

No. 43368-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

V.

K.M.,
Appellant

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-8-00016-1

BRIEF OF RESPONDENT

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resulting from an offense committed against the defendant. The statute, by a strict reading of its terms, does not distinguish between apparent danger and actual danger, but in regard to general assaults the Court has allowed defendants to assert the defense when the danger is merely apparent. The Court has declined to extend this rule to cases of custodial assault. *Does the Court violate the separation of powers doctrine when it declines to extend a judicially created rule to a new class of crimes?.....*11

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. This case was tried to judge as the finder of fact rather than to a jury. During the trial, apparently to rebut an anticipated claim of self-defense against an assault perpetrated by a detention staff member, the prosecutor elicited testimony from two witnesses that the defendant was not in actual imminent danger of serious injury when he assaulted the staff member in this case. *Was the testimony impermissible opinion testimony, and if so, does the error require a new trial?*
2. When the prosecutor during the bench trial of this case elicited testimony from two witnesses that K.M. was not in actual imminent danger of serious injury when he assaulted a detention staff member, his attorney did not assert that the testimony was improper opinion testimony and object on that basis. *Was counsel's performance, therefore, ineffective, and if so, did counsel's failure to object on this basis deprive K.M. of a fair trial for which the result is unreliable?*
3. RCW 9A.16.020 defines specific uses of force that are deemed lawful. RCW 9A.16.020 gives rise to the commonly asserted defense of self-defense when a defendant is defending against the danger of an injury resulting from an offense committed against the defendant. The statute, by a strict reading of its terms, does not distinguish between apparent danger and actual danger, but in regard to general assaults the Court has allowed defendants to assert the defense when the danger is merely apparent. The Court has declined to extend this rule to cases of custodial assault. *Does the Court violate the separation of powers doctrine when it declines to extend a judicially created rule to a new class of crimes?*

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B. FACTS AND STATEMENT OF THE CASE

On February 26, 2012, K.M. was an inmate at the Mason County Juvenile Detention Center. RP 2-3. Before he was booked into the detention center, K.M. was the victim of an assault; so, detention center staff-person Brad Kilmer transported K.M. to the local hospital to be checked out. RP 3.

While on the trip to the hospital, K.M. saw some juveniles in the parking lot, and he yelled out to them, which was a violation of policy. RP 3, 76-77. Afterward, while in the hospital waiting area, K.M. saw another juvenile and also had contact with him, again breaking policy. RP 4, 77.

When Kilmer and K.M. returned to the detention center, Kilmer told K.M. that he was receiving an infraction for having unauthorized contact with others on two occasions. RP 4, 81. The infraction would result in K.M. being “dropped to level one,” which meant that K.M. would only be allowed out of his cell for one hour each day. RP 4-5, 81.

When K.M. was informed of the infraction, he became physically aggressive. RP 5, 81-82. K.M. got up into Kilmer’s face, screamed

profanely, clenched his fist, bumped chests with Kilmer and pushed Kilmer into a wall. RP 5, 8-9, 16-17, 24, 81-85.

After this assault, Kilmer tried to restrain K.M. RP 5. Kilmer reached for K.M. and tried to use defensive tactics to restrain him, but K.M. twisted away. RP 5. K.M. was restrained by a metal chain at his waist during the transport to the hospital, and when K.M. twisted away from Kilmer, Kilmer's left hand got caught in the chain. RP 5-6, 54. As a result, Kilmer suffered torn ligaments in his hand and wrist. RP 9.

A second officer, Mike Arnold, came to assist Kilmer. RP 6, 33-34. When Arnold separated K.M. from Kilmer, he asked K.M. what happened. RP 54. K.M. answered, "this fat fuck dropped me." RP 54. K.M. was restrained and led away. RP 6, 33-34. As K.M. was led away, he warned Kilmer that he'd better watch his back and that he knew where he lived. RP 6, 34, 55, 90.

Officer Christina Torre was on duty in the detention center control room when the assault occurred. RP 31-32. She testified that she was alerted to the assault when she heard K.M. "begin to yell and say fuck you, Brad." RP 33. In reaction to that, Torre turned and looked at a monitor and "saw that Officer Kilmer had the detainee up against the wall at [that] point." RP 33. Officer Torre described a single incident that was

basically two incidents because the single incident was interrupted by a comparative moment of calm. RP 39-41. Officer Torre described that it was after the moment of relative calm that she then saw K.M. push his chest up against Kilmer and put his face into Kilmer's face. RP 39-40.

Officer Arnold testified that he went to help after he heard K.M. yelling. RP 53. Arnold said he "ran as fast as [he] could to the door" of the entry port where the scuffle was occurring. RP 53. When Arnold opened the door he saw Kilmer and K.M. tangled up in what looked like an embrace. RP 55-56. Then K.M. "slammed his chest into [Kilmer], got right in his face." RP 56. Arnold described that K.M. had "spittle coming out of his mouth" as he was "saying fuck you, Brad" while he chest-bumped Kilmer.

