

NO. 49703-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA BALL,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	6
D. ARGUMENT	
I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT REFUSED TO GIVE HIS PROPOSED INSTRUCTION ON SELF-DEFENSE FROM WPIC 17.02.01	13
II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL AND HIS RIGHT TO TESTIFY ON HIS OWN BEHALF WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE DEFENDANT’S MEDICAL CONDITION DETERIORATED TO THE POINT HE COULD NOT EFFECTIVELY TESTIFY	22
E. CONCLUSION	30
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	31
2. Washington Constitution, Article 1, § 22	31
3. United States Constitution, Sixth Amendment	32
4. United States Constitution, Fourteenth Amendment	32
5. WPIC 17.02.01	33
G. AFFIRMATION OF SERVICE	34

TABLE OF AUTHORITIES

Page

Federal Cases

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 22

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 13

Washington v. Texas,
388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 13

State Cases

In re Detention of Haga, 87 Wn.App. 937, 943 P.2d 395
(1997), review denied, 134 Wn.2d 1015, 958 P.2d 316 (1998) 25, 26

In re Pers. Restraint of Stoudmire,
145 Wn.2d 258, 36 P.3d 1005 (2001) 23

State v. Adams, 31 Wn.App. 393, 641 P.2d 1207 (1982) 13-15, 17, 18

State v. Bius, 23 Wn.App. 807, 599 P.2d 16 (1979) 14

State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974) 25, 26

State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977) 13

State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999) 23, 25, 26

State v. Smith, 101 Wn.2d 36, 677 P.2d 100 (1984) 13

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 13

State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996) 23

State v. Tyree, 143 Wash. 313, 255 P. 382 (1927) 14, 15

State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977) 15, 16, 18

Constitutional Provisions

Washington Constitution, Article 1, § 3 13, 22

Washington Constitution, Article 1, § 22 23, 24, 29

United States Constitution, Sixth Amendment 23, 24, 29

United States Constitution, Fourteenth Amendment 13, 22

WPICs

WPIC 17.02.01 13, 19-22

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to give his proposed instruction on self-defense from WPIC 17.02.01.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth amendment, and his right to testify on his own behalf under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it refused to grant a mistrial after the defendant's medical condition deteriorated to the point he could not effectively testify and present a defense.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to give a proposed instruction on self-defense from WPIC 17.02.01, when the facts, seen in the light most favorable to the defense, demonstrate that the defendant was in actual and imminent danger of serious injury from an officer's use of excessive force during arrest?

2. In a case in which a defendant takes the witness stand on his own behalf, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and the right to testify on one's own behalf under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it refuses to grant a mistrial after the defendant's medical condition deteriorates to the point that he could not effectively testify or present his defense?

STATEMENT OF THE CASE

Factual History

The defendant is a 37-year-old man who has been diagnosed with chronic myeloid leukemia, which is a cancer of the white blood cells. RP 311-316, 362-363¹. His attending physician is Dr. Kathryn Kolibaba, whose practice is limited to treating patients with brain cancer and hematologic malignancies. RP 311-314. The drug she initially prescribed to treat the defendant is called Bosutinib and its side effects include significant fatigue, nausea and diarrhea, although it does not affect cognitive function. RP 327-344, 338-342. The fatigue associated with this and other related drugs used to treat patients like the defendant with chronic myeloid leukemia can catch up with those patients very quickly, described as unexpectedly “hitting a wall.” RP 353-354.

On July 13, 2015, the defendant drove to Portland from his home in Longview to spend some time with friends. RP 368-369. While driving home later that evening he began to feel very hot, lethargic and extremely sleepy, all symptoms that sometimes rapidly occur when taking his cancer medications. RP 368-370. In fact, while driving northbound on I-5 in Clark

¹The record on appeal includes five volumes of continuously numbered verbatim reports of the CrR 3.5 hearing, the jury trial, and the sentencing hearing in this case. It is referred to herein as “RP [page #].”

County the defendant passed a car and almost sideswiped it while looking for the next exit where he could stop and take a nap, as he had done previously when he felt the symptoms of his medication while driving. RP 183-194, 370-371, 400-402. The person in the vehicle the defendant almost hit called "911" for a potential drunk driver. RP 192.

