

No. 43368-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

K. M.,

Appellant.

Mason County Superior Court Cause No. 12-8-00016-1

The Honorable Judge Amber Finlay

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Officers Kilmer and Torre violated Mr. M.'s right to due process by expressing explicit or "nearly-explicit" opinions on Mr. M.'s guilt.
2. Officer Kilmer should not have been permitted to provide his "nearly-explicit" opinion that Mr. M. was not entitled to use force in self-defense.
3. Officer Torre should not have been permitted to provide her "nearly-explicit" opinion that Mr. M. was not entitled to use force in self-defense.
4. Mr. M. was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel deprived Mr. M. of the effective assistance of counsel by failing to object to inadmissible opinion testimony.
6. The court applied the wrong legal standard when evaluating Mr. M.'s self-defense claim.
7. The "actual danger/serious injury" standard for certain self-defense cases violates the separation of powers because it criminalizes acts declared lawful by the legislature.
8. The trial court erred by adopting Finding of Fact No. H.
9. The trial court erred by adopting Finding of Fact No. I.
10. The trial court erred in entering Conclusion of Law No. A.
11. The trial court erred in entering Conclusion of Law No. B.
12. The trial court erred in entering Conclusion of Law No. C.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A nearly-explicit opinion on an ultimate issue violates an accused person's constitutional right to due process. In this

case, Officers Kilmer and Torre testified that Mr. M. was not in actual imminent danger of serious injury. Did these nearly-explicit opinions on Mr. M.'s right to use self-defense violate Mr. M.'s Fourteenth Amendment right to due process?

2. An accused person has a constitutional right to the effective assistance of counsel. Mr. M.'s attorney failed to object (or objected on incorrect grounds) to inadmissible and highly prejudicial opinion testimony. Was Mr. M. denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?
3. The separation of powers doctrine prohibits the judiciary from encroaching on the legislative power. Despite this, the judiciary has criminalized certain acts which the legislature has declared lawful. Does the judicially created "actual danger/serious injury" standard for self-defense violate the constitutional separation of powers?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While working in the control room of the Mason County juvenile detention center, Officer Christina Torre heard juvenile detainee K. M. yelling. RP 33. On a monitor, she was able to see another detention officer, Brad Kilmer, holding Mr. M. up against the wall. RP 33.

According to Officer Torre, Kilmer “had his arms around the detainee’s - it appeared to be head and neck area.” RP 33. She couldn’t confirm that Kilmer’s hands touched Mr. M.’s face,¹ but stated clearly that Kilmer had his hands around Mr. M.’s neck. RP 38. She heard Mr. M. yelling at Kilmer to stop choking him. RP 38-39. Mr. M. struggled free, and then stepped aggressively toward Kilmer; at this point, Kilmer “stood back” and reacted by trying again “to get hold of K. M.’s neck area.” RP 40-41.

Officer Kilmer denied ever touching Mr. M.’s face or neck. RP 18; 28. According to Kilmer, Mr. M. started the physical altercation by stepping aggressively toward him and bumping chests (even though Mr. M. was restrained by leg irons and waist chains that secured his hands). RP 5, 17, 30. Kilmer said his wrist was injured when he tried,

¹ Mr. M. had just returned from the hospital, where he was seen for a broken nose. RP 75-77.

unsuccessfully, to take Mr. M. down using a two-hand hair hold. RP 5-6, 7. Following this, another officer separated the two, and restrained Mr. M.. RP 6, 17.

Mr. M. was charged with custodial assault. CP 14. At a bench trial, Officer Kilmer testified (without objection) that Mr. M. was not “in actual imminent danger of serious injury at any time prior to the scuffle...” RP 10. Officer Torre, likewise, was asked “From where you were standing during this incident, was K. M. in imminent danger of serious injury prior to the confrontation between him and Mr. Kilmer?” A relevance objection was overruled, and Officer Torre replied “I would say no.” RP 56.

Mr. M. testified that he’d entered detention with two black eyes and a broken nose.² RP 75. He acknowledged that he got in Kilmer’s face to swear at him after Kilmer imposed consequences that Mr. M. considered unfair. RP 82-83. In response, Kilmer pushed him into a corner and tried for a choke-hold, hitting Mr. M.’s broken nose and causing tremendous pain before slipping his arm around Mr. M.’s neck and cutting off his breathing. RP 82-84. Mr. M. testified that he tried to

² He had just returned from the hospital when the altercation with Kilmer occurred.

get away because he didn't want Kilmer to injure his broken nose further.
RP 89.

The trial court found that Mr. M. was not entitled to use self-defense during the altercation because he was "not in imminent danger under the law." Findings of Fact and Conclusions of Law, Supp. CP. Mr. M. was convicted of custodial assault, and he appealed. CP 5, 6.

ARGUMENT

I. THE IMPROPER ADMISSION OF OPINION TESTIMONY VIOLATED MR. M.'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional issues are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The improper admission of opinion testimony on the accused person's guilt may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Johnson*, 152 Wash.App. 924, 934, 219 P.3d 958 (2009).

B. An accused person's constitutional right to due process prohibits a witness from providing a "nearly-explicit" opinion on the accused person's guilt.