C. ARGUMENT

1. This case was tried to judge as the finder of fact rather than to a jury. During the trial, apparently to rebut an anticipated claim of self-defense against an assault perpetrated by a detention staff member, the prosecutor elicited testimony from two witnesses that the defendant was not in actual imminent danger of serious injury when he assaulted the staff member in this case. *Was the testimony impermissible opinion testimony, and if so, does the error require a new trial?*

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This case was tried to a judge as the finder of fact rather than to a jury. RP 1-112. K.M. was charged with and tried for the offense of custodial assault in violation of RCW 9A.36.100(1)(a). CP 14-15. The State alleged that K.M. intentionally assaulted Brad Kilmer while Kilmer was performing his duties as a staff-member at the Mason County Juvenile Detention Center. CP 14-15.

It is not a crime to assault another in self defense, and if the fact finder is presented with at least some evidence that an assault was committed in self defense, then the State bears the burden of proving the absence of self defense. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). An assault is lawful because committed in self defense:

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[.]

RCW 9A.16.020(3).

Generally, the defense of self-defense may be valid in Washington so long as the person claiming the defense was in apparent danger, and it is not necessary that the person be in actual danger. *Bradley* at 736, citing *State v. Carter*, 15 Wash. 121, 123-24, 45 P. 745 (1986). With regard to

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custodial assault against a detention officer, however, to qualify for the defense of self-defense the defendant must be in actual, imminent danger of serious injury or death as a result of unlawful force used against him by the detention officer. *Bradley* at 737, 743.

During trial of the instant case, apparently anticipating that K.M. would eventually present some evidence of self-defense in the instant case, the prosecutor elicited the following statements from two witnesses who were called to testify during the State's case in chief:

[First witness]

Q. Was [K.M.] in actual imminent danger of serious injury at any time prior to the scuffle you described? [RP 10].

A. No. [RP 10].

[Second witness]

Q. From where you were standing, was [K.M.] in imminent danger of serious injury prior to the confrontation between him and Mr. Kilmer? [RP 56].

A. I would say no. [RP 56].

On appeal, K.M. argues that the two questions and answers above were improper opinion testimony. (Appellant's Opening Brief, pp. 5-7). Opinion testimony is evidence given at trial, under oath, based on one's belief or idea, rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001).

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Neither expert nor lay witnesses are permitted to testify as to an opinion about the guilt of a defendant. *State v. Black*, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Generally, witnesses may not opine about the guilt or veracity of the defendant or the credibility of a witness; such testimony is unfairly prejudicial because it invades the exclusive province of the jury. *Id.* at 348.

However, “testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Courts have ““expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.”” *Demery* at 760, quoting *Heatley* at 579. “The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” *Heatley* at 579.

In the instant case, it is not clear that K.M. ever presented sufficient evidence that he assaulted Kilmer in self-defense or that any such evidence was otherwise before the fact-finder. There is no citation to the record where there is evidence that K.M. was in actual, imminent danger of serious injury or death, and, consequently, there is no citation

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where K.M. claims responsibility for a specific assault that was committed to defend against that danger. Thus, the “challenged testimony was not an impermissible opinion of his guilt or innocence.” *State v. Read*, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). Additionally, because the test for self-defense regarding assault against a staff member in a detention center is actual danger, rather than perceived danger, the ideas or beliefs of any witness about whether such danger was present is relevant only to the extent that it aids the fact-finder in determining whether such danger actually existed. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000); *State v. Read*, 147 Wn.2d 238, 244, 53 P.3d 26 (2002).

Still more, even if K.M. would have, or did, properly raise the issue of self-defense, it is not clear that the challenged testimony was in fact impermissible opinion testimony. The State avers that whether K.M. was in actual, imminent danger of serious injury or death is a mixed question of fact and opinion. Neither witness gave an opinion about K.M.’s credibility or veracity, and neither witness gave an opinion as to whether K.M. was guilty. K.M.’s subjective belief about whether he was in actual, imminent danger of serious injury or death was irrelevant; the relevant question was whether he was in actual danger. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000).

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The State's witnesses in the instant case testified about a circumstance of fact, that there was no danger, but the foundation for this testimony was not detailed; so, it is not clear whether the testimony was based upon belief or whether it was based upon direct knowledge. RP 10, 56; *State v. Demery*, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001). To prove the assault, however, the State was required to disprove the statutory elements of self-defense. RCW 9A.16.020(3); *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). "That the testimony... is then couched in terms of those statutory elements should come as no surprise." *State v. Nelson*, 152 Wn. App. 755, 768, 219 P.3d 100 (2009).

The State avers that the challenged testimony was not impermissible opinion testimony, but even if it was both opinion testimony and impermissible, the error is harmless. Constitutional error is harmless if the it is certain beyond a reasonable doubt that a reasonable fact-finder would have reached the same result in the absence of the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The evidence in the instant case shows that K.M. lashed out violently and assaulted Kilmer because K.M. received an infraction; K.M. did not cry out for help; nor were his actions designed to successfully defend against imminent serious harm or death. RP 4-5, 8-9, 16-17, 24, 81-85.

