

NO. 65411-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA CUELLAR,

Appellant.

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. The trial court does not abuse its discretion in giving an aggressor instruction when the defendant claims self-defense and there is evidence that the defendant was the aggressor. In the present case, there was evidence that appellant, Cynthia Cuellar, advanced aggressively toward the officers and then bit an officer when he tried to restrain her. Did the trial court properly exercise its discretion in giving the aggressor instruction?

2. A crime is not a lesser included offense of a charged crime unless the elements of the lesser offense are necessary elements of the charged offense. The elements of resisting arrest are not necessary elements of assault in the third degree. Did the trial court correctly conclude that resisting arrest was not a lesser included offense?

3. It is not misconduct for the prosecutor to argue reasonable inferences from the facts presented at trial, or to ask the jury to act as the conscience of the community. Where the prosecutor's argument contained reasonable inferences from the facts presented at trial and asked the jury to apply the facts to the law, was the argument misconduct?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Cynthia Cuellar was charged by information with assault in the third degree. CP 1. A jury found her guilty as charged. CP 13. She received a first offender waiver with four days of confinement. CP 45-51.

2. FACTS OF THE CRIME.

On April 24, 2009, at approximately 10:45 p.m., Kent police officers responded to a 911 call of a domestic disturbance at the Pembroke Apartment complex. 1RP 52; 2RP 10. According to the information they received from dispatch, at least one of the people involved in the altercation was armed with a knife. 1RP 53, 90.

Officers Williams and Clark arrived on the scene within a few minutes, and waited for other officers to arrive. 1RP 52-53. When other officers arrived, they approached the parking lot of the complex on foot, while one officer followed in a patrol car. 1RP 54. In the parking lot, they found an inebriated man, later identified as

Luis Cuellar,<sup>1</sup> being held down on the ground by others. 1RP 55, 96; 2RP 14. The officers approached, told the men to release Luis and ordered him to stay on the ground. 1RP 55, 97; 2RP 14. Luis refused to comply and attempted to walk away from the officers. 1RP 55, 97; 2RP 15. Concerned that Luis might be armed with a knife, Officer Williams tried to taser him. 1RP 55-56. When the taser failed to work, Officer Clark knocked Luis to the ground by applying a "front-stop kick." 1RP 55; 2RP 16. The officers then handcuffed Luis, who continued to kick and scream. 1RP 99-100, 171.

A patrol sergeant responded to the scene due to the nature of the 911 call, and he instructed Officer Williams and Officer Clark to investigate whether there were any witnesses or injured people in apartment B-105. 1RP 57, 170; 2RP 18. At this point, the officers did not know who had brandished a knife or whether anyone had been stabbed. 1RP 63-64. When the officers entered apartment B-105, they observed a large hole in the bathroom door and blood on the bathroom floor. 1RP 57. The apartment was in disarray as if a struggle had occurred. 1RP 57. Before they could

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<sup>1</sup> Because Cynthia Cuellar and Luis Cuellar share the same surname, they will be referred to by their first names.

investigate further, the officers heard yelling and screaming coming from the parking lot, and went outside to assist their fellow officers. 1RP 58; 2RP 19.

A crowd of 10 to 15 people had gathered in the parking lot, and seemed angry about the force that was being used to restrain Luis. 1RP 101; 2RP 20. Officer Clark saw the defendant, Cynthia Cuellar, screaming and advancing toward one of the other officers. 2RP 21. She was very angry. 2RP 21. Officer Clark approached her from behind and applied a Lateral Vascular Neck Restraint (LVNR) hold, by placing his arm around her neck. 2RP 22. Officer Clark, who has a Master Instructor Certification as a defensive tactics instructor explained the three levels of the LVNR hold. 2RP 6, 23-25. Level one applies light pressure to the neck. 2RP 24. Level two applies more pressure to the neck. 2RP 25. Level three applies enough pressure to the carotid artery in the neck to make the subject lose consciousness, although some people lose consciousness when only level two pressure is applied. 2RP 25. The LVNR hold restricts blood flow to the brain without restricting the airway, and allows an officer to render a subject unconscious without causing any injury. 1RP 59; 2RP 23. As the subject loses consciousness, the officer is in a position to ease the

person onto the ground, again without causing injury. 2RP 40-41.

Once the pressure is relieved, the person regains consciousness in several seconds. 1RP 60.