No witness may provide an opinion on the guilt of an accused person, whether by direct statement or inference. *State v. Black*, 109 Wash.2d 336, 349, 745 P.2d 12 (1987).. Such testimony "invade[s] the

fact finder's exclusive province.” Johnson, at 930. Opinion testimony on an ultimate issue is forbidden if it is a “nearly-explicit” statement by the witness that the witness believes the accused is guilty. State v. King, 167 Wash.2d 324, 332, 219 P.3d 642 (2009).

To determine whether testimony constitutes an impermissible opinion about the accused person’s guilt, a reviewing court examines “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” Johnson., at 931.

C. Officers Kilmer and Torre improperly testified to “nearly-explicit” opinions that Mr. M. was guilty of custodial assault.

Both Officer Kilmer and Officer Torre told the court that Mr. M. was not in imminent risk of serious injury just prior to the altercation. RP 10, 56. This was a clear expression of each officer’s belief that Mr. M. was guilty because he was not entitled to use self-defense, the absence of which is an essential element of the offense. See State v. Woods, 138 Wash. App. 191, 198, 156 P.3d 309 (2007) (“Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt.”)

The improper opinion testimony invaded the province of the factfinder, and violated Mr. M.'s right to a fair trial.³ Johnson, at 934. Mr. M.'s conviction must be reversed and the case remanded with instructions to exclude such testimony on retrial. Id.

II. MR. M. WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wash.2d 91, 109, 225 P.3d 956 (2010)..

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).. Likewise, Article I, Section 22. of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to

³ Accordingly, the admission of the improper opinion testimony creates a manifest error that affected Mr. M.'s right to due process. RAP 2.5(a); Johnson, at 934.

appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).).

There is a strong presumption that defense counsel performed adequately; the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996). (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

- C. Defense counsel unreasonably allowed the prosecution to introduce inadmissible opinion testimony on Mr. M.'s guilt.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is no legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel erroneously failed to object when Officer Kilmer testified that Mr. M. was not “in actual imminent danger of serious injury at any time prior to the scuffle...” RP 10. Furthermore, counsel’s general relevance objection to similar testimony introduced through Officer Torre may have been inadequate to preserve the issue for review.⁴ See RP 56.

There was no legitimate strategic or tactical reason for the failure to object (or for the potentially inadequate relevance objection), as the evidence was inadmissible and highly prejudicial. A defense objection would likely have been sustained, since a witness may not provide an

⁴ As noted elsewhere in the brief, the admission of the evidence was also a manifest error affecting Mr. M.’s constitutional right to due process. See RAP 2.5(a); Johnson, at 934.

opinion regarding the accused person's guilt, either directly or indirectly.
Black, at 349.

Finally, the result of the trial would have been different had the evidence been excluded. Mr. M.'s right to use force in self-defense was a key issue at trial: he testified that Kilmer's contact with his broken nose was extremely painful, and Kilmer choked him hard enough to prevent him from breathing, at least briefly. RP 84.

Defense counsel's failure to object to this inadmissible testimony deprived Mr. M. of the effective assistance of counsel. Saunders, at 578. Accordingly, his conviction must be reversed and the case remanded for a new trial. Id.

III. THE JUDICIALLY CREATED "ACTUAL DANGER/SERIOUS INJURY" STANDARD FOR CERTAIN SELF-DEFENSE CASES VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

A. Standard of Review

Constitutional issues are reviewed de novo. E.S., at 702.

B. The state constitution prevents one branch of government from encroaching upon the powers of another.

The separation of powers doctrine is a fundamental aspect of government in Washington. *State v. Rice*, 174 Wash. 2d 884, 900, 279 P.3d 849 (2012). Authority is divided into legislative,

executive, and judicial branches, and “[e]ach branch of government wields only the power it is given.” Id (quoting *State v. Moreno*, 147 Wash.2d 500, 505, 58 P.3d 265 (2002)). The fundamental functions of each branch are inviolate. Id.

Furthermore, this “division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices.” Id, at 900-901. Criminal liability attaches “only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency.” Id, at 901.

The state constitution confers legislative authority upon the state legislature, consisting of the state house and state senate. Wash. Const. Article II, Section 1. The legislature may not abdicate its legislative responsibility, or transfer its legislative function to another branch of government. *Larson v. Monorail Authority*, 156 Wash.2d 752, 759, 131 P.3d 892 (2006); see also *Sackett v. Santilli*, 146 Wash.2d 498, 504, 47 P.3d 948 (2002) (“[T]he legislature may not grant this Court authority to perform a function that is reserved exclusively to the legislature by the constitution.”)

It is the role of the legislature, not the judiciary, to balance public policy interests and enact law. *Nw. Animal Rights Network v. State*, 158 Wash. App. 237, 245, 242 P.3d 891, reconsideration denied (2010). The judiciary “will not ‘arrogate to [itself] the power to make legislative schemes more perfect, more comprehensive and more consistent.’” *State v. Delgado*, 148 Wash. 2d 723, 730, 63 P.3d 792 (2003) (quoting *State v. Taylor*, 97 Wash.2d 724, 729, 649 P.2d 633 (1982)).