After the near miss with the vehicle on the highway, the defendant took the exit at 78th Street in Hazel Dell, and then drove into a parking lot of a Taco Bell off Old Highway 99. RP 188-194; 400-402. Although he believed he had entered the parking lot and stopped, what he actually did was pull into the parking lot, turn around, and partially exit the lot into the street, where he stopped and fell asleep with his vehicle still running. RP 62-64, 74-76, 103-104, 371-372. Within a few minutes one and then another Clark County Sheriff's Deputies arrived. RP 62-64, 74-76, 103-104. These two deputies noted that the defendant appeared to have passed out in the driver's seat with his vehicle still running. RP 62-63, 74-75. Upon seeing this the officers parked their vehicles in front and behind the defendant's car to keep it from moving. *Id.*

After the two deputies blocked the defendant's vehicle, one got out and opened the driver's door while the other opened the passenger's door. RP 61-63, 107-112. The officer at the passenger's door leaned inside,

turned the defendant's vehicle off, and kept the keys. RP 199. The officer at the driver's door was then able to rouse the defendant and tell him to exit the vehicle, although the defendant's reactions were initially very lethargic. RP 63-64. Although both officers smelled cut marijuana in the defendant's truck, neither smelled burning marijuana and neither smelled the odor of alcohol from either the inside of the defendant's truck or from the defendant. RP 113, 218, 289.

According to the officers the defendant's demeanor went from extremely lethargic and unresponsive to annoyed and then to very agitated after he got out of his truck. RP 64-67. In addition, the defendant was oddly yelling incoherent statements about a religious theme involving angels, demons and ascensions, then about being a cancer patient whom they couldn't treat the way they were, then a stream of expletives, and then recycling through those three themes repeatedly. RP 66-67, 134-135. As this was happening the officers grabbed the defendant in an attempt to throw him to the ground and place him in handcuffs. RP 66-68, 74-76, 130-135. According to the officers the defendant resisted their efforts and attempted to hit one of the deputies in the head with his closed fist. RP 261-262. Eventually the officers got the defendant down to the ground, put cuffs on him, and placed him under arrest. RP 66-68, 74-76, 130-135, 261-

267.

The defendant's version of what happened with the officers was that he woke up just outside the Taco Bell parking lot to find two officers taking his keys and telling him to get out of his truck. RP 272-274. Although at that point he was only semi-conscious and was confused, he did see that they were officers and he didn't believe he had done anything wrong. *Id.* As he got out of his truck, the defendant began feeling extreme hot flashes, which was one of the symptoms of his medication. RP 405-407. As a result, when he got out of his truck he tried to take off his shirt. *Id.* The officers then grabbed him, beat him, and tried to throw him to the ground where they could do a "Rodney King" on him. RP 377, 415. As the deputies got him to the ground the defendant continued to struggle and kick because they were on top of him and he couldn't breathe. RP 390-391.

Procedural History

By information filed July 15, 2015, and later amended the Clark County Prosecutor charged the defendant Joshua S. Ball with one count of third degree assault against Deputy Sheriff Ryan Preston, and one count of physical control while under the influence of liquor, marijuana or any drug. CP 1, 21. Deputy Preston was the officer who was standing outside the driver's door of the defendant's vehicle and who claimed that the

defendant attempted to strike him in the head with a closed fist but ended up hitting the deputy in the chest. RP 261-262. This case later came to trial before a jury with the state calling Deputy Preston, two other responding deputies, as well as the woman from the highway who called 911. RP 99, 183, 196, 233. The defense then twice called Dr. Kolibaba as well as the defendant. RP 312, 360, 503. These witnesses testified to the facts set out in the preceding factual history. See Factual History, *supra*.

