion in finding Read did not produce sufficient evidence to support his claim he subjectively believed in good faith he was in imminent danger of great bodily harm.

While the State is certain that under either standard the actions of the trial court were correct Appellant has ignored the operative section of the court's ruling.

> This is the court's ruling;
>
> THE COURT: Okay. **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. (Emphasis mine.)

This court must therefore look to the State's argument to determine what the basis of the court's ruling was. It is clear from a complete reading of the State's argument that the State believed that was insufficient evidence to support the claim of self-defense. The State's argument in part:

> "To raise a claim of self defense the defendant must first offer credible evidence tending to prove self defense…. Your Honor, that doesn't mean the defendant

> has to get up and testify it was in self defense. What the law states is there need only be some evidence admitted in the case from whatever source which tends to prove the defendant acted in self defense. Now -- and that's -- that's the tends to prove, and I think we -- that's where the State has an issue, which tends to prove that the defendant acted in self defense. And we'll get some more -- a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that the belief was objectively reasonable. … I mean, if the jury's thinking, well, you have the right to refuse and that means that you can punch somebody to refuse, that's not reasonable and that is not the law and none of the evidence that has come out so far in the State's position as elicited by defense and we were all here listening to the cross-examination, it was, well, he had the right to refuse. (RP 200-1)

The State does discuss "reasonable" in its argument however it is clear that the basis for objecting is that there was insufficient evidence:

> Now -- and then of course is what a reasonable prudent person would find necessary under the conditions as they appeared to the defendant and the fact finder must stand in the shoes of the defendant and determine whether the individual defendant has a reasonable subjective fear of imminent harm and I think that's where Mr. Dold is talking about. It's kind of a mix. The jury will stand in a subjective position but then you use sort of a reasonable standard, well, was it reasonable for them to believe that there was imminent harm.
>
> … mean, if the jury's thinking, well, you have the right to refuse and that means that you can punch somebody to refuse, that's not reasonable and that is not the law and none of the evidence that has come out so far in the State's position as elicited by defense and we were all here listening to the cross-examination, it was, well, he had the right to refuse.

The State does believe that even if this court were to use the de novo standard set forth in Read, supra, the actions of the trial court will still pass muster.

Appellant states "Jordan was entitled to use reasonable force to defend himself against unwanted medical treatment because such treatment meets the definition of an assault." (Appellant's brief at 7.) He then cites to State v. Kyllo, 166 Wn.2d 856, **866**,215 P.3d 177 (2009) (Emphasis mine.) not only does Kyllo at 866 not indicated that unwanted medical treatment is equal to assault, nowhere in the entirety of Kyllo are the words "medical" or "treatment" even used by the court.

State v. Graves, 97 Wn.App. 55, 982 P.2d 627 (1999) cited by Appellant is factually distinguishable; there a father and a son had an argument about household chores. The defendant was the son who was charged with assaulting his father. Graves was completely competent and involved in an altercation with his parent. Not an unknown male passed out and unresponsive, in a puddle of vomit, in a toilet stall at the public library. Graves was not unresponsive to questions put to him by fully uniformed emergency medical personnel attempting to render aid.

The State is at a total loss as to how Jordan can state that "his reaction made it clear that 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. (Appellant's brief at 10) There is not a

single word in the record of this case that could by any stretch of one's imagination support this claim. The State can only guess Mr. Jordan "made it clear" when he yelled "fuck you and get the fuck off" or perhaps it was when he was attempting to bite the first responses. The State is also at a loss as to how any person at that scene having observed the state of Jordan in the toilet stall in the puddle of vomit could or would "interpret" fuck you and get the fuck off to mean that Appellant "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."