Officer Clark placed Cynthia in a LVNR hold, applying little or no pressure, and Cynthia fought to loosen his hold. 2RP 26. He told her that if she stopped resisting and placed her arms at her sides, he would release her. 2RP 26. She started to comply by placing her hands at her sides and he released her. 2RP 26. As soon as he released her, she began fighting again. 2RP 26. He attempted to reapply the LVNR hold, but she bit his arm. 2RP 27. Unable to pull his arm away, he pulled her to the ground and then struck her in the face when she ignored repeated commands to let go. 2RP 29. She finally released him, and had to be restrained by more than two officers before she was handcuffed. 2RP 31. In the process, she was tasered twice. 2RP 31-32. Officer Clark received medical care for the bite at a nearby hospital. 2RP 34. Although other officers testified that they thought Cynthia had started to lose consciousness when Officer Clark applied the LVNR hold, he testified that he did not believe she lost consciousness because she continued to yell at him, and she was supporting her own body

weight, not slumping against him as an unconscious person would do. 2RP 40.

Officer Makings was restraining and handcuffing Hilda Cuellar, who had ignored the officer's commands to stay back and began punching him. 1RP 100. He saw Cynthia running toward the officers yelling "get off my family." 1RP 102. She appeared angry. 1RP 102. He did not see Officer Clark apply the LVNR hold because he was busy trying to restrain Hilda. 1RP 100-04.

Officer Vance also saw Cynthia advance on the officers. 1RP 119. She appeared to be very upset and ignored the officers' commands to stay back. 1RP 119. Officer Vance then saw Officer Clark apply the LVNR hold on Cynthia from behind. 1RP 119-20. Officer Vance believed that Cynthia had started to pass out, but then saw her biting Officer Clark's arm. 1RP 122-23. Officer Vance helped Officer Clark restrain Cynthia, who continued to fight even after she was handcuffed. 1RP 125-27.

Sergeant Hemmen saw Cynthia yelling and approaching the officers when Officer Clark placed her in the LVNR hold. 1RP 173-74. Sergeant Hemmen called for more officers to respond to the scene because the crowd was getting more agitated and the officers were outnumbered. 1RP 177.

Officer Williams emerged from the apartment building after Officer Clark, and saw that Officer Clark had a woman in a LVNR hold. 1RP 59, 79. He did not see most of the contact between Officer Clark and Cynthia Cuellar because his attention was drawn elsewhere. 1RP 61-65. He also believed from where he stood that Cynthia started to lose consciousness because her body started to slump. 1RP 63-64.

Cynthia Cuellar testified in her own defense. 2RP 53. She testified that on the night of April 24, 2009, she was at her cousin's apartment with several other cousins, including Luis, when an argument broke out in another room. 2RP 55-58. She testified that everyone was screaming and that Luis was forced out of the apartment by other family members. 2RP 58-59. She did not know what the argument was about and was not aware that anyone had called the police. 2RP 60. She followed the crowd outside when she heard people say that the police were there. 2RP 60. She agreed with the officers that a crowd of 10 to 15 people had gathered in the parking lot and that the scene was very loud and chaotic. 2RP 61, 90. She saw her cousin Luis on the ground being tasered by the police officers. 2RP 61. She started to walk toward Luis when she felt herself being thrown to the ground and then held

down by a police officer. 2RP 63-64. The officer then picked her up off the ground and put his arm around her neck. 2RP 65-66. She told him she could not breathe, but he did not respond. 2RP 66. She then bit him, after which he hit her in the face and then she was tasered before being placed in handcuffs and then in a patrol car. 2RP 67. No other defense witnesses were presented. 2RP 135, 141.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING AN AGGRESSOR INSTRUCTION.

Cuellar contends that the trial court abused its discretion by giving an aggressor instruction over her objection. This claim should be rejected. The aggressor instruction was properly given in light of the evidence that Cuellar advanced aggressively toward the officers before Officer Clark tried to restrain her. Even if error, the error was harmless because no reasonable juror could have concluded that Cuellar was in actual danger and acted in self-defense.

