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SUPREME COURT
STATE OF WASHINGTON
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No. 999597

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MARIO ZAMORA,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the respondent in this case and plaintiff below.

B. DECISION

The State of Washington asks the Court to deny review of the Court of Appeals decision in this case, attached to petitioner's brief.

C. ISSUES PRESENTED FOR REVIEW

1. Was it reversible error for the prosecutor to discuss immigration issues as a way to bring up sensitive relations with law enforcement, where defense counsel did not object and even stated the questions were beneficial to the defense?

2. Did the trial court error in excluding as irrelevant the fact that the Officer's statements given during an investigation were made under the protection of *Garrity v. New Jersey?*[1]

3. Does an assertion by the defendant of self-defense sufficient to obtain an instruction entitle the defendant to override the well-established public policy that a mistake in search and seizure law does not entitle the defendant to attack the officer?

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[1] *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

4. Was defense counsel ineffective for properly analyzing evidentiary rules and agreeing that evidence of a prior assault was inadmissible under ER 404(b)?

D. STATEMENT OF THE CASE

On a dark, cold, snowy winter night, Brandi Moncada saw someone lurking around the cars on her dead end street, carrying something and looking into vehicles. RP 296-300, 309. She told him he was on private property and he needed to leave or she would call the police. RP 299-300. The person just stood there. *Id.* Ms. Moncada called the police. RP 301.

Officer Kevin Hake was the first officer to respond. RP 316. The roads were icy, but he was nearby. RP 317. Mr. Zamora came towards Officer Hake. RP 321. He stared right through Officer Hake. RP 451. Officer Hake asked Mr. Zamora who he was and where he was going. There was no response. RP 322. Mr. Zamora was fiddling with something in his pocket. RP 323. Mr. Zamora turned away. Officer Hake told him he was not free to leave. *Id.* Officer Hake felt uncomfortable and called for assistance, since it would take time for other officers to get to his location given the weather conditions. RP 324. Mr. Zamora was carrying a boot, which he let fall as he turned away and Officer Hake was trying to talk to him. RP 326. It was clear that Mr. Zamora was going for something in his left pocket. RP 327. Officer Hake tried to grab Mr. Zamora as he twisted away. *Id.*

Officer Hake was unable to grab Mr. Zamora and then pushed him away forcefully near a truck. RP 344. Officer Hake believed Mr. Zamora was going for a weapon and chose to reengage Mr. Zamora, rather than draw his firearm. RP 344. As they struggled part way underneath the pickup Mr. Zamora wrapped Officer Hake's microphone cord around the Officer's neck. RP 346.

As the struggle continued, Officer Hake managed to get on top of Mr. Zamora. RP 358. Mr. Zamora showed unusual strength for someone his size. *Id.* Early on Officer Hake pepper sprayed Mr. Zamora to gain compliance, but Mr. Zamora only fought harder. RP 363. During the struggle, Mr. Zamora alternatively attempted to take Officer Hake's gun and reach back into his own pocket. RP 359. Mr. Zamora defeated two out of the three safeties holding Officer Hake's firearm in its holster. RP 359-60. At one point Officer Hake tore Mr. Zamora's hand off his gun and Officer Hake drew it. RP 369. Officer Hake stuck the gun in Mr. Zamora's ear, then eye, telling Mr. Zamora to stop or he would kill him. RP 370. Mr. Zamora bit down on the gun. *Id.* Officer Hake was about to shoot when he heard a siren of other police cars responding to his distress call. RP 373. He decided he could maintain the fight until help arrived. *Id.*

Officer Welsh arrived and ran up to help Officer Hake. RP 374. Officer Welsh also tried pepper spray, which was ineffective on Mr. Zamora, but effective on Officer Hake. *Id.,* RP 631. Eventually six officers arrived but it still took three or four minutes to get handcuffs on Mr. Zamora. RP 376. During the struggle Mr. Zamora kicked back and kicked Officer Welsh in the chest. RP 637. Mr. Zamora showed unnatural strength and stamina. RP 638. Officers tried to tase Mr. Zamora in drive stun mode to gain compliance, but that failed. RP 693. As soon as the officers had restrained Mr. Zamora they stood up and summoned medical aid. RP 641. The officers eventually looked in Mr. Zamora's jacket pocket where he kept trying to reach and found a blue handled folding knife with the blade locked open. RP 388, 711.