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Finally, because this was a bench trial rather than a jury trial, even if the challenged testimony was improper opinion testimony it does not result in reversible error. *State v. Reed*, 147 Wn.2d 238, 244-245, 53 P.3d 26 (2002). When a case is tried to a judge, rather than a jury, it is presumed on appeal that the trial judge knows the law and the rules of evidence and that he or she does not consider inadmissible or improper evidence when rendering findings. *Id.* at 243-246.

2. When the prosecutor during the bench trial of this case elicited testimony from two witnesses that K.M. was not in actual imminent danger of serious injury when he assaulted a detention staff member, his attorney did not assert that the testimony was improper opinion testimony and object on that basis. *Was counsel's performance, therefore, ineffective, and if so, did counsel's failure to object on this basis deprive K.M. of a fair trial for which the result is unreliable?*

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011). To demonstrate prejudice, K.M. must show that but for the deficient

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performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

In response, the State first avers, as argued in section one above, that the challenged testimony was improper opinion testimony. But even if the challenged testimony was improper, it is not reversible error, because there was substantial, other evidence to support the trial judge's findings, to trial judge is presumed to disregard improper evidence, and there was a lack of evidence to support K.M.'s argument that he assaulted Kilmer in order to defend against an actual, imminent danger of serious injury or death due to an unlawful assault perpetrated by Kilmer. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000); *State v. Reed*, 147 Wn.2d 238, 244-245, 53 P.3d 26 (2002). As a result, K.M. has not, and cannot, make the required showing that there is a reasonable probability that the result of the trial would have been different if the challenged testimony were not known to the judge. *Strickland*, 466 U.S. at 697; *Foster*, 140 Wn. App. at 273.

3. RCW 9A.16.020 defines specific uses of force that are deemed lawful. RCW 9A.16.020 gives rise to the commonly asserted

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defense of self-defense when defending against the danger of an injury resulting from an offense committed against the person asserting the defense. The statute by a strict reading of its terms does not distinguish between apparent danger and actual danger, but in regard to general assaults the Court has defendants to assert the defense when the danger is merely apparent. The court has declined to extend this rule to cases of custodial assault. *Does the Court violate the separation of powers doctrine when it declines to extend a judicially created rule to a new class of crimes?*

On appeal, K.M. asserts that the self-defense standard applied to assaults against detention staff members unconstitutionally violates the separation of powers doctrine “because it criminalizes acts declared lawful by the legislature.” (Appellant’s Opening Brief, at pp. 1, 2, 10-15). The State responds that, the rule applied in this case does not contradict any enactment of the legislature.

RCW 9A.16.020 defines certain incidents of the use of force that are not unlawful. Among these lawful uses of force is force used “by a public officer in the performance of a legal duty,” such as Kilmer’s use of force against K.M. in the instant case. RCW 9A.16.020(1). Another lawful use of force defined by RCW 9A.16.020 is force:

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[.]

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RCW 9A.16.020(3).

In general, an assault (against a victim other than a detention staff member or police officer) is not a crime if the assault is lawful as defined by RCW 9A.16.020(3). *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). Generally, the defendant is entitled to the defense if or she is apparently in danger of imminent serious harm. *Id.* In general, there is no requirement that danger be actual rather than merely apparent. *Id.*

But there is nothing in the statutory language of RCW 9A.16.020(3) that permits apparent danger to substitute for actual danger. It follows then, that allowing the defense when the danger is merely apparent as opposed to actual is a judicially created rule. See, e.g., *State v. Carter*, 15 Wash. 121, 123-24, 45 P. 745 (1986).

When the assault is against a police officer or detention officer, however, the court as a matter of public policy has declined to extend the judicially created defense of self-defense that arises out of apparent, as opposed to actual, danger as defined by RCW 9A.16.020. See, e.g., *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000).

Thus, the State asserts, the legislature authorized the use of force by any person against a perpetrator of an offense when there is actual risk of injury due to an unlawful offense committed against the person. RCW

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9A.16.020; *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). The court has allowed the risk to be apparent, rather than actual, in most cases but has declined to extend this judicial rule to cases involving assault against a police officer or detention staff person. *Id.* Thus, if there were a separation of powers violation, K.M. would not have standing to assert it, because he is not one of the beneficiaries of what would be a defense that is greater or more broad than that strictly enacted by the legislature.

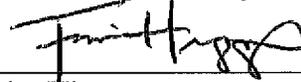
Still more, the defense of self-defense would only be available to K.M. in the instant case if K.M. used reasonable force, no more than what was necessary, to defend against an offense committed against him. *Id.* But RCW 9A.16.020(1) authorizes a public officer to use reasonable force to carry out his duties. Thus, on the facts of the instant case the force used by Kilmer to subdue K.M. was not unlawful and does not constitute an “offense” to which RCW 9A.16.020(3) would authorize K.M. to respond with violence. And, there was no necessity for K.M. to use violence; thus, any force, and particularly the force actually used by K.M., was more than necessary and was, therefore, not authorized by RCW 9A.16.020(3).

D. CONCLUSION

For the reasons argued above, the K.M.'s appeal should be denied and his conviction affirmed.

DATED: January 23, 2013.

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