Cuellar presented a claim of self-defense. CP 7. The self-defense standard for assault of a police officer differs from the

general self-defense standard. A person charged with assaulting a police officer must show that there was an imminent threat of serious harm in order to establish self-defense, whether or not the person is being lawfully arrested. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995); State v. Hornaday, 105 Wn.2d 120, 131, 713 P.2d 71 (1986); State v. Holeman, 103 Wn.2d 426, 693 P.2d 89 (1985). The jury in this case was properly instructed that a person may use force against a police officer only if the person is in "actual and imminent danger of serious injury from an officer's use of excessive force." CP 35; WPIC 17.02.01.

A person who provokes an altercation cannot claim the right of self-defense unless she in good faith first withdraws from the combat at a time and in a manner to let the other person know that she is withdrawing. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). In this case, the trial court gave a jury instruction based on WPIC instruction 16.04, commonly referred to as the aggressor instruction. 2RP 123. That instruction read:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct

provoked or commenced the fight, then self-defense is not available as a defense.

CP 36. The defense objected to this instruction. 2RP 123.

The aggressor instruction is appropriate when there is credible evidence that the defendant provoked the need to act in self-defense, even if the evidence before the jury is conflicting. Riley, 137 Wn.2d at 909-10. The provoking act must be intentional. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). A trial court's decision to give a jury instruction based on a factual dispute is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). When determining if the evidence at trial was sufficient to support the giving of an aggressor instruction, the reviewing court should view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

Cuellar makes several arguments as to why the trial court abused its discretion in giving the aggressor instruction to the jury. First, Cuellar claims that an aggressor instruction must be based on the defendant's aggressive acts toward the victim, not a third party. Washington cases have held otherwise. In State v. Davis, 119

Wn.2d 657, 666, 835 P.2d 1039 (1992), the Washington Supreme Court has held that as long as the defendant engages in an "intentional act[] reasonably likely to provoke a belligerent response" it is immaterial to whom the intentional act was directed. In Davis, the court held that the defendant's pushing of a third person was an "intentional act" reasonably likely to provoke a belligerent response from the victim. 119 Wn.2d at 666. Nothing in the Supreme Court opinion suggests that the defendant must have assaulted the third person with the intent to provoke the victim. The only "intent" requirement is that the defendant acted intentionally in the action that ultimately provokes a belligerent response from someone.

Similarly, this Court has held that an aggressor instruction may be warranted where an intentional act by the defendant against a third party reasonably provokes a belligerent response from the victim. State v. Kidd, 57 Wn. App. 95, 786 P.2d 847 (1990). In Kidd, the defendant shot two people on a bus, then fled the scene. Police officers responded and engaged the defendant in a gun battle, after which he was arrested. Kidd, 57 Wn. App. at 97. The Kidd court upheld the aggressor instruction with respect to the defendant's assault against the pursuing police officers, reasoning

that the defendant could "scarcely be surprised that police come after [him], prepared to use weapons, in such circumstances." Kidd, 57 Wn. App. at 100. This Court reached this holding despite the fact that the police were not present at the initial shooting of the bus patrons. Kidd, 57 Wn. App. at 97. More recently, in State v. Wingate, supra, 155 Wn.2d at 823, the state supreme court held that an aggressor instruction was properly given where the defendant pulled out a gun to scare the victim's friends, and then shot the victim after the victim confronted him. There is no requirement under Washington law that an aggressor's acts be directed against the eventual victim of an assault in order for the aggressor instruction to apply.

Second, Cuellar contends that the aggressor instruction is inapplicable to an assault on a police officer. She argues that applying the aggressor instruction "vitiates the right of self-defense categorically." Washington cases have held the aggressor instruction was properly given in cases where the defendant is charged with assaulting a police officer. State v. Cyrus, 66 Wn. App. 502, 832 P.2d 142 (1992) (aggressor instruction properly given in first degree assault trial where defendant who assaulted police officers trying to arrest him); State v. Kidd, 57 Wn. App. at

100 (aggressor instruction properly given in second degree assault trial where defendant assaulted police officers trying to arrest him after he shot two bus passengers and fled).

Third, Cuellar argues that the evidence was insufficient to warrant the aggressor instruction because the provoking act was words alone. However, Cuellar's argument is based on viewing the facts in the light most favorable to Cuellar. This Court must view the facts in the light most favorable to the State. Wingate, 155 Wn.2d at 823 n.1.