After Mr. Zamora was restrained, he was moaning on the ground. RP 681. Later it was noticed he had stopped breathing when the EMT's assessed him. RP 798. Officers removed his restraints so he could be treated. RP 675-76, 798. He was resuscitated and taken to the hospital. RP 847.

The Doctor who treated Mr. Zamora described the symptoms of methamphetamine intoxication, which matched the symptoms described by Officer Hake. RP 568-71. After hearing what happened Dr. Frank believed that Mr. Zamora was under the effect of a stimulant and was in a delirium. RP 580-81, 585. Mr. Zamora had methamphetamine, amphetamine and THC in his system. RP 585. Dr. Frank concluded that Mr. Zamora's cardiac arrest was secondary to severe metabolic derangement, due to the effects of methamphetamine overdose. RP 600-01.

The Moses Lake police department conducted a use of force review and officers involved made *Garrity* statements. RP 418. The investigation found no wrongdoing on the part of the officers. RP 423. The State moved in limine to prevent the defense from mentioning an internal affairs investigation. RP 231. The court granted that motion. RP 430.

Mr. Zamora was convicted at trial of two counts of assault in the third degree. The Court of Appeals rejected Mr. Zamora's arguments on the merits of the case, but remanded for resentencing pursuant to *State v. Blake*[2] and offender score issues.

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[2] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

E. ARGUMENT WHY REVIEW SHOULD BE DECLINED.

1. The prosecutor did not improperly raise immigration issues, and defense counsel waived any argument on this issue.

One of the purposes of voir dire, is for parties to gain knowledge that would "enable an intelligent exercise of preemptory challenges." CrR 6.4(b). Additionally, during voir dire parties may question prospective jurors on anything that touches their qualifications, "subject to the supervision of the court as appropriate to the facts of the case." *Id.* In this case the obvious defense strategy was to engender sympathy for the defendant by pointing to his injuries inflicted during the fight with the police. Immigration is another area of law where people often have sympathies that are supportive of those violating the law. By raising an analogues topic to an issue in the case during voir dire the prosecutor attempted to gain information to exercise preemptory challenges. The prosecutor did not inject race into the case, nor did he call upon the jury to fix a social problem. This case was about a person who assaulted an officer, and in the ensuing fight was gravely injured and almost died. This is obviously a touchy topic. The defense was to place the officer on trial. This was going to be an emotional case. Seeing how people felt about law enforcement in a potentially emotionally charged subject was clearly important information for both sides in this case. The prosecutor's comment about a drug bust in Nogales, RP 139–40, occurred in voir dire in the context of a discussion on drugs, which defense counsel originally brought up. RP 136–41. As the case involved an issue of the defendant being under the influence of drugs, *see* RP 136, defense counsel and the prosecutor were well within CrR 6.4(b) in addressing the topic. Notably, this trial occurred before the death of George Floyd, the aftermath of which only emphasizes the need to discuss with jurors sensitive topics and obtain their feelings and opinions on these types of issues prior to a trial of this kind.

In *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499, 503 (2020), the prosecutor invoked the war on drugs once in voir dire, and then in opening and twice in closing argument, describing the trial as a battle in the war on drugs. The Court concluded this was misconduct, focusing on the statements made in trial, not in voir dire. The Court held that exhortations to address a societal problem with a guilty verdict were improper.