In addition, during Dr. Kolibaba's testimony, she explained that 195 days prior to her testimony the defendant underwent a bone marrow transplant, and has since been on the highest dose allowed for a steroid by the name of Prednisone, as well as the highest dose available for an immuno-suppressant by the name of Tacrolimus. RP 502-531. According to Dr. Kolibaba the side effects of the prednisone are sleeplessness, heartburn, severe irritability, "crankyness", memory problems and severe mood swings to the point that she normally prescribes an anti-depressant along with the Tacrolimus. RP 502-531. The side effects of the Tacrolimus included clouded memory and thinking, lack of concentration, depression, anger and unpredictability. *Id.*

In this case the defendant began his testimony on the afternoon of the second day of trial, and then finished his testimony on the morning of

the third day of trial. RP 360-418, 480-497. Apparently the defense believed that the defendant had exhibited a number of the side effects of the Prednisone and the Tacrolimus he was taking because prior to the finish of the defendant's testimony on the morning of the third day of trial the defense moved for a mistrial on the basis that the defendant's use of his medications prevented him from effectively presenting his case to the jury and gave the jury an incorrect view of his demeanor and affect. RP 435-439.

In support of this motion the defendant's attorney made an offer of proof on the side effects of the high doses of prednisone and the tacrolimus, which he learned based upon prior communications with Dr. Kolibaba, which included Dr. Kolibaba's opinion that the defendant would not be able to effectively present testimony. *Id.* In fact, the defense later called Dr. Kolibaba by way of offer of proof and then called her before the jury to explain the effects of the medications the defendant was taking. RP 502-513. Although the state opposed the motion for a mistrial, it did admit that the defendant's demeanor and affect during his testimony the prior day had been "somewhat erratic" and then had "progressively" become more erratic on cross-examination. The prosecutor made the following statement on this point, although the state denied that these problems

were the result of his medications:

The Defense describes that to medical issues. Perhaps that's at play. Perhaps there are other issues at play. The defendant's behavior on the stand certainly was somewhat erratic. It became progressively so on cross-examination when certain points were raised.

RP 436.

The trial court denied the defendant's motion for a mistrial, noting as follows:

THE COURT: I'm certainly disappointed the issue has been brought up at this point in time.

An email is not evidence. The doctor was on the witness stand. From my recollection, the doctor was present before noon yesterday. I saw her in the foyer and she was able either to testify prior to lunch, or sometime during the lunch hour yesterday, you had plenty of time to discuss this matter with her. It appears this email is dated August 23, 2016. It is not September 14, 2016. This issue should have been investigated previously.

I do acknowledge that you're accepting responsibility, but that doesn't obviate the fact that we're in the middle of trial, that these issues should have been brought to the Court's attention previously. It doesn't appear to be a 10-77 issue at this point in time. It was not brought to the Court previously.

A motion by the defendant for mistrial will ordinarily remove any barrier to further prosecution absent circumstances attributable to prosecutorial or judicial overreaching. Retrial is allowed if the Defense consents and the mistrial results from judicial or prosecutorial error. I don't believe we have judicial or prosecutorial error at this point in time. The manifest necessity for a mistrial was not Court-created.

At this point, the issue is whether or not your client is able to proceed further with testimony. It's your decision whether to continue with any redirect once Mr. Smith has completed his cross-examination.

Mr. Smith is absolutely correct, the behavior that he exhibited yesterday is very consistent with the behavior that the officers provided, talking about religious symbols, this and that, according to Deputy Hafer, that the allegation was that the defendant charged Deputy Preston. The behavior was somewhat odd then. It's odd now. I'm not sure that is the basis for a mistrial.

The request that I interview or have Kolibaba testify at this point in time, I'm not in charge of testimony. If Mr. Smith agrees to allow Dr. Kolibaba to testify to the jury about how medication could affect a person's demeanor -- that was never brought forth during the direct examination of Dr. Kolibaba -- and, again, according to my information, personal knowledge, Dr. Kolibaba was here prior to the noon hour yesterday, on September 13, 2016, and those issues could have been discussed. In fact, I was waiting for issues to be discussed from Dr. Kolibaba on direct testimony.

I received no information, and neither did the trier of fact, regarding how these medications could have affected his ability to operate a motor vehicle on the evening in question under those circumstances, and how those medications could have affected him on the evening in question after driving for a period of time after doing what he did for the period of time, and after being confronted by the witnesses, I was provided no medical testimony how these medications could have affected the cognitive ability of the defendant to respond to otherwise simple commands from law enforcement. I was expecting that testimony to come out yesterday. It did not come out. Merely because it did not come out doesn't mean that the Defense counsel is entitled to a mistrial or entitled to recall Dr. Kolibaba.