Instead, courts “‘can only apply the laws which the legislature makes to the facts in a particular case.’” *W. v. Thurston County*, 168 Wash. App. 162, 184 n. 25, 275 P.3d 1200 (2012) (quoting *Fix v. Fix*, 33 Wash.2d 229, 231, 204 P.2d 1066 (1949)).

Legislative authority includes the power define crimes. *State v. Wadsworth*, 139 Wash.2d 724, 734, 991 P.2d 80 (2000); *State v. Calle*, 125 Wash.2d 769, 776, 888 P.2d 155 (1995); see also *State v. Clark*, ___ Wash. App. ___, ___, 283 P.3d 1116 (2012). This power is exclusive to the legislative branch. *State v. Zumwalt*, 119 Wash. App. 126, 131, 82 P.3d 672 (2003) *aff'd sub nom. State v. Freeman*, 153 Wash. 2d 765, 108 P.3d 753 (2005). This is so because of our “instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.” *United States v. R. L. C.*, 503 U.S. 291, 305, 112 S.Ct 1329, 117 L.Ed. 2d 559 (1992) (plurality), quoting *U.S. v. Bass*, 404 U.S. 336, 348,

92 S.Ct. 515, 30 L.Ed 2d 488 (1971) (internal quotation marks and citations omitted).

C. The judiciary may not criminalize acts which the legislature has declared to be lawful.

The legislature has created a statutory defense to the crime of assault. Under RCW 9A.16.020, the use of force against another person “is not unlawful... [w]henever used by a party about to be injured... in case the force is not more than is necessary.” Under the plain language of the statute, the defense is applicable whenever a person is “about to be injured,” so long as “the force is not more than is necessary.” RCW 9A.16.020(3).

Despite this clear legislative edict, the judiciary has criminalized force exerted under circumstances covered by the statute. Specifically, the judiciary has declared unlawful the use of force by a person about to be injured by an unlawful arrest or detention by law enforcement/corrections personnel unless the person is in actual danger of serious bodily injury. This criminalization originated with the Court of Appeals in *State v. Westlund*, 13 Wash.App. 460, 536 P.2d 20 (1975), and was later adopted and extended by the Supreme Court. *State v. Holeman*, 103 Wash.2d 426,

693 P.2d 89 (1985);⁵ *State v. Valentine*, 132 Wash.2d 1, 935 P.2d 1294 (1997); *State v. Bradley*, 141 Wash.2d 731, 10 P.3d 358 (2000).⁶

In none of these cases did the reviewing court determine whether the judicial criminalization of acts declared lawful by the legislature violates the constitutional separation of powers. Instead, each court wrestled with determining the appropriate standard—in some cases departing from centuries of common law—under the circumstances under review (i.e. lawful arrests, unlawful arrests, detentions by correction officers). See, e.g. *Westlund*, at 467-468; *Holeman*, at 429-431; *Valentine*, at 21-22; *Bradley*, at 740.

The actual danger standard applied in this case violates the constitutional separation of powers. The legislature has declared the use of force lawful by one “about to be injured.” RCW 9A.16.020. The judicially-created standard that has evolved from *Westlund* contradicts standard this by placing additional burdens upon the subject.⁷ From a

⁵ The decision in *Holeman* was arguably dicta. See *State v. Bradley*, 141 Wash. 2d 731, 750-755, 10 P.3d 358 (2000) (Sanders, J., dissenting; Alexander, J. concurring in the dissent.)

⁶ The Court of Appeals has also applied the rule to offenders in juvenile detention centers. *State v. Garcia*, 107 Wash. App. 545, 27 P.3d 1225 (2001).

⁷ The legislature has granted the judiciary power to supplement penal statutes with the common law. However, the judiciary may only do so “insofar as not inconsistent with the Constitution and statutes.” RCW 9A.04.060. Because the actual danger/serious injury standard is inconsistent with RCW 9A.16.020, it cannot be upheld under RCW 9A.04.060.

policy standpoint, it may be preferable to adopt a different standard when the injury is inflicted by a police officer or a corrections officer; however, that is a decision for the legislature. *Nw. Animal Rights Network*, at 245; *Delgado*, at 730.

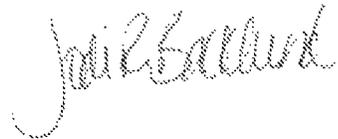
The trial judge applied the wrong legal standard when evaluating Mr. M.'s self-defense claim. The court should have applied the "about to be injured" standard of RCW 9A.16.020(3), rather than the actual danger/serious injury standard. Accordingly, Mr. M.'s conviction must be reversed and the case remanded for a new trial. *Woods*, at 200-202.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 25, 2012

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund". The signature is written in black ink and is positioned above the typed name and title.

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A handwritten signature in cursive script, appearing to read "Manek R. Mistry". The signature is rendered in a dotted or dashed line style.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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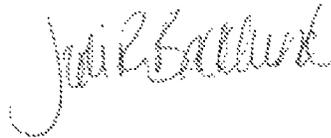
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 25, 2012.



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