None of the things that the Court found wrong in *Loughbom* occurred in this case. While the prosecutor brought up a politically sensitive topic in voir dire, there is nothing that can be found that can be construed as an exhortation to fix the problem with their verdict. There was no mention of immigration during the trial except in defense counsel's opening statement, where he informed the jury, without objection, that his client was a U.S. Citizen, and therefore immigration was not an issue in the case. *Loughbom* is simply not on point to this case; thus there is no conflict.

Trial Defense Counsel did not see this discussion as a problem. When specifically asked he felt it might be harmful to the State, if anything. He also discussed the issue among the public defenders in his office. When a potential error is brought to defense counsel's attention, and he expressly chooses not to seek a remedy for it, appellate review is barred, absent a claim of ineffective assistance of counsel. *State v. Hernandez*, 6 Wn. App. 2d 422, 427, 431 P.3d 126, 130 (2018). Mr. Zamora did more than sit silent during this discussion, he affirmatively assented to it. He cannot complain of it now.

Mr. Zamora was not denied a fair and impartial jury by voir dire questions related to feelings about law enforcement and their interactions with people who may arouse sympathy. He also does not show any alleged misconduct could not have been cured by a timely objection. Nor does he show a conflict with a State Supreme Court case. There is no basis to grant review on this issue.

2. The trial court properly did not allow the defendant to question officers about the nature of their *Garrity* statements.

Mr. Zamora makes the following logical proposition. The officers' statements given prior to trial were given under the protections of *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), therefore their statements at trial were less credible. What he does not do is explain why this was so. The officers could not be prosecuted based on what they said in their statements during the investigation. They could be prosecuted based on what they said at trial. Given the *Garrity* statements were admissible as prior inconsistent statements if the testimony supported application of that rule, and defense counsel did not raise any inconsistencies, then it must be presumed there were no material inconsistencies between the *Garrity* statements and the testimony at trial. Nor does the argument that their careers were at stake make sense. An officer's career is at stake every time he testifies. A perjury conviction would surely end the officer's career. The logical proposition Mr. Zamora attempts to make simply does not follow.

Garrity is based on the Fifth Amendment right not to incriminate one's self. It allows a public employer to demand statements from an employee for employment purposes without running afoul of the Fifth Amendment right to not incriminate one's self in a criminal case. The claiming of the Fifth Amendment privilege is not evidence, and the jury is not allowed to draw inferences from it. *State v. Smith*, 74 Wn.2d 744, 757, 446 P.2d 571, 580 (1968), *vacated in part*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). It would be improper for the jury to draw any inference from the Officer's use of the *Garrity* right. "It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense." *Bowles v. United States*, 439 F.2d 536, 541 (D.C. Cir. 1970). There is no evidence in the record as to whether the officers insisted on *Garrity* or the warnings were given based on the decision of the investigator. Allowing any inferences to be drawn from this would be error.

In any event, even if there is some marginal relevance, the discussion of *Garrity* would clearly be unduly prejudicial for a very limited probative value, in violation of ER 403. By informing the jury there had been an internal investigation, without letting them know the result, the jury would be left to speculate as to the outcome, especially since Kevin Hake was no longer a police officer. The jury could have been told about the outcome of the use of force investigation to minimize this prejudice, but that would risk invading the province of the jury to decide the case on the facts before them, not on the basis of a different investigation. Even assuming the information about the internal investigation was marginally relevant, its potential for unfair prejudice drastically outweighed its minimal probative value. "The Constitution permits judges to exclude evidence that is 'repetitive ... only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *State v. Orn*, 197 Wn.2d 343, 352, 482 P.3d 913, 919 (2021).

Nor does the Court of Appeals decision conflict with *Orn*. In *Orn* the witness was a confidential informant. The only question the defense was permitted to ask was whether the witness had worked with the police department, without giving details. In this case the witnesses were sworn officers with a clear, undisputable relationship with the department. Their relationship with the department was unambiguous, and free to be explored, if defense counsel thought it necessary. The only fact that was concealed was there had been an internal investigation of this incident. The internal investigation found no wrongdoing. The officers did not make any deals, as the witness in *Orn* did. This case is simply not the same as *Orn*.