Based upon the law in the State of Washington, I don't believe that there has been judicial error nor has there been prosecutorial error. There may have been tactical or strategy decisions by the

Defense that may have backfired, but that is purely a tactical or strategical matter, not a position of placing the defendant in a situation where he's not being represented fully with respect to presentation of evidence and defenses. The only issue before the Court, at this point in time, the Court will deny the motion for a mistrial.

There's no legal basis for the same. As I indicated previously, there's been no judicial or prosecutorial error.

RP 441-445.

Once the court denied the motion for a mistrial the defendant took the stand for further testimony, after which the defense called Dr. Kolibaba by way of offer of proof to the court and then as a witness before the jury testifying to the side effects of high doses of the medications the defendant was taking. RP 480-497, 502-513, 513-527. The state then called Deputy Preston in short rebuttal. RP 538-545.

Following the reception of evidence the court instructed the jury with the defense taking exception to the court's refusal to give WPIC 17.02.01 on the justified use of force against a police officer during an arrest. CP 45; 471-472, 546-550. The trial court made the following comments when it denied the defendant's request that the court instruct the jury under WPIC 17.02.01.

There's been no testimony, other than Mr. Ball's testimony that he flailed in response to being touched by the officers, or as he stated, "Rodney King'd" that he felt he was being suffocated by a car

or something was on his chest. The overwhelming testimony was that he initiated the contact with Deputy Preston, that in order to thwart the aggressive actions by Mr. Ball, one officer grabbed on arm. I believe that was Deputy Hafer. Another officer grabbed the other arm. That may have been Deputy Preston. A third officer, Deputy Beck, may have come into play and then a Deputy Phillips may also have come into play by grabbing the [s]hovel.

So the testimony so far has been that any force used was to place the defendant under arrest or at least get him into custody based upon his actions. There does not appear to be any force used by the officers to suggest that, one, it was excessive; or, two, that it was initiated to allow a self-defense instruction to be utilized in this case.

Based upon my review of the facts and of the instruction, I'm going to go ahead and deny the request for WPIC 17.02.01

RP 549-550.

Following instruction the parties presented their closing arguments, after which the jury retired for deliberation. RP 564-574, 575-631. The jury eventually returned a verdict of "guilty" on the charge of third degree assault, along with a verdict of "not guilty" on the charge of physical control while intoxicated. RP 637-644; CP 83-83. The court later sentenced the defendant within the standard range and waived discretionary fees, after which the defendant filed timely notice of appeal. RP 650-678; CP 106-118, 119-120.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT REFUSED TO GIVE HIS PROPOSED INSTRUCTION ON SELF-DEFENSE FROM WPIC 17.02.01.

While due process does not guarantee every person a perfect trial, under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment due process does guarantee every person charged with a crime a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This right to a fair trial includes the right to raise any defense supported by the law and facts, such as self-defense or justified use of force. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

In order to properly raise the issue of self-defense or justified use of force in the State of Washington, a defendant need only produce “any evidence” supporting the claim that the defendant’s conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). This evidence need not even raise to the level of sufficient evidence “necessary to create a reasonable doubt in the jurors’ minds as to the existence of self-defense.” *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse

an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* A defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

State v. Tyree, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

State v. Tyree, 143 Wash. at 316.

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *State v. Adams, supra*, also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense beyond a reasonable doubt as part of the elements of the offense. The following examines these cases.

In *State v. Wanrow, supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and got the decedent, whom the other woman believed had molested one of her children. The Supreme Court gave the following outline for the facts as they followed this point.

It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5'4" woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her.

She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

State v. Wanrow, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She then appealed, arguing, among other things, that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, and has reasonable grounds to believe, that *he* is in imminent danger of death or great bodily harm.

State v. Wanrow, 88 Wn.2d at 239 (italics in original).

In *Wanrow*, the court reversed, based in part upon this erroneous instruction. The court's comments were as follows.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

State v. Wanrow, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *State v. Adams, supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbors unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my life..." Adams knew there were other guns in the trailer. He didn't know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn't intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox's death.

Considering these circumstances and Adams' testimony-he thought Chard and Cox had come to do him harm because Goard

fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a loaded gun—a jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing “any evidence.” Accordingly, the trial judge should have given a self-defense jury instruction.

State v. Adams, at 397-98.