Jordan maintains on appeal that he was entitled to a self-defense instruction based on his theory that he had the right to act in self-defense against the alleged unwanted medical help. The most problematic part of this allegation is that at no time, when he was first contacted, being treated and held down in the restroom at the public library after having been found unresponsive in a toilet stall or at trial did the defendant/appellant make any verbal indication that his violent attack on the medical, fire and police personnel, who were all in uniform and who identified themselves as EMT's, firemen or police officers, was because he did not want to be treated. The only indication of this theory in the record was through questions on cross-examination of the State's witnesses. RP 60, 74-5, 97, 102-3, The phrasing changed between witnesses but the following was a

typical exchange between Appellant's trial counsel and the State's witnesses Paramedic Daniel Taylor;

Q He pushed away from you and tried to prevent you from doing things to him that he didn't want done, correct?
A Correct.
Q He done that with you earlier. He tried to keep you from doing things to him. He didn't want those things done.
A He was combative.
Q I understand he's combative and I understand you'll looking over here but in effect he was trying to prevent you from doing things to him that he did not want done.
A He was combative. RP 97
…
Q Okay. Did you not tell me he wasn't able to answer any of your questions appropriately?
A That's correct. He didn't answer any of my questions with an appropriate response.
Q Okay, and that based on the dispatch you had to assume the worst case scenario?
A Correct.
Q You couldn't get the 02 monitor on him so you didn't know what his situation was.
A That's correct.
Q And that he would not permit you to get these things done?
A That's correct.
Q You said all he told you was fuck off and get off me?
A That's correct, sir.
Q Okay. Is that an indication that he doesn't want treatment?
A **It's not an appropriate response to me to my questions.**
Q Did that communicate to you that he did not want treatment?
A **No**.
Q Do you believe that he wanted your treatment?
A **I believed he needed treatment**.
Q You substituted your judgment for his?
A That's correct.
Q Okay. **You're allowed to do that if a person is not capable of making intelligent decisions for themselves**?
A **Correct**.
…

Q And a person in that situation shouldn't be trusted to make decisions as to what's right for them.
A Initially, no. Not when they're not able to answer the questions. RP 98-100
(Emphasis mine.)

Officer Grant responded to a different form of this same line of questioning;

> Q Okay. Now, when you say pushing toward, he was trying to get out of their grasp, right?
> A They were trying to render aid and, yes, he was struggling against them.
> Q He was struggling against their trying to give him aid. He did -- it should have been apparent to you that he didn't want that aid, right?
> A At that point I didn't think that was his choice.
> Q Why not?
> A Because he was unresponsive in a public place.
> (Officer Grant RP 60)

As was so accurately stated by the Paramedic Tayloy, Jordan was not capable of making decisions on his own. If he was he would simply have stated that he was fine and he did not need the assistance of the EMT's, the firemen and the police. Instead Appellant had confused speech and then he began to kick, hit and bite all the while the various emergency personnel and police officers, all in uniform, were repeating over and over why they were there, who they were and what they were trying to do.

It seems as if Appellant has forgotten the one most essential piece of unrefuted testimony, he was found in a public library, face down in a

bathroom stall in a pool of vomit in a nonresponsive state. One can only imagine the law suit that would follow if the library had not called for help or if, as suggested by trial counsel, the people who were there to help Appellant would simply have ignored him and walked away;

> Q So had you just stood outside the bathroom stall and let him lay inside breathing, there would have never been any confrontation, any combat between the two of you, is that right?
> A If I never would have made any patient contact?
> Q Had you stood outside the bathroom stall and just watched him on the floor, he was breathing there wouldn't have been combat.
> A Possibly.
> Q It was your touching him that he responded to, correct.
> A Yes, I mean, I was trying to be -- I was doing my job. I was called there for a 911 emergency.

This concern was addressed by the State and it is the State's position that the answer set out below sums up the basis for the court's denial of Appellant's claim that this was self-defense, and why the court was correct in denying the request for the self-defense instruction. This is a portion of the State's questions and the direct testimony of Paramedic Taylor;

> Q Okay. Here's a question and I'd like you to explain to the jury, and this is a lot of work for someone who was sleeping or laying in a toilet, why didn't you just leave him?
> A You know, we get called in for a lot of calls and if a person is not acting like a competent adult would making decision, as a competent adult, I can't just leave him there. He's not able to answer my questions

appropriately with an appropriate response and talk to me like an adult would, it's -- I can't leave someone there like that. It's irresponsible for me to do that. If I would leave him there and something would happen to him, if he would have passed away then obviously I could potentially lose my job because I left him there. So that's why we wanted to take him to the hospital so he could be evaluated, to get him monitored at a hospital instead of leaving him on the scene which he wasn't making decisions or trying to communicate with me as a normal adult would, so –

…

Q What would have done (sic) based on your training and experience if the defendant in this case would have sat up and said, hey, I'm okay, explained what was going on and said, and I don't need any help, thank you.