Washington courts have long held that the unlawful act constituting provocation for purposes of the aggressor instruction need not be striking the first blow. State v. Hawkins, 89 Wash. 449, 154 P. 827 (1916); 11 Washington Practice, WPIC 16.04, Comment at 242 (3rd ed. 2008). In State v. Hawkins, the defendant returned home from a hunting trip to find some of his livestock missing. 89 Wash. at 450. He also discovered that his boar had been castrated by someone. Id. He went to a neighboring farmer's house, in an angry mood and carrying a revolver, which was concealed. Id. The defendant ran into his neighbor's barn and angrily accused the neighbor of castrating the boar and lying about it. Id. at 451. When the neighbor struck the defendant, the defendant pulled out the

revolver and shot him. Id. The state supreme court held that the defendant was the aggressor and not entitled to claim self-defense, although he did not strike the first blow. Id. at 455-56. Thus, approaching another in a threatening manner may be sufficient to warrant an aggressor instruction. See Riley, 137 Wn.2d at 911, n.3. Similarly, in State v. McConaghy, 84 Wash. 168, 170, 146 P. 396 (1915), the aggressor instruction was held to be proper where the defendant approached the victim and there was evidence "tending to show violent and threatening language used by each towards the other, as well as overt acts of each towards the other indicating an intended assault." See also State v. Anderson, 144 Wn. App. 85, 89-90, 180 P.3d 885 (2008) (holding aggressor instruction warranted where defendant was yelling and aggressively leaning over one of the victims with his hands on the arms of her chair).

In the present case, Officer Makings testified that Cuellar was running toward the officers with a very angry demeanor, yelling "get off my family." 1RP 102. Other officers testified that she was advancing on the officers in an aggressive manner. 1RP 173; 2RP 21. She ignored their repeated commands to stay back. 1RP 119, 174. Viewed in the light most favorable to the State, the

defendant's actions were intentional, aggressive acts reasonably likely to provoke a belligerent response from the officers, who were trying to control a chaotic and dangerous scene. Given the evidence that the defendant provoked the officers into restraining her by her aggressive actions, the aggressor instruction was proper.

Finally, Cuellar contends that the trial court should have added language to the aggressor instruction that words alone are not sufficient provocation to preclude self-defense under the aggressor instruction. However, no written instruction to that effect was submitted to the trial court. Pursuant to CrR 6.15, proposed jury instructions must be filed with the clerk of the court. In discussing instructions, defense counsel merely stated, "If we're going to give that instruction then I think there needs to be an instruction that words alone are not sufficient." 2RP 128.

Counsel's failure to propose a written instruction should preclude this Court's review. Moreover, the aggressor instruction as given was sufficient to apprise the jury that words alone cannot constitute provocation. The instruction stated, "No person may, by *any intentional act* reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense. . ." CP 36 (emphasis

added). Jury instructions are constitutionally adequate if they accurately state the law and permit the defendant to present her theory of the case. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The aggressor instruction was an accurate statement of the law and allowed Cuellar to argue that words alone would not be sufficient provocation to preclude a claim of self-defense.

Even if it was error to give the aggressor instruction, the error was harmless because no reasonable jury could have concluded that Cuellar acted in self-defense. An error in instructing the jury as to the standard for self-defense is harmless if the reviewing court can conclude beyond a reasonable doubt that the error did not contribute to the verdict. State v. L.B., 132 Wn. App. 948, 954, 135 P.3d 508 (2006). See also Kidd, 57 Wn. App. at 101 (finding aggressor instruction harmless). No rational trier of fact could have found that Cuellar was in actual and imminent danger of serious injury from excessive force, which was required for the jury to conclude that she had acted in self-defense against Officer Clark. See CP 35. The only evidence presented as to the LVNR hold was that it was non-lethal and would render a subject unconscious for a few seconds without injury. This Court can conclude beyond a reasonable doubt that the aggressor instruction

did not contribute to the verdict because, with or without the aggressor instruction, there was no credible evidence that Cuellar acted in self-defense. The State presented overwhelming evidence that Cuellar did not act in self-defense. If error, the aggressor instruction was harmless error.

2. RESISTING ARREST IS NOT A LESSER INCLUDED OFFENSE OF ASSAULT IN THE THIRD DEGREE.

Cuellar contends that the trial court abused its discretion in refusing to instruct the jury as to the crime of resisting arrest as a lesser included offense. Assuming that this claim was properly preserved below, it is without merit. Resisting arrest is not a lesser included offense of assault in the third degree.