In *Wanrow*, the Supreme Court reversed on the basis that the jury instruction erroneously failed to allow the jury to consider the defendant’s particular vulnerability under all the facts as they existed, even though the defendant had only been threatened with a simple assault if even that. Similarly, in *Adams*, the court reversed upon the trial court’s failure to give a self-defense instruction in a situation in which the defendant had not even been threatened directly. Both of these cases stand for the proposition that under circumstances of particular vulnerability, a defendant using deadly force may be entitled to a self-defense instruction even if only faced with a simple assault, or no assault at all.

In *Wanrow*, the defendant was particularly vulnerable because of her small stature relative to the decedent, the decedent’s intoxication, and the fact that she had a cast on her foot. In *Adams*, the defendant was

particularly vulnerable because of his isolation, the potential that the burglars knew he was present, and the fact that they might have been armed with deadly weapons. In the case at bar, the defendant was particularly vulnerable because of his compromised physical condition caused by his cancer and the side effects of the drug he was taking. As the prior cases clarify, this evidence is sufficient to trigger the defendant's right to force the state to prove the absence of self-defense beyond a reasonable doubt.

As is apparent from the cases previously cited, claims of self-defense require the court as the preliminary trier of fact to answer the following question: "Does the evidence presented at trial constitute some evidence of self defense when seen in the light most favorable to the defendant?" If this question is answered in the affirmative, then the court is required to grant a defense request to instruct the jury on the lawful use of force.

In the case at bar the defense proposed the following instruction from WPIC 17.02.01 setting out his claim of self-defense:

It is a defense to a charge of third degree assault that the force used was lawful as defined in this instruction.

A person may use force to resist an arrest by someone known by the person to be a police officer only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and

means as a reasonably prudent person would use under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 17.02.01 (modified to facts of this case).

When seen in the light most favorable to the defense, the evidence at trial indicates that the defendant acted under a reasonable belief that he was in actual and imminent danger of serious bodily injury from the officer's use of excessive force. Specifically, the defendant testified that:

Q. What was their response? Do you remember?

A. They Rodney King'd me.

Q. What do you mean they "Rodney King'd" you?

A. Somebody grabbed me from behind, slammed me to the ground and then it was – nothing I could do. It was – the heat was so much more intense and I thought I was going to die.

. . .

Q. Well, let me ask you this: So from the time that you got out of the car and you said you were trying to take your shirt off and you were trying to get some relief from what you've got kind of going on with your body, is the next thing that you remember is being taken down?

A. Yeah.

Q. Okay. So what are you thinking at that point when you're taken down to the ground?

A. What was I thinking? This is the end.

Q. Why did you think it was the end?

A. Because that was how my body felt. It didn't feel like it could – it didn't feel like I could do anything to fix the way it felt, you know, on its own. You know, I needed to see somebody, like – I used – like, when – whenever I had, you know, a feeling somewhat – anywhere close to this, like before, you know what I mean, in the daytime or not, I go – I just go to the ER for hydration, you know. I went to the ER a few different times trying to --

RP 377-379.

This evidence is itself sufficient to require the requested instruction under WPIC 17.02.01 when seen in the light most favorable to the defense. The error in the case at bar is that the trial court did not employ this standard. Rather, in the case at bar, the trial court weighed the credibility of the witnesses and decided it believed the police officers over the defendant. The trial court states the following on this issue:

There's been no testimony, other than Mr. Ball's testimony that he flailed in response to being touched by the officers, or as he stated, "Rodney King'd" that he felt he was being suffocated by a car or something was on his chest. The overwhelming testimony was that he initiated the contact with Deputy Preston, that in order to thwart the aggressive actions by Mr. Ball, one officer grabbed on arm.

RP 549.

In making this decision the trial court employed an incorrect

standard of review. As was stated earlier, the court should look at the evidence in the light most favorable to the defendant. The court should not have decided the issue of credibility of witnesses itself. Thus, by employing an incorrect standard of proof the trial court erroneously refused to give the defendant proposed jury instruction from WPIC 17.02.01. Consequently, this court should reverse the defendant's conviction for third degree assault and remand with instructions to grant the defendant a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL AND HIS RIGHT TO TESTIFY ON HIS OWN BEHALF WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE DEFENDANT'S MEDICAL CONDITION DETERIORATED TO THE POINT HE COULD NOT EFFECTIVELY TESTIFY.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all persons charged with a crime enjoy a series of fundamental rights, including the right to jury trial, the right to the presumption of innocence, the right to confront the state's witnesses, the right to call exculpatory witnesses, the right to compel witnesses to appear and the right to present exculpatory evidence. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Another one of the fundamental rights of due process is the right

to testify on one's own behalf, which is specifically included in Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999).