A I'd just ask if we could check all his vital signs and we have to fill out a refusal form every time we go on a call if we make contact with a patient, just basically saying that they're refusing to go to the hospital with us. It's always in their best interest. We always recommend that they go to a hospital with us and get checked out, especially someone found down and unresponsive in a bathroom. Why are you down on the ground? We don't know, that's why we should take you to the hospital and get you checked out but if they're answering all my questions appropriately, I can't kidnap someone and force them to go to the hospital with me, but I'd like to check all their vital signed, have them sign their refusal form and let them know if anything changes, they can call us right back and we'll come back.

Q Give them information to help make them make a --

A A competent -- or a good decision, a good medical decision.

(RP 88)

The defendant did not take the stand and therefore the testimony of the State's witnesses was and is unrefuted. The State is well aware that a

defendant may assert self-defense and never take the stand, relying on testimony and facts elicited solely from State's witnesses. However there still must be some credible facts, evidence, presented to the court. It is the trial court that must, and did in this case, rule on the sufficiency of those facts.

As the testimony indicates the officers, EMT's and firemen also had a duty to assist this clearly incapacitated person. There are numerous sections of the Revised Code of Washington that set out the duty of officers and other emergency personnel. These laws addresses people who are incapacitated or disabled, such as Mr. Jordan, by some condition or illness. RCW 70.96A.120 provides that:

> "a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective

> custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged
> with a crime."

A failure to act or an alleged failure to act may result in an officer being sued for not assisting an individual who is or may be incapacitated. This court has addressed this issue. In that case the City of Spokane was sued by the estate of a person whom an officer had contacted who was in the officers estimation intoxicated but not incapacitated. Weaver v. Spokane County, 168 Wn.App. 127, 275 P.3d 1184 (Wash.App. Div. 3 2012). This State also recognizes the "Public Duty Doctrine" whereby an individual may maintain a negligence action, if they establish a duty of care that runs from the defendant (Aid personnel) to the plaintiff (Mr. Jordan) Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). And in fact based on the law regarding incapacitated persons it is very possible the Jordan would have been able to maintain such a suit as he would have met one of the exceptions to this doctrine. The public duty doctrine serves "as a framework for courts to use when determining when a governmental entity owes either a statutory or common law duty to a plaintiff suing in negligence." Cummins v. Lewis County, 156 Wash.2d 844, 853, 133 P.3d 458 (2006). In order to establish that the first responders owed a duty, Jordan would have to show that one of four

exceptions to the public duty doctrine applied: (1) legislative intent; (2) a failure to enforce; (3) the rescue doctrine; or (4) a special relationship. See Cummins, 156 Wn.2d at 853 n. 7, 133 P.3d 458. "If one of these exceptions applies, the government will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs." Cummins, 156 Wn.2d at 853, 133 P.3d 458. There is little doubt that these first responders had an obligation, a duty to care for Jordan and they said so in their testimony and gave consistent and valid reasons for their actions. In contrast to the assaultive, irrational and out of control behavior of Jordan which further demonstrated to these first responders that he was in need of assistance and as an incapacitated person not able to may decisions for himself.

An officer may also take into custody a person disabled by a mental illness. A peace officer may take into custody a person whom a designated mental health professional believes, as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, for an emergency evaluation. RCW 71.05.150(4); RCW 71.05.153(2)(a).

A peace officer may take a person into custody for immediate deliverance to an evaluation and treatment facility or the emergency department of a local hospital, if the officer has reasonable cause to

believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled. RCW 71.05.153(2).