Cuellar requested that the trial court instruct the jury as to the lesser degree of assault in the fourth degree and proposed written instructions as to assault in the fourth degree. CP 17-19; 2RP 116-18. The trial court concluded that the lesser degree was not supported by the evidence because there was no question that Officer Clark was a police officer. 2RP 131. Defense counsel orally requested that the trial court instruct the jury as to the lesser crime of resisting arrest as an alternative to the assault in the fourth

degree. 2RP 116-18. However, no written instructions as to resisting arrest were filed with the court. 2RP 118. There are no proposed instructions as to resisting arrest in the record. In discussing the matter, the trial court concluded that resisting arrest is not a lesser included offense of assault in the third degree. 2RP 132-33.

As previously stated, CrR 6.15 requires that all proposed jury instructions be filed with the clerk of the court. Counsel's failure to file written proposed instructions as to resisting arrest should preclude review of this issue on appeal. There is no way that this Court can determine whether any proposed instructions were a correct statement of the law and proper without having the proposed instruction in the record on appeal. This Court should decline to review this assignment of error. Moreover, even assuming that proposed instructions had been submitted that were a correct statement of the law, the trial court did not err in refusing to instruct the jury as to resisting arrest. That crime is not a lesser included offense of assault in the third degree.

RCW 10.61.006 provides that when a defendant is charged with a crime, the jury may find the defendant not guilty of the crime charged and guilty of a lesser included offense of that crime. In

order to be a lesser included offense, each element of the lesser offense must be a necessary element of the offense as charged. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). In order to be entitled to an instruction on a lesser included offense, the defendant must show that the evidence supports an inference that only the lesser included offense was committed. Id.

A person is guilty of third degree assault as charged in this case if she "assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). A person is guilty of resisting arrest pursuant to RCW 9A.76.040(1) if she intentionally prevents or attempts to prevent a peace officer from lawfully arresting her.

In order to be guilty of resisting arrest the State must prove that a person was being lawfully arrested and that the person acted with the intent of preventing the lawful arrest. RCW 9A.76.040(1). Neither of these elements are necessary elements of assault. Applying the Berlin test, the elements of the crime of resisting arrest are not necessary elements of the crime of assault in the third degree. Put another way, one can commit the crime of assault in the third degree without also committing the crime of resisting

arrest. One could assault a police officer without being under arrest. Resisting arrest is not a lesser included offense of assault in the third degree.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Finally, Cuellar argues that the prosecutor committed misconduct in closing arguments. Viewed in context, the prosecutor's argument did not constitute misconduct. The prosecutor's argument was properly confined to facts supported by the record and reasonable inferences drawn from those facts, and urged the jury to apply the law to the facts. The argument did not improperly appeal to the passions or prejudices of the jury.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant bears the burden of

establishing that the prosecutor's conduct was both improper and prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Even if misconduct is properly objected to, it does not constitute prejudicial error requiring reversal unless the appellate court finds there is a substantial likelihood that the misconduct affected the verdict. Id. If the defense does not make a timely objection, the misconduct is waived unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Prosecutors have a duty to seek verdicts free from passion and prejudice. State v. Perez-Mejia, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). A prosecutor's argument should not appeal to jurors' fear of criminal groups or invoke racial, ethnic or religious prejudice as a reason to convict. Id. at 916. Incitements to vengeance, exhortations to wage war against crime, or appeals to patriotism are also improper. Id.

A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. Id. It is improper for a prosecutor to exhort the jury to use its verdict to send a message to society about the type of crime at issue.

Finch, 137 Wn.2d at 841. However, it is not improper to ask the jury to act as the conscience of the community. Id.

In her rebuttal remarks to the jury, the prosecutor made the following argument, which is presented in whole so that this Court can judge the context in which the challenged statements were made:

Just a bite. Just a bite. Some of you may be sitting here wondering why are we here? Why have we been here since last Thursday? It's just a bite. It's a hazard of being a police officer. It's just a bite. I ask you then, where do we draw the line? Yes, it may be a hazard, but does that make it acceptable? Does that make it okay? Where do we draw the line? Is it with her kicking? Is it with her swinging? Is it with her spitting? Is it with her biting a police officer? Or is it when an officer gets stabbed?

Ms. Redford: Objection.