The right to testify is fundamental and as such the decision whether or not to testify lies solely with the defendant; it cannot be abrogated by either defense counsel or the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). As the following analysis of *State v. Robinson*, *supra* explains, the remedy available to the defendant who is denied the right to testify depends on how the deprivation occurs.

In *Robinson* a defendant convicted of second degree rape and unlawful imprisonment following a jury trial appealed the trial court's refusal to grant a motion for a new trial in which the defendant alleged that after the close of the defendant's case he informed his attorney that he wanted to testify on his own behalf but counsel ignored his demand, did not move to reopen his case-in-chief and simply proceeded with closing arguments. On appeal the defendant argued that trial counsel's failure to move to reopen to allow him to testify denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. He further argued

that under the second prong of the *Strickland* standard prejudice should be presumed since trial counsel's failure denied him the fundamental right to testify on his own behalf.

In addressing these arguments the court first noted that the defendant had presented significant evidence that he had indeed demanded that counsel move to reopen the defense case in order to allow him to take the stand. Since the trial court had not resolved this factual issue, the appellate court ruled that the defendant was entitled to an evidentiary hearing to resolve his factual claims. However, the court rejected the defendant's argument that prejudice should be presumed. Rather, the court held that a defendant claiming ineffective assistance of counsel based upon his trial attorney's actions preventing the defendant from testifying still had the burden of proving prejudice under *Strickland*. The court stated the following on this issue:

We agree with these jurisdictions, and similarly decline to adopt a per se reversal rule. In order to prevail on his ineffective assistance of counsel claim, Robinson will therefore have to satisfy the *Strickland* test by proving that Kimberly's conduct was deficient (i.e., Robinson was actually prevented from testifying) and that his testimony would have a "reasonable probability" of affecting a different outcome. If Robinson meets this burden, he will be entitled to a new trial.

State v. Robinson, 138 Wn.2d 769-770 (citations omitted).

Although the decision in *Robinson* is clear about the standard of review and the burden of proof under a claim of ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, the court did not specifically address what standard applied when it was the court that prevented the defendant from testifying. However in *Robinson* the court did take pains to distinguish prior cases in which a defendant was granted a new trial based upon proof that he was denied the right to testify by pointing out that the deprivation in those cases came at the hands of the court, not counsel. In his partial dissent in *Robinson*, Judge Alexander noted the following on this issue:

Indeed, we have concluded in *State v. Hill*, 83 Wn.2d 558, 520 P.2d 618 (1974), that deprivation of a defendant's right to testify is *per se* prejudicial. The Court of Appeals has done likewise in *In re Detention of Haga*, 87 Wn.App. 937, 943 P.2d 395 (1997), *review denied*, 134 Wn.2d 1015, 958 P.2d 316 (1998).

The majority attempts to distinguish the aforementioned cases by pointing out that the abridgment of the right to testify there was by the trial court and not counsel. While the majority is correct in observing that in *Hill* we held that the trial court's evidentiary ruling interfered with the defendant's right to testify, it was clear that we held that the defendant does not have to show that he or she suffered prejudice in order to obtain a new trial.

...

... I fail to understand why counsel's interference with the same fundamental right should be held to a different standard.

Contrary to the majority's efforts to confine *Hill* to its facts, we stated broadly there that the constitutional right to testify "should be unfettered and unhindered by any form of compulsion." *Hill*, 83 Wn.2d at 564, 520 P.2d 618. We did not add, as the majority would have us do, the words "by a trial judge" to the end of that sentence.

State v. Robinson, 138 Wn.2d at 771-772 (Alexander, J., concurring in part and dissenting in part).

The clear implication of the majority's efforts in distinguishing the decision in *Hill* and *Haga* as well as the dissent is that when the trial court denies a defendant the right to testify prejudice is presumed and the defendant is entitled to a new trial.