> i. "Gravely disabled" means a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety. RCW 71.05.020(17).
> ii. "Likelihood of serious harm" means:
> (a) A substantial risk that: (i) Physical harm will be inflicted by an individual upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or
> (iii) physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or (b) The individual has threatened the physical safety of another and has a history of one or more violent acts; RCW 71.05.020(25).
> iii. "Mental disorder" means any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions. RCW 71.05.020(26).
> iv. "Imminent" is the "state or condition of being likely to occur at any moment or near at hand, rather than distant or remote." RCW 71.05.020(20).

Detentions pursuant to chapter 71.05 RCW have been under the following circumstance:

• The officers had reasonable cause under RCW 71.05.153(2) to take the detained person to a hospital for a mental evaluation where the detained person made paranoid comments to the officers, there were 911 reports that the detained person young son, screaming that someone was trying to kill her and that she would kill herself. The amount of force used to subdue the woman, who tried to bite, scratch, and hit the officers, was reasonable under the circumstances. Once at the hospital, the detained woman was diagnosed with "[a]cute psychosis secondary to cocaine intoxication," and her urinalysis tested positive for cocaine, dislocated shoulder and torn shoulder ligaments, and bruises, swelling, and abrasions on her forearms, abdomen, hip, and lower extremities. Luchtel v. Hagemann, 623 F.3d 975 (9th Cir. 2010).

RCW 46.61.266 and 790 also address intoxicated persons in public and who are walking or cycling, these sections allow the officer to offer these citizens assistance short of custody unless the officer determines that the party falls within the edicts of RCW 70.96A.120 as indicated above.

Clearly society, here represented by the various people present to render aid to Appellant has a duty to incapacitated people. The argument that these aid personnel should have or could have just left Appellant passed out lying in a puddle of his own vomit is ludicrous. This duty mandated by various laws further supports the State's position that in this instance, based on these facts, there was no basis for the court to give the self-defense instruction.

As this court is well aware, "Whether to give a particular jury instruction is within the trial court's discretion." Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). State v. Brown, 36 Wn. App. 549,

676 P.2d 525 (1984) "An instruction not warranted by the evidence need not be given." State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); State v. Gibson, 32 Wn. App. 217, 646 P.2d 786 (1982). A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998). The jury must be fully instructed on the law, but there is no right to an instruction that is not supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellant's theory was that his violent actions were his attempt to indicate, to communicate, to those rendering aid that he was "refusing" treatment from the medical, fire and police who had come to his aid. RP 15 Once again there was not one single word spoken at the scene or one word of testimony that would support the proposition that this is what Appellant was trying to do. What is just as likely is that Appellant was an angry intoxicated person who woke up on the floor of the bathroom in the library and knew that he had warrants for his arrest and he was now in the presence of people who could and would take him into custody. (RP 190-1)

Trial counsel was able to elicit testimony from some of the State's witnesses that possibly Appellant's actions indicated that he was refusing treatment but that is all there is in the record to support this theory. These statements were from the personnel there rendering aid who stated that Appellant said something to the effect of "fuck off and get the fuck off of me." RP 82-3, 99. This of course was while appellant was attempting to kick, hit and bite those same personnel.

> Q As part of your communication were you asking what, you know, questions as to we're just trying to figure out what's going on or --
> A Calm down, you know, we were called here to help you. We're not trying to hurt you.
> Q And did you ever ask him any questions concerning why he was laying on the ground?
> A Tried to ask him what happened, you know, do you hurt anywhere.
> Q And what were the responses?
> A Fuck you and get the fuck off of me. (Paramedic Taylor at RP 83)

Trial counsel also attempted to get the medical personnel to agree that this whole incident could have been avoided if they just would have administered the "chemical restraint" and left Appellant lying on his stomach handcuffed. Medical personnel stated this was a possibility but they testified that they needed to remove the restraints to insure Appellant's medical safety. "I don't want to handcuff any patient and I don't want someone to potentially have the possibility of becoming face

down so I can't assess the rebreathing, circulation and I can't monitor their airway." RP 96.