Even if the Court somehow erred, the error was not prejudicial. The officers testified in the same way they testified in their internal affairs investigation. This would simply would not negatively affect the jury's perception of their credibility. Any error was harmless, and there is no basis for review on this issue.

3. For the first time in his petition for review Mr. Zamora seeks a new rule that if a defendant is entitled to a self-defense instruction, suppression is available for an assault of an officer that follows an unlawful stop.

The new rule Mr. Zamora advocates for is nonsensical, and would allow suppression based on the slimmest of evidence. Evidence of assault after an illegal stop is not suppressible for good public policy reasons, as it would immunize people who assault an officer who may be doing their job in good faith, but fall afoul of extremely nuanced search and seizure rules. *See State v. Valentine*, 132 Wn.2d 1, 10, 935 P.2d 1294, 1298 (1997). Indeed, given there is no good faith exception to the warrant requirement in Washington, even an officer who was obeying the law as everyone thought it was at the time could be subject to assault without the protection of the law if the Courts elect to implement a post facto change in the law.

Mr. Zamora argues all one would have to do to obtain suppression is allege self-defense and show enough evidence to get an instruction. But the standard for obtaining a self-defense instruction is low. All the defendant has to do is present some evidence of self-defense, which is evaluated in the light most favorable to the defendant. The evidence need not even create a reasonable doubt. *State v. George*, 161 Wn. App. 86, 96, 249 P.3d 202, 207 (2011). Because the evidence is taken in the light most favorable to the defendant even the most non-credible evidence may obtain a self-defense instruction.

Once there is sufficient evidence to obtain a self-defense, instruction the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627, 631 (1999). The burden on a suppression motion is generally preponderance of evidence. *E.g. State v. Ferguson*, 131 Wn. App. 694, 704, 128 P.3d 1271, 1275 (2006). Under Mr. Zamora's rule the defendant could obtain suppression of the assault simply be alleging self-defense, no matter how non-credible that claim was. He would shift the burden on a suppression motion to a some evidence standard. On the other hand, if the defendant meets or even gets close to meeting the burden of preponderance of evidence of a self-defense claim, then by definition the State does not meet its beyond a reasonable doubt burden, and the defendant wins at trial anyways. Mr. Zamora does not provide any rationale to support that sufficiency to obtain a self-defense instruction should be sufficient to suppress the evidence, nor does he propose a way to resolve this evidentiary quandary with his new rule.

Nor does the fact that Mr. Zamora was seriously injured justify his actions. He was high on methamphetamine, had an unfolded knife in his pocket he was reaching for, and fought with Officer Hake, where if he had cooperated none of this horrible incident would have happened. Mr. Zamora argued that the consequences of losing the fight justifies the actions in starting it. Mr. Zamora's proposed new rule is unworkable and would defeat the purpose of the exception to the exclusionary rule that now exists. Review should not be granted on these grounds.

In addition, the stop was a lawful *Terry* stop. "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968). "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing." *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Here Officer Hake observed the defendant "stare though him," exhibit symptoms that gave an appearance of being under the influence of an intoxicant, refuse to respond to him and reach into his pocket as if he was reaching for a weapon. The encounter was at night on icy, slippery ground. Officer Hake was the only officer present. Given Mr. Zamora's state, simply turning and walking away was not a safe option for Officer Hake. A frisk for weapons was appropriate under the totality of the circumstances.

4. Mr. Zamora's counsel was not ineffective for understanding and following the rules of evidence.

Trial Counsel correctly acknowledged that Officer Hake's prior assault four and disorderly conduct charges where irrelevant unless Mr. Zamora knew of them prior to the fight. Mr. Zamora now claims that they should have been offered to show that Officer Hake acted in conformity with what he assumes was the facts of the charge. When the record is insufficient to show ineffective assistance of counsel the remedy is to bring the claim in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251, 1258 (1995), *as amended* (Sept. 13, 1995).