In the case at bar the testimony from Dr. Kolibaba, along with the observations of the defense attorney, the prosecutor and the judge indicate that the defendant's mental condition deteriorated during the first part of his testimony to the point that he was no longer able to effectively present his case. In spite of this evidence the trial court denied the defendant's motion for a mistrial, apparently upon the basis that since the defense was aware of the defendant's medical condition and took the chance that the defendant's mental condition would deteriorate if it called him to testify.

The trial court's comments on this point were as follows:

THE COURT: I'm certainly disappointed the issue has been brought up at this point in time.

. . . .

A motion by the defendant for mistrial will ordinarily remove any barrier to further prosecution absent circumstances attributable to prosecutorial or judicial overreaching. Retrial is allowed if the Defense consents and the mistrial results from judicial or prosecutorial error. I don't believe we have judicial or prosecutorial error at this point in time. The manifest necessity for a mistrial was not Court-created.

At this point, the issue is whether or not your client is able to proceed further with testimony. It's your decision whether to continue with any redirect once Mr. Smith has completed his cross-examination.

. . . .

Based upon the law in the State of Washington, I don't believe that there has been judicial error nor has there been prosecutorial error. There may have been tactical or strategy decisions by the Defense that may have backfired, but that is purely a tactical or strategical matter, not a position of placing the defendant in a situation where he's not being represented fully with respect to presentation of evidence and defenses. The only issue before the Court, at this point in time, the Court will deny the motion for a mistrial.

There's no legal basis for the same. As I indicated previously, there's been no judicial or prosecutorial error.

RP 441-445.

As the foregoing sets out, in ruling on the motion for a mistrial the trial court apparently conceded the issue that the defendant was having progressively more difficulty in presenting his testimony. However, the court none the less denied the defendant's motion based upon its repeated

finding that there had been no prosecutorial or judicial error. Rather, in the court's opinion, the fault belonged to the defense attorney who had made a bad tactical decision to call the defendant to testify.

In making these findings the trial court ignored the constitutional rule that the right to testify belongs to the defendant, not his attorney. Thus, even if the defense attorney made a bad tactical decision by calling the defendant only to have him mentally decompensate on the witness stand, as the court believed had happened, this finding does not address the ultimate issue whether or not the defendant's mental condition had deteriorated to the point that he could no longer effectively present his defense. Since the evidence from Dr. Kolibaba, as well as the observations of the prosecutor, the judge and the defense attorney all support the conclusion that the defendant's mental condition had deteriorated to the point that he could no longer effectively present his defense, the trial court effectively prevented the defendant from presenting meaningful testimony on his own behalf when it denied the motion for a mistrial. Consequently the trial court's refusal to grant the defendant's motion for a mistrial denied the defendant his right to present meaningful testimony on his own behalf under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result this court should reverse the

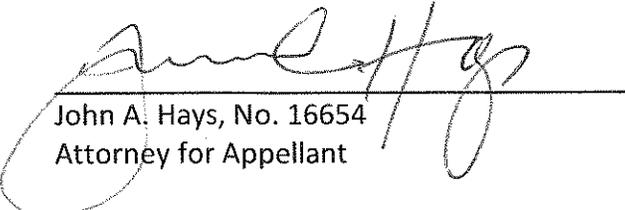
defendant's conviction and remand for a new trial.

CONCLUSION

The trial court's refusal to give WPIC 17.02.01 on lawful force when resisting detention, and when it denied the defendant's motion for a mistrial, denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as his right to testify under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

DATED this 6th day of July, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

WPIC 17.02.01
Lawful Force - Resisting Detention

It is a defense to a charge of (fill in crime) that force [used] [attempted] [offered to be used] was lawful as defined in this instruction. A person may [use] [attempt to use] [offer to use] force [to resist] [to aid another in resisting] an arrest [by someone known by the person to be a [police] [correctional] officer] only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

JOSHUA BALL,
Appellant.

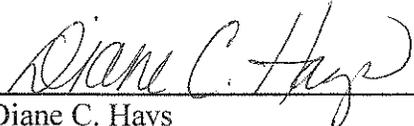
NO. 49703-4-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 6th day of July, 2017, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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