Self-Defense is set out in RCW 9A.16.020 which provides, in relevant part, that:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
> . . .
> (3) Whenever **used by a party about to be injured**, or by another lawfully aiding him or her, **in preventing or attempting to prevent an offense against his or her person**, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary . . .
> (Emphasis added)

The language of the Washington Pattern Instruction 17.02 states;

> The use of or attempt to use force upon or toward the person of another is lawful when used or attempted by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

"To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the

defendant exercised no greater force than was reasonably necessary."

State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) *cited by* Werner, 170 Wn.2d at 337-38.

The right self-defense is historically recognized, "the right of the defendant" to act in defense of himself when he has a good faith belief that he is in apparent danger. State v. Carter, 15 Wash. 121, 123, 45 P. 745 (1896). The right to act in self-defense is viewed from the perspective of the defendant, as the situation appeared to him. Id. The right of self-defense is grounded upon two elements: (1) That the party attacked may use sufficient force to offset the actual danger; [and] (2) that he may use sufficient force to offset the apparent danger. State v. Churchill, 52 Wash. 210, 214, 100 P. 309 (1909).

This Division ruled in State v. Miller, 89 Wn. App. 364, 367-8, 949 P.2d 821 (Div. 3 1997) as follows;

> The State does not dispute that it bears the burden of disproving self-defense. However, it contends no error occurred in the present case because the defense presented insufficient evidence to justify any instruction on the lawful use of force/self-defense. Self-defense instructions are required when a defendant meets his initial burden of producing "some evidence demonstrating self-defense...." The burden then shifts to the State to prove the absence of self-defense.
>
> Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person,

> knowing all the defendant knows and seeing all the defendant sees." This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. (Citations omitted, emphasis mine.)

See also State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999):

> To raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt.
>
> "To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable." Evidence of self-defense is viewed "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." This approach incorporates both subjective and objective characteristics. (Citations omitted, emphasis mine.)

Taking the testimony, the facts, before the court at the time it ruled against the self-defense instruction, the facts did not even amount to "some" "credible" evidence that Appellant was defending himself from the aid being administered to him, these facts do not support Appellant's theory.

Making guttural noises, biting, hitting, kicking and yelling fuck you and get the fuck off of me is not evidence of "lawful" use of force "**used by a party about to be injured** …**in preventing or attempting to prevent an offense against his or her person"** Nor is it a statement by a competent person that they wish to refuse treatment.

This court should note that trial counsel did not brief any of these allegations. Therefore the court itself found some case law and reviewed that.

Appellant cites to one case from Florida, Spurgeon v. State, 114 So.3d 1047 (Fla. Dist. Ct App. 2013) for the position that a defendant can assert self-defense. This case is clearly distinguishable. In Spurgeon "The record reflects Spurgeon was not under arrest at the time he was restrained and that he had repeatedly expressed a desire to leave the hospital. Indeed, testimony revealed much of Spurgeon's agitation was due to him wanting to leave the hospital and being prevented from doing so. He spat on DenDekker 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 at 1047.

The clear expression by Spurgeon was "some" evidence as opposed to biting, kicking, hitting and "fuck you" and "get the fuck off of

me" none of which is an expression that was understood by anyone at the scene to mean "no thank you I do not wish to be treated at this time." Nor were the actions of the personnel at in the library restraint as in the Spurgeon case. Jordan was not coherent and therefore not capable of making sound decisions, Spurgeon obviously could.

Appellant's statement that "Jordan repeatedly expressed a desire to be left alone" is a stretch at best and it was not "clear" that he did not want to be strapped to the backboard. What was clear was that Jordan was found unresponsive on the floor of a public bathroom in a puddle of vomit and became combative when help was being administered. There was obviously no "communication" that he wished to decline medical assistance as "expressed" in Spurgeon.