The Court: Sustained.

Ms. Odonkor: Where do we draw the line? Where do we say no? It may be a hazard but it is not acceptable. Assault tells you that if the touching would be possible [sic] to an ordinary and reasonable person, then it's offensive. Would an ordinary, reasonable person at work that got bit be offended by that? Would an ordinary and prudent person doing their job that got bit have an issue with that? Where are we going to draw the line?

Ms. Redford: Your Honor, I am going to object to the passion that counsel is --

The Court: This is argument. This objection is overruled.

Ms. Odonkor: Officers do take an oath of protecting to serve and there are hazards of doing their job. Where do they get protected? When as a community is it said to the defendant no, that is not acceptable? You are brought in from the community to do just that. You are brought in to say this is acceptable or not.

Ms. Redford: Objection.

The Court: Sustained.

Ms. Odonkor: It may be a hazard, and you may be wondering why did we come? We are here because the defendant bit a police officer, and when she bit that police officer it was an assault. The state would ask you to find the defendant guilty of assault in the third degree.

2RP 183-84.

This argument was not misconduct. The argument was designed to address any concerns the jury might have that, because the injury here might be considered de minimus, the defendant should not have been prosecuted. The argument did not appeal to any specific prejudice the jury might have against the defendant. The argument was not an incitement to vengeance or an exhortation to "wage war" against these types of crimes. The argument did not make reference to any facts outside the record. The argument did not exhort the jury to send a message to society.

The argument essentially asked the jury to take the case seriously and follow the law, which defines any offensive touching as an assault, even though the officer was not seriously injured. The argument exhorted the jury to follow the law, which is not improper. At most, the argument asked the jury to act as the conscience of the community, which is also not improper. Cuellar has failed to show that this portion of the prosecutor's argument was improper.

In addition, Cuellar argues that the prosecutor "argued that Ms. Cuellar's case implied that Officer Clark must be lying about his use of force." Brief of Appellant, at 36. Cuellar gave a starkly different account of the amount and type of force used against her prior to her biting Officer Clark than the officers gave. The challenged portion of the prosecutor's argument properly focused on the evidence, the discrepancies between the testimony of Cuellar and the officers, and the fact that Cuellar would have been unable to bite Officer Clark's arm while placed in the LVNR hold as she claimed in her testimony. 2RP 159. The prosecutor argued:

When she bit the officer that was the only force used.  
Furthermore, when she bit the officer where would the  
arm have to be placed for her to bite [sic] the officer?

Officer Clark testified he was releasing because she was complying. The other officers testified that she appeared to be going out and Officer Clark was releasing his hold. Whether she was going out or not, the other officers saw that her arms went down. Which is lying? Well Officer Clark said she began to comply. The defendant never testified that she began to go out or she lost consciousness. But it was consistent throughout the testimony that at that point her arms went down and she stopped fighting. Officer Clark was removing his arm away from her neck when she bit him. If an arm is on your neck you can't bite it.

2RP 159.

It is not misconduct for the prosecutor to argue that the evidence does not support the defense theory. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). The prosecutor in this case did not argue that in order to acquit the defendant they must find that the officers were lying. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). Such an argument misstates the jury's duty, because it need only entertain a reasonable doubt as to the State's evidence in order to acquit the defendant. Id. at 875-76. It is also misconduct for the prosecutor to argue that in order to believe a defendant's testimony it must find the State's witnesses

are lying. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995). However, this Court explained in Wright that "where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts it must necessarily reject the other." Id. at 825. This portion of the prosecutor's argument, which drew no objection, was not misconduct, let alone flagrant and ill-intentioned. This claim of misconduct was waived below.

Finally, even if the prosecutor's argument could be characterized as improper, there is no substantial likelihood that it affected the verdict. The evidence was undisputed that Cuellar knowingly bit a police officer while he was trying to restrain her during a violent and chaotic scene where the officers were outnumbered by an angry crowd. There was no credible evidence that Cuellar was in actual danger of serious injury, which is required for self-defense against a police officer performing his or her duties. Given the overwhelming evidence of guilt, there is no substantial likelihood that the prosecutor's argument affected the verdict.

D. CONCLUSION.

The conviction for assault in the third degree should be affirmed.

DATED this 3rd day of February, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CUELLAR, Cause No. 65411-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

2/3/11

Date