Here the record details that Officer Hake faced charges of assault in the fourth degree and disorderly conduct by way of fighting words. RP 12. It does not reveal the detailed facts behind the charges. A person is guilty of assault in the fourth degree when he assaults another. RCW 9A.36.041. A person can assault another by actually causing a harmful or offensive contact, attempting to cause a harmful or offensive contact, or taking actions that put the victim in fear of immediately being subject to a harmful or offensive contact. WPIC 35.50. Based on this record there is simply no way to know how close Officer Hake's behavior in that case was to his behavior in this case. It may be he was guilty of boorish behavior at a bar, slapping someone on the backside that lead to aggressive words. On this record we can only speculate. Mr. Zamora presumes it was some sort of major physical fight similar to the altercation with Mr. Zamora. The record does not support such an assumption.

Nor does the case Mr. Zamora cites support his proposition. *State v. York*, 28 Wn. App. 33, 34, 621 P.2d 784, 785 (1980), was a case about dishonest acts in an officer's past. The Court cited ER 608 and stated "The trial court, in its exercise of discretion, appears to have found the proffered testimony not to have been probative of truthfulness or untruthfulness. We must therefore question whether the trial court abused its discretion." *Id.* at 786. The appellate court did find the evidence was probative of truthfulness, therefore it should have been admitted.

Mr. Zamora does not, and cannot, assert that conduct that lead to charges of assault four and disorderly conduct would be probative of truthfulness. There is no evidence in the record that the event involved dishonesty on Officer Hake's part. Thus, ER 608 and *York* are inapplicable to this issue. Instead, Mr. Zamora argues that it should be admitted to show that Officer Hake acted in conformity with a prior violent event. This type of evidence is controlled by ER 404(b). "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." While there are innumerable exceptions to ER 404(b), Mr. Zamora does not show any of them apply or that trial counsel should have argued any of them. Trial Counsel did raise one exception, to show reasonable fear of a person asserting self-defense when that person knew of the prior violent event. However, he correctly rejected that exception because the evidence would not support it.

A prior assault by Officer Hake would be inadmissible under ER 404(b). *York* concerns prior acts of dishonesty under ER 608. This is an apples and oranges comparison trial counsel was correct not to make. In addition, assuming ER 404(b) does not apply, the record is insufficient to conclude whether the prior conduct was sufficiently similar to the current conduct to be useful to the jury. Counsel was not ineffective in failing to object, and there is no showing the outcome would have been different if this evidence had been admitted. There is no basis to grant review on this issue.

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5. There is no basis to grant review pursuant to RAP 13.4(b).

A grant of discretionary review is governed by the considerations in RAP 13.4(b). Mr. Zamora has not demonstrated that the Court of Appeals decision in this case is in conflict with any other case of the Court of Appeals or Supreme Court. There is not a significant question of law that needs to be decided, nor is there an issue of substantial public interest. The petition for review should be denied.

F. CONCLUSION

The prosecutor did not commit misconduct by raising controversial issues in voir dire. In any event, trial counsel affirmatively waived this objection. Nor was the conduct so flagrant and ill intentioned that it could not be cured by an objection, if appropriate. The trial court properly excluded evidence of the internal investigation conducted in this case. Mr. Zamora's self-defense claim leads to suppression rule makes no sense, would conflict with longstanding policy, and is unworkable. Trial

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Counsel properly understood the rules of evidence and was not ineffective.

There is no basis to grant this petition. It should be denied.

Dated this 4th day of August 2021.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

By:________________________
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DECLARATION OF SERVICE

On this day I served a copy of the Response to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Marie J. Trombley
marietromley@comcast.net

Dated: August 4, 2021.

Kaye Burns

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

August 04, 2021 - 9:31 AM

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