State v. Koch, 157 Wn.App. 20, 237 P.3d 287 (2010) cited by appellant does not address an assault by the person to whom aid it being provided, but rather an "assault" by the provider of the aid on a party who does not wish that aid. It too is distinguishable. The statement in Koch does not transform the present issue into a unique issue.

The State would offer that those personnel who is case should be afforded the same consideration as the corrections officer in State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (Wash. 2000) which addressed the standard a court is to use when the alleged self-defense is against a

correctional officer. In Bradley this court imposed the same this court has adopted when there is a claim of self-defense raised with regard to the actions of a police officer:

> A different rule applies, however, if one seeks to justify use of force in self-defense against an arresting law enforcement officer. Numerous cases have held a person may use force to resist arrest only if the arrestee *actually,* as opposed to *apparently,* faces imminent danger of serious injury or death. The Court of Appeals in State v. Westlund, 13 Wn.App. 460, 467, 536 P.2d 20, 77 A.L.R.3d 270 (1975), first articulated the policy rationale for this rule:
> [T]he arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases, as illustrated by the one at bar, resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat. Police today are sometimes required to use lethal weapons for self-protection. If there is resistance on behalf of the person lawfully arrested and others go to his aid, the situation can degenerate to the point that what should have been a simple lawful arrest leads to serious injury or death to the arrestee, the police or innocent bystanders.
>
> In State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985) (quoting Westlund, 13 Wn.App. at 467, 536 P.2d 20) we specifically adopted the Westland court's analysis: "Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest ... unless the arrestee is actually about to be seriously injured or killed." *Accord* State v. Ross, 71 Wn.App. 837, 843, 863 P.2d 102 (1993) (actual danger is standard for self defense in assault on law enforcement officer).
>
> Holeman and Westlund involved lawful arrests. Demonstrating the importance we place on "orderly and safe law enforcement," we extended the Holeman/Westlund rule

> even to allegedly unlawful arrests, specifically affirming Holeman in State v. Valentine, 132 Wash.2d 1, 20-21, 935 P.2d 1294 (1997), a case involving an alleged unlawful arrest. Thus, the established rule for use of force in self-defense cases involving arrests requires the person face a situation of actual, imminent danger, not just apparent, imminent danger. Bradley Id, 737-8 (Footnote omitted, emphasis in original.)

The court in Bradley summarized the ruling as follows:

> We conclude the use of force against correctional officers should have the same status as the use of force against arresting officers, and should generally be discouraged as a matter of public policy. There seems to be little reason to differentiate between law enforcement officers making an arrest and correctional officers maintaining order in jails or other correctional facilities. We adhere to our preference expressed in Mierz, Valentine, and other cases for persons to resort to the processes of law rather than the self-help violence of the street. Id 743 (Emphasis mine.)

V. CONCLUSION

The issue presented to this court is simple, did Appellant present "some" evidence at trial such that he should have been allowed to use the well settled law regarding self-defense and the use of a self-defense instruction at trial? This is a factual question which was addressed by the trial court, the court that sat through pretrial and trial and heard all of the evidence and the theories of the parties regarding that evidence. The court made its discretionary ruling based on the totality of the State's case

and the lack of evidence supporting the defendant's theory in conjunction with the well settled law regarding self-defense.

All cases are "unique" in that the facts of each will never be "on point" with any other case. The case law addressing self-defense is well settled, applying that law to the facts supplied in this trial support the discretionary ruling by the trial court. Not only are there no facts to support the use of the self-defense instruction but the actions of Appellant were also not those which any reasonable person would take when literally faced with first responders attempting to render medical aid.

This court should not disturb the ruling of the trial court, "Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court did not abuse its discretion.

For the reasons set forth above this court should deny this allegation and this appeal should be dismissed.

Respectfully submitted this 6th day of October 2014,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on October 6, 2014, emailed a copy, by agreement of the parties, of the Respondent's Brief to Jennifer Sweigert at Sloanej@nwattorney.net and deposited in the United States mail on this date to;

Raymond Jordan
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of October, 2014 at Spokane, Washington,

s/David B. Trefry

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